explicable only on an assumption that every minute with a possible connection to the litigation could properly be charged to the clients and the class. On April 4, 2006 the Juroviesky firm reported time spent " Preparing FMF documents for meeting and cleaning the office". The time was not significant but its inclusion in the materials filed in support of the motion was indicative.

[50] Between November 15, 2005 and early January 2006, when discussions to co-ordinate work with Siskinds commenced, the Juroviesky firm, with little previous experience in class action litigation, recorded time valued at almost $400,000. Much of this was spent on introductory research and analysis – work that was also performed by Siskinds. Time is included on the defendants' successful challenge to the venue chosen by Siskinds for the Ontario action and, from early October until the conclusion of the second hearing on February 23, 2007, the firms recorded time valued at more than $200,000 finalising the settlement and preparing for the approval motions, including the motion in respect of their fees. Overall, although I do not denigrate the high professional quality of the work performed, or the benefits achieved for the class, the time recorded is, in my judgment, significantly in excess of that which could properly be charged to a client in the absence of a contingency fee agreement.

[51] The fees awarded to plaintiffs' counsel in class actions are often astronomical compared with those in other civil proceedings. They can provide an enormous, and understandable, incentive to lawyers to be over-generous in their allocation of their time and their resources. Inflated expectations of counsel can be reflected in inflated hourly rates as, for example, in the rate of $810 per hour reported by one of the senior counsel who performed supervisory work in the preparation of an opinion on the Class II discount. The hourly rates of other lawyers increased significantly during the proceeding but, overall, I do not consider them to be unreasonable.

[52] The application of a multiplier to a base fee is just one method of computing a contingency fee under the provisions of the CPA. It may also be helpful in some circumstances in testing the reasonableness of a fee that is expressed as a percentage of recovery in an agreement between counsel and representative plaintiffs. Its utility is more limited in a case like this where the proceedings were settled in a relatively short time. In these circumstances, the speed with which a resolution of the issues was effected can itself be considered to be a significant benefit for the class. To the extent, however, that class counsel have relied on the multiplier method to justify their fee request, my review of the time records they have provided, and of the course of the proceedings, has satisfied me that a reasonable base fee for past and future professional services would not exceed $1,000,000.

[53] While an agreement for a contingency fee of 25 per cent has been approved in this jurisdiction in other cases, it may well be excessive if, at the time the fee agreement was executed, there was a reasonable likelihood that a quick settlement would be obtained. Most class actions settle and I have no doubt that, in accepting the retainer by the representative plaintiffs, Siskinds - the firm that took the lead in the co-ordinated litigation - hoped, and intended, to concentrate its efforts and resources in attempting to negotiate a settlement as quickly as possible. I have no doubt also that, from the outset, the firm was alive to the prospect that the defendants would not wish to be involved in lengthy cross-border proceedings in two

jurisdictions and might well be interested in an early settlement. The firm's dockets suggest that the first settlement meeting occurred as early as February 16, 2006 - approximately three weeks after the statement of claim in the Ontario action was issued. The plaintiffs agreed to a settlement in principle with the FMF Defendants less than five months later.

[54] I am satisfied that, when the retainer agreements with Messrs Gould and Leach were executed in December 2005, Siskinds was aware that there was a reasonable possibility that an early settlement would be reached. There is no evidence that they informed their clients of this, or of the possibility of having variable percentages in the retainer agreements to accommodate the possibility of an early settlement.

[55] In determining whether the fee requested in this case is excessive, it is necessary to be careful not to rely on hindsight, or to penalise counsel for the quality of their work and the success they achieved in negotiating an early settlement. It is also necessary to recognise that, in December 2005, when they accepted the retainers from Messrs Gould and Leach that made their fees and disbursements contingent on success in the litigation, there was only a reasonable possibility, and no certainty, that the defendants would settle. The risks counsel assumed were not negligible. They are, nevertheless, very experienced in class action litigation and must be presumed to have been cognizant of the possibility of a speedy recovery, as well as the risks they were assuming.

[56] I have not, in terms, been asked to approve the fee agreements in this motion. Counsel have, however, relied on sections 32 and 33 of the CPA as grounds for their motion for approval of the fees. In these circumstances, I have a discretion under section 32 (4) (a) to determine the amount of an appropriate fee: see *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.), at para 23. I believe, also, that counsel have the burden of demonstrating that the contingency fee they request is fair and reasonable remuneration for the professional services they have rendered to their clients and the members of the class and may perform during the administration of the settlement. They have not satisfied me that global fees in excess of an amount of $4.5 million would be justified or, indeed, that the agreements that provided for a fee of 25 per cent of the gross recovery irrespective of the length of the proceedings should be approved in these circumstances. In my judgment, a global fee of $4,500,000 would represent fair and reasonable compensation for the work performed – and to be performed - the risks that were assumed, and the benefits that were obtained for the class. Accordingly, there will be an order approving fees of that amount, plus the disbursements claimed and GST as applicable.

CULLITY J.

DATE: March 23, 2007

COURT FILE NO.: 49348 CP
DATE: 20070323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Tim Gould and Archie Leach

Plaintiffs

- and -

BMO Nesbitt Burns Inc.; Blackmont Capital Inc.; Canaccord Capital Corporation; National Bank Financial Inc.; Sprott Securities Inc.; TD Securities Inc.; BDO Seidman, LLP; FMF Capital Group Ltd.; FMF Capital LLC; FMF Holdings, LLC; Michigan Fidelity Acceptance Corporation; PKF, LLC; Thomas Little; Atul Shah; Michael Hoffman; Edan King; Howard Morof; Robert Pilcowitz; Eric Slavens; and Lorie Weisberg

Defendants

REASONS FOR DECISION

CULLITY J.

Released: March 23, 2007

283 F.R.D. 178
United States District Court,
S.D. New York.

In re IMAX Securities Litigation.

No. 06 Civ. 6128 (NRB).
|
June 20, 2012.

Synopsis

Background: Lead plaintiff in investors' consolidated class action against entertainment corporation, its officers, and accounting firm for securities fraud moved for final approval of settlement and proposed plan of allocation, final certification of the class for purposes of settlement, and award of attorneys' fees and reimbursement of expenses.

Holdings: The District Court, Naomi Reice Buchwald, J., held that:

notice of settlement was adequate;

commonality and typicality requirements for certification of settlement class were met;

adequacy requirement was met;

common questions predominated over those affecting only individual members;

class action was superior to other methods of adjudicating claims;

proposed settlement was procedurally fair;

proposed settlement was substantively fair; and

plan of allocation was fair and adequate.

Ordered accordingly.

Attorneys and Law Firms

***180** Arthur N. Abbey, Esq., Karin E. Fisch, Esq., Richard B. Margolies, Esq., Abbey Spanier Rodd & Abrams, LLP, New York, NY, for Lead Plaintiff the Merger Fund.

Lewis J. Liman, Esq., David Oliwenstein1, Esq., Cleary Gottlieb Steen & Hamilton LLP, New York, NY, for Defendants IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, and Kathryn A. Gamble.

***181** M. Byron Wilder, Esq., Gibson, Dunn & Crutcher LLP, Dallas, TX, Jennifer L. Conn, Esq., Gibson, Dunn & Crutcher LLP, New York, NY, for Defendant PricewaterhouseCoopers LLP.

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, District Judge.

I. Introduction

On March 28, 2012, we preliminarily certified a class for the purpose of settlement and preliminarily approved an amended settlement of this long-running securities class action against defendants IMAX Corporation ("IMAX"), Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble (the "individual defendants"), and PricewaterhouseCoopers LLP ("PwC") (collectively "defendants"). *See* Amended Order, *In re IMAX Corp. Sec. Litig.,* Master File No. 06 Civ. 6128 (S.D.N.Y. Mar. 28, 2012) (hereinafter the "Preliminary Order"). Following the provision of notice to the members of the preliminarily certified class, on June 14, 2012, we held a hearing on the motion of lead plaintiff The Merger Fund ("TMF" or "lead plaintiff") for final approval of the amended settlement and the proposed plan of allocation, final certification of the class for the purpose of settlement, and the award of attorneys' fees and reimbursement of expenses. For the reasons stated below as well as those reasons that we articulated at the hearing, which are incorporated here by reference, we (1) find that the notice provided to members of the class was adequate; (2) certify the class for the purpose of settlement; (3) approve the settlement; (4) approve the plan of allocation; and (5) reserve decision on the requested attorneys' fees and expenses pending further briefing on these issues from lead plaintiff's counsel Abbey Spanier Rodd & Abrams, LLP ("Abbey Spanier" or "lead plaintiff's counsel").

II. Background [1]

A. The Class Action

Almost six years have passed since the eight cases that were consolidated to form this class action were originally filed with this Court. *See* *Kaplan v. Gelfond,* 240 F.R.D. 88, 90 (S.D.N.Y.2007). It has similarly been almost six years since the parallel class action that remains pending in Canada (the "Canadian Action") was originally filed with the Ontario Superior Court. *See* Abbey Decl. ¶ 11.[2] During the intervening years, we have appointed three different entities as lead plaintiff, denied one motion to dismiss and two motions for class certification, and at the time that the parties entered into a memorandum of understanding ("MOU") to settle this litigation on November 2, 2011 we were preparing to decide a third motion for class certification. *See id.* at ¶¶ 10–57, 68. In the course of addressing these various issues, we have previously set out the facts underlying the allegations of securities fraud in this case in multiple decisions and will not rearticulate them in detail here. *See, e.g.,* *In re IMAX Sec. Litig.,* 272 F.R.D. 138, 142–45 (S.D.N.Y.2010); *In re IMAX Sec. Litig.,* 587 F.Supp.2d 471, 474–78 (S.D.N.Y.2008). It is enough for our present purpose to repeat the following passages:

> IMAX is an entertainment technology company specializing in digital and film-based motion picture technologies and large-format film presentations. The Company's main business is the design, ***182** manufacture, sale and lease of theater systems. As of December 31, 2006, the IMAX theater network included 284 theaters operating in 40 countries.
>
> > The majority of IMAX's revenue [between February 27, 2003 and July 20, 2007] was derived from the sale and lease of theater systems to third-party owners of large-format theaters. Throughout [this time period], IMAX reported upward-trending financial results: 16 theater system installations ("installs") and $71 million revenue for fiscal year 2002; 21 installs and $75.8 million revenue for 2003; 22 installs and $86.6 million revenue for 2004; and 39 installs and $99.7 million revenue for 2005.
>
> On February 17, 2006, IMAX issued a press release announcing its 2005 financials and reporting that the Company had completed 14 [installs] during the fourth quarter of 2005. On March 9, 2006, IMAX filed its Form 10–K for fiscal year 2005 ("2005 10–K"), describing a "record" 14 [installs] and $35.1 million revenue in the fourth quarter.
>
> Five months later, on August 9, 2006, IMAX announced that it was responding to an informal inquiry from the Securities and Exchange Commission ("SEC") concerning the timing of revenue recognition and, specifically, its application of multiple element arrangement ... accounting derived from theater system sales and leases.
>
> ...
>
> In addition to disclosing the SEC investigation, the August 9th announcement stated that [IMAX]'s discussions with potential buyers and strategic partners had faltered. The following day, the price of IMAX shares fell from $9.63 to $5.73.
>
> On March 29, 2007, IMAX announced that, based on comments it had received from the SEC and the Ontario Securities Commission, it was expanding its [internal] review [of its accounting practices], "primarily in connection with its revenue recognition for certain theater system installations in previous periods, including the fourth quarter of 2005." Because of this "expanded review," IMAX stated that it "may determine that it is necessary to restate additional items beyond the previously identified errors."
>
> Four months later, on July 20, 2007, IMAX filed its Form 10–K for fiscal year 2006 ..., which included a restatement of its financial results for fiscal years 2002 through the first three quarters of 2006.[3]
>
> ...
>
> As a result of the restatement of theater system revenue, 16 installation transactions representing $25.4 million in revenue shifted between quarters in their originally reported years, and 14 installation transactions representing $27.1 million in revenue shifted between fiscal years. Of the 14 transactions for which revenue shifted between fiscal years, one was originally recorded as revenue in fiscal year 2002, two were recorded in

fiscal year 2004, ten in fiscal year 2005, and one in fiscal year 2006.

In re IMAX, 272 F.R.D. at 142–43 (internal footnotes omitted).

Bringing claims of securities fraud under §§ 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b–5, 17 C.F.R. § 240.10b–5, the Consolidated Class Action Complaint, which was filed on October 2, 2007, essentially alleges that (i) IMAX, (ii) the individual defendants, who were among IMAX's directors and officers, and (iii) PwC, which served as IMAX's accountant, were responsible for the issuance of materially false and misleading statements concerning IMAX's recognition of revenue from theater system installations during the period from February 27, 2003 through July 20, 2007. *See* *id.* at 143–44.

B. Discovery and Settlement Proceedings

In September 2008, following the denial of defendants' motions to dismiss, the parties agreed to engage in discovery on the merits as well as discovery related to the forthcoming class certification proceedings. Abbey Decl. ¶ 20. In January 2009, IMAX and the ***183** individual defendants produced approximately 150,000 pages of documents. *Id.* at ¶ 32. In February 2009, Abbey Spanier, having reviewed this production, served interrogatories on IMAX and the individual defendants to which these defendants responded in March 2009. *Id.* at ¶ 33. Also in February 2009, PwC produced another approximately 12,000 pages of documents. *Id.* at ¶ 34. It appears that defendants made further productions over the ensuing months because both Abbey Spanier and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), which served as lead plaintiff's counsel between June 2009 and December 2010, make reference in their submissions to the review of hundreds of thousands of pages of documents. *See id.* at ¶ 78 ("[l]ead [c]ounsel have reviewed and analyzed hundreds of thousands of pages of documents produced by [d]efendants"); *id.* at Ex. E ("Rudman Decl.") ¶ 15 (prior to the appointment of Robbins Geller as lead plaintiff's counsel in June 2009 "[d]efendants had previously produced approximately 500,000 pages of documents to plaintiffs"). In addition to the discovery that they obtained from defendants, it appears that both Abbey Spanier and Robbins Geller subpoenaed documents from third parties during the course of the litigation, some of which had previously expressed an interest in acquiring IMAX prior to August 2006. *See* Abbey Decl. ¶¶ 30, 45.

We understand that neither Abbey Spanier nor Robbins Geller conducted any merits depositions during this litigation. *See* June 14, 2012 Hr'g Tr. 5:24–6:12. However, Abbey Spanier has reviewed transcripts from interviews conducted by the SEC of the individual defendants as well as eleven other persons and has also gained access to transcripts from depositions conducted by plaintiffs' counsel in the Canadian Action of eleven persons, including a member of PwC. *See* Abbey Decl. ¶¶ 11, 78; Amended Settlement ¶ EE. In addition, further confirmatory discovery was conducted in January 2012 after the parties entered into a MOU to settle on November 2, 2011. *See* Abbey Decl. ¶¶ 70, 78.

At a number of earlier points during the litigation, the parties explored settlement. Specifically, on December 2, 2008, Abbey Spanier participated in a mediation session with counsel for defendants presided over by the Honorable E. Leo Milonas (Ret.), formerly of the New York Supreme Court, Appellate Division. *Id.* at ¶ 28. As part of this mediation, the parties exchanged confidential mediation statements. *Id.* On July 16, 2010, Robbins Geller participated in a further mediation with counsel for defendants presided over by the Honorable Daniel Weinstein (Ret.), formerly of the California Superior Court. *Id.* at ¶ 44. In preparation for this mediation, Robbins Geller also prepared a mediation statement. Rudman Decl. ¶ 26. While these earlier efforts at mediation proved unsuccessful, once Abbey Spanier was reappointed lead plaintiff's counsel in April 2011, it restarted settlement discussions with counsel for defendants that involved numerous meetings which successfully culminated in the parties entering the MOU to settle on November 2, 2011. *See* Abbey Decl. ¶ 67. Following further negotiations and the production of confirmatory discovery, the parties entered into a settlement on January 26, 2012, which we preliminarily approved on February 1, 2012. *See id.* at ¶¶ 71–73. In response to proposed revisions from plaintiffs' counsel in the Canadian Action, the parties agreed to amend the notice proposed in connection with their settlement of the 26th and approved in this Court's Order of the 1st, changing the notice to provide *inter alia* fuller contact information for plaintiffs' counsel in the Canadian Action. *See id.* at ¶ 73. On March 20, 2012, the parties ultimately entered into an amended settlement, which reflected this alteration, among other changes, as well as a structural modification of the settlement terms, which is discussed immediately below. *See id.* at ¶¶ 73–74.

C. The Amended Settlement

Pursuant to the amended settlement, lead plaintiff and defendants have agreed to resolve this litigation through a cash settlement of $12,000,000. *Id.* at ¶ 1.[4] This cash settlement ***184** lies within the range of possible damages forecast by the parties, which extended as high as $91,000,000 pursuant to lead plaintiff's estimation and as low as $5,000,000 according to defendants' calculation, assuming *arguendo* defendants' liability. *See id.* at ¶ 127. The proposed class on whose behalf lead plaintiff seeks to enter the amended settlement (the "settlement class" or "American Class") includes all investors that acquired the common shares of IMAX on the NASDAQ Stock Market (the "NASDAQ") from February 27, 2003 through July 20, 2007 (the "settlement class period" or "American Class Period"). *Id.* at ¶ 1 n. 1. The settlement class and settlement class period differ from their analogues in the Canadian Action, which is being actively litigated on behalf of all investors that acquired IMAX's common stock on the NASDAQ or Toronto Stock Exchange on or after February 17, 2006 and held some or all of those securities on August 9, 2006 (the "Canadian Class" and the "Canadian Class Period"). *See id.* at ¶ 59. In order to address the overlap between the American Class and the Canadian Class, which was previously certified in the Canadian Action on December 14, 2009, the amended settlement is conditioned on the entry of an order in the Canadian Action that excludes from the Canadian Class those investors who do not opt out of the American Class (the "Canadian Order"). *See id.* at ¶¶ 59, 75. We understand that counsel for IMAX and the individual defendants in the Canadian Action have filed a motion seeking to redefine the Canadian Class in this manner and that oral argument on that motion is now set to begin on July 30, 2012 in the Ontario Superior Court. *See* IMAX and Individual Defs.' Letter of June 12, 2012. While the settlement contemplated entry of the Canadian Order prior to our final approval of the settlement, the amended settlement reflects a structural modification of the settlement terms insofar as it reverses this sequence of events and seeks our final approval of the settlement prior to entry of the Canadian Order. *Compare* Settlement ¶ 5 *with* Amended Settlement ¶ 5. The amended settlement, however, remains contingent on entry of the Canadian Order. *See* Amended Settlement ¶ 8. In light of this contingency, there is an unaccustomed uncertainty as to the finality of our "final" approval of the amended settlement between the parties; however, we proceed to address that settlement on the assumption that the negotiated resolution of this litigation will not be further disturbed should we approve it, as we do.

D. The Preliminary Order and the Provision of Notice

On March 28, 2012, we preliminarily certified the settlement class for the purpose of settlement, approved the amended settlement, and approved the form and content of the notice to be provided to the members of the settlement class (the "notice"). Preliminary Order 2–3. We further set out the procedures by which the notice was to be disseminated to the settlement class and the deadlines by which any members of the settlement class who wished to object to or be excluded from the amended settlement must act ahead of the hearing that we set for June 14, 2012 to finally approve the amended settlement. *Id.* at 3–12.

In accordance with our direction, lead plaintiff's counsel retained Strategic Claims Services ("SCS") to supervise and administer the dissemination of the notice pursuant to the approved notice procedure. *See* Preliminary Order ¶ 5. SCS arranged for the notice to be provided via mail to 426 individuals and organizations identified on a list of shareholders provided by IMAX. *See* Mulholland Aff. ¶¶ 4, 8, Ex. A. In addition, SCS mailed the notice to a further 1,813 banks, brokerage companies, and institutional investors, which may have traded the common shares of IMAX in their clients' or their own accounts during the settlement class period. *See id.* These initial mailings were completed by April 23, 2012. *Id.* at ¶ 4. Following receipt of the notice, the banks, brokerage companies, and institutional investors mentioned above as well other individuals requested that an additional 85,695 copies of the notice be disseminated to possible additional members of the settlement class. *Id.* at ¶ 8. Thus, in total, 87,934 copies of the notice have been mailed to possible members of the settlement class. *See id.* ¶¶ 4, 8–9. Where a mailing was returned as undeliverable, SCS has followed up where possible to ***185** obtain updated addresses. *Id.* at ¶ 9. In addition to the mailing of the notice, SCS launched a settlement website that contained the notice, among other relevant documents, and further published an approved form of summary notice through the national editions of newspapers in both the United States and Canada as well as via electronic newswires. *See id.* at ¶¶ 5–6.

The hearing to address the amended settlement was held on June 14, 2012, as scheduled. No members of the settlement class appeared. As of that date, we were informed that only seven investors had sought to be excluded from the settlement class and only one investor, Mr. Skip Ames, had filed an objection to the amended settlement (the "objection"), which we discuss below. *See* June 14, 2012 Hr'g Tr. 4:22–5:8.

III. Discussion

A. Adequacy of the Notice

Federal Rule of Civil Procedure 23(c)(2)(B) provides the notice that is required to be given to members of a class when it is certified pursuant to Federal Rule of Civil Procedure 23(b)(3), which is the case here. [5] Federal Rule of Civil Procedure 23(e)(1) in turn provides the notice that is required to be given to members of a certified class in which a settlement has been proposed for court approval, which is also the case here. [6] "Where, as here, the parties seek simultaneously to certify a settlement class and to settle a class action, the elements of Rule 23(c) notice ... are combined with the elements of Rule 23(e) notice" and because "Rule 23(e)'s notice requirements are less specific than that of Rule 23(c)'s ... [we] will focus on Rule 23(c)'s requirements." *In re Global Crossing Sec. and ERISA Litig.,* 225 F.R.D. 436, 448 (S.D.N.Y.2004) (Lynch, J.). *See also* Fed.R.Civ.P. 23 advisory committee's note (emphasizing "[n]otice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously" before stating "[r]easonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class"). Where there is compliance with Rule 23(c)(2)(B), the requirements of due process are satisfied. *See* *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 172–174, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (discussing incorporation of due process requirements into Rule 23(c)(2)(B)'s predecessor provision). In addition, in the context of a securities class action settlement, the Private Securities Litigation Reform Act of 1995 (the "PSLRA") imposes additional notice that must be provided to members of the class. *See* 15 U.S.C. § 78u–4(a)(7). [7]

***186** We have reviewed the notice in the form in which it was disseminated to members of the settlement class, *see* Mulholland Aff. Ex. A, and also considered the procedure that we earlier approved. We find that the notice provided here was the best practicable under the circumstances, that it included all of the content necessary as a matter of law, and that it was accordingly adequate under Rule 23, due process, and the PSLRA.

B. Final Certification of the Settlement Class

"Certification of a settlement class 'has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.' " *In re Giant Interactive Group, Inc. Sec. Litig.,* 279 F.R.D. 151, 158 (S.D.N.Y.2011) (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 205 (S.D.N.Y.1995)). *See also* *Weinberger v. Kendrick,* 698 F.2d 61, 72 (2d Cir.1982) ("[t]emporary settlement classes have proved to be quite useful in resolving major class action disputes") (internal quotation marks omitted). "Classes certified for settlement purposes, like all other classes, must meet the requirements of Rule 23(a) and at least one of three requirements set forth in Rule 23(b)." *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009). Here, we find that the settlement class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and accordingly certify it for the purpose of settlement.

1. Federal Rule of Civil Procedure 23(a)

Pursuant to Rule 23(a), certification of a class is proper where "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

a. Numerosity

In a previous decision, we found that the settlement class as now constituted plainly met the numerosity requirement of Rule 23(a)(1). *See* *In re IMAX,* 272 F.R.D. at 146.

b. Commonality and Typicality

" 'The commonality requirement [of Rule 23(a)(2)] is met if plaintiffs' grievances share a common question of law or of fact.' " *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, LLC,* 504 F.3d 229, 245 (2d Cir.2007) (quoting *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997) (*per curiam*)). In turn, "[t]ypicality [pursuant to Rule 23(a)(3)] 'requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.' " *Id.* (quoting *Robinson v. Metro–N. Commuter R.R. Co.,* 267 F.3d 147, 155 (2d Cir.2001)). As the Supreme Court has observed, the commonality requirement "tend[s] to merge" with the typicality requirement because "[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

Here the commonality and typicality requirements are satisfied. The settlement class, and in particular TMF as lead plaintiff, share many common questions of law and fact bearing on for example the central issues of whether defendants' public statements regarding income recognition contained material misstatements or omissions and whether defendants acted with scienter in the issuance of those statements. In a previous decision, we addressed and rejected a number of arguments against TMF's appointment as lead plaintiff on the basis of its failure to satisfy the typicality as well as adequacy requirements of Rule 23(a)(3) and (4), and we find no novel reason on the record before us to believe that TMF's claims are atypical in any manner or that it is ***187** subject to unique defenses. *See* *In re Imax Sec. Litig.,* Master File No. 06 Civ. 6128, 2011 WL 1487090, at *3–7 (S.D.N.Y. April 14, 2011) (rejecting arguments that TMF's (i) successive reassignment of its claims and (ii) investment strategies did not give rise to unique defenses or undermine satisfaction of the typicality and adequacy requirements).

c. Adequacy

"The adequacy requirement of Rule 23(a)(4) involves an inquiry as to whether: (1) the plaintiff's interests are antagonistic to the interests of the other members of the [c]lass; and (2) plaintiff's counsel are qualified, experienced, and capable of conducting the litigation." *In re Giant,* 279 F.R.D. at 159 (citing *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000)). Here, there is no reason to believe that lead plaintiff's interests are in conflict with those of the other members of the settlement class whose claims share common questions of law and fact, and we find that lead plaintiff's counsel is qualified to litigate this case on behalf of the settlement class. We note that the achievement of the lead plaintiff and lead plaintiff's counsel in securing a well-received settlement that we approve below provides confirmation that they have met the adequacy requirement. *See id.* (finding satisfaction of adequacy requirement "confirmed by the lack of any opposition to this settlement (and the very small number of opt-outs), as well as the above-average recovery in this case, measured as a percentage of maximum potential recovery").

2. Federal Rule of Civil Procedure 23(b)(3)

In addition to meeting the four requirements of Rule 23(a), a class must also satisfy one out of the three sub-paragraphs to Rule 23(b). Here, lead plaintiff seeks certification of the settlement class pursuant to Rule 23(b)(3), which requires that a court find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). [8]

a. Predominance of Common Questions

"Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002). As the Supreme Court has observed, the requirement of predominance is "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Here, lead plaintiff alleges that defendants' allegedly fraudulent public statements caused damages to the settlement class, and these allegations are sufficient to establish predominance. *See* *In re Global Crossing,* 225 F.R.D. at 454.

b. Superiority to Other Methods of Adjudication

The class action here is superior to the other available methods for adjudicating the controversy between the settlement class and defendants. "The interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions," which has been evidenced from the fact that only one member of the settlement class has objected to the amended settlement and only seven members ***188** of the settlement class have sought to exclude themselves from the amended settlement. *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 133 (S.D.N.Y.2001) (continuing to note that "[t]o force each investor to litigate separately would risk disparate results among those seeking redress, ... would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources").

Given the existence of the Canadian Action, it has been periodically suggested in the course of this litigation that the parallel class action proceedings to the north offer a better forum for the resolution of this general controversy. *See* *In re IMAX,* 272 F.R.D. at 158. Indeed, the one objection to the amended settlement alleges the comparative attractiveness of the Canadian Action. *See* Objection 2–3. We again "decline to deny certification on th[is] ground [ ] because, amongst other reasons," PwC is not a defendant in the Canadian Action, the American Class Period is significantly longer than the Canadian Class Period, and the American Class includes only purchasers on the NASDAQ whereas the Canadian Class includes purchasers on both the NASDAQ and Toronto Stock Exchange. *In re IMAX,* 272 F.R.D. at 158–59. As we previously stated:

> At bottom, a class action in a foreign jurisdiction, applying that jurisdiction's securities laws, to which a named defendant in the United States action is not a party, in which the first complaint in the foreign jurisdiction was filed after the first complaint in this case, is not a "superior" way of adjudicating plaintiffs' claims against that party for alleged violations of U.S. securities laws—claims which we already have upheld against defendants' motions to dismiss.

Id. at 159. Moreover, there is now a further factor in play that we find resolves any lingering doubt as to whether this class action is superior: the American Class has secured a certain recovery of millions of dollars against defendants through the advocacy of lead plaintiff's counsel here whereas the Canadian Class continues to litigate in the hope of securing a settlement or judgment. [9] It is no less true in the context of securities class action litigation that a bird in hand is worth two in the bush. Finally, to the extent that members of the American Class who are also members of the Canadian Class—it is estimated that 83.9% of the shares of IMAX involved in the Canadian Action were purchased on the NASDAQ, *see* Preliminary Order Ex. A–1 4—share the opinion conveyed in the one objection that the Canadian Action promises a superior alternative for them to recover their investment losses they would "presumably have excluded themselves from the settlement class." *In re Global Crossing,* 225 F.R.D. at 454. As noted earlier, there were only seven exclusion requests despite the extensive notice.

In light of the foregoing analysis, we find that the settlement class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and accordingly certify it for the purpose of settlement.

C. Final Approval of the Amended Settlement

At the outset, we emphasize that that there is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). Pursuant to Federal Rule of Civil Procedure 23(e) any settlement of this class action requires our approval. *See* FED. R. CIV. P. 23(e). Because the amended stipulation will bind the settlement class to its terms, we can only approve it should we find that "it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). "In undertaking this evaluation, [we] must consider 'both the [amended] settlement's terms and the negotiating process leading to settlement,' that is, [we] must review the settlement for both procedural and substantive fairness." *In re Giant,* 279 F.R.D. at 160 (quoting *Wal–Mart Stores, Inc.* ***189** *v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005)).

1. Procedural Fairness

We owe a fiduciary duty to the settlement class "to ensure that the [amended] settlement is not the product of collusion." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997) (citing *In re Warner Commc'ns Sec. Litig.,* 798 F.2d 35, 37 (2d Cir.1986)). With that said, "a class action settlement enjoys a 'presumption of correctness' where it is the product of arm's-length negotiations conducted by experienced, capable counsel." *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 575 (S.D.N.Y.2008) (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989)). Further, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber,* 171 F.R.D. at 125 (internal quotation marks omitted). Here, the presumption of correctness attaches because "[a]ll parties were represented throughout the [s]ettlement negotiations by able counsel experienced in class action and securities litigation." *In re Telik,* 576 F.Supp.2d at 576. This finding is further buttressed in light of the substantial merits-related discovery conducted in this case as well as the prior mediation sessions that, though unfruitful, took place before retired judges. *See In re Giant,* 279 F.R.D. at 160 (noting extent of merits-related discovery); *In re Telik,* 576 F.Supp.2d at 576 (noting involvement of retired judges). In the absence of evidence to rebut the presumption, we find that the amended settlement is procedurally fair.

2. Substantive Fairness

In the Second Circuit, district courts determine whether a proposed settlement in a class action is substantively fair through analysis of the nine factors articulated in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974). These factors are:

> (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;
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal–Mart Stores, 396 F.3d at 117 (quoting *Grinnell,* 495 F.2d at 463). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather [a] 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. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003)). Upon consideration of these factors, we find that the amended settlement is substantively fair.

a. Complexity, Expense, and Likely Duration of Litigation

"[I]n evaluating the settlement of a securities class action, federal courts, including this [c]ourt, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) (internal quotation marks omitted). In this case, we have from the outset acknowledged the complexity of the underlying accounting principles involved. *See* *In re IMAX,* 587 F.Supp.2d at 475–77. While this complexity does not appear extraordinary in the context of issues that are regularly implicated in the course of securities class action litigation, we agree with lead plaintiff's counsel that it would materially increase the challenge as well as expense of litigating this case through trial. *See* Mem. of Law in Support of Lead Plaintiff's Mot. for Final Approval of the Settlement, etc. ("Br.") 9–10; Abbey Decl. ¶ 110. Furthermore, we agree with lead plaintiff's counsel that following a renewed class certification motion, a motion for summary judgment ***190** from one or more of the defendants would possibly precede a trial. *See* Abbey Decl. ¶ 9. In short, we find that the amended settlement permits the settlement class to avoid complicated, expensive, and likely protracted litigation, probably lengthened in its cost and duration due to the parties' likely efforts to coordinate proceedings with those in the Canadian Action.

b. Class Members' Reaction to the Amended Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 362 (S.D.N.Y.2002). Here, only one investor objected to the amended settlement and only seven requested to opt out of the settlement class. In light of the fact that over 87,000 notices were mailed to investors and possible members of the settlement class, this demonstration of discontent is but a whisper amidst an otherwise thundering roar of silence.

c. Stage of Proceedings and Amount of Discovery Completed

In considering this factor, "the question is whether the parties had adequate information about their claims," *In re Global Crossing,* 225 F.R.D. at 458, such that their counsel can intelligently evaluate "the merits of [p]laintiff's claims, the strengths of the defenses asserted by [d]efendants, and the value of [p]laintiffs' causes of action for purposes of settlement." *Maley,* 186 F.Supp.2d at 364. The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties. *See In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *7 (S.D.N.Y. May 1, 2008) (stating "[a]lthough the parties did not engage in extensive formal discovery, such efforts are not required for the [s]ettlement to be adequate, so long as the parties conducted sufficient discovery to understand their claims and negotiate settlement terms" and citing cases). This case has been pending for almost six years. During that time period, substantial merits-related discovery of both a formal and informal variety has occurred. In addition, the parties have conducted additional confirmatory discovery pending their entrance into the amended settlement. Against this history of activity, we find that lead plaintiff's counsel and defendants' counsel are both able to assess the strengths and weaknesses of their respective positions.

d. Risks of Establishing Liability

"This factor does not require [a] [c]ourt to adjudicate the disputed issues or decide unsettled questions; rather, the [c]ourt need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing,* 225 F.R.D. at 459. *See* *In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000) (approving proposed settlement and emphasizing "[t]he [c]ourt is impressed by the factual difficulties and legal defenses that plaintiffs face in further litigation of their claim"). We agree with lead plaintiff's counsel that significant risks would lie ahead should the litigation of this case proceed. *See* Br. 17–18. In particular, for reasons that we have previously noted, albeit in denying defendants' motion to dismiss, whether lead plaintiff could establish scienter on the part of IMAX, the individual defendants, and PwC is far from certain in this case involving accounting irregularities that implicated the recognition not creation of income. *See* *In re IMAX,* 587 F.Supp.2d at 481, 485 (noting the question of whether scienter was adequately pleaded as to IMAX and the individual defendants was a "close one" and observing "[i]f ... discovery reveals that P[w]C's involvement in the development of IMAX's accounting policy was not so extensive as alleged" then the "inference of scienter will weaken substantially").

e. Risks of Establishing Damages

In the context of securities class actions, "[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." ***191** *In re Global Crossing,* 225 F.R.D. at 459 (quoting *Maley,* 186 F.Supp.2d at 365). In this case, loss causation presents a stark challenge to lead plaintiff. On August 9, 2006, IMAX disclosed (i) that the SEC was investigating its accounting practices and also (ii) that a potential acquisition or strategic partnership had not come to fruition. The timing of these twin disclosures significantly complicates the question of what, if any, amount of the resulting drop in the share price is attributable to prior allegedly misrepresentative statements regarding theater system installations and resulting revenue. [10]

f. Risks of Maintaining Class Action Through Trial

We have not yet certified a class in this case except for the purpose of settlement. Were this case to proceed in the absence of the amended settlement, even if lead plaintiff secured certification of the entire settlement class, at the next stage the possibility would remain that following additional factual development multiple sub-classes would emerge for different groups of investors. *See* *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y.1998) (noting that "if insurmountable management problems were to develop at any point, class certification can be revisited at any time" pursuant to Federal Rule of Civil Procedure 23(c)(1)) (internal quotation marks omitted).

g. Defendants' Ability to Withstand Greater Judgment

Without question, IMAX, the individual defendants, and PwC could withstand a much greater judgment against them, and this factor weighs against the fairness of the amended settlement. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony,* 2008 WL 1956267, at *8 (quoting *McBean v. City of New York,* 233 F.R.D. 377, 388 (S.D.N.Y.2006) (Lynch, J.)). Indeed, this factor, standing alone, is not sufficient to preclude a finding of substantive fairness where the other factors weigh heavily in favor of approving a settlement. *See* *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001).

h. Amended Settlement's Range of Reasonableness in Light of Possible Recovery

"The adequacy of the amount achieved in settlement may not be judged in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Giant,* 279 F.R.D. at 162 (internal quotation marks omitted). Instead, we must examine whether the settlement amount lies within a "range of reasonableness," which range reflects "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal–Mart,* 396 F.3d at 119 (internal quotation marks omitted). We have already discussed the material weaknesses in lead plaintiff's case as well as the additional risks attendant to further litigating this class action. In light of these weaknesses and risks, we find that the settlement amount here—$12,000,000, which constitutes over 13% of the maximum damages that lead plaintiff's counsel argues are conceivably possible to prove—is within the range of reasonableness. Nor is it without precedent that settlement amounts reflecting similar (or lower) percentages of possible recoveries have been approved in other recent securities class action cases. *See, e.g., In re Giant,* 279 F.R.D. at 162 (finding $13,000,000 settlement amount that reflected percentage of recovery of 16.5% was within the range of reasonableness). *See also In re China Sunergy Sec. Litig.,* No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May

13, 2011) (noting "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade ... have ranged from 3% to 7% of the class members' estimated losses") (internal quotation marks omitted); ***192** *In re Union Carbide,* 718 F.Supp. at 1103 (noting the Second Circuit "has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought" and emphasizing "[t]he essence of settlement is compromise").

* * *

In light of the foregoing analysis, we find that the amended settlement is substantively fair under the factors of *Grinnell* and accordingly give it final approval.

D. Final Approval of the Plan of Allocation

" 'To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate.' " *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 344 (S.D.N.Y.2005) (quoting *Maley,* 186 F.Supp.2d at 367). " 'When formulated by competent and experienced counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.' " *In re Telik,* 576 F.Supp.2d at 580 (quoting *In re Global Crossing,* 225 F.R.D. at 462). Such "[a] reasonable plan may consider the relative strength and values of different categories of claims." *Id. See* *In re Lloyd's Am. Trust Fund Litig.,* No. 96 Civ. 1262(RWS), 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002) ("[c]lass action settlement benefits may be allocated by counsel in any reasonable or rational manner because allocation formulas reflect the comparative strengths and values of different categories of the claim") (internal ellipsis and quotation marks omitted).

The proposed plan of allocation effectively divides the settlement class period into two parts. For common shares of IMAX purchased from February 27, 2003 through August 9, 2006, the plan of allocation assigns an inflation factor per share of $3.90, which reflects the entire drop in the share price that occurred immediately following IMAX's disclosure on August 9th of the SEC's investigation into its accounting practices. For shares of IMAX purchased from August 10, 2006 through July 20, 2007, the plan of allocation assigns no inflation factor. *See* Preliminary Order Ex. A–1 19–20. This latter assignment of value renders worthless the claims of those members of the settlement class who purchased the common stock of IMAX after the initial disclosure. The plan of allocation reflects the advice of lead plaintiff's counsel's damages expert, who in particular "recommended that there w[ere] no damages for IMAX shareholders between the period of August 10, 2006 and July 20, 2007 (the date of the [r]estatement) because on the date of the restatement, IMAX'[s] stock closed up $0.45 from the previous day's closing." Abbey Decl. ¶ 132.

We find that the proposed plan of allocation, which was devised by experienced counsel, is fair and supported by a reasonable, rational basis. The assignment of no value to the claims of investors who purchased after August 9th not unreasonably reflects what we agree would be the considerable difficulty of establishing damages during this time period. The mere fact that the lead plaintiff selects zero as the proper correction to the share price during this period of the settlement class does not alone undermine the fairness of the plan of allocation because the selection of zero seems rational here. *See* *Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 74–76, 78–79 (S.D.N.Y.2003) (rejecting post-approval challenge to plan of allocation in securities class action premised on allegedly false denials of impending merger that assigned "$8.00 per share for those shares traded from October 26, 1998 through November 18, 1998; $3.91 per share for those shares traded on November 19, 1998; and $0.00 for [those] shares traded on November 20, 1998" and noting "[t]he deflationary effect declined to $3.91 per share on November 19 [th] and to zero on November 20[th], because by those dates there was new information in the marketplace indicating that there was to be an impending merger announcement and that information drove the price ... back to its predeflationary levels"). Furthermore, no member of the settlement class has objected to this aspect of the plan of allocation.

The one objection to the amended settlement instead criticizes the plan of allocation because it assigns a uniform inflation value to claims arising from transactions on or before ***193** August 9th. *See* Objection 1. In particular, the objection argues that the value of common shares prior to 2005 was less inflated, citing the opinion of an expert submitted in the Canadian Action. *See id.;* Abbey Decl. Ex. B Tab 2 ("Torchio Aff."). While we have no reason to doubt that the expert retained by plaintiffs' counsel in the Canadian Action is as qualified to opine on this topic as the expert retained by Abbey Spanier here and moreover that his rationale for further segmenting the share price inflation in the plan of allocation is not unreasonable, *see* Torchio Aff. ¶¶ 18–20, it is well established that damages calculations in securities class actions often descend into a battle of experts. *See* *In re Marsh,* 2009 WL 5178546, at *6 ("[o]n damages, this case would have ended up as a classic 'battle of the experts' "). In the context of settlement approval, however, the rationale here for setting inflation at a constant rate throughout the entire portion of the settlement class period that preceded the initial corrective disclosure and that was covered by subsequently restated financial results need not overwhelm in our estimation all competing theories of damages. Instead, the rationale need only be reasonable and rational, which it is.

E. The Requested Attorneys' Fees and Expenses

In connection with its motion for final approval of the amended settlement, Abbey Spanier also seeks an award of attorneys' fees of $3,000,000, representing 25% of the settlement amount, as well as reimbursement of expenses totaling $1,677,838.02. *See* Br. 33–42. Adding these attorney's fees and expenses, the total of $4,677,838.02 reflects almost 39% of the settlement amount. While this figure alone gives us pause, as we explained at the hearing on June 14, 2012, we are concerned about the attorneys' hours expended and expert fees incurred by Abbey Spanier and in particular Robbins Geller given the evidentiary challenges that were obviously involved in bringing this case from the outset. In addition, we find particularly troubling the failure of Robbins Geller to address in its application the circumstances of its prior removal as lead plaintiff's counsel, which circumstances drew into question the candor and good faith of its representations to this Court. *See* *In re IMAX,* 272 F.R.D. at 155–57, 160; *In re IMAX,* 2011 WL 1487090, at *9. In light of these concerns, we agreed with Abbey Spanier at the hearing on the 14th that further briefing on the issue of the requested attorneys' and expenses is appropriate. Accordingly, we reserve decision on the award of fees and reimbursement of expenses.

IV. Conclusion

For the reasons stated above as well as those reasons that we articulated at the hearing, which are incorporated here by reference, we (1) find that notice provided to members of the was adequate; (2) certify the class for purpose of settlement; (3) approve the settlement; (4) approve the plan of allocation; and (5) reserve decision on the requested attorneys' fees and expenses pending further briefing on these issues from lead plaintiff's counsel.

All Citations

283 F.R.D. 178

Footnotes

1 The facts recited here are drawn from the following sources: (1) the Stipulation and Agreement Between Settlement Class Members and IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble, and PricewaterhouseCoopers LLP, dated January 26, 2012 ("Settlement"); (2) the Amended Stipulation and Agreement Between Settlement Class Members and IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble, and PricewaterhouseCoopers LLP, dated March 20, 2012 ("Am. Settlement"); (3) the Preliminary Order; (4) the Declaration of Arthur N. Abbey in Support of Lead Plaintiff's Motion for Final Approval of the Settlement with Defendants, etc. ("Abbey Decl."); and (5) the Affidavit of Paul Mulholland Concerning Mailing of Notice ("Mulholland Aff.").

2 The eight cases—06 Civ. 6128, 06 Civ. 6235, 06 Civ. 6313, 06 Civ. 6349, 06 Civ. 6449, 06 Civ. 6693, 06 Civ. 7057, and 06 Civ. 7162—were filed between August 11, 2006 and September 18, 2006. The Canadian Action commenced thereafter on September 20, 2006. Abbey Decl. ¶ 11.

3 Following this restatement, the price of IMAX shares actually closed up $0.45. *See* Abbey Decl. ¶ 132.

4 The $12,000,000 has already been deposited in an escrow account where it is earning interest. *See* Abbey Decl. ¶ 71 n. 3.

5 Rule 23(c)(2)(B) provides:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (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).

FED. R. CIV. P. 23(c)(2)(B).

6 Rule 23(e)(1) provides that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” FED. R. CIV. P. 23(e)(1).

7 Pursuant to the PSLRA, the notice must contain the following information as well as a cover page summarizing it:

> (A) Statement of recovery—the amount of the settlement determined in the aggregate and on an average per share basis;
>
> (B) Statement of potential outcome of case—amount of damages per share recoverable if plaintiffs were to prevail on every claim. If the parties are unable to agree on damages, a statement concerning the issues on which the parties disagree;
>
> (C) Statement of attorneys' fees—statement of fees and costs to be applied for in the aggregate and on a per share basis;
>
> (D) Identification of lawyers' representatives—the name, telephone number, and address of counsel available to answer questions; and
>
> (E) Reasons for settlement—a brief statement explaining the reasons why the parties are proposing the settlement.

In re Indep. Energy Holdings PLC Sec. Litig., 302 F.Supp.2d 180, 184 (S.D.N.Y.2003).

8 In undertaking these two inquiries, the following matters are among those that Rule 23(b)(3) identifies as “pertinent”:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3).

9 The most recent development of which we are aware in the settlement negotiations in the Canadian Action is that on May 3, 2012 defendants' counsel in the Canadian Action made an offer to plaintiffs' counsel in the Canadian Action to settle on terms roughly analogous to those on which the parties have reached agreement here. *See* Abbey Decl. Ex. A Tab 2 ¶ 29.

* * *

10 In addition, on July 20, 2007, when IMAX actually restated its financial results from multiple prior years, its share price closed up $0.45 in response to this correction. Abbey Spanier effectively now concedes that no loss to investors is attributable to the restatement, which conclusion guides its proposed plan of allocation, as discussed below. *See* Abbey Decl. ¶ 132.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Tremont Securities Law, State Law and Insurance Litigation, S.D.N.Y., February 11, 2019

2014 WL 7323417
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

In re HI–CRUSH PARTNERS
L.P. SECURITIES LITIGATION.

No. 12–Civ–8557 (CM).
|
Signed Dec. 19, 2014.

DECISION AND ORDER APPROVING SETTLEMENT AND AWARDING ATTORNEY'S FEES AND EXPENSES

COLLEEN McMAHON, District Judge.

I. INTRODUCTION

***1** Lead counsel for the plaintiffs having moved for approval of the settlement of this class action, and no class member having either objected or opted out, the court approves the settlement and awards attorney's fees to counsel in the sum of $1,266,666.67, plus any accrued interest, together with $106,451.20 for litigation expenses actually incurred.

II. PROCEDURAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

A. Procedural Background

Between November 21, 2012 and December 18, 2012, plaintiffs Shirley Horn, Douglas Goodhart, Leona Sesholtz, Alexander W. Thiele, and Peter A. Luebke filed four separate putative class action lawsuits against Hi–Crush, its general partner, certain of its officers and directors, and the underwriters of Hi–Crush's Initial Public Offering ("IPO"): *Horn v. Hi–Crush Partners, LP., et al.,* 12–CV–8557 (S.D.N.Y.) (the "Horn Action"); *Goodhart v. Hi–Crush Partners, LP., et al,* 12–CV–8574 (S.D.N.Y.) (the "Goodhart Action"); *Sesholtz, at al. v. Hi–Crush Partners, LP., et al.,* 12–CV–8610 (S.D.N.Y.) (the "Sesholtz Action"); and *Luebke v. Hi–Crush Partners, LP., et al.,* 12–CV–9212 (S.D.N.Y.) (the "Luebke Action"). These lawsuits alleged violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") in connection with Hi–Crush's IPO, against Hi–Crush Partners LP, the company's investment bankers (Barclays Capital Inc., Credit Suisse Securities (USA) LLC, Morgan Stanley & Co. LLC, RBC Capital Markets, LLC, Raymond James & Associates, Inc., Robert W. Baird & Co. Incorporated, UBS Securities LLC), and Individual Defendants (Jeffries V. Alston, III ("Alston"), Robert L. Cabes, Jr. ("Cabes"), Laura C. Fulton ("Fulton"), John R. Huff ("Huff), Robert E. Rasmus ("Rasmus"), Trevor M. Turbidy ("Turbidy"), Steven A. Webster ("Webster"), and James M. Whipkey ("Whipkey")).

Pursuant to the PSLRA (15 U.S.C. § 78u–4(a)(3)(B)), several members of the putative class moved for appointment as lead plaintiff on or before January 22, 2013.

Plaintiffs in the *Goodhart* Action and *Sesholtz* Action voluntarily dismissed their lawsuits on December 10, 2012 and February 7, 2013, respectively.

By an order dated February 11, 2013 (the "Order") (Docket # 54), the Court consolidated the *Horn* Action and *Luebke* Action under the caption *In re Hi–Crush Partners, L.P. Securities Litigation,* 12 Civ. 8557 (the "Consolidated Action"). In the Order, the Court appointed the HITE Funds as the Lead Plaintiffs, and Kirby McInerney LLP as lead counsel for the putative class in the Consolidated Action. The Court also directed Lead Counsel to file any consolidated or amended complaint on or before February 15, 2013.

On February 15, 2013, Lead Plaintiffs filed a consolidated amended complaint (the "Consolidated Complaint"), adding Hi–Crush GP as a defendant. The Consolidated Complaint alleged violations of Sections 11, 12 and 15 of the Securities Act, and added claims for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b–5 promulgated under Section 10(b), which had not been asserted in any of the previously filed complaints.

***2** On March 22, 2013, all of the named defendants moved to dismiss the Consolidated Complaint. On April 12, 2013, Lead Plaintiffs filed their Opposition to the defendants' motions to dismiss the Consolidated Complaint. Defendants filed replies in support of their motions to dismiss on April 19, 2013.

On December 2, 2013, the Court issued a Decision and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("Decision and Order"). Specifically, the Court dismissed the claims asserted under Sections 11, 12 and 15 of the Securities Act, but denied dismissal as to the claims asserted under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b–5, relating to investments in Hi–Crush common units during the period from September 25, 2012 through November 12, 2012. As a result of the Decision and Order, certain defendants, including the named underwriter defendants (who had only been named in the Securities Act claims) and certain of the individual defendants, were dismissed from the Consolidated Action.

On January 13, 2014, the remaining Defendants (Hi–Crush, Hi–Crush GP, Alston, Fulton Rasmus, and Whipkey) filed their answer to the Amended Complaint, denying the allegations therein.

From February to June 2014, the parties engaged in discovery that included the production and exchange of documents, and the taking and defense of deposition testimony.

On April 15, 2014, Lead Plaintiffs filed a Motion for Class Certification and Appointment of Class Representative and Class Counsel ("Class Certification Motion"). On May 15, 2014, Defendants filed their Opposition to Plaintiffs' Class Certification Motion and Plaintiffs filed their reply on June 17, 2014.

During the pendency of Lead Plaintiffs' motion for class certification, the parties agreed to explore a negotiated resolution through mediation. On June 25, 2014, the Settling Parties participated in mediated settlement negotiations before the Mediator. After an intensive day long mediation session, which was attended by Defendants' insurers, the Mediator made a proposal to settle the Action for $3.8 million in cash, subject to the execution of a formal stipulation and the Court's approval. Shortly thereafter, the parties accepted the Mediator's proposal. The Stipulation of Settlement ("Stipulation") together with exhibits and certain other documents referred to herein, has been duly executed and reflects the final and binding agreement between the parties. *See* Press Decl. Ex. 1.

On September 12, 2014, Lead Plaintiffs moved for preliminary approval of the Settlement, certification of a settlement class and approval of the Settlement. (Docket # 100.) On September 16, 2014, the Court granted Lead Plaintiffs' motion. (Docket # 104.)

B. Substantive Allegations

The factual allegations of the Complaint have been summarized and discussed at length in the Court's decision on Defendants' motion to dismiss. *See* *In re Hi–Crush Partners L.P. Sec. Litig.,* No. 12 Civ. 8557(CM), 2013 WL 6233561, at * 1–5 (S.D.N.Y. Dec. 2, 2013). In support of the claims that survived Defendant's motions to dismiss, Lead Plaintiffs pled that, prior to November 13, 2012, Defendants wrongfully concealed that Baker Hughes Inc. ("Baker Hughes") repudiated its Supply Agreement with Hi–Crush in September 2012. Moreover, in public statements following that repudiation, Defendants continued to reference Hi–Crush's relationship with Baker Hughes, and they did not even hint at the possibility that this customer relationship, which comprised a significant proportion of Hi–Crush's revenues, was endangered.

***3** On November 13, 2012, Hi–Crush issued a press release and filed a Form 8–K with the U.S. Securities and Exchange Commission ("SEC"). These filings for the first time publicly disclosed that, on September 19, 2012, Baker Hughes had purported to repudiate its Supply Agreement with Hi–Crush. The release additionally disclosed that, in response to Baker Hughes' purported repudiation, Hi–Crush had formally terminated the Supply Agreement and had filed a lawsuit against Baker Hughes on November 12, 2012.

On the first day of trading following this disclosure, Hi–Crush's common units lost approximately 26% of their value on extremely high trading volume of more than 3.3 million units. The price fell from $20.35 per unit on November 12, 2012 to $15.00 per unit on November 13, 2012.

III. REASONS FOR THE SETTLEMENT

The principal reason advanced for the Settlement is the significant benefit that it provides to the Settlement Class now. This benefit must be weighed against the risk that the Settlement Class would have received no recovery had Plaintiffs elected to continue litigating and been defeated at the class certification or summary judgment phases, trial, or appeal.

IV. THE TERMS OF THE SETTLEMENT

The Settlement resolves all claims of Lead Plaintiffs and the Settlement Class against all Released Parties. The Defendants have agreed to cause $3.8 million in cash to be paid into a Settlement Fund on behalf of Lead Plaintiffs and the Settlement Class. The Settlement Fund will be deposited into an escrow account within thirty days after the entry of the Preliminary Approval Order in accordance with the payment instructions to be provided by Lead Counsel and will then earn interest until distributed to the Settlement Class.

V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Applicable Standard

The settlement of claims brought by a certified class is subject to court approval after reasonable notice and a hearing. *See* Fed. R. Civ P. 23(e)(l)-(2). A court will approve a settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005) (internal quotations omitted).

This determination falls within the Court's sound discretion. *See* *Joel A. v. Giuliani,* 218 F.3d 132, 139 (2d Cir.2000); *In re Ivan F. Boesky Sec. Litig.,* 948 F.2d 1358, 1368 (2d Cir.1991); *In re Visa Check/Master Money AntitGCG Litig,* 297 F.Supp.2d 503, 509 (E.D.N.Y.2003). In exercising such discretion, a court should be mindful of the "strong judicial policy in favor of settlements." *Wal–Mart,* 396 F.3d at 116 (internal quotations omitted); *see also* *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.,* 722 F.2d 988, 997 (2d Cir.1983).

"Courts determine the fairness of a settlement by looking both at the terms of the settlement and the negotiation process leading up to it." *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 575 (S.D.N.Y.2008); see *Wal–Mart,* 396 F.3d at 116 (citations omitted). With respect to process, a class action settlement enjoys a strong "presumption of fairness" where it is the product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery. *See* *Wal–Mart,* 396 F.3d at 116; *see also* *City of Providence v. Aeropostale, Inc.,* No. 11 Civ. 7132(CM), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014); *Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.); *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 461 (S.D.N.Y.2004); *Chatelain v. Prudential–Bache Sec., Inc.,* 805 F.Supp. 209, 212 (S.D.N.Y.1992). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.,* 840 F.Supp. 277, 281 (S.D.N.Y .1993). This is particularly true in complex class actions, where "the courts have long recognized that such litigation 'is notably difficult and notoriously uncertain,' and that compromise is particularly appropriate." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989) (internal citations omitted).

***4** With respect to the substantive terms of a settlement, courts in this Circuit analyze the factors set forth in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974), which include:

> (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 in light of all the attendant risks of litigation.

Wal–Mart, 396 F.3d at 117 (quoting *Grinnell,* 495 F.2d at 463) (citations omitted)).

In applying the *Grinnell* factors, a court should not substitute its judgment for those of the parties who negotiated the settlement, or conduct a "mini-trial" on the action's merit. *See* *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1982).

Here, the proposed Settlement is fair, reasonable and adequate when measured under the *Grinnell* factors. Counsel for the parties have thoroughly weighed the strengths and weaknesses of the claims and defenses thereto and, after a formal mediation session and extensive negotiations facilitated by an independent and experienced mediator, have reached an informed compromise.

B. The Settlement Is Procedurally Fair as it Was Negotiated at Arm's Length and Is Supported by Lead Plaintiffs and Experienced Counsel

The Settlement was negotiated at arm's length by counsel who are experienced in complex securities litigation and who were acting in an informed manner. Discovery was well underway when the parties agreed to mediate this matter. During the mediation process, the parties submitted confidential mediation statements and participated in a full day mediation session, which was attended by Defendants' insurers. After the conclusion of the mediation, the parties accepted the Mediator's proposal to settle and release all claims for $3.8 million in cash. *See* *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) ("mediator's involvement ... ensure[d] that the proceedings were free of collusion and undue pressure"); *see also* *In re Advanced Battery Techs., Sec. Litig.,* 298 F.R.D. 171, 179 (S.D.N.Y.2014) ("[A] strong initial presumption of fairness attaches to the proposed settlement, if, as here, the settlement is reached by experienced counsel after arm's-length negotiations."); *In re Indep. Energy Holdings PLC,* No. 00 Civ. 6689(SAS), 2003 WL 22244676, *4 (S.D.N.Y. Sept. 29, 2003) ("[T]hat the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.").

***5** Moreover, the recommendation of Lead Plaintiffs, which are sophisticated institutional investors, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor ... is entitled to an even greater presumption of reasonableness ." *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 0165, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (internal citation omitted). The HITE Funds are managed by a sophisticated institutional investment management company that manages hedge fund portfolios. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including during discovery and participation in settlement negotiations. *See, e.g.* Press Decl. at ¶¶ 27–28, 32. Lead Plaintiff approves of the Settlement without reservation. *Id.* at ¶ 55.

Lead Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair, reasonable and adequate, but is an excellent result for Lead Plaintiff and the Class. *See* Press Decl. ¶¶ 12, 49, 72. This opinion is entitled to "great weight." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997) *aff'd,* 117 F.3d 721 (2d Cir.1997) (citation omitted); *see also* *Vecco,* 2007 WL 4115809, at *12.

All of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

C. The Settlement Terms are Fair, Reasonable, and Adequate and Satisfy the Second Circuit's *Grinnell* Factors

In determining whether the substantive terms of a settlement are fair, reasonable, and adequate, courts in this Circuit look to the nine *Grinnell* factors. All nine factors need not be satisfied; the court must look at the totality of these factors in light of the specific circumstances involved. *Global Crossing,* 225 F.R.D. at 456. As demonstrated below, the Settlement satisfies the *Grinnell* factors.

1. Continued Litigation Would Be Complex, Expensive, and Protracted

Courts consistently have recognized that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement, especially in a securities class action. *See, e.g.,* *In re AOL Time Warner, Inc. Sec. & "ERISA " Litig,* No. MDL 1500, 02 Civ. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *5–6 (S.D.N.Y. Oct. 24, 2005).

The parties resolved this action after the Lead Plaintiffs: (i) conducted an extensive pre-complaint investigation; (ii) drafted and filed an Amended Consolidated Complaint; (iii) successfully opposed Defendants' motions to dismiss briefing; (iv) engaged in class and merits discovery; and

(v) retained the Mediator to assist them in exploring a potential negotiated resolution of the claims against the Defendants. During the mediation process, the parties submitted confidential mediation statements and participated in a full day face-to-face mediation session, which, with the assistance of the mediator, resulted in an agreement to settle and release all claims asserted against all Defendants for $3.8 million in cash. Reaching a settlement at this juncture avoided the uncertainties of protracted litigation.

***6** Absent the Settlement, Lead Plaintiffs still would need to pursue contentious and expensive discovery proceedings, including expert discovery, additional motion practice, a complex and costly trial, and likely appeals. Throughout this process, Lead Plaintiffs would face numerous hurdles such as compelling challenges to scienter. Defendants consistently suggested that they acted in good faith and did not intend to defraud investors. In particular, Defendants observed that they relied upon experienced counsel's advice that Baker Hughes' purported repudiation was invalid and that a disclosure duty did not arise until Hi–Crush filed its own lawsuit against Baker Hughes on November 12, 2012. Indeed, as this Court observed in its motion to dismiss opinion, notwithstanding Baker Hughes' September 19, 2012 repudiation of the Supply Agreement, "Hi–Crush did not actually breach its agreement with Baker Hughes and ... Baker Hughes had no valid basis for terminating the agreement." *See* *Hi–Crush,* 2013 WL 6233561, at *16. In addition, Defendants have challenged Lead Plaintiffs' loss causation and damages theories.

By contrast, the Settlement offers the opportunity to provide definite recompense to the Class now-making the instant Settlement a particularly valuable "bird in the hand." *See In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) (*"Sony"); Strougo v. Bassini,* 258 F.Supp.2d 254, 261 (S.D.N.Y.2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation ... the passage of time would introduce yet more risks ... and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks,* 2005 WL 2757792, at *6 ("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.").

2. Reaction of the Class to the Settlement

The reaction of the Settlement Class to the Settlement is a significant factor in assessing its fairness and adequacy. *See* *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02 Civ. 400, 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010); *Veeco,* 2007 WL 4115809, at *7. The absence of valid objections or investors electing to exclude themselves from the Settlement provides evidence of Class Members' approval of the terms of the Settlement and desire to share in the proceeds thereof. *See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.,* No. 94 Civ. 5587, 2003 WL 21136726, at * 1 (S.D.N.Y. May 15, 2003). Pursuant to the Preliminary Approval Order, Class Members were notified that they had until November 28, 2014 to request exclusion from the Settlement Class or to object to the Settlement. On December 12, 2014, the Court was advised that no objections were received and no actual members of the Class had requested to be excluded from the Settlement Class. *See* Press Decl. at ¶ 11.[1] The overwhelmingly positive reaction of the Settlement Class evidences the Class' approval. *See City of Providence,* 2014 WL 1883494, at *6 ("That almost no Class Member objected to the Settlement or chose to exclude himself from it is indeed the strongest indication that the Settlement is fair and reasonable.").

3. Lead Plaintiffs Had Sufficient Information to Make Informed Decisions as To Settlement

***7** In considering the third *Grinnell* factor, "the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Der ., and ERISA Litig.,* 909 F.Supp.2d 259, 266 (S.D.N.Y.2012) (citing *In re IMAX Sec. Litig.,* 283 F.R.D. 178, 190 (S.D.N.Y.2012) (internal citations, quotation markets and alterations omitted)). To satisfy this factor, parties need not have even engaged in formal or extensive discovery. *See* *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 363 (S.D.N.Y.2002).[2]

Here, Lead Counsel conducted its own independent investigation without the benefit of any government investigation to formulate its theory of the case and develop sufficient detail to defeat Defendants' motions to dismiss. As detailed in the Press Declaration, the investigation included, *inter alia,* reviewing and analyzing publicly available information and data concerning Hi–Crush and its industry, and consulting with experts about accounting and causation issues. Press Decl. ¶¶ 57, 59.

After defeating Defendants' motion to dismiss, Lead Counsel embarked on simultaneous class and merits discovery. Review of thousands of pages of documents produced by Defendants allowed Lead Counsel to corroborate Lead Plaintiffs' factual allegations arising in connection with the seven week Class Period. *See* Press Decl. ¶ 27. The strength of the evidentiary support factored heavily in settlement negotiations with Defendants and their insurers, and allowed Lead Counsel to argue plausibly that victory at summary judgment or trial were likely outcomes. Thus, even though discovery had not yet concluded, Lead Plaintiffs and Lead Counsel "had more than enough information to make an informed and intelligent decision" to settle the claims at the current stage of the litigation. *See* *In re Citigroup Inc. Sec. Litig.,* 965 F.Supp.2d 369, 382 (S.D.N.Y.2013).

Lead Plaintiffs also filed their motion for class certification, arguing that the Action was particularly well-suited for class action treatment and that all requirements of Federal Rule Civil Procedure Rule 23 were satisfied. (Docket # 81.) Accompanying Lead Plaintiffs' class certification motion was an expert declaration that demonstrated that the market for Hi–Crush common units was efficient during the Class Period. During Class Discovery, Defendants deposed Lead Plaintiffs' representative in addition to Lead Plaintiffs' damages expert. *See* Press Decl. ¶ 59.

"Accordingly, Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *City of Providence,* 2014 WL 1883494, at *7; *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,* No. 01 Civ. 11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted).

4. Lead Plaintiffs Faced Significant Risks in Establishing Liability and Damages

***8** In analyzing the risk to plaintiffs in establishing liability, the Court does not "need to decide the merits of the case or resolve unsettled legal questions." *Cinelli v. MCS Claim Servs., Inc.,* 236 F.R.D. 118, 121 (E.D.N.Y.2006) (internal quotations and alterations omitted). Rather, the Court is only required to weigh the likelihood of success on the merits against the relief provided by the Settlement. *See id.* Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *See* *Global Crossing,* 225 F.R.D. at 459.

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See* *Grinnell,* 495 F.2d at 463; *Vecco,* 2007 WL 4115809, at *8–9. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See* *AOL Time Warner,* 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy, Inc. Sec. Litig.,* No. 03 Civ. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in a securities action presented significant hurdles to proving liability).

As set forth in detail in the Press Declaration (¶¶ 38–46), Lead Plaintiffs faced numerous hurdles in establishing liability. In particular, Lead Plaintiffs would bear the burden of showing that the evidence they elicited during discovery was sufficient to establish their claims despite any credible defenses. While Lead Plaintiffs believe that documentary and testimonial evidence would support their claims, there was no way to determine, without substantial additional litigation, whether such evidence would withstand a summary judgment motion, let alone convince a jury to accept Lead Plaintiffs' theory over Defendants' competing narrative. Among other factual defenses, Defendants have argued that Hi–Crush's senior management: (i) believed that Baker Hughes' repudiation of the Supply Agreement was invalid under the contractual provisions and therefore did not have to be disclosed to investors; and (ii) relied upon advice of counsel in connection with evaluating their duty to disclose. Even if Hi–Crush was legally obligated to disclose the repudiation, Defendants argued that their failure to do so was the result of a good faith error, rather than an intent to defraud investors.

Lead Plaintiffs also faced the risk that they would be unable to prove loss causation and damages. *See* *In re Milken and Assoc. Sec. Litig.,* 150 F.R.D. 46, 54 (S.D.N.Y.1993) (approving settlement of a small percentage of the total damages sought because the magnitude of damages often becomes a "battle of experts ... with no guarantee of the outcome"); *see also* *PaineWebber,* 171 F .R.D. at 129. To prevail on those issues, Plaintiffs would be required to prove, with the assistance of an expert, that Defendants' misleading statements inflated the price of Hi–Crush common units, as well as the amount of the artificial inflation.

***9** Defendants already have challenged through a *Daubert* motion the scientific validity of Lead Plaintiffs' expert's report in connection with class certification briefing. It is likely that Defendants would have submitted their own competing expert reports as the litigation proceeded. *See, e.g., In re Omnicom Group, Inc. Sec. Litig.,* 597 F.3d 501 (2d Cir.2010). At the summary judgment stage, Defendants likely would continue to challenge Lead Plaintiffs' calculation of damages and argue that any decline in the price of Hi–Crush common units resulted from factors other than disclosure of Baker Hughes' purported repudiation of the Supply Agreement. Even if the Action were permitted to go to trial, it is not possible to determine which expert the jury would find more credible.

Accordingly, absent this Settlement, the proposed class faces a very real risk of no recovery, possibly after years of additional proceedings. Conversely, the Settlement will provide tangible, certain and substantial relief to the proposed class now, "without subjecting them to the risks, complexity, duration, and expense of continuing litigation." *Global Crossing,* 225 F.R.D. at 456–57. Under these circumstances, the proposed settlement balances the risks, costs, and delay inherent in complex cases.

5. Risks of Maintaining Class Action Status Through Trial

Lead Plaintiffs had fully briefed a class certification motion at the time the Settlement was finalized. I do not know how I would have ruled, especially in the face of the Daubert cross motion. Even if Lead Plaintiffs had prevailed, Defendants could have raised additional challenges to class certification, and even moved to de-certify the Class before trial or on appeal at the conclusion of trial. *See* Fed.R.Civ.P. 23(c); *Chatelain,* 805 F.Supp. at 214 ("Even if certified, the class would face the risk of decertification. This factor indicates that settlement is advantageous to the class at this time."). "Given such risk, this factor weighs in favor of approval of the Settlement." *In re Advanced Battery Techs.,* 298 F.R.D. at 178.

6. Ability to Withstand Greater Judgment

The Court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement. *See Grinnell,* 495 F.2d at 463. Lead Counsel does not dispute the viability of Hi–Crush and has no reason to believe that Defendants could not withstand a greater judgment. Courts, however, generally do not find the ability to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement. *See In re Sony,* 2008 WL 1956267, at *8 ("a defendant is not required to 'empty its coffers' before a settlement can be found adequate.").

7. The Settlement Amount Is in the Range of Reasonableness in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The size of the Settlement provides support for its reasonableness when viewed in light of the best possible recovery and all of the risks of litigation. *See Wal–Mart,* 396 F.3d at 119 ("There is a range of reasonableness with respect to a settlement-a range which 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 ....") (internal citation omitted).

***10** When compared to other securities class action settlements, the Settlement is clearly within the range of reasonableness. According to a 2014 report by NERA Economic Consulting entitled "Recent Trends in Securities Class Action Litigation: 2013 Full–Year Review" ("NERA Report"), "the median settlement for cases with investor losses of less than $20 million has been 17.1% of the investor losses." *See* Press Decl. ¶ 48, Ex. 4 at 32. Accordingly, the $3.8 million settlement here, which represents over 36% of the estimated class-wide damages of $10.4 million, represents a fine result.[3] Accordingly, the Settlement represents a recovery well in excess of the median securities class action settlement for comparable cases. *See* Press Decl. ¶ 48.

The Settlement is therefore favorable in comparison to other securities class action settlements and represents a significant recovery in light of the risks that Lead Plaintiffs would not succeed on class certification and that, even if they prevailed at summary judgment or trial, they would recover only a fraction of the maximum recoverable damages, or none at all. As this Court previously has noted, "There is a high likelihood that the costs involved in shepherding a securities action like this one through the discovery process, pre-trial motions, trial, and appeals will far outweigh-and indeed subsume-any recovery that might be realized by the Settlement Class." *In re Advanced Battery Techs.,* 298 F.R.D. at 179.

The *Grinnell* factors, taken together, weigh in favor of Settlement.

D. The Plan of Allocation Is Fair, Reasonable, and Adequate

When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel. "When formulated by competent and experienced class counsel," a plan for allocation of net settlement proceeds "need have only a reasonable, rational basis." *Telik,* 576 F.Supp.2d at 580 (quoting *Global Crossing,* 225 F.R.D. at 462 (quotation marks omitted)). "A reasonable plan may consider the relative strength and values of different categories of claims." *Id; see also* *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 142 F.R.D. 588, 595–96 (S.D.N.Y.1992) (plan of allocation that distributes greater part of settlement proceeds to those most injured is reasonable). Because they tend to mirror the complaint's allegations, "plans that allocate money depending on the timing of purchases and sales of the securities at issue are common." *In re Datatec Sys., Inc. Sec. Litig.,* Master File No. 04 Civ.525, 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007).

Here, the proposed Plan of Allocation is rational and consistent with Plaintiffs' theory of the case; the plan reimburses claimants largely based on when they bought or sold Hi–Crush common units, taking into account the amount of artificial inflation present in the stock price at those times (and the amount by which the level of inflation was reduced by the alleged corrective disclosure). *See* Declaration of Jose C. Fraga, dated November 13, 2014 ("Fraga Decl."), at 5–6. More specifically, the Plan allocates Recognized Loss based on the Hi–Crush price decline immediately following the November 13, 2012 disclosure. This Recognized Loss is applied to units that were purchased between the time of Defendants' allegedly misleading September 25, 2012 presentation and the November 13, 2012 disclosure, and were not sold prior to that disclosure. It should be noted that not one objection to the Plan of Allocation has been filed, which also supports approval of the Plan of Allocation. *See* *Veeco,* 2007 WL 4115809, at *14; *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y.2002).

E. Notice to the Class Satisfies Due Process Requirements

***11** The Notice program provides the "best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *See* *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173 (1974) (citing Fed.R.Civ.P. 23(c)(2)). In accordance with the Preliminary Approval Order, the Settlement Administrator, Garden City Group ("GCG"), caused the Court-approved Notice and Proof of Claim forms to be mailed by first class mail, postage prepaid to 2,360 potential Class Members. Press Decl. Ex. 3 (Fraga Decl. at ¶ 3). As of November 13, 2014, GCG has disseminated a total of 7,546 Notice Packets to potential Settlement Class Members. Press Decl. ¶ 7, Ex. 3 (Fraga Decl. at ¶ 9). On October 14, 2014, the Court-approved Summary Notice was published in *Investor's Business Daily,* and issued electronically over *Business Wire.* Press Decl. ¶ 8, Ex. 3 (Fraga Decl. at ¶ 10). The Notice and Proof of Claim along with other important documents related to the Settlement were also posted on the Claims Administrator's website (http://www.hicrushsecuritiessettlement.com) (the "Website") for easy downloading by interested investors. Press Decl. ¶ 9, Ex. 3 (Fraga Decl. at ¶ 12). Additionally, the Website allows claimants to submit electronic claims. *Id.* GCG also established a toll-free telephone hotline with a recorded message and live operators to assist potential Settlement Class Members with questions about the Settlement. *See* Press Decl. Ex. 3 (Fraga Decl. at ¶ 11). GCG has received 53 calls. *Id.* All calls to the toll-free telephone hotline have been responded to in a timely manner. *Id.*

Moreover, as is required in class actions, the Class has been given notice of the proposed Settlement and Plan of Allocation, as well as the rights of Class Members and the method and dates by which they can object to, or opt-out of, the Settlement. *See* Press Decl. at ¶¶ 10–11. Further, the Class has been advised of the date of the final fairness hearing at which time they will have an opportunity to be heard with respect to any objection raised. *See* Press Decl. ¶ 8.

F. The Fee Award Motion is Granted

1. The Percentage of the Fund Method is Appropriately Used In This Case

Where "an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class, as ... in a securities class action litigation, the attorney is entitled to the reasonable value of the services performed in creating that class recovery, as set by the court." *In re Philip Servs. Corp. Sec. Litig.,* No. 98 Civ. 835, 2007 WL 959299, at *1 (S.D.N.Y. Mar. 28, 2007) (internal citations and quotations omitted). As the Second Circuit observed in *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.:*

> Courts may award attorneys' fees in common fund cases under either the "lodestar" method or the "percentage of the fund" method. The lodestar method 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.

***12** 396 F.3d 96, 121 (2d Cir.2005) (internal citation omitted).

Nonetheless, "[t]he trend among district courts in the Second Circuit is to award fees using the percentage method." *City of Providence,* 2014 WL 1883494, at *11 (citations omitted).[4] The text of the PSLRA also contemplates using the percentage method, as it provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a *reasonable percentage* of the amount" recovered for the class. 15 U.S.C. § 78u–4(a)(6) (emphasis added); *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 355 (S.D.N.Y.2005) (the PSLRA expressly contemplates that "the percentage method will be used to calculate attorneys' fees in securities fraud class actions"); *Maley,* 186 F.Supp.2d at 370 (by using this language, Congress "indicated a preference for the use of the percentage method" rather than the lodestar method).

District courts' adoption of the percentage of recovery methodology is consistent with national precedent. *See, e.g., In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 586 & n.7 (S.D.N.Y.2008) (citing *Maley,* 186 F.Supp.2d at 370 ("[T]here is a strong consensus-both in this Circuit and across the country-in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 430 (S.D.N.Y.2001) ("In recent years, a majority of the Circuit courts have approved the percentage-of-the-fund method.")).[5] It is also consistent with the PSLRA, which expressly provides that class counsel are entitled to attorneys' fees that represent a "reasonable percentage" of the damages recovered by the class. *Telik,* 576 F.Supp.2d at 586 (citing 15 U.S.C. § 78u–4(a)(6)). "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *Id.*

Consistent with the approach adopted by the *Goldberger* court, the practice of district courts in this Circuit and nationally, and the relevant portions of the federal securities laws, the percentage-of-recovery approach is the appropriate methodology for awarding attorneys' fees in this action.

2. The Requested Fee is Fair and Reasonable

Lead Counsel is seeking a fee award of 33 1/3% of the Settlement Amount.

"In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund." *Beacon,* 2013 WL 2450960, at *5. Courts in this District have approved percentage-based fee awards comparable to the amount requested here. *See City of Providence,* 2014 WL 1883494, at *20 (awarding 33% of $15 million settlement); *Fogarazzo v. Lehman Bros. Inc.,* No. 03 Civ. 5194, 2011 WL 671745, *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig.,* 279 F.R.D. 151, 165 (S.D.N.Y.2001) (awarding 33% of $13 million settlement); *In Van Der Moolen Holding N.V. Sec. Litig,* No. 03 Civ. 8284, slip. op. at 2 (S.D.N.Y. Dec. 7, 2006) (awarding 33 1/3% of $8 million settlement) (ECF No. 45) (Ex. 11); *Maley,* 186 F.Supp.2d at 367–68 (awarding 33 1/3% of $11.5 million settlement and citing two cases which awarded 33 1/3% of the settlement amount: *In re Apac Teleservs., Inc. Sec. Litig.,* No. 97 Civ. 9145, slip op. at 2 (S.D .N.Y. June 29, 2001) (Docket # 54), awarding 33 1/3% of $21 million settlement; and *Newman v. Caribiner Int'l Inc.,* No. 99 Civ. 2271 (S.D.N.Y. Oct. 25, 2001) (Docket # 31), awarding 33 1/3 of $15 million settlement); *see also Moloney v. Shelly's Prime Steak, Stone Crab & Oyster Bar,* No. 06 Civ. 4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Khait v. Whirlpool Corp.,* No. 06 Civ. 6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement).

***13** Courts in other federal jurisdictions similarly have determined that a fee award of 33% or more is reasonable and should be awarded. *See, e.g., Grant Barfuss v. DGSE Companies, Inc., et al.,* No. 12 Civ. 3664 (N.D.Tex. Oct. 21, 2013) (Docket # 59) (awarding 33% of $1.7 million settlement); *In re Pilgrim's Pride Corp. Sec., Litig.,* No. 08 Civ. 419 (E.D.Tex. May 2, 2012) (Docket # 85) (awarding 34% of $1.5 million settlement); *In re Heritage Bond Litig,* No. 02 ML 1475, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005) (awarding 33 1/3% of $27.278 million settlement); *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 498 (E.D.Pa.2003) (awarding 1/3% of $7 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig.,* No. 01 Civ. 258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33 1/3% of $20 million settlement); *In re Green Tree Fin. Corp. Stock Litig.,* Nos. 97–2666 and 97–2679, slip. op. at 9 (D.Minn. Dec. 18, 2003) (awarding 33 1/3% of $12.45 million settlement) (Docket # 140). [6]

3. The Goldberger Factors Support the Requested Award of Attorneys' Fees

Under either the percentage-of-the-fund approach or the lodestar multiplier approach, the "*Goldberger* factors" ultimately determine the reasonableness of a common fund fee. *Goldberger,* 209 F.3d at 50. 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." *Id.; see also McDaniel v. Cnty. of Sc hen ectady,* 595 F.3d 411, 417, 422–26 (2d Cir.2010) (confirming the continued availability of both lodestar and percentage-of-the-fund methods and the applicability of the *"Goldberger* factors").

(i) Lead Counsel Has Devoted Significant Time and Labor to This Action

Lead Counsel devoted 1,594.75 hours to this matter (excluding time devoted to preparing this submission), yielding a "lodestar" amount of $900,705. The requested fee is a multiplier of 1.41 on that lodestar. *See* Press Decl. at ¶ 74. [7]

(ii) Lead Counsel's Hours and Hourly Rates are Reasonable

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. Lead Counsel devoted substantial time devoted to this litigation over two years. Lead Counsel, among other things:

- Investigated, drafted, and filed the Consolidated Amended Complaint, which involved: (i) review and analysis of Hi–Crush's public filings, including its SEC filings; (ii) review and analysis of news articles, press releases, announcements, and analysts' reports by and relating to Hi–Crush; (iii) researched law applicable to the claims asserted in the Action and the defenses thereto; (iv) developed new claims not included in previously filed complaints (which were the *only* claims to survive Defendants' motion to dismiss) (Press Decl. at ¶ 57);

***14** • Responded to and, with respect to the claims that gave rise to the settlement, defeated Defendants' complex motion to dismiss (*id.* at ¶ 58);

- Negotiated the exchange of class and merits discovery from Defendants and reviewed over 14,000 pages of documents (*id.* at ¶¶ 27, 58);

- Researched and briefed class certification motions amid the changing legal landscape relating to class certification, in addition to responding to Defendants' document requests related to class certification and defending the depositions of Lead Plaintiffs' damages expert and representative (*id.* at 1159);

- Conducted numerous settlement meetings and telephone calls, prepared a mediation statement, worked with a damages expert to prepare a classwide damages analysis and negotiated during one day of mediation in Los Angeles, California before the Mediator, which resulted in the parties reaching an agreement in principle to settle (*id.* at ¶ 60); and

- Vigorously pressed the Class' interest through the negotiation of beneficial terms for the Class in the Stipulation (*id.* at ¶ 61).

In addition, Lead Counsel directly supervised the day-to-day litigation work, to ensure efficiency and minimize unnecessary duplication of work.

Lead Counsel's hours are reasonable. The attorneys' fees requested will compensate counsel for work already performed in this case, and for work remaining to be performed, including making sure that the Settlement is fairly administered and implemented, preparing for and attending the final fairness hearing, and obtaining dismissal of the action. For these reasons and as further discussed below, Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses is granted.

In a lodestar analysis, the appropriate hourly rates are those rates that are "normally charged in the community where the counsel practices, *i.e.,* the 'market rate.' " *In re EVCI Career Colls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240, 2007 WL 2230177, at *17 n.6 (S.D.N.Y. July 27, 2007); *Luciano v. Olsten Corp.,* 109 F.3d 111, 115 (2d Cir.1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted). Awards in comparable cases are an appropriate measure of the market value of counsel's time. *Jones v. Amalgamated Warbasse Houses, Inc.,* 721 F.2d 881, 885 (2d Cir.1983).

The rates billed by Lead Counsel (ranging from $425 to $825 per hour) for attorneys, are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. *See* Press Decl. at Exs. 11, 12.[8] Similar billing rates for law firms representing plaintiffs in securities class actions have been approved by other courts in this Circuit. *See, e.g., City of Providence,* 2014 WL 1883494, at *13 (finding partner rates of $640 to $875 and non-partner attorney rates of $335 to $725 to be line with defense firms); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* No. 02 MDL 1484, 007 WL 313474, at *22 (S.D.N .Y. Feb. 1, 2007).

***15** Finally, the use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation.[9] Lead Counsel's calculated lodestar of $900,705.00 represents the appropriate amount on which to apply a multiplier to reflect the contingent nature of the fee and risk incurred by Lead Counsel.

(iv) The Complexity, Duration, and Magnitude of the Litigation Weigh in Favor of Approval

"The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel." *City of Providence,* 2014 WL 1883494, at *16 (citing *Chatelain v. Prudential–Bache Sec. Inc.,* 805 F.Supp. 209, 216 (S.D.N.Y.1992)). Courts have recognized the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* No. MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006). A securities fraud class action's magnitude and complexity must be evaluated in comparison to similarly complex cases. *See* *In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 234 (S.D.N.Y.2005). As described in greater detail in the Press Declaration, this case was no exception. It involved complex and inextricably linked legal and factual issues relating to Hi–Crush's customer relationship with Baker Hughes, in addition to inherently complex Exchange Act issues regarding, *inter alia,* whether Defendants' omissions were materially misleading, whether Defendants' acted with scienter and if loss causation could be established.

In addition, Lead Counsel did not have the benefit of a "road map" established by a government investigation off which they could "piggy back", but instead independently developed factual allegations and legal theories sufficient to survive the PSLRA's heightened pleading standards. *City of Providence,* 2014 WL 1883494, at *16 (citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02 Civ.3400, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010); *In re Med. X–Ray Film Antitrust Litig,* No. 93 Civ. 5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998)). Accordingly, the complexity of this case supports the requested fee award.

(v) The Risks of the Litigation Warrant Approval

Courts have frequently recognized that "[t]he risk of the litigation is often cited as the first, and most important, *Goldberger* factor." *In re MetLife Demutualization Litig.,* 689 F.Supp.2d 297, 361 (E.D.N.Y.2010) (internal citation and quotations omitted). As the Second Circuit has observed, "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir.1974) (citation omitted).

***16** "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.,* No. 01 Civ. 11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees].' " *In re Marsh,* 2009 WL 5178546, at *18 (quoting *Goldberger,* 209 F.3d at 54). Lead Counsel undertook the representation of Lead Plaintiffs and the Class in this Action on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation of of recovering out-of-pocket expenses. There is a real risk of no recovery in complex securities litigation cases such as this one. Over the last five years, nearly 48% of all securities class actions have been dismissed on motions prior to trial, [10] while plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions [11] or appeal. [12]

While Lead Counsel believes that the evidence obtained pursuant to discovery confirms Defendants' wrongful conduct, Defendants have steadfastly denied any wrongdoing. *See* Press Decl. ¶¶ 38–46. In particular, Defendants consistently have argued that they did not intend to defraud investors and that Baker Hughes' purported repudiation of its supply agreement was a meritless renegotiation ploy. [13] Defendants also claimed to have relied upon the advice of experienced counsel, who advised that Baker Hughes' repudiation was invalid, and that Hi–Crush only owed investors a disclosure duty when Hi–Crush filed its own lawsuit against Baker Hughes on November 12, 2012. This Court observed, in its opinion denying the motion to dismiss, that "Hi–Crush did not actually breach its agreement with Baker Hughes and ... Baker Hughes had no valid basis for terminating the agreement." *See* *Hi–Crush,* 2013 WL 6233561, at *16.

While Lead Plaintiffs believe that they would be able to establish that Defendants acted with-scienter in failing to disclose Baker Hughes' supply agreement repudiation, they still faced considerable risk that available evidence would not withstand a summary judgment motion, or that they would not be able to convince a jury to accept Lead Plaintiffs' theory over Defendants' competing narrative. Similarly, Defendants raised arguments in opposition to Lead Plaintiffs' loss causation and damages theories, which created additional risk that in the absence of a settlement, the Class's recovery would have been commensurately smaller, or nonexistent.

(vi)The Quality of Representation Favors Approval of Lead Counsel's Fees

Given the number and complexity of the factual and legal issues presented by this action, this case required the expertise and capacity that Lead Counsel brought to bear. Kirby McInerney has decades of experience in complex federal civil litigation, particularly the litigation of securities and other class actions. *See* Press Decl. Ex. 6. Kirby McInerney's experience translated into immediate benefits for the class. Whereas other plaintiffs and their counsel focused exclusively on claims linked to Hi–Crush's IPO, Kirby McInerney also developed after-market claims under Sections 10(b) and 20(a) of the Exchange Act and Rule 10b–5. These new claims were the only ones to survive Defendant's motion to dismiss. Following the Court's motion to dismiss order, Kirby Mclnerney continued to actively prosecute these remaining claims and brokered a settlement for an amount that compares very favorable to cases with similar estimate total damages.

***17** Another consideration for assessing the quality of services rendered by Lead Counsel is the quality of the opposing counsel in the case. *See* *Flag Telecom,* 2010 WL 4537550, at *28; *Teachers' Ret. Sys.,* 2004 WL 1087261, at *7; *Maley,* 186 F Supp.2d at 373. The Defendants were represented by Vinson & Elkins LLP, a prominent international defense-oriented law firm, with more than 700 attorneys in 15 offices worldwide. Defendants' counsel zealously contested the merits of Lead Plaintiffs' claims at every stage of the litigation and engaged in a hard-fought settlement negotiation. In sum, Plaintiffs and all Defendants were well represented.

(vii) The Requested Fee in Relation to the Settlement Is Reasonable

Regardless of which method a court uses to award attorneys' fees, the award must be reasonable under the circumstances of the particular case. *See* *Goldberger,* 209 F.3d at 47. The Supreme Court has held that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See* *Jenkins,* 491 U.S. at 285–86. As discussed above (*see supra* Section III.C), the 33 1/3% fee requested by Lead Counsel in this Action is consistent with percentage fees awarded in this Circuit and nationwide for comparable recoveries.

(viii) Public Policy Considerations

" 'A strong public policy concern exists for rewarding firms for bringing successful securities litigation.' " *Telik,* 576 F.Supp.2d at 593 (quoting *In re Ashanti Goldfields Sec. Litig.,* No. 00 Civ. 717, 2005 WL 3050284, at *5 (E.D.N.Y. Nov. 15, 2005)). The Supreme Court has recently reaffirmed its longstanding recognition of the importance of private class actions to the enforcement of the securities laws. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 318–19 (2007) (private securities fraud actions provide " 'a most effective weapon in the enforcement' of securities laws and are 'a necessary supplement to Commission action' "); *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985).

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,* 2007 WL 313474, at *21.[14] This Court also recently recognized the importance of "private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis." *City of Providence,* 2014 WL 1883494, at *17 (citing *Shapiro v. JPMorgan Chase & Co.,* No. 11 Civ. 8331, 2014 WL 1224666, at *24 (S.D.N.Y. March 24, 2014)).[15] Under these circumstances, "provid[ing] appropriate financial incentives ... 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' " is entirely appropriate as "[l]awsuits such as this one can only be maintained if competent counsel" is retained. *Id.* at *17–18 (quoting *In re WorldCom,* 388 F.Supp.2d at 359).

4. The Class' Reaction *to* the Fee Request

***18** In addition to the criteria set forth in *Goldberger,* courts in the Second Circuit consider the reaction of the Class to the fee request in deciding how large a fee to award. *See Veeco,* 2007 WL 4115808, at *10; *Maley,* 186 F.Supp.2d at 374; *see also In re Rite Aid Corp. Sec. Litig.,* 396F.3d 294, 305 (3d Cir.2005) ("The class'[ ] reaction to the fee request supports approval of the requested fees").

Thus far, no Class Members have objected to the fee request.

5. The Lodestar Multiplier Requested by Lead Counsel is Fair and Reasonable, and the Cross–Check Supports Approval of Attorneys' Fees

The Second Circuit also permits courts to utilize a lodestar "cross-check" to further test the reasonableness of a percentage-based fee. *See* *Goldberger,* 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig,* 225 F.R.D. 436, 468 (S.D.N.Y.2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger,* 209 F.3d at 47); *see also* *Flag Telecom,* 2010 WL 4537550, at *25–26. "Where the lodestar is 'used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.' " *Veeco,* 2007 WL 4115808, at *8 (quoting *Goldberger,* 209 F.3d at 50).

Lead Counsel and its para-professionals have spent, in the aggregate, 1,594.75 hours in the prosecution of this case. *See* Press Decl. ¶ 63. The attorneys' fees requested by Lead Counsel, i .e. 33 1/3% of the Settlement Amount, or $1,266,666.67, plus interest, represented a 1.41 multiplier to Lead Counsel's lodestar.[16] This multiplier is well within the range of multipliers that are typically approved in this Circuit.[17] The multiplier is also within the range of multipliers that have been recently awarded in securities class actions settling for less than $20 million. *See* Press Decl. ¶ 76 (showing a multiplier range from 1.60 to 3.11). Moreover, the multiplier here is well within the Tange approved in other circuits.[18]

G. LEAD COUNSEL SHOULD BE REIMBURSED FOR REASONABLY INCURRED LITIGATION EXPENSES

Lead Counsel also requests reimbursement in the amount of $106,451.20 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this Action. The Press Declaration attests to the accuracy of Lead Counsel's expenses, and it is well established that expenses are properly recovered by counsel. Press Decl. ¶¶ 77–81; *see, e.g., In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n.3 (S.D.N.Y.2003) (citations omitted).

***19** Because the expenses here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. Lead Counsel made a concerted effort to avoid unnecessary expenditures and economized wherever possible. Most of the expenses arose out of professional services rendered by experts, along with the costs of document production, online legal research databases, and other expenses directly related to the prosecution of this Action. Press Decl. Ex. 8. The remaining expenses are attributable to such things as travel for mediation and other incidental expenses. *Id.* These expenses were all necessarily incurred in connection with this litigation and were reasonable. *See* Press Decl. ¶¶ 77–81, Ex. 8; *see also* *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N . Y.2004) ("The expenses incurred ... are the type for which 'the paying arms' length market' reimburses attorneys ... [and] for this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

CONCLUSION

For all of the foregoing reasons, the Court approves the proposed Settlement as fair, reasonable, and adequate; approves the Plan of Allocation as fair, reasonable, and adequate; and grants the accompanying motion for fees and expense reimbursement.

The Clerk of Court is directed to remove Docket105 and 107 from the Court's list of pending motions. Docket # 88 is denied as moot; the Clerk of Court also should remove Docket # 88 from the Court's list of pending motions, and close the file.

All Citations

Not Reported in F.Supp.3d, 2014 WL 7323417

Footnotes

1 On October 14, 2014, Harold Rowell ("Rowell") sent a letter to the Settlement Administrator requesting exclusion from the Settlement Class and acknowledging that he would "release all manner of future claims [that he] may have had." Fraga Decl. ¶ 13, Ex. D. As Rowell failed to provide any detail relating to his ownership of Hi–Crush common units, whether he even is a member of the Settlement Class cannot be ascertained. Likewise, on November 10, 2014, Herbert M. Seybold requested exclusion from the Settlement Class but did not provide any evidence of his Class Period ownership of Hi–Crush common units. *Id.* Neither individual appears to be a member of the plaintiff class.

2 Formal discovery may not commence in cases brought under the PSLRA, such as this Action, until the motion to dismiss is denied.

3 As this is not a claims-made settlement, in the event that fewer than 100% of the class members choose to submit claims to share in the settlement recovery (securities class action claims rates are generally below 100%), those class members who file timely conforming claims will receive more than 36% of their potential recovery damages; perhaps significantly more.

4 *See also* *In re Beacon Assocs. Litig.,* No. 09 Civ. 3907, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) ("the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128, 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (same); *Fogarazzo v. Lehman Bros., Inc.,* No. 03 Civ. 5194,

2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) (same); *In re* *Comverse Tech., Inc. Sec. Litig.,* No. 06 Civ. 1825, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (same); *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 480 (S.D.N.Y.2009) (same); *see also, e.g.,* *In re Marsh & McLennan Cos. Sec. Litig,* No. 04 Civ. 8144, 2009 WL 5178546, at *14 (S.D.N.Y. Dec. 23, 2009) ("the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits"); *see also Veeco,* 2007 WL 4115808, at *3; *Hicks,* 2005 WL 2757792, at *8 (same).

5 Percentage-based fee awards in common fund cases have been approved by every of Circuit Court that has addressed the issue. *See* *In re Thirteen Appeals Arising out of the San Jun Dupont Plaza Hotel Fire Litig,* 56 F.3d 295, 305 (1st Cir.1995); *In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 821–22 (3d Cir.1995); *Rowlings v. Prudential–Bache Props.,* 9 F.3d 513, 515–16 (6th Cir.1993); *Harman v. Lyphomed, Inc.,* 945 F.2d 969, 975 (7th Cir.1991); *Johnston v. Comerica Mortg. Corp.,* 83 F.3d 241, 246 (8th Cir.1996); *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989); *Brown v. Phillips Petroleum Co.,* 838 F.3d 451, 454–56 (10th Cir.1988); *Camden I. Condo. Ass'n v. Dunkle,* 946 F.2d 768, 773–74 (11th Cir.1991); *Swedish Hosp. Corp. v. Shala,* 1 F.3d 1261, 1269–71 (D.C.Cir.1993). The Eleventh and District of Columbia Circuits require the use of the percentage method in common fund cases. *Camden,* 946 F.2d at 774; *Swedish Hosp.,* 1 F.3d at 1271.

6 A recent analysis of securities class action settlements from 1996 through 2013 confirmed that the median fee award was 30% of the settlement amount for settlements between $5 and $10 million. *See* NERA Report at 34, Figure 34 (NERA Jan. 21, 2014).

7 All attorneys who submitted time in connection with this Action were full-time employees of Lead Counsel Kirby McInerney. No contract attorneys were employed by Lead Counsel on this matter.

8 "[T]he best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that defend class actions on a regular basis." *Telik,* 576 F.Supp.2d at 589 (emphasis omitted) (cited by *City of Providence,* 2014 WL 1883494, at * 13). *See also* Jones, Leigh, *The best still charge the most: For high-end legal work, firms remain in the driver's seat over hourly rates.* The National Law Journal (Online) (Dec. 17.2012) at *2 ("Not surprisingly, the biggest firms in the biggest markets generally had the highest rates. Several firms that have their largest offices in New York and Washington had median rates above $500, according the NLJ survey.")

9 *See, e.g.,* *Missouri v. Jenkins,* 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Gierlinger v. Gleason,* 160 F.3d 858, 882 (2d Cir.1998) (rates "should be 'current rather than historic' ") (citation and internal quotations omitted); *LeBlanc–Stemberg v.. Fletcher,* 143 F.3d 748, 764 (2d Cir.1998) (current rates "should be applied in order to compensate for the delay in payment"); *Telik,* 576 F.Supp.2d at 589 n.10 (same); *Veeco,* 2007 WL 4115808, at *9 (same).

10 Ex. 4, NERA Report, at 21, 24.

11 *See, e.g.,* *In re BankAtlantic Bancorp, Inc. Sec. Litig.,* No. 07 Civ. 61542, 2011 WL 1585605, at *6, *20 (S.D.Fla. Apr. 25, 2011) (although the jury found that certain statements violated section 10(b) of the Exchange Act, the court entered judgment as a matter of law in favor of the defendants as to all claims and statements, on the ground that plaintiffs had failed to present evidence from which the jury could reasonably find loss causation).

12 *See, e.g.,* *Robbins v. Koger Props. Inc.,* 116 F.3d 1441, 1449 (11th Cir.1997) (reversing district court's denial of defendant's Federal Rule of Civil Procedure 50(a) motion after trial; reversing $81 million judgment in plaintiffs' favor and entering judgment in favor of defendant); *Anixter v. Home–Stake Prod. Co., 11* F.3d 1215, 1233 (10th Cir.1996) (overturning plaintiffs' verdict obtained after two decades of litigation and remanding for new trial in light of intervening Supreme Court decision in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164(1994)).

13 During the pendency of this Action, Hi–Crush filed an 8–K filed with the U.S. Securities and Exchange Commission on October 10, 2013 that announced Hi–Crush had resolved its contract dispute with Baker Hughes by negotiating a new 6–year supply agreement which required Baker Hughes to purchase a minimum amount of frac sand on a monthly basis.

14 *Telik,* 576 F.Supp.2d at 593; *In re Priceline.com, Inc. Sec. Litig.,* No. 00 Civ. 1884, 2007 WL 2115592, at *5 (D.Conn. July 20, 2007) (finding award percentage encourages enforcement of securities laws and supports “attorneys' decisions to take these types of cases on a contingent fee basis”); *In re Bristol–Myers Squibb,* 361 F.Supp.2d at 236 (“[P]ublic policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC”).

15 *See also* *Telik,* 576 F.Supp.2d at 585 (“Courts have also recognized that, in addition to providing just compensation, 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.”) (citing *Maley,* 186 F.Supp.2d at 369).

16 The Supreme Court and other courts have held that the use of current billing rates is proper since such rates compensate for inflation and the loss of use of funds. *See* *Jenkins,* 491 U.S. at 283–84; *supra* note 8.

17 *See, e.g.,* *In re Nortel Networks Corp. Sec. Litig.,* 539 F.3d 129, 134 (2d Cir.2008) (holding that a $34 million fee, representing a 2.04 multiplier was “toward the lower end of reasonable fee awards”); *Wal–Mart,* 396 F.3d at 123 (multiplier of 3.5 approved on appeal); *Telik,* 576 F.Supp.2d at 590 (finding a multiplier of 1.6 “well within the range of fees approved by courts in this Circuit”); *Maley,* 186 F.Supp.2d at 369 (awarding fee equal to a 4.65 multiplier); *In re EVCI,* 2007 WL 2230177, at *17 (finding a multiplier of 2.48 in a lodestar cross-check to confirm the reasonableness of the requested attorneys' fees).

18 *See, e.g., In re Genta Sec. Litig.,* No. 04 Civ. 2123, 2008 WL 2229843, at *11 (D.N.J. May 28, 2008) (lodestar multiplier of 3.72); *In re Ravisent Techs. Sec. Litig.,* No. 00 Civ. 1014, 2005 WL 906361, at *12 (E.D.Pa. Apr. 18, 2005) (lodestar multiplier of 3.1); *In re Rite Aid Sec. Litig.,* 362 F.Supp.2d 587, 588 (E .D.Pa. March 24, 2005) (finding multipliers of four fairly common); *In re AremisSoft Corp. Sec. Litig.,* 210 F.R.D. 109, 135 (D.NJ.2002) (lodestar multiplier of 4.3); *In re Cardinal Health, Inc. Sec. Litig,* 528 F.Supp.2d 752, 767 (S.D.Ohio 2007) (performing lodestar cross-check and stating, “[m]ost courts agree that the typical lodestar multiplier in a large post-PSLRA securities class action [ ] ranges from 1.3 to 4.5”); *Manners v. Am. Gen. Life Ins. Co.,* No. 98 Civ. 266, 1999 WL 33581944, at *31 (M.D.Term. Aug. 11, 1999) (observing that multipliers in similar litigations “have ranged from 1–4 and have reached as high as 10”); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 250 (S.D.Ohio 1991) (noting multipliers of 4 and 5 in other cases).

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Tremont Securities Law, State Law and Insurance Litigation, S.D.N.Y., February 11, 2019

2015 WL 10847814
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Martin FLEISHER, as Trustee of the Michael Moss Irrevocable Life Insurance Trust II and Jonathan Berck, as Trustee of the John L. Loeb, Jr. Insurance Trust, on Behalf of Themselves and All Others Similarly Situated, Plaintiff,
v.
PHOENIX LIFE INSURANCE COMPANY, Defendant.
SPRR LLC, on behalf of itself and all others similarly situated, Plaintiff,
v.
PHL Variable Insurance Co., Defendant.

Civil Action Nos. 11-cv-8405 (CM), 14-cv-8714 (CM)
|
Signed September 9, 2015

Attorneys and Law Firms

Frances Sarah Lewis, Steven Gerald Sklaver, Susman Godfrey L.L.P., Los Angeles, CA, Jacob W. Buchdahl, Seth D. Ard, Shawn J. Rabin, Susman Godfrey LLP, Rebecca Sol Tinio, U.S. Attorney's Office, New York, NY, for Plaintiff.

David T. McDowell, Thomas F.A. Hetherington, Hutson Brit Smelley, Jarrett Earl Ganer, Edison, McDowell & Hetherington, LLP, Houston, TX, Brian Patrick Perryman, Jason H. Gould, Kristen Reilly, Waldemar J. Pflepsen, Carlton Fields Jorden Burt, P.A., Washington, DC, Jacob R. Hathorn, Stephen J. Jorden, Robert David Helfand, Carlton Fields Jorden Burt, PA, Simsbury, CT, Patrick J. Feeley, Dorsey & Whitney LLP, New York, NY, Raul Antonio Cuervo, Carlton Fields Jorden Burt, P.A, Miami, FL, for Defendant.

DECISION AND ORDER APPROVING CLASS ACTION SETTLEMENT AND APPROVING MOTION FOR ATTORNEYS' FEES

McMahon, United States District Judge

***1** After three-plus years of hard-fought litigation and one year of arm's-length negotiations conducted with the assistance of a highly experienced mediator, Plaintiffs have agreed to settle this complex insurance class action after securing an excellent result for the Class. The Settlement was reached on the eve of trial, after class certification and decertification briefing and rulings, voluminous cross-motions for summary judgment and rulings, and the submission of the Joint Preliminary Trial Report, exhibit and witness lists, objections, and deposition designations, voir dire questions, and proposed jury instructions. Preliminary approval of the Settlement was granted on June 3, 2015, and Notice to the Class was mailed on June 17, 2015. Not a single objection to the Settlement has been filed. Only three requests for exclusion were made by anyone not affiliated with the pending *U.S. Bank* actions, which were not settled along with the Fleisher and TIGR actions.

The Settlement gives the Class an outstanding recovery. When the monetary and nonmonetary benefits are combined, the Class will receive over $130 million in total value. This includes over $40.5 million in cash payments by Phoenix. Checks will be mailed directly to all Class members with no need to submit claim forms. No funds will revert to Defendants.

The non-monetary benefits also provide very substantial benefits to the Class. First, Phoenix has agreed to waive any further challenges to the validity of the Class Policies on the grounds of misrepresentations in the application or a lack of insurable interest, permanently giving up the “stranger-originated life insurance” or “STOLI” defense. Phoenix's agreement to end all STOLI challenges represented by these lawsuits, despite having an industry-high rate of resisting payment of claims, will ensure that, upon the occurrence of a maturity event, hundreds of millions in death benefits otherwise owed to members of the Class will be paid. Second, Phoenix has agreed not to impose any additional COI increases through December 31, 2020, even if otherwise permitted by the express language of the policies. Plaintiffs' expert, Ann Juliano from Demeter Investments Ltd., an independent consultant for large, institutional life settlement investors globally, has opined that the net present value of the STOLI and fraud defense waiver and five-year COI freeze creates an additional $94.3 million in value to the Class.

These are exceptional results for the Class in this hotly-contested litigation.

In November 2011, Plaintiffs filed suited asserting that Phoenix's COI rate increases on certain PAUL policies in April 2010 and November 2011 were made in violation of the policy terms. Phoenix disputed these allegations and challenged Plaintiffs on the sufficiency of the allegations of the complaint, energetically litigating class certification, discovery, liability, and damages at every turn. The summary judgment briefing and the parties' Preliminary Joint Pretrial Report previewed the many difficult and complex issues that remained for trial, including disputed questions of fact about Phoenix's pricing assumptions and applicable actuarial standards of practice. Class Counsel achieved this Settlement only after undertaking significant labor in prosecuting this litigation and investing substantial sums, all entirely at their risk if they did not prevail, including: obtaining and analyzing more than 1.2 million pages of documents, working with liability and damages experts, briefing numerous motions, and taking and defending twenty depositions. The arm's-length settlement negotiations were also extensive: the parties along with counsel attended three in-person mediation sessions with Professor Eric Green, a highly experienced and very well-regarded mediator.

***2** The positive reaction to the Settlement by the Class also confirms that the terms are fair, adequate, and reasonable. The deadline to object or request exclusion from the Class has passed, and *not a single Class member objected,* and this is a Class that contains many large and sophisticated investors who are all owners of million dollar-plus life insurance policies. Furthermore, after removing the opt-outs affiliated with the *U.S. Bank* actions, only three other Class members requested exclusion—less than 2% of the Class.

For each of the foregoing reasons and additional reasons provided for below, the court grants final approval to the settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Class Action Litigation*

In 2010 and 2011, Phoenix announced that it was raising COI rates on more than a thousand life insurance policies it had previously issued. On November 18, 2011, Plaintiffs challenged both rate hikes in a class action brought against Phoenix Life Insurance Company ("*Fleisher* Action"), Case No. 11–cv–8405–CM. The complaint alleged four claims for relief: breach of contract, breach of the implied covenant of good faith and fair dealing, violation of New York General Business Law § 349, and declaratory judgment. On May 2, 2012, the Court dismissed three of these four claims for relief, but denied the motion to dismiss Plaintiffs' breach of contract claim. Dkt. 29.

Merits discovery began in December 2011. *See* Dkt. 43 at 1. Plaintiffs filed two, important motions to compel in November 2012, which were granted by Magistrate Judge Francis and confirmed by this Court, despite heavy opposition and reconsideration requested by Phoenix. Dkt. 72 & 77; Dkt. 93, 101, 112–13, 115, 117, 123–24, 140. During discovery, Class Counsel analyzed over a million pages of documents, including complicated actuarial tables, took and defended over 20 days of depositions of 17 witnesses, and subpoenaed Defendants' reinsurers and actuarial and financial advisors. Declaration of Steven G. Sklaver in support of Plaintiffs' Motion for Final Approval of Class Action Settlement, filed Aug. 19, 2015, ("Sklaver Decl.") ¶¶ 5–6. Class Counsel also defended the depositions of Mr. Fleisher and Mr. Berck, named Plaintiffs, as well as Plaintiffs' actuarial expert, Larry N. Stem, and Plaintiffs' economist, Robert Mills, among others. *Id.*

On January 11, 2013, Plaintiffs moved to certify the 2010 and 2011 classes. Dkt. 81. The Court initially certified both classes. Dkt. 135. The Court subsequently decertified the 2010 class, but denied two motions to decertify the 2011 class. On December 6, 2013, both parties filed motions for summary judgment, supported by extensive expert reports, exhibits and declarations. Dkt. 184, 190. The Court denied Plaintiffs' motion and granted Phoenix's motion in part. Dkt. 235. The Court also denied a second motion to dismiss and a motion for partial summary judgment of Mr. Berck's claim. Dkt. 231. On March 13, 2015, the parties filed a Preliminary Joint Pre-trial Report totaling over a 100 pages on the liability phase alone. Dkt. 262. The parties also proposed jury instructions, verdict forms, and voir dire questions. Dkt. 263, 265. On April 7, 2015, the parties filed 10 motions *in limine.* Dkt. 268, 273. The Settlement was reached in principle the morning of the pre-trial conference while those motions were pending.

On October 31, 2014, Plaintiff SPRR, LLC, also represented by Class Counsel, filed a complaint against PHL Variable Insurance Company challenging the same 2011 COI increase on behalf of a putative national class and alleging a breach of contract claim ("*SPRR* Action"), Case No. 14–cv–8714–CM.

Because discovery overlapped with the *Fleisher* Action, and the same issues and counsel for plaintiff and defendant were involved, the parties agreed that discovery in the *Fleisher* Action was deemed to be produced in the *SPRR* Action. After making their initial discovery requests, the parties continued several deadlines until after the conclusion of the *Fleisher* Action. *SPRR* Dkt. 30. The *SPRR* Action was reassigned to this Court on April 30, 2015. *See* Notice of Case Reassignment, *SPRR* Action, Dkt. Entry 4/30/15.

B. *Settlement Negotiations and Terms*

***3** The Settlement was reached only after the parties conducted extensive, arm's-length negotiations with the assistance of an experienced, nationally known mediator. Professor Eric D. Green is the co-founder of Resolutions LLC. Declaration of Professor Eric Green in support of Plaintiffs' Motion for Preliminary Approval ("Green Decl."), filed May 29, 2015, Dkt. 300, ¶ 2. Prof. Green was a member of the faculty of Boston University School of Law where he taught mediation for thirty years, co-founded JAMS/ Endispute, was a co-author of Dispute Resolution, which was the first legal textbook on ADR, and has successfully mediated many high stakes cases, including complex class actions and the *United States v. Microsoft* antitrust case. *Id.*

The mediation process began in April 2014 and lasted over a year. Sklaver Decl. 9–10; Green Decl. ¶¶ 7–11. On April 1, May 9, and June 25, 2014, the parties participated in three, full-day, in-person mediation sessions with Prof. Green at his offices in Boston, which were preceded by mediation briefing. Sklaver Decl. ¶¶ 10–12; Green Decl. ¶¶ 7–9. All three sessions were attended by counsel for Phoenix, Class Counsel, as well as Mr. Fleisher. Sklaver Decl. ¶ 10; Green Decl. ¶¶ 6–9. The terms of the Settlement were also negotiated in extensive teleconference and email discussions. Sklaver Decl. 12. A Memorandum of Understanding ("MOU") was negotiated in-person at Susman Godfrey's offices in New York City, with the assistance of Prof. Green who participated by telephone. Sklaver Decl. ¶ 11; Green Decl. ¶ 11. Thereafter, the long-form Stipulation of Settlement was exchanged, edited, drafted, and heavily negotiated and ultimately agreed to and signed on May 29, 2015. Sklaver Decl. ¶ 7, 11.

Prof. Green believes that the proposed Settlement is fair and reasonable, and is a highly successful result for the Class. Green Decl. ¶ 6, 15. Class Counsel was well informed of the strengths and weaknesses of the parties' claims and defenses, and the negotiations were hard-fought and non-collusive. Sklaver Decl. ¶¶ 12, 14–16; Green Decl. ¶ 12–15.

The Settlement was also made in light of the results of an all-day mock jury trial conducted by Class Counsel in advance of trial. Sklaver Decl. ¶ 5.

1. Monetary and Non–Monetary Relief to Class Members

The Settlement provides the following substantial benefits to the Class members:

- ***Cash Payment of $40,759,820.88* – Not *Claims Made.*** This includes $34,759,820.88 [1] in cash (minus fees and expenses) for the benefit of Class members that will be automatically distributed *without* requiring them to submit proofs of claim, plus Phoenix's agreement to separately pay the first $6 million in attorneys' fees awarded by the Court.

- ***COI Freeze valued at $61 million.*** A total and complete COI freeze through December 31, 2020. Thus, even if Phoenix has a change in expectations that would otherwise permit a COI rate increase under the policies, Phoenix will not increase COI rates for more than five years.

- ***Policy Validity and STOLI Waiver valued at $33.3 million.*** Phoenix has agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentations in the application. [2]

Sklaver Decl. ¶ 8; Declaration of Robert Mills, filed Aug. 19, 2015 ("Mills Decl.") ¶ 7; Declaration of Ann Juliano, filed Aug. 19, 2015, ("Juliano Decl.") ¶ 14 & Ex. A (Report).

The Settlement defines the Class as:

> "Class" or "Settlement Class" means the Owners of PAUL Policies for which Phoenix sent notice that the Policy was subject to the 2010 Adjustment or 2011 Adjustment (the "Class Policies").

Preliminary Approval Order, Dkt. 303, ¶ 5. Excluded from the Class are (1) any officers, directors, or employees of any Defendant; the affiliates, legal representatives, attorneys, successors, or assigns of any Defendant; attorneys, successors, or assigns of any Defendant; Class Counsel and their employees; and any judge, justice, or judicial official presiding over the Actions and the staff and immediate family of any such judge, justice, or judicial official; (2) Owners of Policies that received a decrease in their COI rates or whose COI rates were unchanged as part of the 2011 Adjustment; (3) Owners of confidentially identified Policies for which Phoenix covenants that a prior settlement bars claims; and (4) Owners of two designated Policies that are the subject of pre-existing litigation. *Id.* at ¶ 6.

2. Release of COI–Related Claims against Defendants

***4** In exchange for the consideration provided, Plaintiffs and Class members will release any and all claims, causes of action, debts, liabilities, damages, restitution, equitable, legal and administrative relief, known and unknown, at law or in equity, whether brought directly or indirectly, including any further claim to recovery or relief as a result of actions by any state or federal government agencies, arising out of or relating to any and all matters concerning the COI rates and COI charges assessed in the past or in the future by Defendants as a result of the 2010 or 2011 COI rate adjustments as stated in the Stipulation of Settlement.

3. Attorney's Fees, Costs, and Class Representative Incentive Awards

The Settlement recognizes that Class Counsel may seek attorneys' fees and reimbursement of costs and expenses incurred in the prosecution of these actions, subject to approval of the Court. The Notice informed Class Members that Class Counsel may seek fees up to one-third of the cash portion of the settlement plus $6 million that Phoenix agreed to pay over and above the benefits provided to class in cash and other relief, which would have equaled $17.5 million. *See* Declaration of Scott Exley of Rust Consulting, filed July 7, 2014, Dkt. 307 ("Exley Decl."), Ex. A ("Notice") ¶ 18. In a concurrently filed motion, Class Counsel seeks payment of a total of $13.5 million in attorney's fees, representing 9.9% of the overall Settlement value or 22% of the cash fund plus Phoenix's agreement to separately pay the first $6 million in fees awarded. Class Counsel also seek $902,564.49 in unreimbursed expenses necessarily incurred in connection with the prosecution of this action, plus future such expenses, and incentive awards of up to $25,000 for Mr. Fleisher and $5,000 for the two other named Plaintiffs. No Class member objected to these terms, which were all described in the Notice to the Class. *Id.*

4. Distribution Plan

The Distribution Plan, as also set forth in the Notice, allocates funds to Class members on a *pro rata* basis. The cash payment will be allocated as follows: (1) $2 million will be distributed to those whose policies lapsed after receiving notice of a COI increase but before ever paying an overcharge, and (2) the remaining funds, after reduction for Court approved fees, costs, and incentive awards, will be distributed among those who paid a COI overcharge. Eligible lapsed policyholders will be paid in proportion to the premiums each paid before termination. Eligible COI overcharge policyholders will be paid in proportion to their share of the COI overcharges paid through March 2015. After expiration of the deadline for any returned or uncashed check, an escheatment process will follow consistent with applicable law.

C. *Preliminary Approval and Notice to the Class*

On June 3, 2015, the Court entered an order conditionally certifying the Settlement Class, naming Susman Godfrey as counsel for the Settlement Class, naming Plaintiffs as representatives of the Class, and preliminarily approving the settlement with Defendants. Dkt. 303 at 2–3, 8, 9. The Court also appointed Rust Consulting to serve as the Settlement Administrator, approved the proposed Notice Program, and set a final approval hearing for September 9, 2015. *Id.* at ¶¶ 10, 12, 20. On June 8, 2015, the Court proposed certain amendments to the Notice. Dkt. 304. The Court approved Plaintiffs' proposed revisions, Dkt. 306, and the Notice was mailed to the last known address of all known potential Class Members on July 17, 2015. *See* Exley Decl. ¶ 7.

I. *DISCUSSION*

The settlement of complex litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal–Mart Stores,* *Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116–17 (2d Cir.2005) ("*Wal–Mart*") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y.1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions."). The approval of a class action settlement is a matter of discretion for the trial court. *See* *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.,* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672(PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation...." *Id.* (internal quotation marks omitted).

***5** A court may approve a class settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06–MD–1775 (JG) (VVP), 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (quoting *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000)). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal–Mart,* 396 F.3d at 116. For the negotiating process, "So long as the integrity of the arm's length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997). For approval of the settlement's terms, recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that although a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974); *see also* *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). In assessing a settlement, then, the court should neither substitute its judgment for that of the parties who negotiated the settlement nor conduct a mini-trial on the action's merits. *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1983).

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors for a court to consider in making a Rule 23(e) fairness determination:

> (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 litigation....

Grinnell, 495 F.2d at 463. In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 575 (S.D.N.Y.2008) (internal quotation marks omitted).

A. *The Proposed Class Action Settlement is Procedurally Fair*

The Settlement is entitled to an initial presumption of fairness and adequacy because it was reached by experienced, fully-informed counsel after extensive arm's-length negotiations. *See* *Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014). Counsel on both sides are well-versed in the prosecution of contract and insurance litigation (including life settlement litigation), and the Settlement was reached just before trial. *See* Green Decl. ¶¶ 10–12. The negotiations spanned a year and included three mediation sessions in Boston, as well as numerous telephone calls, emails, and in-person meetings. Sklaver Decl. ¶¶ 10–12;

Green Decl. ¶¶ 7–11. The discussions culminated in a signed MOU the day of the pre-trial hearing. This occurred only after Class Counsel had conducted a full day of jury testing, reviewed millions of pages of documents with the assistance of experts, conducted a substantial number of depositions, and briefed or opposed—mostly successfully—motions to dismiss, motions to compel, class certification, summary judgment, and motions *in limine.*

It is the opinion of Class Counsel, Class Plaintiffs, and an experienced mediator that this settlement is fair, reasonable, and adequate. Sklaver Decl. ¶¶ 7, 14; Green Decl. ¶ 6, 15. Courts give counsel's opinion considerable weight because they are closest to the facts and risks associated with the litigation. *In re Hi–Crush Partners L.P. Sec. Litig.,* No. 12–cv–8557–CM, 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) ("[Counsel's] opinion is entitled to great weight." (quotation marks and citations omitted)); *see also PaineWebber,* 171 F.R.D. at 125. The extensive participation of an experienced mediator also "reinforces that the Settlement Agreement is non-collusive." *Johnson v. Brennan,* 10–cv–4712–CM, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) ("[The] presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation"); *see also D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) ("[A] mediator[ ] ... helps to ensure that the proceedings were free of collusion and undue pressure.").

***6** All of the above facts establish that the Settlement is procedurally fair. *See McReynolds v. Richards–Cantave,* 588 F.3d 790, 803 (2d Cir.2009) (There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery" (alteration and internal quotation marks omitted)).

B. *The Proposed Class Action Settlement Is Substantively Fair:* Grinnell Factors

Evaluation of this settlement under the *Grinnell* factors supports final approval.

1. Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

The first factor, which addresses "the complexity, expense and likely duration of the litigation," strongly supports approval. *Grinnell,* 495 F.2d at 463. The litigation was indisputably complex. The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or "discriminate unfairly" within a "class" of insured. These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. The court has issued opinions of great length of complexity in connection with motions to dismiss and for summary judgment.

The Settlement also ends future litigation and uncertainty. Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years. *See Strougo v. Bassini,* 258 F.Supp.2d 254, 261 (S.D.N.Y.2003) ("[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class"); *Prudential,* 163 F.R.D. at 210 ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)); *In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("the complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement.... Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all."). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. Reaction of the Class to Settlement (*Grinnell* Factor 2)

The second factor, the "reaction of the class to the settlement," strongly supports approval. *Grinnell,* 495 F.2d at 463; *see, e.g., In re FLAG Telecom,* 2010 WL 4537550, at *16.

Specifically, ' "the absence of objections may itself be taken as evidencing the fairness of a settlement.' " *PaineWebber,* 171 F.R.D. at 126 (citation omitted); *see also In re Luxottica Grp. S.p.A. Sec. Litig.,* 233 F.R.D. 306, 311–12 (E.D.N.Y.2006). This Court has noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.' " *Veeco,* 2007 WL 4115809, at *7 (citation omitted).

***7** Here, pursuant to the Preliminary Approval Order, a total of 758 copies of the Notice were mailed to potential Class Members. Dkt. 303 (Preliminary Approval Order); Exley Decl. ¶ 7. The Notice was also made available on a public website, and Class Members were provided a dedicated P.O. Box and toll-free hotline with live support to contact the Settlement Administrator. *Id.* at ¶ 4. After the initial mailing of 758 Notices to the last known addresses of Class members, Rust continued to investigate and update addresses. Declaration of Joel Botzet in support of Plaintiff s Motion for Final Approval of Class Action Settlement, filed Aug. 19, 2015 ("Botzet Decl.") ¶ 5. Before and after mailing, Rust undertook thorough efforts to update the mailing list using the National Change of Address Database. *Id* at ¶ 2, 5. The Settlement has also attracted national media attention and was disclosed in Phoenix's filings with the SEC. *See* Sklaver Decl. ¶ 13.

Class members were given until July 17, 2015, to object to or exclude themselves from the Settlement. Notice 14, 19Notice 14, 19. That deadline passed and not a single objection was received. Botzet Decl. ¶ 6. As expected, U.S. Bank acting as securities intermediary for Lima Acquisition LP, which has brought its own litigation against Phoenix scheduled to go to trial in September, excluded itself from the Class, as did five entities affiliated with Lima. *Id.* at ¶ 8; *see U.S. Bank Nat'l Assoc., as securities intermediary for Lima Acquisition LP v. PHL Variable Insurance Co.,* Case No. 12–CV–6811(CM); *U.S. Bank Nat'l Assoc., as securities intermediary v. PHL Variable Insurance Co.,* Case No. 13–CV–1580(CM). Aside from the Lima-affiliated entities, only three other Class members requested exclusion from the Class, representing a total of 26 Class policies. These 3 Class members own a combined 26 policies representing only 1.5% of the total Class of policies in the Settlement. Botzet Decl. ¶¶ 8–9.

Tiger Capital LLC, a sophisticated investor which owns a significant number of Class Policies and also pursued litigation against Phoenix that was set for trial in July 2015, settled its litigation and remained a member of the Class. *See Tiger Capital LLC v. PHL Variable Ins. Co.,* Case No. 12–cv–2939(CM), Dkt. 156 (announcing "settlement in principle of all claims in this case that includes Tiger Capital, LLC's participation in the nationwide class settlement pending for Court approval in [the *Fleisher* and *SPRR* Actions").

The overwhelming response of Class members is in favor of the Settlement, as evidenced by the complete lack of any objections and only three requests for exclusion by Class members other than those who have already opted out by filing the *U.S. Bank* Action, which will be tried later this month. *Cf. Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 24 (2d Cir.1987) (approving class settlement where 45 of the 126 class members, or approximately 36%, expressed opposition to the settlement). This factor, too, strongly weighs in favor of approval.

3. Stage of the Proceedings and Amount of Discovery Completed (*Grinnell* Factor 3)

The third *Grinnell* factor, which addresses "the stage of the proceedings and the amount of discovery completed," also strongly supports approval of the Settlement. *Grinnell,* 495 F.2d at 463. When courts "look [ ] to the stage of the proceedings and the amount of discovery completed" under the third *Grinnell* factor, they "focus[ ] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Techs., Inc. Sec. Litig.,* No. 11 Civ. 2279(CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014) (internal quotation marks omitted); *see also Visa,* 396 F.3d at 118.

At the time of Settlement—the morning of the pre-trial conference—trial was a mere 45 days away. Fact and expert discovery were both extensive (and had long since closed):

***8** • Plaintiffs served 80 document requests and, with expert assistance, Class Counsel analyzed over 1.2 million pages of documents produced by Defendants that exceeded nine gigabytes of native files alone (over 100 gigabytes when considering TIFFs), took and defended over 20 days of depositions of 17 witnesses, and issued numerous third-party subpoenas to Defendants' reinsurers and actuarial and financial advisors. Sklaver Decl. ¶ 5.

- Plaintiffs Fleisher and Berck were both deposed during full day depositions. *Id.*

- Plaintiffs successfully obtained class certification for the 2011 COI increase in the *Fleisher* Action, extensively briefed the central legal issues on motions for summary judgment, and consulted with experts to develop a liability and damages model, both in support of their motion for class certification and for trial. Those experts included:

  - Larry N. Stem, a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries, who has worked in the insurance industry for over forty years and who has designed, developed, and priced many universal life products for life insurance companies, including drafting policy forms; and

  - Robert Mills, an economist and Director at Micronomics, Inc., who has more than sixteen years of economic research and consulting experience and the calculation of economic damages.

- Class Counsel and their experts also reviewed and analyzed the expert analysis Defendants submitted. Defendants retained Douglas French, who submitted a total of 146 pages of expert reports and declarations, including extensive quantitative analysis. Plaintiffs' experts assessed these reports and provided responses to them. Id.

- Plaintiffs also participated in three separate in-person mediation sessions conducted by a highly experienced and respected mediator, supported by additional lengthy briefing, and conducted numerous settlement negotiations with Defendants. *Id.*

- The parties submitted a voluminous pre-trial order with hundreds of exhibits, and briefed over ten motions *in limine. Id.*

In sum, Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Class if this litigation continued. Sklaver Decl. ¶¶ 15–16; see In re Bear Stearns Cos. Secs., Derivative, & *ERISA Litig.,* 909 F.Supp.2d 259, 267 (S.D.N.Y.2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues"). To be blunt, on only one other occasion has this court seen a case that settled after such full and thorough preparation. Class counsel could not possibly have been more knowledgeable about the strengths and weaknesses of their case.

4. Risk of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial (*Grinnell* Factors 4, 5, & 6)

The fourth, fifth and sixth *Grinnell* factors, which address "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial," also strongly support approval of the Settlement. *Grinnell,* 495 F.2d at 463. In assessing factors 4, 5 and 6, which are often considered together, the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to "foresee with absolute certainty the outcome of the case." *Shapiro,* 2014 WL 1224666, at *10. "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Secs. And ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004). In assessing the risks, courts recognize that "the complexity of Plaintiff's claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 123 (S.D.N.Y.2009). While Plaintiffs and Class Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals.

a. *Risks to Establishing Liability*

***9** Plaintiffs believe their position on liability is strong, but accept that there are complex issues that pose risk. The Court is well aware of the challenges that Plaintiffs would face at trial. Defendants laid out their contentions for the liability phase of the trial in 38 detailed paragraphs of the pre-trial order. Dkt. 262, 89–126. For example, Plaintiffs allege that actuarial standards of practice define a "class" of policies for purposes of determining and re-determining rates at issuance, and that Phoenix breached the policies by changing which policies constituted a "class" and by making changes that unfairly discriminated within a class. Defendants contested these allegations, offering its own actuarial expert who was going to testify that Phoenix was permitted to re-determine which policies comprised a "class" at the time of the COI rate increases. It is unclear how a jury would decide these disputed issues at trial. *See* *West Virginia v. Chas. Pfizer & Co.,* 314 F.Supp. 710, 743–44 (S.D.N.Y.1970), *aff'd,* 440 F.2d 1079 (2d Cir.1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Baldwin–United Corp.,* 105 F.R.D. 475, 482 (S.D.N.Y.1984) (comparing advantages of immediate cash payments with risks involved in long and uncertain litigation).

b. *Risks to Establishing Damages*

Even if Plaintiffs won the liability phase, Plaintiffs also faced risks in establishing damages during the separate damages phase of trial. The Settlement removes substantial uncertainties about Plaintiffs' chances of success or potential decertification. *Charron v. Wiener,* 731 F.3d 241, 249 (2d Cir.2013) ("[T]he litigation risks attendant to these possibilities [like decertification] weighed heavily in favor of the fairness of a settlement."). Plaintiffs' submitted a comprehensive damages expert report by Robert Mills, whom Phoenix deposed. Phoenix rebutted Plaintiffs' testimony in its own expert reports, in opposing class certification and in Phoenix's subsequent motions for decertification. Dkt. 97, 159, 172. Defendants have vigorously contested Mr. Mills's conclusions in quantifying the alleged overcharges and also the Plaintiffs' legal grounds for recovering past premiums for policies that lapsed after the COI increases were announced but before paying an overcharge. *See, e.g.,* Dkts. 97, 159, 172. The prospect of a battle at trial and establishing recovery for all Class members without decertification adds substantial risk to Plaintiffs' claims. *See* *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y.1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited") (internal quotation marks omitted); *In re FLAG Telecom,* 2010 WL 4537550, at *18 ("The jury's verdict ... would ... depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.").

c. *Risks on Appeal.*

Even if Plaintiffs succeed at trial, Defendants are certain to file post-trial motions and, if necessary, an appeal. The appeal of the complex insurance and actuarial issues in this case is likely to be lengthy and expensive, and there is no assurance that Plaintiffs would prevail. *See* *In re Michael Milken & Assocs. Secs. Litig.,* 150 F.R.D. 57, 65 (S.D.N.Y.1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success" and citing a case where a multimillion dollar judgment was reversed). There is also a huge appellate risk for Phoenix: if an appellate court overturned this court's determination that "changed investment expectations" (assuming those expectations did indeed change), which may properly be considered in setting new COI rates, includes changes in the amount of money to be invested (which is not Plaintiffs' position at all), Phoenix's entire defense would crumble.

5. Ability of Defendants to Withstand a Greater Judgment (*Grinnell* Factor 7)

The seventh *Grinnell* factor addresses the defendants' ability to withstand a greater judgment. Even if Phoenix could withstand a greater judgment, "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato,* 236 F.3d at 86. Indeed, "a defendant is not required to empty its coffers before a settlement can be found adequate." *Sony,* 2008 WL 1956267, at *8 (internal quotation marks omitted). The mere 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." *Global Crossing,* 225 F.R.D. at 460.

6. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

***10** The final two *Grinnell* factors, "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," also strongly support approval of the Settlement. *Grinnell,* 495 F.2d at 463. Courts typically combine their analysis of the final two *Grinnell* factors. *See* *Global Crossing,* 225 F.R.D. at 460. In analyzing these two factors, a reviewing 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. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.,* No. 11–cv–05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, "there is a range of reasonableness with respect to a settlement—a range which 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." *Visa,* 396 F.3d at 119. Moreover, the settlement amount must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Shapiro,* 2014 WL 1224666, at *11. The overall value of the settlement comprises monetary as well as non-monetary relief. *See, e.g.,* *Velez v. Novartis Pharm. Corp.,* No. 04 CIV 09194 CM, 2010 WL 4877852, at *8, *18 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement).

Here, the overall Settlement value exceeds $130 million, including substantial monetary as well as non-monetary benefits. Subject to Court approval, Phoenix will be paying $40,759,820.88 in cash, which includes $34,759,820.88 for distribution to Class members along with Phoenix's agreement to separately pay the first $6 million in attorneys' fees awarded for, amongst other things, the substantial non-monetary relief obtained for the Class. *See, e.g., In re Excess Value Ins. Coverage Litig.,* 598 F.Supp.2d 380, 386–87 (S.D.N.Y.2005) (holding value of settlement includes the value of any legal fees paid by defendants); *Johnston v. Comerica Mortg. Corp.,* 83 F.3d 241, 245–46 (8th Cir.1996) ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery."). The $34,759,820.88 amounts to 68.5% of the Plaintiffs' overcharge damages through March 2015. Mills Decl. ¶ 7.

The non-monetary relief provided by the Settlement is also substantial and has an estimated value of over $93.4 million. Juliano Decl. ¶ 14 & Ex. A (Report) at 1. First, Phoenix has agreed never to contest the validity and enforceability of Class Policies on the grounds of lack of an insurable interest or misrepresentations in the application for such policies. And second, Phoenix has agreed to implement a total and complete COI freeze through December 31, 2020. Plaintiffs' expert, Ann Juliano of Demeter Capital, who has over 10 years of experience in analyzing the buying and selling of life insurance policies on the secondary market, including Phoenix policies, has evaluated both of these guarantees by Phoenix. Juliano Decl. 6–9. For the validity guarantee, Ms. Juliano analyzed the historical challenge rate by Phoenix to the validity of these Class policies, as well as Phoenix's likelihood of success based on historical industry data. *Id.,* Ex. A, Section 2.2. Based on the ownership make-up of the Class Policies, life expectancy estimates for each policy generated to assess the longevity expectations of the policies, and lapse assumptions and future premiums owed for the Class Policies based on historical data from Phoenix, Ms. Juliano estimates that Phoenix's commitment not challenge the Class Policies upon the occurrence of a maturity event saves Class members an estimated $33.3 million in claims payments that Phoenix otherwise would have recovered. *Id.*

With respect to the COI freeze, Ms. Juliano analyzed Phoenix's previous COI rate adjustments and calculated the likelihood of a future COI increase in the next five years—the period of the freeze—and the impact Phoenix's guarantee not to adjust rates would have on the value of the life insurance policies in question on the secondary market. Ms. Juliano's analysis concludes that the promise of a COI freeze adds another $61 million in value to the Settlement. *Id.,* Ex. A, Section 2.1.

***11** The combination of monetary and non-monetary benefits is a sizable recovery in light of the total projected damages and the risks of litigation. In fact, this is one of the most remunerative settlements this court has ever been asked to approve. Even considering just the cash component, the settlement is well within the permitted range on final approval. *See* *Grinnell Corp.,* 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 986 F.Supp.2d 207, 229 (E.D.N.Y.2013) (granting final approval to antitrust class action settlement representing approximately 2.5% of the highest damages estimate as "within the range of reasonableness in light of the best possible recovery and in light of all the attendant risks of litigation"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, Case No. 06–MD–1775, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement in price-fixing class action representing approximately 10.5% of the surcharges incurred by class members during the class period); *In re Med. X–Ray Film Antitrust Litig.*, CV–93–5904, 1998 WL 661515, *5–6 (E.D.N.Y. Aug. 7, 1998) (granting final approval to antitrust class action settlement representing approximately 17% of the estimated best possible recovery).

The Settlement is even more significant given the considerable risks involved in the litigation as set forth above. Plaintiffs and Class Counsel carefully and thoroughly analyzed these risks when negotiating the present Settlement. The proposed Settlement is a favorable result for the Settlement Class in light of the range of possible recoveries and the risks of continued litigation. *Massiah,* 2012 WL 5874655, at *5 ("[W]hen a settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor.") (internal quotation marks omitted).

In short, all the Grinnell factors are satisfied.

The settlement is approved.

C. *The Notice Program Satisfied Rule 23 and Due Process*

Due process and the Federal Rules require that the class receive adequate notice of a class action settlement. *See* *Wal–Mart,* 396 F.3d at 114. The standard for the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id.* at 113 (citing *Soberal–Perez v. Heckler,* 717 F.2d 36, 43 (2d Cir.1983); Fed.R.Civ.P. 23(e)). As the Second Circuit has held, "[t]here 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." *Wal–Mart,* 396 F.3d at 113–14 (internal quotation marks omitted). The notice sent to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997).

Here, the robust Notice Program, which included mailing individual Notices to the last known address of all Class members, more than meets the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Preliminary Approval Order, Rust Consulting individually mailed the Notice to Class members via First–Class mail. Exley Decl. ¶¶ 6–7; Botzet Decl. ¶¶ 3, 5. Rust conducted skip tracing for any Notices returned as undelivered, and Class Counsel and Phoenix assisted in investigating additional approaches where the mailing was returned, such as contacting the servicer for the policies to acquire updated information. Botzet Decl. ¶ 5. Through these methods, Rust was able to reduce the total number of undelivered Notices to under fifty. *Id.* Rust also made the Notice publicly available on a website, and maintained a call center for Class members with questions. Exley Decl. ¶¶ 3–5.

***12** The Notice communicated in plain language the essential elements of the Settlement and the options available to Class Members in connection with the settlement. Exley Decl., Ex. A. The Notice describes the litigation, summarizes the Settlement's terms and benefits, describes the manner of allocating the cash payments among eligible Class members, quotes the releases verbatim, discloses the request for Court approval of attorneys' fees, expenses, and named plaintiff incentive awards, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the cash settlement class. *Id.* Additionally, the Notice prominently notifies class members how they can obtain more information from Class Counsel or the Settlement Administrator though a toll-free number, a website, and traditional channels including mail and telephone. *Id.* These features of the Notice all demonstrate due process and that the federal rules have been satisfied. *See* *Wal–Mart,* 396 F.3d at 114 (quoting *Newberg* § 11.53, at 167) ("Notice is 'adequate if it may be understood by the average class member.' ").

D. *The Distribution Plan is Fair and Reasonable*

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y.2002). 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," not mathematical precision. *PaineWebber,* 171 F.R.D. at 133. The cash payment will be allocated *pro rata* as follows, which was fully explained in the Notice: (1) $2 million will be distributed to those whose policies lapsed after receiving notice of a COI increase but before ever paying an overcharge, and (2) the remaining funds, after reduction for fees, costs, incentive awards, will be distributed among those who paid a COI overcharge. Exley Decl. Ex. A, at 5. Eligible lapsed policyholders will be paid in proportion to the premiums each paid before termination, relative to the premiums paid by all such policyholders. Eligible COI overcharge policyholders will be paid in proportion to their share of the overall COI overcharges paid by Class members through March 2015. *Id.* For uncashed or returned checks, after the time to request reissuance for any lost checks expires, an escheatment process will follow consistent with applicable state law.

This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.,* No. 99–CV–197, 2000 WL 1737867 at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyds' Am. Trust Fund Litig.,* No. 96–CV–1262, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *PaineWebber,* 171 F.R.D. at 135 (approving pro rata distribution). Counsel's conclusion that the distribution plan is fair, adequate, and reasonable, Prelim. Sklaver Decl. ¶ 14, is entitled to great weight. *See In re Am. Bank Note Holographies,* Inc. 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001) (approving allocation plan and according counsel's opinion "considerable weight"). Furthermore, no Class member has objected to this straightforward and equitable allocation.

Accordingly, the distribution plan is fair and reasonable, and is approved.

E. *The Motion for Approval of Counsel's Fee Request is Granted*

Court-appointed Class Counsel Susman Godfrey L.L.P. ("SG" or "Class Counsel"), having recovered $134 million in total relief for the benefit of the Class, has applied for an award of attorneys' fees in the amount of $13.5 million, which is 9.9% of the gross settlement benefit (or using a less-accepted and more conservative methodology, 1/3 of the cash component of the settlement viewed in isolation). The proposed figure is well within the range approved by courts in this Circuit. *See Velez v. Novartis Pharm. Corp.,* No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the **gross settlement benefit,"** which includes the value of both monetary and nonmonetary relief, and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater.").[3] Here, the requested award is warranted by the outstanding results achieved for the Class through the efforts of Class Counsel, and the enormous risks taken and overcome in litigation brought entirely on a contingency fee basis.

***13** The Settlement was achieved as a result of the tenacious prosecution of the case by Class Counsel. As this Court is well aware, the litigation was hard-fought. Class Counsel briefed (or opposed) motions to dismiss, motions for class certification and decertification, several motions to compel, took and defended a large number of depositions, including the depositions of senior current and former employees of Phoenix and its actuarial advisors, assisted in the preparation of four detailed expert reports on liability and damages in addition to other expert submissions, reviewed more than 1.2 million pages of documents produced in discovery, filed and responded to motions for and against summary judgment, prepared and filed a 100+ page Joint Preliminary Trial Report, briefed ten motions *in limine,* prepared exhibit and witness lists, submitted jury instructions, and proposed voir dire questions—all after significant jury testing was conducted in an all-day mock trial. The Settlement was reached on the eve of trial, and only after protracted, arm's-length settlement negotiations, including three full-day mediations in Boston facilitated by Professor Eric D. Green, an experienced and highly respected mediator.

Class Counsel faced and overcame substantial risks to achieve this settlement. Class Counsel invested over ***$3.6 million in time and money*** into this case, with the real possibility of getting nothing in return. Class Counsel undertook this litigation on a wholly contingent basis, with no assurance either of payment or of recouping expenses. On damages, Defendants vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharges and also the Plaintiffs' legal grounds for recovering past premiums for policies that immediately lapsed after the COI increases were announced. Finally, class certification was a hotly disputed issue, and the Court noted that it would entertain motions to decertify after trial. Dkt. 230 (Jan. 31, 2014 Order) at 3 ("Only if Fleisher and his class prevail on [liability] will I even begin to consider the argument that this group of people can prove damages on a class-wide basis. I admit that I am skeptical of that argument – I said that last August – but I will approach the issue with an open mind ..."). Notwithstanding these issues and many more, SG achieved a settlement value of $134 million that will provide Class members with outstanding relief.

The Class was advised in the Notice that Class Counsel could apply for fees equal to one-third of the cash portion of the settlement plus $6 million that Phoenix agreed to pay over and above the benefits provided to the Class in cash and other relief, which would have equaled $17.5 million. Declaration of Scott Exley re: Notification and Settlement Administrative Services, filed July 7, 2015, Dkt. 307 ("Exley Decl."), Ex. A (the "Notice") ¶ 18. No Class member objected to a fee award in that amount. This is particularly significant where, as here, the Class contains many large and sophisticated investors. *See* Dkt. 97 (Phoenix's Opp. to Class Cert.) at 16 ("the putative class members are all owners of million dollar-plus life insurance policies capable of paying large premiums, including many sophisticated life settlement investors or their nominees."); *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 594 (S.D.N.Y.2008) ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable"). In addition, the non-cash benefits of a COI freeze and a STOLI and fraud waiver have an easily quantifiable value and do not depend on any redemption rates. An application for $17.5 million as provided for in the Notice would be fair and reasonable in light of all the circumstances.

Despite these facts, Class Counsel has determined to only apply for a fee equal to $13.5 million, and amount which equals less than 10% of the gross settlement benefit (including the value of the nonmonetary benefits), or $6 million that Phoenix has agreed to separately pay plus 22% of the cash fund, or 33–1/3% of the cash portion of the settlement considered in isolation from the other components of the Settlement. The $13.5 million applied for would be reasonable under governing standards even if there had never been a non-cash component of the Settlement's benefits. If this application is approved, the Class will end up with 78% of the cash fund because $6 million of the fees are being separately paid by Phoenix.

***14** For each of these reasons, SG respectfully moves this Court for an award of attorneys' fees of $13,500,000. SG also seeks reimbursement for $902,564.49 in litigation expenses and incentive awards for the named Plaintiffs to compensate them for their time and efforts in bringing this case to a successful resolution.

1. Class Counsel is Entitled to Fees From the Common Fund

The Supreme Court has long recognized that a lawyer who obtains a recovery "for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). "The court's authority to reimburse the parties stems from the fact that the class action [device] is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1803, at 493–94 (2d ed.1986). The purposes of the doctrine are to fairly and adequately compensate class counsel for services rendered; to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf; and to encourage skilled counsel to represent those who seek redress for injury inflicted on an entire class and thereby discourage future misconduct of a similar nature. *See City of Providence v. Aeropostale, Inc.,* No. 11 Civ. 7132(CM), 2014 WL 1883494, at *10–*11 (S.D.N.Y. May 9, 2014) (citing *Goldberger v. Integrated Res.,* 209 F.3d 43, 47 (2d Cir.2000) and *Hicks v. Morgan Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005)); *accord* *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002). As this Court has previously observed, "Courts in this Circuit have consistently adhered to these teachings." *City of Providence,* 2014 WL 1883494, at *11.

2. Percentage Method

Under the percentage method, the "court sets some percentage of the recovery as a fee." *Goldberger,* 209 F.3d at 47. While Courts may award attorneys' fees under either the "lodestar" method or the "percentage of the recovery" method, "[t]he trend in this Circuit is toward the percentage method." *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) (quotations and citation omitted). The percentage method is preferable because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Id.* (quotations omitted). [4] "[T]he percentage method continues to be the trend of district courts in this Circuit and has been adopted in the vast majority of circuits." *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at * 14 (S.D.N.Y. Dec. 23, 2009); *accord City of Providence,* 2014 WL 1883494(CM), at *11 ("The trend among district courts in the Second Circuit is to award fees using the percentage method."); *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 586 & n.7 (S.D.N.Y.2008) ("[T]here is a strong consensus—both in this Circuit and across the country—in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery."). [5]

15** Here, Class Counsel is seeking a $13.5 million fee, which represents ***less than 10% of the overall settlement value, including monetary and non-monetary benefits. As set forth in the Final Approval Memorandum supporting declarations and accompanying expert report, financial analysts with expertise in longevity markets who work with large, institutional investors to acquire life settlements value the nonmonetary relief provided in the Settlement at $94.3 million. The overall cash payment by Phoenix is $40,759,820.88, consisting of a $34,759,820.88 payment from which distributions to the Class will be made (net fees and costs) and a separate payment for the first $6 million in fees awarded. [6] The overall cash payment made available for the benefit of the Class, prior to the opt-out reduction, was $48.5 million. The gross settlement value, combining the monetary and nonmonetary benefits, is approximately $134 million after removing opt-outs, or $142 million when the entire benefits made available to the Class are considered.

In calculating the overall settlement value for purposes of the "percentage of the recovery" approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class. *See* *Velez,* 2010 WL 4877852, at *8, *18 (approving settlement that was "21.8 percent of the ***total relief*** available through the settlement," which included "both nonmonetary and monetary relief valued at up to $175 million"). Leading authorities agree, [7] as do courts in this Circuit and nationwide. [8] The Federal Judicial Center provides an example of when it is appropriate to base a percentage fee on the value of injunctive relief through objective criteria: "an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future." [9] In this case, the valuation of the COI freeze follows a similar formula.

***16** In *Velez,* this Court explained that, in addition to monetary relief, the Settlement provided equitable relief that would improve Novartis' employment practices in order to ensure that its sales force was treated fairly. *Id.* at *1. This Court valued this programmatic relief at "at least $22.5 million." *Id.* at *15. In granting the requested $38.125 million fee, this Court compared the fee to the "gross value of the settlement," which combined the values of the monetary relief, the nonmonetary benefits and the money earmarked for attorneys' fees:

> The Settlement Agreement provides that, subject to Court approval, Class Counsel will receive $38,125 million in attorneys' fees—which equals 21.8 percent of the $175 million **total gross value of the settlement,** including the attorneys' fee provision ...
>
> Based on the "percentage of the fund" approach for evaluating class action fees, the amount of attorneys' fees in question is compared to the overall settlement value, including any portion earmarked for said fees. Here, the requested fees represent approximately 21.8 **percent of the total relief** available through the settlement. Even if calculated in **the more conservative and less-accepted methodology of percent against monetary fund** (rather than overall value), the requested fees represent approximately 25 percent of the monetary relief available through settlement. As such, the fee falls well within the mainstream of percentage of awards granted by courts in the Second Circuit in class suits of similar size and complexity—and is less, percentage-wise, than many.

Id. at *18. Here, the requested fee represents less than 10% of the total gross value of the Settlement, which is *far below* the mainstream of percentage awards in this Circuit. Even if calculated in "the more conservative and less-accepted methodology of percent against monetary fund (rather than overall value)," *id.,* the requested fees represent just 22% of the cash fund that is available for distribution to the Class plus Phoenix's separate $6 million payment (or 27.8% of the $48.5

million made available for the benefit of the class, [10] or one-third of the entire remaining cash portion of the settlement—all of which falls well within the mainstream of percentage of awarded granted by courts in this Circuit).

Courts in this district regularly approve percentage-based awards that far exceed the 10% requested here. *See, e.g., Novartis,* 2010 WL 4877852, at *8 (approving $38 million in fees that were approximately 22 percent of the total settlement value and 25 percent of monetary award); *Central States S.E. and S.W. Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 504 F.3d 229 (2d Cir.2007) (affirming 30% award of a $42.5 million settlement). That is true in cases with similar or higher fee requests as this one. [11]

***17** This Court recently approved a much higher (33%) award in a case that, like this one, was litigated to the brink of trial, after extensive and hard-fought discovery. *See City of Providence v. Aeropostale, Inc.,* No. 11 Civ. 7132(CM), Oral Arg. Tr. (Dkt 68, May 15, 2014) at 4 ("[T]his is the rare case where I have no problem with a 33 percent fee ... because this case has actually been litigated. This is not a case where ... there was a relatively quick settlement followed by confirmatory discovery. This was a case where you all were way, way down the pike in the litigation before Judge Weinstein came in and knocked your heads together and got you to settle it."). [12] In the circumstances, the fee request is entirely reasonable.

Finally, the requested fee is far less than the 45% that Sussman Godfrey would obtain on the open market under its standard contingency fee arrangement in which expenses are advanced. *See* Declaration of Steven G. Sklaver in support of Final Approval, filed Aug. 19, 2015 ("Sklaver Decl.") ¶ 17. This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York,* No. 08–cv–3673 (KAM)(LB), 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel v. County of Schenectady,* 595 F.3d 411, 420 (2d Cir.2010)); *see also McDaniel,* 595 F.3d at 422 (district court's focus should be "on mimicking a market"); *see also In re Lloyd's Am. Trust Fund Litig.,* No. 96–cv–1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("[T]he percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the **marketplace contingency fee model.").**

All this is predicated on the non-cash portion of the settlement's having considerable value—and it does. But even if no specific monetary value were attributed to the injunctive relief, the fee request would still be fair and reasonable under the percentage approach. The substantial injunctive relief is a major factor in favor of the fee request, even if no specific monetary value is assigned to it. [13]

3. Lodestar "Crosscheck"

The Second Circuit also permits courts to utilize a lodestar "crosscheck" to further test the reasonableness of a percentage-based fee. *See Goldberger,* 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N.Y.2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger,* 209 F.3d at 47); *see also In re Flag Telecom Holdings, Ltd. Secs. Litig.,* Case No. 02–cv–3400(CM), 2010 WL 4537550, at *25–26 (S.D.N.Y. Nov. 8, 2010). 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.

***18** In these entirely contingent actions, as of August 6, 2015, Class Counsel collectively spent over 6,500 hours, representing a lodestar of $2,770,410, and advanced $902,564.49 in expenses, in investigating, prosecuting and ultimately settling these claims over a multi-year period. *See* Sklaver Decl. ¶¶ 8–21. This lodestar is calculated at current hourly rates, which has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation. [14] Based on the requested fee ($13,500,000), class counsel's aggregate lodestar yields a "crosscheck" multiplier of 4.87. This is well within the range of crosscheck multipliers awarded in this circuit.

"Courts regularly award lodestar multipliers from 2 to 6 times lodestar" in this Circuit, *Morris v. Affinity Health Plan, Inc.,* 859 F.Supp.2d 611, 623–24 (S.D.N.Y.2012), and have been known to award lodestar multipliers significantly greater than the 4.87 multiplier sought here. *See e.g., Maley,* 186 F.Supp.2d at 369 (awarding percentage method with cross-check lodestar multiplier of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country," and citing cases with a 7.7 multiplier and 5.5 multiplier); *see also In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 590 (S.D.N.Y.2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court" (citing *Maley*)); *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* No. 05 Civ. 10240(CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").The multiplier is on the higher end, but that is entirely appropriate, given the fact that counsel were ready to go to trial when they settled.

Class Counsel's hourly rates are reasonable. The rates for Class Counsel who billed meaningful time to this case (ranging from $225 to $675 per hour) are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. *See* Sklaver Deck 18–20; *see In re Hi–Crush Partners L.P. Sec. Litig.,* No. 12 Civ. 8557(CM), 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) ("The rates billed by Lead Counsel (ranging from $425 to $825 per hour) for attorneys, are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude."). [15]

4. The *Goldberger* Factors Support the Requested Fee Award

***19** Under either the percentage method or the lodestar multiplier approach, the *Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal–Mart,* 396 F.3d at 121. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (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 (citation omitted). Each of these factors confirms that the requested fee is reasonable on a percentage basis.

(i) Time And Labor Expended By Counsel (*Goldberger* Factor 1)

The first *Goldberger* factor, which addresses the "the time and labor expended by counsel," strongly supports approval of the requested fee. Class Counsel spent over 6,500 hours prosecuting this case and, as discussed above, the lodestar multiplier is well within the range approved by Courts in this Circuit. The substantial time devoted to this litigation over three and a half years reflects the intensive effort Class Counsel exerted to bring this case to a favorable resolution, and was reasonable. Class Counsel among other things:

- Conducted an initial investigation of this case to develop the theories and facts that formed the basis of the allegations in the complaint, and responded to and, with for the claims that gave rise to the settlement, defeated Defendants' two complex motions to dismiss, filed years apart. Dkt. 29; Dkt. 231.

- Filed two important motions to compel in November 2012, which were granted and reaffirmed, despite heavy opposition and re-litigation by Phoenix. Dkt. 72 & 77; Dkt. 93, 101, 112–13, 115, 117, 123–24, 140.

- Completed fact discovery:

  - Served 80 document requests and, with expert assistance, analyzed over 1.2 million pages of documents produced by Defendants that exceeded 9 gigabytes of native files. Class Counsel also issued numerous third-party subpoenas to Defendants' reinsurers and actuarial and financial advisors (some of which required litigation to compel production). Sklaver Decl. ¶ 5.

  - Assisted in gathering and reviewing the production of 3,632 documents by Class Plaintiffs. *Id.*

- Took and defended over 20 days of depositions of 17 witnesses, including senior executives of Phoenix. Plaintiffs Fleisher and Berck were both deposed during full day depositions. *Id.*

- Obtained class certification for the 2011 COI increase in the *Fleisher* Action, supported by two expert reports, and defeated two motions to decertify the 2011 class. Dkt. 81, 135, 149, 230.

- Briefed motions for summary judgment filed by both parties, supported by extensive expert reports, exhibits and declarations, and defeated Phoenix's motion in the part that gave rise to this settlement. Dkt. 184, 190, 235.

- Conducted all-day jury testing in advance of trial before 24 mock jurors, divided into 3 panels of 8 for deliberations. Sklaver Decl. ¶ 5.

- Filed a joint pre-trial order totaling over a 100 pages on the liability phase alone. Dkt. 262. The parties also proposed jury instructions, verdict forms and voir dire questions. Dkt. 263, 265.

***20** • Filed or opposed 10 motions *in limine.* Dkt. 268, 273.

- Attended three full day, in-person mediation sessions in Boston conducted by a highly experienced mediator, preceded by mediation briefing. Sklaver Decl. ¶ 5; Green Decl. 7–9. All sessions were attended by counsel for Phoenix, counsel for Plaintiffs, as well as Mr. Fleisher. The terms of the Settlement were also negotiated in extensive teleconference and email discussions. Sklaver Decl. ¶ 5. A memorandum of understanding was negotiated in-person at Susman Godfrey's offices in New York City. Sklaver Decl. ¶ 5.

- Obtained the excellent result for the class, as described in the Final Approval Memorandum and supporting papers.

In sum, Class Counsel committed substantial time and resources to achieve an excellent recovery in this case. The time and lodestar figures will increase as counsel prepare for final-approval proceedings, handle claims administration issues, and continue to respond to class member inquiries.

(ii) Magnitude and Complexity of the Litigation (*Goldberger* Factor 2)

The second *Goldberger* factor, which addresses "the magnitude and complexities of the litigation," also strongly supports approval of the requested fee. The litigation was indisputably complex, as attested by the parties' extensive discovery and pre-trial order and the summary judgment records. *See City of Providence,* 2014 WL 1883494, at *16 (the "magnitude and complexity" of litigation supported award when counsel analyzed "1.3 million documents," "prepared for and took 12 fact depositions of executives of the Company," and "prepared an extensive motion for class certification").

The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards of practice, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or discriminate unfairly "within a class of insured." These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. If the litigation had not been settled, Class Counsel would have faced additional obstacles as Defendants continued to mount a vigorous defense, including a trial that would require substantial fact and expert testimony, and certain appeals thereafter.

(iii) The Risk of the Litigation (*Goldberger* Factor 3)

The third *Goldberger* factor, which addresses the "risk of the litigation," also strongly supports approval of the requested fee. The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable fee award]." *Goldberger,* 209 F.3d at 54 (citation omitted); *see also* *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 592 (S.D.N.Y.2008) ("Courts have repeatedly recognized that 'the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions."). Class Counsel confronted and overcame myriad risks in reaching the Settlement. Those litigation risks are discussed extensively above.

***21** In addition, "The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award." *City of Providence,* 2014 WL 1883494, at *14. As the Second Circuit has observed:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir.1974). [16] Unlike counsel for the Defendants, who are paid hourly rates and reimbursed for their expenses on a regular basis, Sussman Godfrey has not been compensated for any of its time (above 6,500 hours) with a lodestar value of over $2.7 million, or for any of its more than $900,000 in litigation expenses incurred since the case commenced in November 2011. Moreover, the firm would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation. *See* *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 471 (2d Cir.1974) ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *Marsh & McLennan,* 2009 WL 5178546, at *18 ("In numerous class actions ... plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever." (citing examples of cases dismissed)). The risk of no recovery in complex cases of this type is real, and is heightened when Class Counsel opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation.

(iv) The Quality of the Representation (*Goldberger* Factor 4)

The fourth *Goldberger* factor, which addresses the "the quality of representation," also supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See, e.g.,* *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983). Class counsel respectfully submits that the Settlement— which creates an overall value of $134 million— achieved in face of complex litigation and the real risk from the outset that the case could be dismissed and/or the class not certified, evidences the quality of Class Counsel's representation.

***22** Regarding the skills of Class Counsel, the Court previously appointed Sussman Godfrey as Class Counsel because the firm met all the requirements of Rule 23(g). [17] Susman Godfrey has significant experience with insurance litigation and class actions, including settlements thereof. *See* Sklaver Decl. ¶ 3. The lawyers working for the Class have substantial experience prosecuting large-scale class actions and life settlement litigation. *Id.* The work that Class Counsel has performed in litigating and settling this case, and the substantial resources they have committed to prosecuting the case, demonstrates their commitment to the Class and to representing the Class's interests. *See* *Morris,* 859 F.Supp.2d at 622. They also, frankly, did very good work.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *City of Providence,* 2014 WL 1883494, at *17. [18] Defendants are represented by skilled and highly regarded counsel from prestigious firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. In sum, all of the customary metrics indicative of high quality of representation weigh in favor of the requested fee.

v. Requested Fee In Relation to the Settlements (*Goldberger* Factor 5)

The fifth *Goldberger* factor, which addresses "the requested fee in relation to the settlement," also strongly supports approval of the requested fee. In *Costco,* the court held that "the fact that the requested fee is comparable to fees that courts have found reasonable ... weighs in favor of the fee's reasonableness." *Dupler v. Costco Wholesale Corp.,* 705 F.Supp.2d 231, 244 (E.D.N.Y.2010). As discussed above, the proposed award is well within the range of fees awarded by courts under the percentage method.

vi. Public Policy Considerations (*Goldberger* Factor 6)2

Finally, the sixth *Goldberger* factor, which addresses "public policy considerations," supports approval of the request fee. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf. *See In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005) ("[T]o 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"); *Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (" 'To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding' " (citation omitted)).

5. The Class's Reaction to the Fee Request

***23** In addition to the criteria set forth in *Goldberger,* courts in the Second Circuit consider the reaction of the Class to the fee request in deciding how large a fee to award. *See* *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 594 (S.D.N.Y.2008) ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable"); *In re Veeco Instruments Inc. Secs. Litig.,* Case No. 05–MDL–01695(CM), 2007 WL 4115808, at * 10 (S.D.N.Y. Nov. 7, 2007); *Maley,* 186 F.Supp.2d at 374 374 (when no one objected to fee request, finding that the "overwhelmingly positive" reaction by members of the Class "is entitled to great weight by the Court"); *see also* *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir.2005) ("The class's reaction to the fee request supports approval of the requested fees"). The Notice provided that Counsel may seek "an award for attorneys' fees of $6 million for, among other things, the non-monetary benefits conferred, to be paid for by Phoenix and not from the Settlement Fund, and up to one-third of the Settlement Fund after any reduction for Class members who opt-out," which amounts to $17,586,606.96 (= $6 million plus $11,586,606.96, *i.e.,* a third of $34,759,820.88). Notice ¶ 18. Class members, including many large and sophisticated businesses, were given until July 17, 2015, to object or exclude themselves from the Settlement. *Id.* That deadline passed and not a single objection was received. Declaration of Joel Botzet re: Notification, Requests for Exclusion and Settlement Administration Services, filed Aug. 19, 2015 ("Botzet Decl.") ¶ 7. Furthermore, aside from the Lima-affiliated entities, only three other Class members requested exclusion from the Class, representing a total of 26 Class policies. These 3 Class members own a combined 26 policies representing only 1.5% of the total Class of policies in the Settlement. *Id.* 8–9. "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.' " *In re Remeron Direct Purchaser Antitrust Litig.,* No. Civ. 03–0085 FSH, 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) (awarding fee of 33.3% of $75 mm settlement).

F. *Counsel's Motion for Reimbursement of Expenses is Granted*

Class Counsel also requests reimbursement in the amount of $902,564.49 for out-ofpocket expenses reasonably and necessarily incurred in connection with the prosecution of this Action. "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Anwar v. Fairfield Greenwich Ltd.,* Case No. 09–cv–118(VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.,* 818 F.2d 278, 283 (2d Cir.1987)). [19]

The expenses advanced in this litigation are described in the papers filed in support of this application. *See* Sklaver Decl. ¶ 21. These expenses were reasonable and necessary in this litigation, and have been expended for the direct benefit of the Class. *See Id.* They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with this litigation. *See Anwar,* 2012 WL 1981505, at *3 (reimbursing expenses such as "mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys" (quoting *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N.Y.2004))). The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary. *See, e.g.,* *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 525 (E.D.N.Y.2003) (noting that it is common practice to grant expense request and awarding $18.7 million in expenses where the "lion's share of these expenses reflects the cost of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, on-line legal research, and travel expenses."). [20]

G. *The Motion for Incentive Fees is Granted*

***24** Finally, Class Counsel seeks an incentive award of $25,000 for named plaintiff Marty Fleisher and $5,000 for named Plaintiffs Jonathan Berk and SPRR, as stated in the Notice. No Class member objected to this award. Courts "routinely award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley,* 2005 WL 2757792, at *10. [21]

This is not a case where the named plaintiffs had little or no involvement. Martin Fleisher, for example, spent at least 88 hours actively fulfilling his obligations as a Class representative, complying with all demands placed upon him during the prosecution and Settlement of this Action, and providing valuable assistance to Class Counsel for over three years. *See* Declaration of Marty Fleisher in support of Final Approval, filed Aug. 19, 2015, ¶ 13. Mr. Fleisher is a highly sophisticated named plaintiff, whose knowledge of the insurance industry and the pricing of life insurance products proved continually invaluable in this case.

The discovery obligations imposed on Mr. Fleisher were significant, including the Defendant taking a full day deposition of Mr. Fleisher, and a separate deposition of one of his analysts. *See* Fleisher Decl. ¶ 13. Mr. Fleisher reviewed pleadings and motions, reviewed other court filings, communicated regularly with Class Counsel, and was continuously involved in the litigation process. *See id.* Finally, showing his dedication to this case, Mr. Fleisher, who resides and works in New York, personally travelled to Boston to attend all three mediations in person. Mr. Fleisher is a graduate of NYU School of Law and his typical billable rate ranges from between $550 at the low end and $715 at the high end, and the opportunity cost alone for his time spent on this case well exceeds $25,000. *Id.* at ¶ 6, 13.

The contributions of the other two class members were less than Mr. Fleisher but still meaningful and set forth in the accompanying Sklaver declaration, and warrant $5,000 incentive and time award. *See Sklaver Decl.* ¶ 23.

CONCLUSION

The motions at Docket # # 308 and 315 in No. 11–cv–8405 and Docket # # 42 and 49 in No. 14–cv–08714 are granted in their entirety. The Clerk of the Court is directed to remove those motions from the court's list of open motions, and to close the file in these matters.

All Citations

Not Reported in Fed. Supp., 2015 WL 10847814

Footnotes

1 The Settlement provided for the reduction of a $42.5 million cash fund based on opt-outs, calculated using the proportional amount of COI overcharges paid by the opt-outs compared to the rest of the Class.

2 Phoenix's frequent assertion of STOLI challenges on multi-million dollar universal life policies is well documented in litigation filed across the country. *See* Sklaver Decl. ¶ 26 (listing cases); *Wall Street Journal,* "Vulture Investor Battles for Death–Bet Payouts," April 19, 2012, ("Phoenix has denied tens of millions of dollars in investors' claims for death benefits, its regulatory filings show. In 2008, its peak year for challenges, it reported seven claims in dispute, totaling $50 million, or 7.6% of the face amount of claims that it received that year. The industry average is less than 1%. It has been involved in dozens of lawsuits asking courts to void policies.... But Phoenix has continued to bring lawsuits.").

3 All capitalized terms shall have the meaning set forth in the Stipulation of Settlement, Dkt. 299–2.

4 The Second Circuit has also explained the disadvantages of the lodestar method: "In contrast, the lodestar [method] 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." *Id.* (citations and alterations removed).

5 *See also In re Beacon Assocs. Litig.,* No. 09 Civ. 3907(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) ("The trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128, 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (same); *Fogarazzo v. Lehman Bros., Inc.,* No. 03 Civ. 5194, 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) (same); *In re Comverse Tech., Inc. Sec. Litig.,* No. 06 Civ. 1825, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (same); *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 480 (S.D.N.Y.2009) (same).

6 In calculating the value of the monetary benefit, Courts include any amounts earmarked for attorneys' fees. *See id. See Velez,* 2010 WL 4877852, at *18 ("Based on the 'percentage of the fund' approach for evaluating class action fees, the amount of attorneys' fees in question is compared to the overall settlement value, **including any portion earmarked for said fees.").**

7 Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 3d. Ed., 35 (2010) ("Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. **The primary method is based on a percentage of the actual value to the class of any settlement fund plus the actual value of any nonmonetary relief.");** Principles of the Law of Aggregate Litigation, **The** American Law Institute, Mar 1, 2010, § 3.13 ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary **value** of the judgment or settlement.").

8 *See Sheppard v. Consol. Edison Co. of New York,* No. 94–CV–0403(JG), 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (approving fee petition where fee was measured as a percentage of the "total settlement," which included $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief); *In re Auction Houses Antitrust Litig.,* No. 00 CIV. 0648(LAK), 2001 WL 170792, at *10, *17 (S.D.N.Y. Feb. 22, 2001) *aff'd,* 42 F. App'x 511 (2d Cir.2002) (approving fee measured as a "percentage of the recovery," which was valued at $512 million based on cash payments and nonmonetary discount certificates; the court noted that valuing the certificates, through expert testimony, was relevant to "fixing the amount of lead counsel's fee, which is fixed as a percentage of the gross recovery"); *McCoy v. Health Net, Inc.,* 569 F.Supp.2d 448 (D.N.J.2008) (awarding fee of $69.7 million, which represents "28% of the $249 million value of the common fund **plus the parties' lowest estimated value of the injunctive relief"** of $28 million and noting: "The value of the injunctive relief here is a highly relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees."); *cf. Blessing v. Sirius XM Radio Inc.,* 507 F. App'x 1, 4 (2d Cir.2012) (district court properly determined that settlement was fair based in part on its valuation of the "nonmonetary antitrust" benefits, principally a "price freeze").

9 A Pocket Guide for Judges, 3d. Ed., 34–35 (2010).

10 The Second Circuit has held that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 437 (2d Cir.2007). District courts in the Second Circuit agree that the entire-fund rule applies even if some portion of the unclaimed fund reverts to defendants. *See, e.g., In re Nigeria Charter Flights Litig.,* No. 04–CV–304, 2011 WL 7945548, at *5 (E.D.N.Y. Aug. 25, 2011) *report and recommendation adopted,* No. 04–CV–304, 2012 WL 1886352 (E.D.N.Y. May 23, 2012); *Aros v. United*

Rentals, Inc., No. 3.10–CV–73 JCH, 2012 WL 3060470, at *5 (D.Conn. July 26, 2012); Bozak v. FedEx Ground Package Sys., Inc., No. 3:11–CV–00738–RNC, 2014 WL 3778211, at *6 (D.Conn. July 31, 2014). Here, the entire fund, prior to the opt-out, is $42.5 million, plus the $6 million earmarked for attorneys' fees. That is one proper benchmark for the monetary portion of the fund.

11 *See, e.g., City of Providence,* 2014 WL 1883494, at *20 (awarding 33% of $15 million settlement recovery); *In re Sadia S.A. Sec. Litig.,* No. 08 Civ. 9528(SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement recovery); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 135 (S.D.N.Y.2010) (1/3 of $35 million); *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding 33.3% fee of $510 million net settlement recovery); *In re Priceline.com, Inc. Sec. Litig.,* 2007 WL 2115592, at *5 (D.Conn. July 20, 2007) (awarding 30% of $80 million settlement recovery); *Maley v. Del Global Tech. Corp.,* 186 F.Supp.2d 358, 370 (S.D.N.Y.2002) (awarding 1/3 of $11.5 million recovery); *see also In re Oxford Health Plans, Inc. Sec. Litig.,* No. MDL–1222 (CLB) slip op. at 7 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement recovery).

12 *See also In re Payment Card Interchange Fee Lit.,* 991 F.Supp.2d 437, 446 (E.D.N.Y.2014) (award of $554.8 million was appropriate partly because "this case settled only after many years of hard-fought litigation. Privately negotiated fees in complex cases ... often include a higher fee for cases that proceed past a motion to dismiss, discovery, summary judgment, or other benchmarks").

13 *See, e g., In re Payment Card Interchange Fee Lit.,* 991 F.Supp.2d 437, 446 (E.D.N.Y.2014) (awarding although it is impossible to know with certainty the ultimate value of the injunctive relief, it may very likely exceed the value of the monetary relief in the long run. The injunctive relief is therefore a "relevant circumstance," to say the least (citation omitted); *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 524–25 (E.D.N.Y.2003) *aff'd* 396 F.3d 96 (2d Cir.2005) (awarding $220 million fee and explaining: "the Settlements are so large, particularly considering the injunctive relief, that even the exorbitant fee I award seems small in comparison ... I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has"); *see also Torres v. Gristede's Operating Corp.,* 519 Fed.Appx. 1, 5 (2d Cir.2013) (where fee award was analogized to a common fund percentage award, fee was justified in part by "injunctive and other non-monetary relief").

14 *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Gierlinger v. Gleason,* 160 F.3d 858, 882 (2d Cir.1998) (rates "should be 'current rather than historic' ") (citation and internal quotations omitted); *LeBlanc–Sternberg v. Fletcher,* 143 F.3d 748, 764 (2d Cir.1998) (current rates "should be applied in order to compensate for the delay in payment"); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989) (citation omitted) (Using current rates helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest.").

15 Courts compare hourly rates with those prevailing in the community. *See Luciano v. Olsten Corp.,* 109 F.3d 111, 115 (2d Cir.1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted). One source commonly used by courts in this Circuit to assess prevailing rates in this District is the National Law Journal Survey. *See, e.g., Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.,* No. 76 Civ. 2125, 2005 U.S. Dist. LEXIS 5200, at *35 (S.D.N.Y. Apr. 4, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $ 750 per hour and junior partners charge as much as $ 490 per hour"). Current median rates are often above $500 in New York. *See* Jones, Leigh, *The best still charge the most: For high-end legal work, firms remain in the driver's seat over hourly rates.* The National Law Journal (Online) (Dec. 17.2012) at *2 ("Not surprisingly,

the biggest firms in the biggest markets generally had the highest rates. Several firms that have their largest offices in New York and Washington had median rates above $500, according the NLJ survey."). The National Law Journal survey for 2012 shows that partners at New York firms charge between $330 to $1200 and associates range between $215 to $760. *See* Sklaver Decl. Ex. 1 (2012 National Law Journal survey).

16 *See also In re Dreyfus Aggressive Growth Mut. Fund Litig.,* No. 98 CV 4318 HB, 2001 WL 709262, at *6 (S.D.NY. June 22, 2001) ("Contingency risk is the principal, though not exclusive factor, courts should consider in their determination of attorneys' fees."); *Flag Telecom,* 2010 WL 4537550, at *27 ("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."); *In re Am. Bank Note Holographies,* 127 F.Supp.2d 418, 433 (S.D.N.Y.2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

17 *See Morris,* 859 F.Supp.2d at 621–22 (noting that Rule 23(g)) requires the court to consider "the work counsel has done in identifying or investigating potential claims in the action, ... counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, ... counsel's knowledge of the applicable law, and ... the resources counsel will commit to representing the class") (internal quotation marks omitted).

18 *See also Anwar,* 2012 WL 1981505, at *2 (considering "the quality and vigor of opposing counsel"); *Marsh & McLennan,* 2009 WL 5178546, at *19 (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations"); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 148 (S.D.N.Y.2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

19 See *also In re Arakis Energy Corp. Sec. Litig.,* No. 95cv3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Vitamins Antitrust Litig.,* No. 99–197(TFH), MDL No. 1285, 2001 WL 34312839, at *13 (D.D.C. July 16, 2001) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of ... reasonable litigation expenses from that fund.... Courts have routinely awarded expenses for which counsel would normally directly bill their clients.").

20 The Settlement, and the preliminary approval order, also provides that Notice and Administrative Costs shall be paid from the Settlement Fund as they become due. Settlement ¶¶ IV.E, VIII; Prel. Appr. Order, 11–cv–8405, Dkt. 303 ¶ 10. Class Counsel seeks the Court's approval to continue making those payments as they become due. Current amounts are set forth in the Declaration.

21 *See also Anwar,* 2012 WL 1981505, at *3 ("Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."); *Varljen v. H.J. Meyers & Co.,* No. 97 CIV 6742(DLC), 2000 WL 1683656, at *4 (S.D.N.Y. Nov. 8, 2000) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel").

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Ortiz v. Chop't Creative Salad Co. LLC, S.D.N.Y., January 16, 2015

524 F.Supp.2d 425
United States District Court,
S.D. New York.

Selwyn SILBERBLATT, on behalf of himself and all others similarly situated, Plaintiff,
v.
MORGAN STANLEY and Morgan Stanley DW Inc., Defendants.

No. 05 Civ. 7569(PKC).
|
Nov. 19, 2007.

Synopsis
Background: Buyers of precious metals sued seller claiming that seller breached contract, committed fraud, was unjustly enriched, engaged in negligent misrepresentation and violated Uniform Commercial Code and deceptive trade practices statute by misrepresenting that each buyer had individual interest in specific units of metals. Parties submitted proposed settlement for court approval, as required by federal procedure rules.

Holdings: The District Court, P. Kevin Castel, J., held that:

cash offer of $1.5 million, as partial reimbursement of $4 million in storage fees, would be approved;

proposed allocation would be approved, when amount varied depending upon applicability of statute of limitations to particular recipient;

court would not accept as amount on which legal fees would be computed, valuation of remedial measures undertaken by seller;

attorney fees would be limited to $300,000, representing 20% of cash offer; and

class representative was entitled to payment for two trips from Maine to New York City, to work with counsel and give deposition.

Ordered accordingly.

Attorneys and Law Firms

***427** Ashley H. Kim, Joel Paul Laitman, Kurt Michael Hunciker, Schoengold Laitman & Lometti, P.C., Samuel P. Sporn, Schoengold & Sporn, P.C., Frank Rocco Schirripa, Schoengold Laitman & Lometti, P.C., New York City, for Plaintiff.

Richard A. Rosen, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City, for Defendant.

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge.

This is an application for final approval of a settlement of the claims of a certified class. In this context, plaintiff's counsel seeks an award of attorneys' fees on a percentage basis, valuing the recovery at $4,355,000, of which $2,855,000 is referred to as "Remedial Consideration." The Remedial Consideration is a potpourri, including revisions to sales brochures, alterations to third-party agreements and temporary modification of pricing policies to which class members and non-class members benefit equally. Plaintiff's valuation is flawed and grossly inflated. Even at that, only 500 of the approximately 23,000 class members, those who have open accounts, would be in a position to benefit from the Remedial Consideration. If plaintiff's request for fees and expenses were granted in full, counsel would receive 63% of the cash component of the settlement, an unfair result.

The Court concludes, after a hearing, that the cash component of the settlement, $1.5 million, is fair, reasonable and adequate to the members of the class and, on this basis, the settlement is approved. Plaintiff's counsel's fee award will be set at $300,000 or 20% of the cash component of the settlement, plus expenses of $150,016.44. [1]

The application of Selwyn Silberblatt, class representative, to be paid $9,600 in addition to the amount awarded to other members of the class is denied. A payment to him of $1,920 will be approved plus expenses of $840.

***428** I. *Prior Proceedings*

This action was commenced on August 26, 2005. By Order dated October 18, 2006, this Court certified a class consisting of all persons who entered into contracts to purchase precious metals from and through Morgan Stanley DW Inc., the retail broker-dealer subsidiary of Morgan Stanley, during the period February 19, 1986 through August 26, 2005.

The parties engaged in extensive discovery and expert discovery closed on January 31, 2007. Thereafter, I set a schedule for defendants' proposed motion for summary judgment. Proceeding on a separate track, the parties engaged in private mediation. On April 20, the Court was informed that the parties had entered into a Memorandum of Understanding, setting forth the terms of a proposed settlement.

I granted a motion for preliminary approval of the settlement and directed that notice be given to the members of the class. The proposed notice was clear and gave fair notice of the terms of the settlement and of the application for fees. I set September 14, 2007 as the date for individuals to opt out of the class and also as the date for class members to object to the settlement or to the request for attorneys' fees.

Notices were mailed to over 24,317 individuals. (Senzer Aff't, ¶ 4–6.) Notice was also published in the *Wall Street Journal.* (*Id.,* ¶ 7.) Opt outs were timely received from 27 individuals. (*Id.,* ¶ 10.) No class member objected to the settlement or fee application. (*Id.,* ¶ 10.) At the hearing on September 24, no objector appeared and no witnesses were called by the parties to the settlement. (Hearing Tr. 2–3.) Counsel orally argued their positions and responded to questioning from the Court.

II. *Fairness, Reasonableness and Adequacy of The Settlement from the Standpoint of the Class*

A. *Standard for Reviewing the Fairness of the Settlement*

Rule 23(e) (1)(A) provides that "[t]he court must approve any settlement ... or compromise of the claims, issues, or defenses of a certified class." Rule 23(e)(1)(C) requires, as a precondition to approval of a settlement that would bind class members, that the Court find, after conducting a hearing, that the settlement "is fair, reasonable, and adequate." The parties have submitted to the Court a "Stipulation and Agreement of Settlement" (the "Settlement Agreement"), containing all of the terms of their agreement.

In conducting the review mandated by Rule 23(e), I have a duty "to make a considered and detailed assessment of the reasonableness of proposed settlements ...." *Weinberger v. Kendrick,* 698 F.2d 61, 82 (2d Cir.1982) (Friendly, J.). "The district court must consider many factors, including the complexity of the litigation, comparison of the proposed settlement with the likely result of litigation, experience of class counsel, scope of discovery preceding settlement, and the ability of the defendant to satisfy a greater judgment." *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 292 (2d Cir.1992) (citing *Weinberger,* 698 F.2d at 73–74 and *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974)).

B. *Complexity and the Likely Results of Litigation*

This is a diversity action for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, negligent misrepresentation, and violations of N.Y. Gen. Bus. Law § 349–a and N.Y.U.C.C. § 2–313, arising out of the payment of storage fees associated with precious metals purchases. ***429** Plaintiff alleges that he and other members of the class were misled into believing that specific bars or units of precious metals were allocated to them and, therefore, not subject to claims of creditors of defendants. He further alleges that defendants did not fully and truthfully disclose the true nature of defendants' purchase and storage practices and that plaintiff and members of the class paid excessive storage fees. Defendants assert that they did, indeed, purchase actual, physical metals for customers, albeit on an unallocated basis. They further assert that they made no misrepresentations regarding purchase or storage of precious metals and, in any event, no customer sustained any economic injury.

Although the claims were relatively straightforward in terms of the theories of liability, plaintiff would have had to overcome difficult obstacles in proving them. Plaintiff would have endeavored to prove that the nature of the contractual documents and surrounding representations left the impression that a quantity of precious metal would be segregated or allocated for the specific buyer. It is fair to observe that defendants' statements did not drive home the point that no specific metals were segregated for the particular purchaser. Yet, no single document indisputably excluded the possibility of unallocated holdings. For example, a silver purchaser was not given the number of a specific bar owned by him, which would have pointed toward an allocated purchase.

Among the hurdles for plaintiff was that no class member suffered a loss. Unallocated metals *could* have been subject to a lien by a creditor of defendants or the ware-houseman but none were. Also, it would have been difficult to establish that there was illegality in charging a storage fee for unallocated precious metals, absent a misstatement. Proving that a storage fee of .75% was excessive and unlawful would have been difficult in both legal theory and in fact.

C. *The Proposed Settlement and Its Value*

As noted, the settlement consists of $1,500,000 in cash and $2,855,000 in so-called Remedial Consideration. Plaintiff's counsel asks that the Remedial Consideration be included in the overall valuation of the settlement. However, counsel seeks payment of all attorneys' fees and expenses out of the cash consideration. I will first address the cash component, next the allocation, and, finally, the Remedial Consideration.

1. *Cash*

In evaluating the adequacy of the cash component, I note that the storage fees were a very small portion of the overall precious metal transaction. Storage fees charged by defendants were 0.75% of the value of the customer's precious metal holdings. The aggregate amount of storage fees collected by defendants from class members over the class period was about $4 million. (Hearing Tr. 19.)

The full amount of all customer payments, $4 million, would have been at the high end of the range of any reasonably likely recovery, if liability had been established. A settlement of $1.5 million which amounts to 37.5% of all sums paid as storage fees during the class period is a very good settlement. This was not a good case for punitive damages because it would have been difficult to prove knowing misstatements or any extreme or outrageous behavior.

Standing alone and without the Remedial Consideration, the cash component renders the settlement fair, reasonable and adequate to the members of the class.

***430** 2. *Plan of Allocation: Pre–2000 versus Post–2000 Claimants*

Under the terms of the settlement, the cash portion of the settlement, which is $1.5 million less amounts paid to class counsel and the class representative, will be allocated such that 20% will be paid to the those incurring storage fees prior to January 1, 2000 and 80% to those incurring storage fees from January 1, 2000 to the end of the class period. The distinction was drawn in part because of the arguable bar of the statute of limitations for some pre–2000 claims.

I conclude that the distinction is warranted. New York, whose law would likely govern this diversity action, has a six-year limitations period for claims asserted in contract. N.Y. CPLR § 213(2). None of the claims in the Amended Complaint have a longer limitations period, with the possible exception of the fraud claim to which tolling might apply. N.Y. CPLR § 213(8). It would be difficult to establish *scienter* on the part of defendants, a requirement of a fraud claim.

Exactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate. While there are some claimants who held precious metals from August 26, 1999 to December 31, 1999 whose claims would be timely under New York's six-year limitations period for claims asserted in contract, the limitations period is not the sole factor in assessing the reasonableness of the allocation. Older claims, even if not time-barred, would have been more difficult to prove. The plan of allocation meets the threshold of fairness.

3. *Remedial Consideration*

There are some 22,653 members of the class with accounts no longer open as of the last day of the class period, January 10, 2007. There were approximately 500 class members with accounts open on that date. (Hearing Tr. 18.) To those who had open accounts, the so-called Remedial Consideration was available.

No declaratory or injunctive relief was sought in the complaint. The claims of those with open accounts were not analytically stronger than those in the post–2000 period with closed accounts.

The Remedial Consideration consists of modifications to the customer disclosure statements explaining, among other things, the difference between "allocated" and "unallocated" ownership. Plaintiff's expert, Jeffery M. Christian of CPM Group, describes himself as "one of the world's foremost authorities on the precious metals markets ...." (Christian Aff't, ¶ 1). He breaks down the value of the revised disclosures into the following sub-categories: modification of customer disclosure, valued at $339,502.39; modification of Internal Broker Website, valued at $339,502.39 and modification of customer brochure, $339,502.39. A well-crafted letter on fancy, embossed stationary sent by overnight courier to each of the 500 holders could have conveyed the same information with much the same effectiveness at a fraction of the combined value exceeding $1 million. The methodology of valuation does not tie the disclosures to the approximately 500 holders to whom the new dis-closures will be made. Class counsel conceded that the number of holders was not known as of the date of the expert's valuation. (Hearing Tr. 35–42.)

The Remedial Consideration also includes revisions to certain agreements between defendants or their affiliates and JP Morgan Chase and FideliTrade. The revisions afford better protections to customers. However, in each instance, the Settlement Agreement recites that "[d]efendants reserve the right to amend the ***431** terms of the agreement at any time." Thus, the value of such a revision is inherently uncertain.

Defendants also have liquidated the precious metal holdings at a London storage facility and now use a Delaware facility. [2] Also, defendants agree that, during the next five years if any storage facility assigns its assets for the benefit of creditors or is in bankruptcy proceedings, then defendants will move the precious metals out of the warehouse or otherwise take steps to protect the customers.

Finally, there is (1) an adoption of quarterly billing, rather than a nonrefundable annual fee, so that an investor who holds for fewer than four quarters pays less in fees; and (2) a one-year storage fee cap reduction (from .75% per year to either .36% per year for unallocated precious metals or .60% per year for allocated precious metals). Class members and non-class members will benefit from these changes. The method of valuation utilized by the expert for these two items is exemplary of the flaws throughout the report. For the purposes of valuing the change to quarterly billing, the expert assumes that those who hold precious metals will keep them in unallocated metals and sell them off in equal installments over the four quarters of the following year; this is the low-end scenario to which he assigns a value of $144,288, including interest. For the high-end scenario, he assumes that all the metals will be stored on an allocated basis (with a higher fee) but will all be sold in the first quarter (a period the expert describes as the traditionally heavy selling period); this produces a figure of $543,203.82, including interest. He then averages the two figures to arrive at a value of $343,746.17. However, when valuing the reduction in storage fees, the expert reverses fields and instead assumes no sales during any of the first three quarters and that all precious metals will be held at least into the fourth quarter. The inconsistent application of fundamental assumptions in a manner that inflates values to the benefit of plaintiff's counsel renders the expert's report unreliable.

The Remedial Consideration undoubtedly has some value but that value has not been proven. The methodology offered by the plaintiff's expert is so flawed as to be entitled to little weight. It assumes continued holdings for valuing one item but assumes the opposite in valuing another. It places a value on disclosures without knowing to how many investors the disclosures would be made. It was the plaintiff's privilege to offer credible evidence in support of valuation. Plaintiff was given the opportunity to call live witnesses but declined to do so. (Hearing Tr. 2–3.) The Court is incapable of fashioning an alternative valuation in the absence of a record that would enable it to do so in a reliable manner. No application to supplement the record was made at or since the hearing and do-overs are not an encouraged practice.

Of course, were the Court to assign some value to the Remedial Consideration, it would be unfair to saddle the 22,653 class members with closed accounts with a subsidization of the attorneys' fees attributable to Remedial Consideration that they will not receive. The creation of a subclass of those with open accounts on January 10, 2007 may have been appropriate, if the parties had provided a factual record adequate to do so. Unless fundamentally restructured, those in the subclass would receive a fraction of the cash, all of the ***432** Remedial Consideration and any attorneys' fees attributable to the Remedial Consideration.

The Class Action Fairness Act of 2005 ("CAFA") governs the Court's consideration of proposed settlements in cases to which Rule 23 applies. 28 U.S.C. § 1711(2). It requires written findings as to any settlement in which class members receive coupons and permits the court to receive expert testimony on the "actual value" of the coupons. 28 U.S.C. § 1712(d) and (e). Further, it places restrictions on how attorney's fees are awarded in coupon settlements by, for example, requiring that the award be based on the value to the class of the coupons that are redeemed. 28 U.S.C. § 1712(a). The statute does not apply to all forms of non-monetary relief and, indeed, permits the use of "a lodestar with a multiplier method" in awarding fees where injunctive relief is obtained. 28 U.S.C. § 1712(b)(2) and (c).

The Seventh Circuit has had occasion to observe that a non-monetary benefit to class members—pre-paid express envelopes—had characteristics in common with coupons but were not coupons within the meaning of CAFA, principally because they represented the entire product and not just a discount on the price of the product. Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir.2006).

Here, the reduction in storage fees may be viewed as a discount on a future purchase and, thus, has an important characteristic in common with a coupon. But unlike a coupon, the discount is not limited to class members. The discount is incapable of transfer because there would be no point to a transfer because the price reduction has no relationship to class membership. Thus, it can have no value in a secondary market. [3] It fairly may be viewed as an across-the-board re-pricing of a component of the total price. Nothing is known of how this pricing component factors into the overall price to the customer. The parties have not presented me with any commitment to refrain from other charges or price increases so that the value of the reduction is quite uncertain.

The issue of whether a price reduction available to non-class members is a "coupon" under CAFA is an issue that has not been briefed by the parties, is likely to recur in future cases and need not be resolved in this case. That an item of non-monetary consideration may not fall within the statute's use of the term "coupon" does not make it any less worthy of close judicial scrutiny. Whether or not the storage fee reduction is a "coupon," its value has not been proven. I recognize that (with or without CAFA) I have the discretion to hear expert testimony on valuation and, indeed, could appoint an expert. Rule 706, Fed.R.Evid. The parties have been afforded the opportunity to present live witnesses but declined to do so and I see no good reason for the Court to appoint an expert under the circumstances described herein.

On this record, the value of the Remedial Consideration has not been proven.

D. *Experience of Counsel*

Lead plaintiff's counsel has been admitted to practice in the State of New York for 50 years. He and his firm have had extensive class action experience. Defendants' counsel is a top national law firm with extensive experience defending complex ***433** and difficult lawsuits. Defendants had the resources to fight the claims through trial and on appeal.

E. *The Negotiations*

The settlement was achieved as a result of arm's-length negotiations conducted under the supervision of an experienced private mediator, Michael D. Young.

F. *Scope and Extent of Discovery*

Judging by one of the disputes that came before me, plaintiff's counsel were aggressive in the pursuit of discovery. The parties report that plaintiff conducted nine depositions in this case and that defendants produced thousands of pages of documents.

G. *Ability of Defendants to Withstand a Judgment for a Greater Sum*

There is no serious question that the defendants could have withstood a judgment for an amount greater than that proposed to be paid in settlement.

H. *Reaction of the Class*

No class member has objected to the settlement. This speaks in favor of its reasonableness but is not conclusive.

* * * * * *

Taking all of these factors into account, I conclude that a cash payment of $1,500,000 to the members of the class, allocated as indicated above, is fair, reasonable and adequate and it is approved.

III. *Attorneys' Fees and Expenses*

Plaintiff's counsel seeks a fee award of $783,900. In support of the reasonableness of the figure, it reports a "lodestar" of $1,310,853. For the reasons more fully explained below, I conclude that an attorneys' fee award of 20% of the cash consideration or $300,000 is fair and appropriate.

In reviewing a fee application in the class action context "the court is 'to act as a fiduciary who must serve as a guardian of the rights of absent class members' ". Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.L.C., 504 F.3d 229, 249–50 (2d Cir.2007) (quoting City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1099 (2d Cir.1977)). The award "must reflect 'the actual effort made by the attorney to benefit the class'." *Id.*

The Second Circuit has provided substantial guidance to the district courts on common fund fee applications in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir.2000). *Goldberger* made plain that the district court has discretion to use either the lodestar or percentage in setting a fee award.

> In sum, we hold that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases. Of course, no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee ....

Id. at 50.

Goldberger notes that "the lodestar remains useful as a baseline even if the percentage method is eventually chosen." *Id.* It serves as "a 'cross-check' on the reasonableness of the requested percentage." *Id.* (quoting *General Motors,* 55 F.3d at 820). "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court .... Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Id.* (citations ***434** omitted). The Second Circuit's recent opinion in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 493 F.3d 110, 117–18 (2d Cir.2007), moves away from the concept of a "lodestar" in favor of a "presumptively reasonable fee." "The reasonable hourly rate is the rate a paying client would be willing to pay." *Id.* at 117.

A. *The time and labor expended by counsel.*

The first of the traditional factors in determining a reasonable common fund fee requires consideration of the time and labor expended by counsel. *Id.* Here, partner Samuel P. Sporn of Schoengold, Sporn, Laitman & Lometti, P.C., bills at the rate of $675 per hour. One other partner and an "of counsel" each bill at $550 per hour. Three associates of varying seniority and experience bill at $290, $350 and $425 per hour. While the record developed by plaintiff's counsel is skimpy, I nevertheless conclude—for the limited purpose of a crosscheck—that, taking account of the *Arbor Hill* factors, a paying client would be willing to pay these rates. [4] The 2,838.15 hours are not well-documented beyond a cursory summary. Nevertheless, I will use the $1,310,853.50, solely as a crosscheck on the reasonableness of the percentage of recovery award.

B. *The magnitude, complexities and risk of the litigation and quality of representation.*

In discussing the fairness of the consideration to be paid in settlement, I have addressed the nature and magnitude of the claims, their complexity and the risk of success or failure and I will not do so again.

C. *The requested fee in relation to the settlement.*

Plaintiff's counsel's proposed fee of $783,900 is 18% of plaintiff's full valuation of the settlement, including Remedial Consideration, of $4,355,000. When the $783,900 is added to the expenses of $150,016.44, the total requested fees and expenses, $943,916.44, would amount to 63% of the cash component. A fee award of $300,000, which I conclude is reasonable, represents 20% of the cash consideration. It is a negative multiplier of the "lodestar" of 4.4. Expenses in this case are $150,016.44 and I conclude they are reasonable under the circumstances. Total fees and expenses of $450,016.44 will be awarded, which amounts to 30% of the cash component.

D. *Public policy considerations.*

While at least one other Circuit has viewed 25% of the recovery as a "benchmark," the *Goldberger* court noted that "we adhere to our prior practice that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.' " 209 F.3d at 53 (citation omitted). *Goldberger* affirmed a fee award that amounted to 4% of the total recovery. Percentages of 11% ***435** to 19% have been awarded in cases with recoveries in the $50–75 million range. *See id.* at 52. Judges of this court have approved fees of 20% of the recovery net of expenses, *In re Independent Energy Holdings PLC,* No. 00 Civ. 6689, 2003 WL 22244676 at *7–*9 (S.D.N.Y. Sept. 29, 2003), and 20% of the cash and stock, *Varljen v. H.J. Meyers & Co., Inc.,* No. 97 Civ. 6742, 2000 WL 1683656 at *5 (S.D.N.Y. Nov.8, 2000). One court has approved a fee award of 8% of the total settlement amount. *Klein v. Salvi,* No. 02 Civ. 1862, 2004 WL 596109 at *11 (S.D.N.Y. March 30, 2004). I recognize that there are judges of this court who have awarded higher percentages in other circumstances.

IV. *Differential Payment to Class Representative*

The class representative seeks $9,600 as an "award" and $840 in reimbursement of out-of-pocket expenses in this case. Mr. Silberblatt undertook the selfless task of serving as a representative for the class, a fiduciary responsibility. Absent class members are entitled to repose confidence and trust in a class representative to pursue claims with diligence and refrain from proposing a settlement which is unreasonably low. This confidence derives in large measure from knowing that the class representative stands in the same shoes as all other members of the class. If the class does well, the class representative will do well in the same proportion to others.

Payments to class representatives, while not foreclosed, should be closely scrutinized. *See* *Weseley v. Spear, Leeds & Kellogg,* 711 F.Supp. 713, 720 (E.D.N.Y.1989) (Nickerson, J.); *see also* *Brown v. Steinberg,* Nos. 84 Civ. 4654, 84 Civ. 4665 and 84 Civ. 8001, 1990 WL 161023 at *3–*4 (S.D.N.Y. Oct.13, 1990) (Motley, J.).[5] A differential payment may be appropriate in order to make the class representative whole. The representative plaintiff may have lost wages, vacation time or commissions from sales because of time spent at depositions or other proceedings. *See, e.g., Varljen v. H.J. Meyers & Co.,* No. 97 Civ. 6742, 2000 WL 1683656 at *5 n.2 (S.D.N.Y. Nov 8, 2000) ("lost wages" may be recovered). A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded. *See* *Roberts v. Texaco, Inc.,* 979 F.Supp. 185, 200–05 (S.D.N.Y.1997) (extensive findings on risk of retaliation) (Brieant, J.). A balance must be struck so that a class representative does not view his prospect for rewards as materially different from other members of the class, yet is not disadvantaged by his service in pursuing worthy claims.[6]

***436** Here, Mr. Silberblatt reports that he operates an herb farm in Maine and is endeavoring to launch "an entrepreneurial venture in the field of music education." (Silberblatt Aff't, ¶ 2) He spent time "staying informed and involved in the case during the settlement and Court hearing in this matter." (*Id.,* ¶ 4) Prior to the litigation, he pursued the issue with Morgan Stanley and read numerous articles on the subject. (*Id.,* ¶ 6–8) He reviewed drafts of the complaint and traveled to New York before the filing of the action and again for his deposition. (*Id.,* ¶ 10) He asserts that he has spent 240 hours on the matter and should be compensated at the rate of $40 per hour. (*Id.,* ¶ 16) Most of the work described is that which any person undertaking the task of class representative ought to expect and should not be compensated out of class funds. The two trips to New York, for which he spent a total of 48 working hours, stand in a different posture and presented a substantial inconvenience to him. *Cf.* *Matter of Cont'l Illinois Sec. Litig.,* 962 F.2d 566, 571–72 (7th Cir.1992) (denial of incentive award affirmed where representative spent a few hours at a deposition and there was only a slight risk of exposure to costs or sanctions). Reimbursement of these hours at $40 per hour ($1,920), plus out-of-pocket expenses of $840, is reasonable. The total amount approved for payment to Mr. Silberblatt is $2,760. pocket expenses of $840, is reasonable. The total amount approved for payment to Mr. Silberblatt is $2,760.

Conclusion

The settlement is approved. Attorneys' fees of $300,000 and expenses of $150,016.44 are awarded to plaintiff's counsel. Selwyn Silberblatt may be paid $2,760 out of class funds.

SO ORDERED.

All Citations

524 F.Supp.2d 425

Footnotes

1 The award for expenses includes $44,318.52, which either was paid or will be paid by plaintiff's counsel to Garden City Group for the performance of administrative functions in connection with the settlement, including dissemination of the notice of proposed settlement to class members. Any additional amounts owed to Garden City Group will be paid from the Cash Settlement Fund, as set forth in the Stipulation and Agreement of Settlement.

2 The physical location of the precious metals is somewhat tangential to plaintiff's claim, although, if a lien issue were ever to arise, it may be more burdensome for some class members to litigate a lien challenge in the U.K. rather than Delaware.

3 The Third Circuit considered the likely rate of utilization, the transfer feature and the value of the coupons in a secondary market as potential indicators of value. *In re General Motors Corp. Pick–Up Truck Fuel Tank Litig.,* 55 F.3d 768, 806–10 (3d Cir.1995).

4 In other areas of the law and based on better developed records, I have approved fees in the $400 to $555 range. *BMS Entertainment/Heat Music LLC v. Bridges,* No. 04 Civ. 2584, 2007 WL 1989292 at *2, *4 (S.D.N.Y. July 6, 2007) (partners in copyright suit: $400–555; associates: $225–440); *Martinez v. Port Authority of N.Y. and N.J.,* No. 01 Civ. 721, 2005 WL 2143333 at *26 (S.D.N.Y. Sept. 2, 2005) (lead trial counsel in civil rights case: $400); *In re AMF,* 334 F.Supp.2d 462, 467–68 (S.D.N.Y.2004) (securities class action: partners in range of $315 to $545 per hour). If I were to reduce Mr. Sporn's rate to $550, it would reduce the overall fee calculation by a mere $36,625. The figure proposed by plaintiff's counsel is sufficient for cross-check purposes.

5 I note that at the outset of a suit brought under the Private Securities Litigation Reform Act ("PSLRA"), a lead plaintiff would be required to certify that he "will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 U.S.C. § 78u–4(a)(2)(A)(vi). The PSLRA also provides that "[t]he share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of the class shall be equal, on a per share basis" to the amount awarded to all other members of the class, but goes on to state that "[n]othing 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." 15 U.S.C. § 78u–4(a)(4). This case is not brought under the PSLRA and I give its provisions no weight in this case.

6 I am mindful that other respected judges have viewed a willingness to come forward to faithfully pursue a worthy claim with diligence and success as grounds for some level of award. *See, e.g., In re Polaroid,* No. 03 Civ. 8335, 2007 WL 2116398 at *3 (S.D.N.Y. July 19, 2007); *Sheppard v. Consolidated Edison,* No. 94–cv–0403, 2002 WL 2003206 at *5–*7 (E.D.N.Y. Aug.1, 2002); *Dornberger v. Metropolitan Life Ins. Co.,* 203 F.R.D. 118, 124–25 (S.D.N.Y.2001); *Genden v. Merrill Lynch,* 700 F.Supp. 208, 210 (S.D.N.Y.1988). An empirical study of incentive awards reveals that they have been granted in 28% of 374 examined cases, including 59% of consumer credit class actions, 46% of employment discrimination class actions and 7% of mass tort actions. T. Eisenberg and G. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 U.C.L.A. L.Rev. 1303, 1322 (2006).

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by H.B. Automotive Group, Inc. v. Kia Motors America, Inc., S.D.N.Y., July 25, 2018

2010 WL 363113

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

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

In re AOL TIME WARNER SHAREHOLDER DERIVATIVE LITIGATION.

No. 02 Civ. 6302(CM).
|
Feb. 1, 2010.

Opinion

COLLEEN McMAHON, District Judge.

***1** I have received no objections from the parties. There are a few objections filed by persons who objected at the settlement, but after reviewing them I have concluded that they do not cause doubt on the conclusion rendered by the Special Master. I adopt the Special Master's Report and the opinion of the court and concur on his recommendation. Plaintiff's counsel should prepare an appropriate order for entry.

REPORT & RECOMMENDATION OF THE SPECIAL MASTER

DAVID H. PIKUS, Special Master.

TO: HON. COLLEKN MCMAHON, U.S.D.J.:
By order of the late Hon. Shirley Wohl Kram, I was appointed Special Master of the Court for the purpose of reviewing and making recommendations to the Court upon various applications for fees and expenses filed by the law firms representing the derivative plaintiffs in this action. Ten separate law firms request an aggregate fee of $9.6 million, subsuming expenses, based on a reported “lodestar” of $5, 753, 064.50, [1] enhanced by a 1.60 fee multiplier. The fee application, and the objections filed, raise some complicated and novel issues, including the circumstance that the settlement obtained by counsel consisted essentially of cutting-edge changes in corporate governance. I respectfully recommend that the applications be granted to the extent of awarding $8, 772, 335.60.

Background of the Action

This is the last in a trilogy of large scale matters filed in the wake of an ill-fated merger between two corporate behemoths. [2] The underlying settlement, approved by the late Judge Kram, resolved several different tracks of litigation: (1) an action filed in the Southern District after the Company ignored, and eventually refused, shareholder demands to investigate allegedly improper and illegal conduct at AOLTW [3] (the “Demand Action”); (2) actions filed, without the plaintiffs first having made a demand upon the Company, in federal court and in the Delaware Court of Chancery (the “No–Demand Actions”),(3) lawsuits filed under Title 8, Section 220 of the Delaware General Corporation Law, seeking production of documents relevant to the alleged misconduct (the “Section 220 Actions”); and (4) a complaint filed on behalf of the Company against AOLTW's auditor, Ernst & Young, and investment banks Morgan Stanley and Smith Barney (the “Auditor and Investment Bank Action”). Each track of litigation arises from common allegations of misconduct.

As set forth in the Court's Opinion approving the settlement, [4] plaintiffs alleged that declining Internet stock values in 1999 and 2000 led AOL personnel, with the knowledge or reckless disregard of that company's directors, to routinely override and abuse internal policies and procedures with respect to the negotiation, contracting, and accounting of revenues. Those same directors comprised half of the board at the merged entity when AOLTW failed to rein in the continuing misconduct at the AOL business division. Plaintiffs argued that directors and senior officers of AOLTW “breached their fiduciary duties to the Company and its shareholders by .. knowingly (or with conscious disregard of obvious facts) ignoring the clear and longstanding ‘red flag’ warnings of systemic corporate governance and compliance breakdowns and widespread instances of management override of compliance controls.” In addition, plaintiffs argued that the defendants breached their fiduciary duties to the Company by failing to design sufficient internal governance controls to evaluate the effectiveness of their financial and operational compliance processes. After the first shareholder derivative complaint was filed, plaintiffs engaged in extensive investigation, reviewing millions of corporate documents obtained through discovery and in response to their Section 220 document requests. Additionally, plaintiffs participated in numerous depositions, consulted with experts, and prepared submissions assessing the strengths and weaknesses of their claims in the context of settlement negotiations overseen by a court-appointed special master. The parties ultimately entered into a stipulation of settlement after months of negotiations mediated by the special master, Paul D. Wachter, in proceedings sometimes more akin to a trial than a settlement conference, with each side making its case to the special master, often with evidentiary support, and eliciting the special master's feedback and recommendations. Counsel for each side were challenged to prove their respective positions through evidence, written presentations and oral arguments that spanned multiple days and required elaborate preparation. In short, this was no ordinary mediation, a conclusion reinforced by examination of the attorneys' extensive time records.

***2** The settlement consisted of two major components: (1) extensive governance and compliance provisions at the board and management level, and (2) an acknowledgment by the Company that the derivative actions were a "substantial factor" in the Company's ability to obtain an approximately $200 million recovery from its director and officer liability insurance carriers. The governance and compliance provisions focus on the centralized oversight of compliance systems, the increased independence of the board of directors and compliance personnel, the design and implementation of an expanded operational audit to complement the Company's enhanced financial audit procedures, and a funding commitment to fully implement and support all governance and compliance systems for at least four years from the effective date of the Settlement. The monetary recovery was designed to help offset the substantial losses alleged in the derivative actions. Further, the settlement narrowly limited the use of those funds to ensure that the bulk of the proceeds were available for the direct benefit of the Company.

Defendants were primarily represented by the famed defense firm of Cravath Swaine & Moore. Counsel thus faced stiff resistance, which they no doubt anticipated and were willing to risk from the start.

The various firms seeking compensation represented several different derivative plaintiffs. Extensive research, some of it from public media sources, was harvested for the essence of the complaints, which were eventually consolidated into a single complaint for this litigation. Unlike the securities and ERISA cases involving AOLTW, however, the parties refrained from litigating a phalanx of dismissal motions that often arise in cases of this nature. Instead, the parties relied upon elaborate document production and analysis, depositions and coordination with counsel litigating the securities and ERISA cases. The actual litigation file, reviewed at the Courthouse, is unusually thin for a case of this scale, containing 57 documents, many of them relating to the settlement. A comparable volume of other materials, however, was submitted for the mediation.

According to counsel, the main challenge faced in this particular case was tracing responsibility for the accounting irregularities into the corporate boardroom. Liability in this case would turn largely on proving that the corporate officers and directors were responsible, through acts of omission or commission, for the roughshod accounting practices alleged.

To accomplish this goal, much of the legal work in the case consisted of the review and coding of documents—millions of pages in all, according to counsel. The results, in turn, were used in depositions and in the settlement negotiations under the auspices of Special Master Wachter.

While counsel faced the particular challenge of pinning responsibility for the corrupt accounting on the Company's leadership, they also had to surmount the hurdles confronting plaintiffs in the two parallel AOLTW cases. Included among these challenges was the dispute over loss causation, accentuated by the recession and the shattering of the so-called "technology bubble" which coincided with the misdeeds chronicled in the Amended Complaint. It comes as no surprise that counsel report dedicating 12,487.5 hours to the case at bar. [5]

***3** The case was finally settled at the end of a mediation session with Special Master Wachter on February 22, 2006. Unlike the securities and ERISA settlements, or, for that matter, most settlements obtained by the plaintiffs' bar, counsel cannot point to a distinct monetary recovery attributable to their hard work. Rather, counsel point to changes in corporate governance designed to avoid future crises akin to the wrongs alleged here and to enhance corporate responsibility and profitability. Defendants and the Company not only agreed to the changes, but also to adequate funding to ensure that the reforms are properly implemented and maintained.

Counsel also extracted from defendants an "acknowledgement" that their prosecution of this derivative action was a "substantial factor" in the Company's ability to obtain an approximately $200 million recovery from its director and officer liability insurance carriers. While the pressure of this additional litigation was no doubt considered by the Company and the insurance carriers, counsel in the other AOLTW litigation and the Company itself also can claim some credit for this achievement, so the Court need be mindful of rewarding multiple firms in differing cases for a single accomplishment, one in which the Company itself played a major role.

To evaluate the fee application, I reviewed a heavy volume of materials, filling three boxes, including those submitted to the mediator, and significant portions of their written product in the action. Counsel also submitted their daily time records and summaries of their expenses, broken down by firm. The documents reflect the services performed by each timekeeper, with corresponding dates and duration.

Counsel for plaintiffs, as well as the lead objector counsel, also responded to a series of requests I made after reviewing their proffers, including their retainer letters and briefs on changes in fee jurisprudence that occurred during the pendency of this analysis. They have complied with numerous requests to plug gaps in the record. In addition, I invited counsel to confer with me on February 4, 2009, an invitation accepted by several of plaintiffs' counsel but declined by the objector counsel.

At that conference, counsel stressed several matters. Foremost among them was the fact that their $9.6 million fee request was the product of mediation by Special Master Wachter involving plaintiffs' counsel, defendants and the Company. Counsel urged, accordingly, that substantial deference be given to the amount requested.

Counsel's application can claim some other unusual sacrifices. First, although they reportedly incurred $389,023.28 in out-of-pocket disbursements, they expressed willingness to absorb those expenses within the $9.6 million in fees that they seek. In addition, counsel did not adjust their hourly billing rates to correspond to more current rates, and they declined an invitation to do so.

The fees sought would be payable from the $200 million in insurance proceeds recovered by the Company. But because the insurers have already paid these benefits to the Company via an escrow, earmarked in part for the agreed corporate reforms, the fee payments should be viewed as the Company's, not the largess of an external source.

***4** Ten firms seek compensation. Lead counsel were Morris & Morris and Greenfield & Goodman on the so-called "Demand" cases, Emerson Poynter on the "No–Demand" cases and Barrack Rodos & Bacine for the Delaware plaintiffs. Six other firms played lesser roles.

After meeting with plaintiffs' counsel, I informed the only counsel appearing for an objector, Edward F. Siegel, Esq., of the issues raised and again solicited his input. He accepted and, after several extensions, he submitted lengthy comments and supporting materials to me on July 31, 2009. Rather than address the specific points made by plaintiffs' counsel, he communicated his position by commenting on the Report & Recommendation I filed in 2007 on the ERISA counsel fee request. [6] Among other points, he objected to the inclusion of a "lodestar" multiplier upon the fees attributable to "contract attorneys" temporarily hired by plaintiffs' law firms for purposes of this action. Supplemental responsive briefing was then provided on this point by plaintiffs' counsel.

All counsel were also provided with an opportunity to comment upon the Second Circuit's intervening decision in Arbor *Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 493 F.3d 110 (2d Cir.2007), amended and superseded on other grounds by 522 F.3d 182 (2d Cir.2008). Plaintiffs' counsel and the objector availed themselves of this invitation as well.

Discussion

This case presents perhaps the first opportunity for a district court to apply *Arbor Hill* to an award of attorneys' fees' in the context of a derivative settlement resulting in non-monetary relief. Although *Arbor Hill's* evolutionary holding arose in the context of a statutory fee shifting determination under the Voting Rights Act of 1965, 42 U.S.C. § 1973, its principles arguably resonate at least as strongly in this case, where the guideposts are much murkier. *Arbor Hill's* market orientation echoes the Court of Appeals' pronouncement seven years earlier in its reigning common fund guidance that "market rates, where available, are the ideal proxy for [counsel's] compensation." *See* *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 52 (2d Cir.2000). Counsel and the objector all acknowledge some pertinence in *Arbor Hill,* although counsel would limit strict application of this recent decision to statutory fee shifting cases, the context in which it was decided. Each side nonetheless urges that its particular position is consistent with *Arbor Hill.*

Arbor Hill is the latest milestone in a cycle of judicial fee jurisprudence that dates back as far as the 19th century. *See* *Trustees v. Greenough,* 105 U.S. 527 (1881).[7] The so-called "common fund doctrine," coupled with Fed.R.Civ.P. 23(e), authorizes the Court to award fees and expenses to class counsel and certain other claimants in a duly certified class action. *See* *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 216, 222 (2d Cir.1987), *cert. denied sub nom.* *Schwartz v. Dean,* 484 U.S. 926 (1987). Based on the notion that incentives and rewards are necessary for those who would take on a legal risk and challenge for the benefit of a wide class, the doctrine awards the successful champions reasonable compensation from the resultant fund.

***5** As the Court of Appeals acknowledged in *Arbor Hill,* the journey from the early days of class actions to the current day has not always been smooth, consistent or, in some cases, clear. The federal courts have shifted back-and-forth between the percentage-of-recovery method and the so-called "lodestar" method, a term now banished by the Court of Appeals to the lexical dustbin in favor of the "presumptively reasonable fee." *Compare, e.g., Winkelman v. General Motors Corp.,* 48 F.Supp. 504 (S.D.N.Y.1942), *aff'd sub nom. Singer v. General Motors Corp.,* 136 F.2d 905 (2d Cir.1943) *with* *City of Detroit v. Grinnell Corp.,* 495 F .2d 448, 468 (2d Cir.1974) *and with* *Goldberger,* 209 F.3d at 47. Despite the change in terminology, "the methodology remains the same." *Rozell v. Ross–Hoist,* 576 F.Supp.2d 527, 536–37 (S.D.N .Y.2008).

The Second Circuit has left broad discretion to the district courts in choosing between the lodestar and percentage processes. *Goldberger,* 209 F.3d at 50; *Wal–Mart Stores, Inc. v. Visa U.S .A. Inc.,* 396 F.3d 96 (2d Cir.2005), *cert. denied sub nom. Leonardo's Pizza by the Slice, Inc. v. Wal–Mart Stores, Inc.,* 544 U.S. 1044 (2005). Despite having this option, the district courts in the Southern District have almost uniformly embraced the percentage approach—but, notably, in cases where a monetary sum was recovered. *See, e.g., Banyai v. Mazur,* No. 00–Cv–9806, 2007 WL 959066(SHS) (S.D.N.Y. Mar. 30, 2007) (8.45 percent fee award for $40 million settlement); *In re AOL Time Warner, Inc. Securities & "ERISA" Litig.,* No. 02–Cv–5575, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006); *Ling v. Cantley & Sedacca, L.L.P.,* No. 04–CV–4566, 2006 WL 290477 (S.D.N.Y. Feb. 8, 2006); *In re Worldcom, Inc. ERISA Litigation,* No. 02–CV–4816, 2005 WL 3116188 (S.D.N.Y. Nov. 22, 2005); *Hicks v. Morgan Stanley & Co.,* No. 01–Cv–10071, 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005); *In re WorldCom, Inc. Securities Litigation,* 388 F.Supp.2d 319 (S.D.N.Y.2005); *FTR ex rel. Cel–Sci Co v. Adv. Fund II Ltd.,* No. 02–CV–8608, 2005 WL 2234039 (S.D.N.Y. Sep. 14, 2005); *Spann v. AOL Time Warner Inc.,* No. 02–CV–8238, 2005 WL 1330937 (S.D.N.Y. Jun. 7, 2005); *In re Elan Securities Litig.,* 385 F.Supp.2d 363 (S.D.N.Y.2005); *In re Bristol–Myers Squibb Sec. Litigation,* 361 F.Supp.2d 229 (S.D.N.Y.2005); *Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317 (S.D.N.Y.2005), *aff'd in part, rev'd in part on other grounds* 443 F.3d 253 (2d Cir.2006).

In this case, the choice between the percentage and presumptively reasonable fee methods is readily made. As a practical matter, aside from the nebulous "acknowledgement" that the derivative litigation was a "substantial factor" in a $200 million insurance contribution, there is no discrete amount here to which a percentage could be applied. Because the value of the stipulated corporate reforms will be recognized in major part in future profits, goodwill and avoidance of repeat litigation, quantification of such benefits would be speculative at best. Counsel, for good reason, do not even attempt to ascribe a tangible monetary value to the corporate governance reforms. This resembles more a case of "common Denef it" than one of "common fund." *See* *Polonski v. Trump Taj Mahal,* 137 F.3d 139, 145 (3d Cir.1998).

***6** The present case is therefore more analogous to cases in which a class has received injunctive relief, for which valuation is impractical, if not impossible. *See* *City of Burlington v. Dague,* 505 U.S. 557, 565 n. 1 (1992) (noting "severe problems of administration in determining the value of injunctive relief"); *see also* *Shaw v. Toshiba America Information Systems,* 91 F. Supp .2d 942 (E.D.Tex.2000).[8] Indeed, though its application entails time, precision and no shortage of tedium, the hourly fee method is arguably a more objective measure in general. *See* *Grinnell,* 495 F.2d at 470–71 (only the lodestar method can "claim objectivity"); *see also* *Reiter v. Metropolitan Transportation Authority,* No. 01–Cv–2762, 2004 WL 2072369 at *4 (E.D.N.Y. Sept. 10, 2004), *rev'd on other grounds,* 457 F.3d 224 (2d Cir.2006), *cert. denied,* 549 U.S. 1211 (2007) ("the amount actually paid to counsel by paying clients is compelling evidence of a reasonable market rate"); *In re Bolar Pharmaceutical Co. Sec. Litig.,* 966 F.2d 731, 732 (2d Cir.1992) (fee computed under lodestar method is "strongly presumed to be reasonable").

Accordingly, the presumptively reasonable fee method, formerly known as "lodestar," emerges as the best practical and objective device to assess the worth of counsel's services in this case. Under this procedure, "the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate. Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on 'other less objective factors,' such as the risk of the litigation and the performance of the attorneys." *Goldberger,* 209 F.3d at 47 (citations omitted); *see also* "*Agent Orange" Product Liability Litigation,* 818 F.2d at 222 ("the court may, in its discretion, increase or decrease [the hourly fees] by examining such factors as the quality of counsel's work, the risk of the litigation and the complexity of the issues").

This Report & Recommendation takes into account the pitfalls of the oft-criticized lodestar procedure, through close scrutiny of the litigation record and the attorney time submissions. Critics have long contended that the lodestar created a temptation for lawyers to run up the number of hours for which they could be paid, created an unanticipated disincentive to early settlements and compelled district courts "to engage in a gimlet-eyed review of line-item fee audits." *Goldberger,* 209 F.3d at 48–49; *see also Court Awarded Attorney Fees,* Report of the 3d Cir. Task Force, 108 F.R.D. 237, 246–49 (Oct. 8, 1985); *Kirschoff v. Flynn,* 786 F.2d 320 (7th Cir.1986). To this day, the lodestar method continues to spark criticism for generating avoidable hours, discouraging early settlement and burdening district judges (or, in this case, a special master) with tedious audits of time records. *Goldberger,* 209 F.3d at 48–49; Alan Hirsch & Diane Sheehey, *Awarding Attorneys Fees & Managing Fee Litigation* at 73–74 (Fed.Jud.Ctr.2d ed.2005).

***7** With this in mind, I have thoroughly reviewed counsel's time records, as well as their other submissions to me and the case file, and recommend reductions for services that were duplicative, avoidable, inadequately documented, unnecessary or otherwise excessive in terms of staffing or time spent.

Superimposed on the lodestar framework is the admonition of the Court of Appeals in its series of recent cases to replicate as much as possible "market" compensation that would be paid by a sophisticated but "thrifty" client bargaining for such services. *Arbor Hill,* 522 F.3d at 185; *see also* *Simmons v. New York City Transit Authority,* 575 F.3d 170 (2d Cir.2009). As the Court of Appeals begrudgingly but realistically acknowledged, the courts themselves have become factors in this marketplace. *Arbor Hill,* 522 F.3d at 184 ("the district court [unfortunately] bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively").

While invoking the marketplace as its conceptual guidepost, the Court of Appeals has reaffirmed the traditional factors utilized in determining the ultimate fee. In *Goldberger,* the Court defined those elements as (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. *Wal–Mart,* 396 F.3d at 121 (*citing* *Goldberger,* 209 F.3d at 50); *see also* *Matter of Freeman,* 34 N.Y.2d 1, 9, 355 N.Y.S.2d 336 (1974) (adopting similar analyses under state law).

More recently, in *Arbor Hill,* the Court of Appeals revivified the criteria enunciated in *Johnson v. Georgia Highway Express, Inc .,* 488 F.2d 714 (5th Cir.1974), *abrogated on other grounds by* *Blanchard v. Bergeron,* 489 U.S. 87, 92–93 (1989). The so-called "Johnson factors" include (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717–19. In core substance, the *Goldberger* and *Johnson* criteria require similar assessments. [9]

Goldberger emphasizes two other important points, namely that "moderation" is the touchstone and, presaging *Arbor Hill,* that the district courts should strive to replicate market compensation. 209 F.3d at 52 ("market rates, where available, are the ideal proxy for [class counsel's] compensation"). At the same time, the Second Circuit recognizes that, at least in cases where the fee, as here, is set retrospectively without the challenge of a traditional adversary, we "cannot know precisely what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Id.* Accordingly, the Court of Appeals requires that a "searching assessment" be performed by the district court in each case based upon the circumstances of that case. *Id.*

***8** *Arbor Hill* now adds, at least for the purpose of determining the presumptively reasonable fee, a set of further considerations. In addition to assessing the factors set forth in *Johnson,* the court

> should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case.

522 F.2d at 189.

The *Johnson* Factors

(1) The time and labor required.

Counsel report spending in the aggregate 12,487.5 hours on this litigation, including paralegal and clerical time. This equated to fees of $5,753,064.50. Of that amount, attorney time comprised 10,547.5 hours, with corresponding fees of $5,405,125.75.

Most of the work was dedicated to pleadings, motion practice, memoranda, legal research, document discovery and settlement activities. Nearly two-thirds of the total reported time was spent on document discovery, which consumed 5,357.50 hours, and activities relating to the mediation and settlement, which absorbed 2,736.50 hours.

A case of this nature is built on documents. Here in particular, although the wrongdoing had been chronicled in parallel litigation, the media and even criminal indictments, counsel faced the especial burden of tracing knowledge and conduct to the corporate boardroom. Suggests that it was a meritless case. The dedication of over 5,000 hours to this phase of the litigation is not surprising. The harvest of this information was evidently sufficient to cause the defendants to agree to sweeping corporate reforms, including structural changes in the board and senior management, and to help generate a sizable monetary contribution by sophisticated insurance carriers.

The mediation process was unusually sophisticated. The mediation often took on the atmosphere of a trial, with each side using documents, deposition testimony, legal research and negotiating skill to endeavor to persuade the mediator of the merits of its case.

With the possible exception of the pleadings, the remaining expenditures of time are commensurate with the nature of the case and the formidable opposition. The 1,982.20 hours devoted to the pleadings are high. These can be explained in part by the fact that various counsel had prepared their own complaints before the actions were consolidated, and that the consolidation then required collaboration on a new Amended Complaint, spanning 253 paragraphs over 109 pages. Even so, because counsel had the benefit of the parallel securities and ERISA actions, some of which were filed before this case, it is difficult to countenance nearly 2,000 hours for work on pleadings. I recommend a reduction of 15 percent, or 297 hours, and a corresponding pro rata hourly fee reduction of $136,830 for this phase. [10]

***9** In addition, to this general analysis of the eight major components of counsel's work, I have reviewed on a line-by-line basis the daily time records of counsel. As a result of this examination, I recommend an additional reduction of $332,429 attributable to these broad categories: services that belong more appropriately in overhead, such as training and installation relating to electronic records; vague service descriptions; repetitive entries over multiple days; lack of corresponding entries between two timekeepers for an interactive service; full billing of travel time charges; excessive rounding of time charges; work on the fee application; excessive time on task; and charges more appropriately allocable to overhead. *See* *Hensley v. Eckerhart,* 461 U.S. 424, 433–34 (1983) (district court should adjust the basic time charges where the hours were inadequately documented or not reasonably expended).

Commendably, counsel have reviewed and accepted this proposed reduction of $332,429. In view of this concession, this Report & Recommendation will not detail the reductions on a line-by-line basis, but will instead summarize the components. For example, many disallowances consisted of conferences between or among lawyers where one participant's time was recorded but not another's. If this signals that one of the participants did not consider the service sufficiently meaningful or lengthy to bill, the reporting lawyer's time should be excised. If, on the other hand, the discrepancy stems from inadequate recordkeeping, the remedy of disallowing the recorded time may seem harsh. But the law on this subject is settled: a lawyer applying for a fee bears the burden of recording all corresponding entries. *See, e.g., Carrero v. New York City Housing Authority,* 750 F.Supp. 660 (S.D.N.Y.1990); *see also* *Kirsch v. Fleet Street Ltd.,* 148 F.3d 149 (2d Cir.1998) ("we see no abuse of discretion in the ... reduction for vagueness, inconsistencies, and other deficiencies in the billing records"). Excusing these omissions would only serve to discourage thorough recordkeeping.

In other instances, time was disallowed for inadequately described services. This occurred most often where counsel's time records referred to a conference or telephone call without any identification of the other participants or the subject. Again, there is no evidence of fabrication. But without such information, the reviewer cannot discern whether the work was necessary, performed by a lawyer at the appropriate seniority level or consistent with the records of the other participants.

Travel time is another consideration. A lawyer's reasonable travel time for client business purposes should be recoverable, as the practice in this jurisdiction is to charge at a unitary hourly rate and a lawyer not engaged in travel for a client's business could presumably otherwise be representing another client at his or her hourly billing rate. Once again, however, as with any attorney's time, the key is "reasonableness."

***10** Applying this standard to the present case, long distance travel should not be treated identically with local travel to Foley Square or opposing counsel's office in Manhattan. This is not to suggest that long distance travel should not be reimbursed at all. A long distance trip, however, affords opportunities to perform work for the present or other clients, especially with advances in technology such as laptop computers and cellular phones. Travel time not productively spent should be adjusted. This is particularly so here, where most of the travel hours were charged by multiple out-of-town firms representing the same cause, including those from Delaware, Pennsylvania and Arkansas. [11]

For long-distance travel in which the time records contain no evidence of other work performed *en route,* I applied a reduction of 50 percent for billable hours, consistent with the methodology adopted by the district court and affirmed by the Court of Appeals in *Agent Orange,* 818 F.2d at 230; *see also* *Luciano v. Olsten Corp.,* 925 F.Supp. 956, 965 (E.D.N.Y.1996), *aff'd,* 109 F.3d 111 (2d Cir.1997).

Certain other time entries bear telltale signs of rounding and estimation, rather than precise recording. A noticeable illustration is a pattern of some timekeepers of recording much of their daily time in even-hour increments, rather than a random mixture of daily hours ending in .00, .25, .50 and .75.

Those hours were reduced by 10 percent. *See* *Welch v. Metropolitan Life Ins. Co.,* 480 F.3d 942 (9th Cir.2007); *New York Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1146–47 (2d Cir.1983) (upholding percentage reductions and placing the burden on fee applicants to keep and produce "accurate records" of work done and time spent). This reduction is recommended due to imprecision, not evidence of fabrication.

The reductions finally include several miscellaneous items, such as services that should have been performed by more junior personnel, review of certain media reports or review of the same book or document by multiple personnel. [12] Unlike statutory fee cases, the 97.5 hours recorded for preparation of counsel's fee application here are not compensable. *See* *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093. Some of the applicants recognized this principle and designated such time as "non-billable," while others sought reimbursement.

Paralegals and clerks are generally not included in the reductions. With one exception, their overall time fell well within acceptable bounds, as was confirmed by a less intensive review of their daily entries.

The one notable exception is Dave Parkinson, who is described as the "Financial Analyst and Director of Information Technology" for Emerson & Poynter. (Compendium, Tab 12, Ex. E at 6.) He was responsible for "financial analysis, high-technology company analysis, and corporate information systems." *Id.* Billed at the rate of $250 per hour, his 384.25 hours consisted essentially of assisting the lawyers and paralegals with computers, software and electronic document access. Part of his service should be ascribed to normal firm overhead, while other components matched the particular demands of this case. Had the firm not supplied its internal expert, an outside consultant performing many of his functions would have been a reimbursable disbursement and a charge that many paying clients would bear. At the same time, $250 per hour is excessive. I recommend that the charges for Mr. Parkinson be halved, which would compensate for the excessive rate and for the volume of services more appropriately chargeable to overhead. The resulting reduction is $48,031.25.

***11** This amount is recommended in addition to the $332,429.00 in reductions for itemized attorney time and $136,830.00 eliminated for excess time on the pleadings. The total of the recommended disallowance is therefore $517,290.25, or $827,664.40 of the enhanced fee request.

These adjustments should not detract from counsel's fidelity to their cause, the laudable service they rendered or the efficiency with which much of the case was handled. There is no evidence of purposeful engagement in unnecessary work or a deliberate attempt to pad the hourly fees. Rather, many of these excesses are attributable to the pressures and time constraints of oversized litigation, the inevitable inefficiencies in cases this large, the interaction among large numbers of lawyers and the desire of senior lawyers to shepherd the case through to a successful conclusion. [13]

Notably, the hours devoted to this matter were substantially fewer than those committed to the securities and ERISA cases. In part, this results from counsel's efficient use of time and existing information. It also stems, however, from building on the work done by counsel in the parallel cases and the absence of dispositive motion practice which occurred in the two parallel matters. In fact, this case was stayed for a considerable period pending determination of the motions to dismiss the ERISA action. (Pretrial Order No. 1, Mar. 26, 2003.) Both matters were settled prior to the resolution of this action, auguring a willingness to resolve this matter with a minimum of litigation. Counsel's time records reflect consultations among the lawyers in the three cases and their use of material generated in the other actions, as well as public media reports and even books written about the scandal.

As in *Goldberger,* counsel may not welcome the use of the gimlet-eyed fee auditor's blue pencil. But had this been a more conventional attorney-client relationship in the contemporary legal workplace, counsel would have been subjected to similar scrutiny of their periodic billings by a client, corporate general counsel, auditor or other reviewer. *See also* *Goldberger,* 209 F.3d at 51 ("[t]oday, all lawyers, even those in the more traditional corporate practice, must submit to the 'nitpicking' of fee review").

(2) The novelty and difficulty of the questions.

Derivative actions based on faulty corporate accounting practices are nothing new. Several of the most notorious corporate scandals over the past decade spawned similar —and successful—lawsuits. *See* Ralph C. Ferrara, Kevin T. Abikoff, Laura Leedy Gansler, *Shareholder Derivative Litigation: Besieging the Board* § 16.01 at 16–1 (Law J. Press 2005). The Second Circuit has also reminded us that these large corporate cases born of financial wrongdoing inherently entail a baseline of complexity. *See In re:* *Nortel Networks,* 539 F.3d 129 (2d Cir.2008) (declining to enhance fees based on complexity because "large securities litigations often involve complex issues").

***12** Proving liability on the part of the company's officers and directors posed the greatest challenge. Because counsel do not have a "client" in the traditional sense who can recite the facts from memory and deliver the inculpatory documents in a neat package, extensive discovery is required, often from recalcitrant defendants and witnesses and the painstaking review of countless pages of unfamiliar documents. But that is a challenge faced by counsel in any derivative action. Neither this action nor the basic issues were especially novel. The magnitude of the case, and the attendant mass of documents, made the case more difficult than a routine derivative action in terms of burden and time, but not necessarily in terms of legal issues.

(3) The level of skill required to perform the legal service properly.

The skill levels required in this action fell on two extremes. On the one hand, this case demanded and received the attention of top practitioners in this area of the law for the formulation of strategy, evaluation, conduct of the mediation and overall supervision. On the other hand, much of the other work such as research and document review could be, and, in most instances was, performed by less experienced personnel, including temporary lawyers hired under contract for this assignment. In isolated instances, reductions were recommended, and accepted by counsel, for services performed by senior lawyers that were within the competence of basic personnel.

Goldberger's corresponding element is described as the "quality of the representation." 209 F.3d at 50. The representation here was excellent. The litigation and mediation papers prepared by counsel were persuasive and instrumental in forging the fair settlement approved by the Court. The result, a groundbreaking series of corporate reforms, is testament to the skill and the tenacity of counsel.

AL the same time, such superior work is to be expected from lawyers of their caliber and reputation, and is reflected in counsel's lucrative billing rates. Counsel here also had the advantage of the work done and results achieved in the two parallel cases, which were settled prior to the compromise here.

(4) The preclusion of employment by the attorney due to acceptance of the case.

Counsel have not pointed to any specific employment forgone due to this case. To the contrary, the lead firms here followed the practice, now common in these types of large actions, of hiring temporary attorneys to help staff the matter during its pendency. Had counsel been retained for other matters, there was sufficient supervisory capacity among the ten firms, coupled with the use of these "contract attorneys," to accept other matters. The 12,487.5 hours billed over approximately four years would average out to 3,122 hours per year, barely denting the collective capacity of the ten firms now applying for fees.

(5) The attorney's customary hourly rate.

A lawyer's customary hourly rate plays the role of fulcrum in the lodestar process. The rate is the starting point for determining the presumptively reasonable fee.

***13** Counsel use hourly rates ranging from $90 to $250 for paralegals, from $175 to $550 for associates and other non-partner level attorneys and from $3 00 to $850 for partners. These rates, though relatively high, fall within the range of those commanded by leading lawyers in the Southern District, particularly those practicing at large firms or with high profiles. At the same time, because the applicant firms are predominantly, if not exclusively, engaged in plaintiff-oriented class action, securities and derivative service, these rates are not necessarily those "actually paid to counsel by paying clients." *See* *Reiter v. Metrop. Transit Auth.,* 2004 WL 2072369 at *5.

According to a leading authority covering the period in which most of the work was done, the average hourly rates in New York state for associates ranged from $206 to $274 per hour, while average partner rates ranged from $361 to $444. *See* Altman Weil, *Survey of Law Firm Economics* (Altman Weil Publications Inc.2005) at 91. Other courts have recognized that rates ranging from $450 to $750 per hour were appropriate for partner-level practitioners in this district. *See* n. 17, *infra.* Most of the firms seeking compensation, however, including the four lead counsel, are located outside of New York.

This raises the difficult question of whether the presumptively reasonable fee should be evaluated on the basis of the rates prevailing in the forum district, or in the district in which counsel's offices are located and much of the work was performed. [14] If recent language from the Court of Appeals is taken literally, the answer is a facile yes. *See* *Simmons v. New York City Transit Authority,* 575 F.3d at 172. But an unintended windfall lurks in blindly applying this language.

Simmons and similar cases dealt with situations in which out-of-district lawyers sought their regular rates in districts where the prevailing rates were significantly lower. The court explained in *Simmons* that "[i]n order to overcome th[e] presumption [in favor of application of the forum rule], a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result." *Id.* This holding is consistent with the contemporary preference that fee awards mimic the market, with a hypothetical "thrifty," empowered client as the measuring proxy. Stated more simply, the Second Circuit has used this doctrine to *limit* fees. It has yet to address the thorny issue of using host district fees to *increase* the presumptively reasonable fee above the amount that counsel would customarily receive from "paying clients" back home. At least one other circuit has endorsed the home market rate in these situations. *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. E.P.A.,* 169 F.3d 755, 759 (D.C.Cir.1999) (announcing an exception to the forum rule to govern cases where "the home market is substantially less costly and the site of the bulk of the legal work"). And further complicating that issue is another question, namely whether the courts should recognize a "national bar" for these types of cases. *See* *Arbor Hill,* 522 F.3d at 192 ("[s]ometimes, legal markets may be defined by practice area").

***14** The hourly rates sought by the four lead counsel substantially exceed the customary amounts charged in their home states, even within the top decile. In Delaware, for example, where the Morris firm practices, the average rate in the top bracket for the corresponding period was $425. The highest decile rate in Pennsylvania—the office location Greenfield & Goodman and Barrack, Rodos & Bacine-was $415. In Arkansas, the home of the Emerson firm, that rate was a still lower $320. The top rates sought by these firms here, by comparison, are $585 for the Morris firm, $695 for Greenfield & Goodman, $625 for Barrack, Rodos & Bacine and $585 for the Emerson firm. [15] Most of the lodestar for partner level work performed by these lead counsel was calculated at or close to these peak hourly rates.

The billing rates attributed to associate and other non-partner attorneys were also above the norm for the home communities. The median rates in Pennsylvania and Arkansas for 2005 were reported at $185 and $150, respectively. Altman Weil at 89, 91. By contrast, the associate rates charged by the Emerson firm ranged from $175 to $375. The associate rates for the other three lead counsel ranged from $260 to $340. [16]

Determining these community-based billing rates is far from exact science. This is particularly so because the Altman Weil survey reports the data on a state-by-state basis, thereby discounting the higher rates prevalent in large urban centers. Nevertheless, these and other available data lead to an inexorable conclusion that, overall, the customary rates in the Southern District are higher than those in smaller cities. It is also relevant, in connection with any claim that a national bar exists for plaintiffs' derivative work, that Altman Weil reported the ninth decile for partners nationally at $395 per hour and for associates nationally at $260 per hour. *Id.* at 83. However viewed, counsel are seeking hourly fees well above average. [17]

These findings create a tension between two precepts emanating from the single decision in *Arbor Hill*—(1) the preference for host district rates, and (2) the moderating influence of a hypothetical thrifty client in the—marketplace. The common denominator, on the other hand, is discipline of the fees, which in this case would ultimately be borne by the Company's shareholders.

While *Arbor Hill* endorses the concept of a national bar in appropriate instances, the process of determining the presumptively reasonable fee is not ended by a conclusion, though partially accurate, that leading plaintiff derivative litigation specialists set their fees at $600 or more per hour, regardless of geography. The policy underlying *Arbor Hill* is to moderate fees through the use of actual or hypothetical price competition. While a monopolistic element inheres in the longstanding requirement that fees fall within a customary range, the Court of Appeals surely did not intend to entrench a national cartel over the robust competition of a national marketplace. And while the law firms in this case are all stellar organizations who can be proud of the fine work done here, it would be a stretch to find that a hypothetical client with bargaining power could not achieve billing rate concessions without sacrificing quality. If anything, the existence of a national bar, including firms with much lower overhead than those in Manhattan, should lead to greater fee competition with concomitantly lower hourly rates.

(6) Whether the fee is fixed or contingent.

***15** The fee here is neither fixed nor contingent. Instead, it is rooted in an hourly computation.

It bears noting, however, that the outcome of this case—both in terms of the relief obtained and the basis for the fee—is far different than contemplated at its inception. Initially, there was a strong contingent element. The original pleadings primarily sought money damages. The ultimate settlement was essentially non-monetary.

As a related matter, counsel's engagement letters at inception provided for a wholly contingent fee, based on a percentage of the anticipated recovery or a fee application to the court. Counsel themselves did not anticipate sending an hourly bill to the client or the Court, except perhaps for a less than intensive lodestar cross-check.

(7) The time limitations imposed by the client or the circumstances.

Although counsel were retained by nominal clients at the inception, this was a derivative action seeking to vindicate the rights of the corporation. The record contains no evidence of any special demands imposed by these clients.

Similarly, counsel point to no extraordinary time limitation posed by the circumstances. Deadlines were set by the Court and the Special Master, but none particularly out of the ordinary. As noted, some firms hired contract personnel to handle the flood of documents, marking up their costs to enjoy profits as they would with salaried associates.

(8) The amount involved in the case and the results obtained.

The Amended Complaint alleged billions of dollars in accounting irregularities. The case ended consensually, however, not with a monetary recovery but, instead, with the company's agreement to a series of corporate reforms. Counsel take partial, though amorphous credit for recovery by AOLTW of $200 million in insurance proceeds. The settlement agreement with defendants described the derivative action as a “substantial factor” in this insurance recovery.

Given the many other pressures facing the insurers, the pendency of the two parallel cases in which other attorneys were handsomely compensated and the indistinct depiction of present counsel's role, I am hesitant to recommend too much tribute here for the insurance recovery.

On the other hand, the accession of one of America's largest corporations to an intrusive series of novel governance and monitoring initiatives was a commendable achievement for which credit clearly goes to counsel. Results like those here “can be socially efficient remedies for large-scale misconduct. Nonpecuniary settlements can offer benefits to defendants that can be shared with the plaintiff class, making all parties better off.” *See Geoffrey Miller & Lori Singer, Nonpecuniary Class Action Settlements,* 60 J. Law & Contemporary Problems 97, 99 (1997); *see also* *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1311 (3d Cir.1993) (“[d]espite the difficulties they pose to measurement, nonpecuniary benefits to the corporation may support a settlement” and “[t]his is particularly true when the relief is intended to prevent future harm”). Though the value of these reforms cannot be reduced scientifically to dollars and cents, counsel are entitled to sizable compensation for this corporate *mea culpa* and measures that enhanced the company's goodwill, standing and profitability into the future.

(9) The experience, reputation, and ability of the attorneys

***16** Counsel in this action were all experienced members of the plaintiffs' bar practicing in the area of corporate securities and derivative action law. Counsel have submitted detailed and impressive firm biographies. These include information about challenging cases in which counsel have achieved great success and earned the commendation of the judiciary. For example, John Emerson represented plaintiffs in derivative litigation against Computer Associates and in the Enron ERISA litigation. (Compendium, Ex. 12D.) Richard Greenfield was selected by the *National Law Journal* as one of the nation's 100 most influential lawyers. (*Id.,* Ex. 12E .) Morris & Morris was co-counsel in the Mutual Fund Multidistrict Litigation and the Christie's antitrust class action. (*Id.,* Ex. 12F.) The Barrack firm served as lead counsel in the WorldCom, Inc. and Cendant Corporation litigation, among others. (*Id.,* Ex. 12G .)

Of the remaining firms, some, such as the Abbey Spanier firm, are well known for high quality work in financial litigation and others, though much smaller firms perhaps having lower profiles, utilized their evident experience and skill to contribute to the successful result achieved here. The experience, reputation and ability of each of the firms in this case were superior and worthy of compensation at reasonably high rates.

(10) The "undesirability" of the case.
"Undesirability" should be measured in context. This case might be considered undesirable by a firm with a stable of clients who pay by the hour. It is also generally undesirable in the sense of facing well funded, prominent individual defendants and the board and special committee of a mammoth corporation, all represented by some of the top defense lawyers in the nation.

On the other hand, for lawyers, like the applicants, whose practices consist heavily of class, derivative and securities actions against similar types of opponents, this action was relatively promising. The risk was shared among ten firms. Counsel had the benefit of two large parallel cases and a federal criminal investigation. The Company maintained a large directors and officers insurance policy.

The criminal proceedings culminated in a deferred prosecution agreement, inked long before the present settlement. AOLTW was cited by the SEC for limited violations in 2000 and entered into the deferred prosecution agreement with the United States Attorney for the Eastern District of Virginia on December 14, 2004. Several peripheral figures were indicted, various Company executives implicated in the irregularities lost their jobs and the company restated its accounting during the pendency of the action.

The financial scandal also drew widespread media attention, conferring the reputational benefits envisioned in *Arbor Hill.* The fact that ten different firms jumped into the fray bespeaks an element of desirability.

(11) The nature and length of the professional relationship with the client.
***17** There is nothing in the extensive record prepared by counsel that elucidates this factor. By the nature of this derivative case, the plaintiffs were shareholders who sought, through counsel, to vindicate the rights of the corporation. Most of the clients were individuals, but the Barrack firm represented a pension fund. There is no indication whether there was a regular relationship between the fund and the law firm.

Regardless, this particular *Johnson* factor should have no material impact on the outcome. The fee is not being paid by the clients. Not surprisingly, the record contains no history of hourly payments from the clients on which the Court can rely for guidance. Neither attorney nor client expected a client-paid fee. Instead, as is customary, they anticipated payment from a recovery in the action.

(12) Awards in similar cases.
Counsel cite a matrix of sizable awards in other cases. Although *Arbor Hill* reminds us to avoid excessive homage to benchmarks, determinations in comparable cases remain a factor if, for no other reason, because the fees in these cases are invariably court-awarded and, therefore, the courts play a pivotal role in calibrating the market.

One difficulty here is a lack of precise comparables. Not only is it rare to assess fees in a corporate derivative action where the relief was non-monetary, but there is the added dimension of a fee negotiated between counsel and the corporation, with the assistance of the Special Master who helped settle the underlying case.

Fees and expenses of $9.2 million were awarded in the Shell derivative litigation. *Unite Nat'l Retirement Fund v. Watts,* No. 04–CV–3603, slip op. at 10–11 (D.N.J. Oct. 27, 2005). That case too ended in a settlement featuring a series of corporate governance reforms. Beyond that, it is not unusual to see multimillion dollar fee awards generated in monetary settlements of massive corporate infraction cases. *See* *Carlson v. Xerox Corp.,* 596 F.Supp.2d 400, 405, App. A (D.Conn.2009) (collecting cases). The award sought here is considerably below those issued in the AOLTW securities and ERISA cases, where fees of $147,500,000 and $17,865,395 were granted, respectively.

This is also a case entailing a rare conflation of circumstances, including an absence of specific monetary recovery, the use of hourly rates in a non-statutory fee case and a mediated fee. While the few comparables suggest that the fee falls within comfortable bounds, this is an award built on lodestar, and therefore not mechanistically guided by results in similar cases.

Fee Recommendation

The district courts, and even the Court of Appeals itself, are still grappling with the implementation of *Arbor Hill.* Some courts and commentators have viewed it as revolutionary, transforming district judges into surrogate clients with vast discretion to engage in virtual bargaining over the fee. *See*

Note, *Questioning the "Presumptively Reasonable Fee" as a Substitute for the Lodestar Method,* 76 U. Cin. L.Rev. 1371, 1386, 1392 (2008). The majority of courts, however, seem to view *Arbor Hill* largely as a re-sequencing of the process, with a heightened emphasis on moderation and the competitive marketplace. *See, e.g., McDow v. Rosado,* 05–Cv–9787, slip op. at 4 (S.D.N.Y. Sept. 29, 2009) (Holwell, J.) ("[i]t is not obvious how this process substantively differs from the lodestar approach except perhaps to emphasize that relevant Johnson factors are to be considered when establishing the reasonable hourly rate"); *Steinberg v. Nationwide Mut. Ins. Co.,* 612 F.Supp.2d 219 (E.D.N.Y.2009).

***18** The *Arbor Hill* doctrine emanates from a statutory fee-shifting case. Nevertheless, a number of district courts have not hesitated to invoke its principles in common fund and other fee-based situations, including a prior decision arising from the AOL Time Warner scandal. *See In re AOL Time Warner, Inc. ERISA Litig.,* No. 02–Cv–8853, 2007 WL 3145111 at *1 (S.D.N.Y. 2 007) (adopting Special Master's Report & Recommendation which considered *Arbor Hill*); *Steinberg v. Nationwide Mut. Ins. Co.,* 612 F.Supp.2d 219; *Finkel v. E. End Elec. Assocs., Ltd.,* 06 Cv. 2169(FB) (RLM), 2007 WL 2572167, at *4 (E.D.N.Y. Aug. 31, 2007) (adopting Magistrate Judge's calculation of attorney's fees and costs, 06 Cv. 2169 (FB), 2007 WL 2572169, at *6–*7 [E.D.N.Y. July 10, 2007]). And, as *Arbor Hill's* holding is directed toward the calculation of a reasonable hourly based fee, there is little reason to eschew its guidance. That being said, the recommendation here is designed to pass muster under *Goldberger,* relying on *Arbor Hill* only for reinforcement.

The relative weight given to each of the *Goldberger* or *Johnson* factors depends on the overall circumstances of the case at hand:

> In reviewing an attorneys' fees award in a class action settlement, a district court should consider all factors that are useful and relevant with respect to the particular facts of the case. The factors should not be applied formulaically; in cases involving extremely large settlement awards, district courts may give some factors less weight than others in evaluating a fee award. It is important in all cases that the district court robustly engages in assessments of the fee award reasonableness factors with close scrutiny of fee arrangements in class action settlements.

Current Decisions Survey, 27 Class Action Rep. 34 (2006).

The *Johnson* findings here can be distilled into several broad conclusions that should drive the award. First, the case fell close to the midpoint of overall risk. Risk is a multifaceted concept. There is risk of protracted proceedings, risk of loss at various stages and financial risk assumed by the attorneys. The risk of protracted litigation existed here, but was tempered by the settlements of the other cases and the early intervention of mediation. These same factors suggest that an outright loss was unlikely here, both because most cases of this type end in settlement, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 597 (1991), and because the prior settlements and successes of the Special Master in the companion cases augured a meaningful outcome here. Counsel correctly argue that a derivative action requires an additional measure of proof against the company's officers and directors, but that hurdle is eased by the basic foundation built on the other litigation, media and governmental investigations and the resourcefulness of Special Master Wachter.

***19** Counsel assumed a sizable financial risk by filing these cases. They devoted many professional hours to the prosecution and mediation, without progress payments. In many instances, the firms advanced funds for contract attorneys and disbursements. At the same time, the defendants consisted overwhelmingly of highly successful individuals, backed by insurance coverage, against whom a judgment stood a good chance of collection. It is true that there were competing claims against the insurance policies at the commencement of the case. But there also exists abundant evidence that cases of this magnitude frequently end in settlement because neither side wants to assume the ultimate risk of a jury verdict or summary judgment. *See* Alexander, 43 Stanford L.Rev. at 578 ("evidence seems to show that derivative actions tend to be resolved ... with no tangible economic benefit to the corporation, plus large attorney's fees"). This risk is an issue not only for the immediate defendants, but globally for director and officer insurers, for whom a losing precedent could have broad impact.

The issue of risk is an important one, as it is built into the hourly rate structure and any multiplier. Taking the situation as a whole, this case entailed risk but not of an unusual magnitude.

Second, the case required and received high quality legal work. By the same token, such work is expected of the fine firms involved and the premise of excellence is built into the firms' hourly rates.

This segues into the third fundamental conclusion, namely that the hourly rates utilized by counsel here fall on the "higher end of the prevailing range." *See* *Goldberger,* 209 F.3d at 56. This finding takes on added impact in the wake of *Arbor Hill.* A sophisticated but thrifty client would not unquestioningly accept an hourly rate dictated by the law firm, especially where other firms were competing for the work and some of the firms are based in lower cost areas outside of New York. Aside from the need for local counsel in New York, all of the firms accurately claim to be comparable in experience and skill.

Any argument that counsel's rates should be considered in the context of a "national bar" is partially undermined by the rates proffered by the various firms. Examining the senior partners, for example, Arthur Abbey in New York was billed at $850 per hour, Richard Greenfield in Philadelphia was billed at $695, Karen Morris in Delaware was billed at $585 and John Emerson in Arkansas was billed at $585. A review of their work reveals generally comparable high quality, leading to a finding that the fee differential is attributable largely to location-driven overhead or arbitrary profit expectations of counsel.

Notwithstanding these differentials, the hourly rates designated by counsel are well above the average rates in the firms' respective locales and press the envelope of the presumptively reasonable fee envisioned in *Arbor Hill.* But this too does not end the inquiry in this case.

***20** Counsel's voluminous time records were submitted on the basis of their historical hourly rates on the later dates on which the work was performed. At our conference, I pointed out to counsel that I was prepared to award a current presumptive fee, as authorized by *Missouri v. Jenkins,* 491 U.S. 274 (1989), to compensate for the inevitable delay in payment. Counsel declined my invitation, no doubt because recalculating these capacious submissions would have posed a heavy burden and led to further delay.

Billing rates across the country have increased since settlement was reached in 2006. Based on my own observations, [18] annual hourly fee increases of $25 to $50 at the top levels have been common throughout the past decade. Authoritative sources bear this out. The *National Law Journal* has reported annual average increases as high as 7.7 percent during the period. *See Leigh Jones, Law Firm Fees Defy Gravity, Annual Survey Shows,* Natl. L. J ., Dec. 8, 2008. At the end of last year, at least one lawyer's billing rate had soared to $1,260 per hour, while at least four other firms broke the $1,000 barrier. *Id.* Various firms in New York, Chicago, Palo Alto and Washington, D.C. were billing some partners at over $900 per hour. Average hourly rates among the firms surveyed nationally were $451 for partners and $282 for associates. *Id.*

Counsel here use high end rates. By the same token, the complexity of this case demanded exceptionally able counsel, who, in turn, faced top defense attorneys, in terms of credentials and hourly rates.

The increase in customary billing rates since 2006 offsets to a large degree the cuts I would have recommended in the billing rates requested by counsel, in order to reach a presumptively reasonable fee under the historic numbers submitted. [19] Because the formulation of a presumptively reasonable fee is inherently an imprecise exercise, mathematical exactitude is not required. The uncertain interplay between *Simmons'* endorsement of host district rates, and *Arbor Hill's* eye toward thrift, gives further pause to an adjustment in the billing rates. Under these circumstances, I recommend that the historical rates proffered by counsel serve as the presumptively reasonable fee.

These rates, however, should be applied to the adjusted hours, rather than the gross hours claimed by counsel. A major criticism of the lodestar is its propensity to encourage hours over efficiency. *See* Report of the 3d Circuit Task Force, 108 F.R.D. at 248. Counsel should not be paid for tasks that were unnecessary, excessive, performed by inappropriately senior personnel or inadequately documented. A reasonable, fee-minded client receiving monthly bills would question and resist such charges. Again, this recommendation does not stem from any finding of purposeful overbilling by counsel, but, instead, derives from inefficiencies and recordkeeping deficiencies often found in cases of this extreme magnitude.

Multiplier

***21** The presumptively reasonable fee remains subject to an adjustment, upward or downward. In this case, with its salutary outcome and counsel's large investment of time, effort and even funding, any adjustment should be positive.

Historically, the two major factors driving a fee multiplier have been quality and risk. *See* *Farrar v. Hobby,* 506 U.S. 103, 114 (1992) (" 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained,' " *quoting* *Hensley,* 461 U.S. at 436); *see also* *Goldberger,* 209 F.3d at 54 (Second Circuit has "historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement") (*citing Agent Orange,* 818 F.2d at 236). Although multipliers were originally designed for exceptional risks or results, they have become widespread in these outsized derivative suits and class actions.

The admonitions toward moderation expressed in *Goldberger* and *Arbor Hill* warrant comment about the routine application of a multiplier. In *Blum v. Stenson,* 465 U.S. 886 (1984), the Supreme Court discouraged the use of multipliers, at least in recognition of excellence or complexity of the work. The opinion held that "[t]he novelty and complexity of the issues presumably were fully reflected in the number of billable hours," *id.,* and "[t]he 'quality of representation' ... generally is reflected in the reasonable hourly rate." 465 U.S. at 899. The Court further stated that "acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee." *Id.* at 900. The Court did not address the use of multipliers to compensate for exceptional risk.

The Supreme Court tackled the risk question in *City of Burlington v. Dague,* 505 U.S. 557, a statutory fee-shifting case. The Court observed that "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits," *id.* at 562, and that "no claim has a 100% chance of success." *Id.* at 563. The Court concluded, with respect to the fee-shifting statutes, that "[c]ontingency enhancement is therefore not consistent with our general rejection of the contingent fee model for fee awards, nor is it necessary to the determination of a reasonable fee." *Id* . at 557.

Still, the multiplier refused to die. Nevertheless, some courts reaffirmed the exceptional nature of the enhancement.[20] In *Forshee v. Waterloo Industries, Inc.,* 178 F.3d 527 (8th Cir.1999), for example, the Eighth Circuit held:

> An upward adjustment to an attorney's lodestar hourly rate is permissible in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts. Because the lodestar amount may already compensate the applicant for exceptionally good service and results, however, the fee applicant must do more than establish outstanding service and results. The applicant also must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended.

***22** The Supreme Court also has not said whether its disapproval of enhancements in *Hensley, Dague* and other statutory fee-shifting cases applies with equal force to derivative actions and other common fund cases. Without decisively addressing this question, *Goldberger* makes a clear assumption that multipliers for risk and qualify survive in the Second Circuit, though reserved for select cases. *Contrast* *In re Bolar Pharmaceutical Co., Inc. Sec. Litig.,* 800 F.Supp. 1091, 1095 (E.D.N.Y.1992) (holding that the rationale for disallowing multipliers in statutory cases should apply with equal force to common fund or common benefit situations).

Regardless of any categorical difference between statutory and other types of cases, it is unquestionably true that risk, quality and experience are ingredients in the formulation of an hourly billing rate. *See* Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 14:6 (Thomson–West, 4th ed.2002) ("market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case").

In *Goldberger,* the Second Circuit signaled its displeasure with the routine use of multipliers. In fact, in that case, the

Court of Appeals affirmed the district court's denial of *any* multiplier, on the basis that the high hourly rates of counsel already accounted for risk and quality. Despite this call for moderation, and the "nagging suspicion that attorneys in these cases are routinely overcompensated for such things as contingency risk," *id.* at 57, enhancements continue to flourish within the Second Circuit in common fund cases.

Counsel's original fee request of $9.6 million was based on a multiplier of 1.60.[21] This is a relatively low multiplier, measured by the range more recently awarded by various judges in this district and others. *See* *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998) (multipliers between 3 and 4.5 are common); *see also Wal–Mart,* 396 F.2d at 123 (3.5 multiplier); *WorldCom,* 388 F.Supp.2d at 354 (4.0 multiplier); *In re Avon Products, Inc. Securities Litig.,* Fed. Sec. L. Rep. (CCH) 197061, 1992 WL 349768 (S.D.N.Y.1992) (decision used percentage method, but stated that under the lodestar approach a risk multiplier of 2 to 3 would have been appropriate); Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 14:6 ("[m]ultiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied"); Wayne Schneider, *Courts Don't Have to Award Excessive Fees,* 20 NAPPA Report at 10 (range of multipliers between 1.37 and 3.1 in seven representative class action settlements in 2004 and 2005); *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 742 (3d Cir.2001), *cert. denied sub nom. Kirby McInerney & Squire, LLP v. Joanne A. Aboff Family Trust,* 534 U.S. 889 (2001) (in surveying cases with common funds over $100 million, court found multiplier of 1.35 to 2.99 common); compare William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class–Action Litigation,* 23 J. Legal Studies 185, 196 (1994) (reporting an average multiplier of 1.69 for class actions studied between 1973 and 1990).

***23** It is important to note, however, that the district courts in the Second Circuit, since *Goldberger,* have applied the percentage-of-recovery approach in common fund cases and utilized the lodestar method only as a cross-check. There appears to be no published opinion since *Goldberger* in this circuit that utilized the lodestar method from the ground up in anything other than a statutory fee case.

The present case resembles *Goldberger* to some degree, as it involves many of the standard risks attendant to derivative and securities actions, as well as prominent plaintiffs' law firms with high billing rates. As with Drexel Brunham Lambert (the firm at the heart of *Goldberger*), the financial transgressions were exposed by the national media before the lawsuit was filed and were the subject of government investigations and eventual indictments. Ten separate law firms shared the workload and, accordingly, the risk. By the time that this action gathered steam and entered the mediation that produced the settlement, the securities action had settled for $2.5 billion and the ERISA action stood on the verge of one of the largest settlements of its type.[22] *Compare In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. 02–Cv–8853 (S.D .N.Y. Aug. 7, 2007) (assessing case in phases) *with* *Goldberger,* 209 F.3d at 55 (holding that risk should be measured as of inception). Many aspects of this case were not high risk.

On the other hand, this case required penetration of the corporate boardroom to establish liability and ended with the somewhat unusual result of extensive future corporate reforms without a recovery of money damages. In this respect, counsel took one unusual risk. Without having their fees assured, counsel yielded the claims for money damages, which would have generated a common fund. That, in turn, would have strengthened their prospect of a sizable attorneys' fee. Instead, counsel negotiated a nascent form of corporate managerial relief,[23] designed to benefit the company and its shareholders in the future and deter a recurrence of this expensive and embarrassing litigation.[24] It is for this risk, and the ingenuity applied in crafting this settlement, that a multiplier is recommended. *Cf. In re Diet Drugs Prods. Liab. Li tig.,* ––– F.3d –––– (3d Cir.2009) (holding that, although the Third Circuit had "never addressed whether courts must reconsider the risk of nonpayment as the action evolves" [emphasis added], it was nevertheless permissible for the district court to have done so). It will also serve as an incentive for future counsel to devise remedies as an alternative to money, strengthening corporate America in the long run through innovation and prophylaxis. *Id.* at n. 41 (citing innovative settlement in assessing fees).

The requested multiplier of 1.60 is at the lower end of the range recently seen, which has generally run between 1.5 and 4.0. *See also* *In re Cendant Corp. PRIDES Litig.,* 243 F.3d at 735–36 (3d Cir.2001) ("strongly suggest [ing]" a multiplier of 3 as the ceiling for an award in a simple case where "no risks pertaining to liability or collection were pertinent"). As applied to the presumptively reasonable fee, but not the expense component, this yields a total award of $8,772,335.60.

***24** Beyond the pioneering aspects of this case, two other factors convince me that this amount is reasonable. First, counsel have taken the unusual step of absorbing their out-of-pocket expenses within their fee request. Ordinarily, such expenses are compensable, both in the marketplace and in derivative actions. Counsel reported $389,023.28 in such expenses. Although, in the absence of such a concession, I would have trimmed the expenses in a few areas, the vast majority of the outlays were reimbursable. While this is not a basis *per se* for a multiplier (other than perhaps the financial risk of these advances that existed during the case), it supports the numerical end product of the multiplier. In line with counsel's original methodology, the multiplier is not applied to $389,023.28 of the award.

Additionally, the requested fee here, and the multiplier that generated it, were the products of a mediation under the auspices of the same special master who settled the underlying case, as well as the two companion cases. While this factor is by no means decisive, it provides an additional measure of support for the request.

Negotiated fees have been cited with favor by some courts. In *Nortel,* the Second Circuit, though declining to determine “precisely how much weight to accord a negotiated fee,” nevertheless stated its expectation that this factor would be given “serious consideration”:

> We leave open the question of how much weight should be given to fees agreed upon by PSLRA lead plaintiffs. We expect, however, that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis.

539 F.3d at 133–34. While *Nortel* involved a fee negotiated between a lead plaintiff and counsel in a securities action, the corporation was in an analogous position here because, in a derivative action, it has a “significant financial stake” in the outcome. And in the present case, the mediations of the underlying action and the fees were conducted sequentially, further minimizing the possibility of actual or tacit collusion. *Cf. D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (“a court-appointed mediator's involvement in ... settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure,” *citing County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1323 [2d Cir.1990]); *see also* Stipulation of Settlement, ¶ 17 (“an award of attorneys' fees and expenses that is less than the amount requested by Plaintiffs shall not be grounds for termination or cancellation of the Settlement”).

At the same time, there always exists some possibility for collusion, not necessarily in a nefarious sense, but at least in a natural convergence of the desire of the corporation's leaders to extinguish the claims and the aspiration of counsel for generous fees. Accordingly, the mediated fee is undeserving of a presumption, but lends further credence to the overall result.

Objections

***25** The principal objection emanates from Badzik, the purported shareholder represented by counsel. The objection is several fold.

First, he questions the weight to be given the $200 million insurance recovery in assessing counsel's achievements. This Report & Recommendation agrees to a considerable extent, declining to treat that number as it would a monetary recovery obtained by counsel in this case.

Second, Badzik urges that “the time sheets in this matter be carefully scrutinized to avoid ... excess billing.” This has also been done. In fact, the recommended fees are based on hourly billing rates, with substantial reductions in the requested time charges.

Third, he questions the materiality of the changes in corporate governance extracted through this litigation. Judge Kram, however, found those results to be substantial and praiseworthy in approving the underlying settlement. *See* Slip op. at 9 ("[t]he preventative aspect of these provisions is itself a significant benefit of the Settlement").

The remaining point of contention is the use of the multiplier to enhance the fees of so-called "contract" or "temporary" attorneys who engaged chiefly in document coding. [25] The contract attorney time amounted to 11.4 percent of the lodestar. (Letter of Karen L. Morris, Sept. 16, 2009 at 2.) The objector argues that the service was more clerical than legal, and that the firms seek a huge markup on the differential between their payment to the businesses referring the contract attorneys and the hourly rates sought.

Badzik supports his objection with submissions made by former contract attorneys in another case, *Carlson v. Xerox Corp.,* D. Conn., No. 00–Cv–1621 (AWT), in which they alleged that class counsel there (not those engaged here) were profiteering on the spread between the cost of the contractors and their billing rates. In *Carlson,* contract lawyer time constituted 63 percent of the total lodestar. Badzik presumably offered these materials simply as background to acquaint the Court with an alleged practice, as surely the Court cannot be expected to extrapolate the conduct of counsel in one action into another action entailing different counsel and different circumstances.

The short answer to this objection is that the district court in *Xerox* rejected the argument. *Carlson,* 596 F.Supp.2d at 409–10; *see also* *Enron Corp. Sec., Deriv. & "ERISA" Litig.,* 586 F.Supp.2d 732, 783–84 (S.D.Tex.2008); *In re Tyco Intern., Ltd. Multidistrict Litig.,* 535 F.Supp.2d 249, 271–74 (D.N.H.2007).

The objector's contention is, in any event, not persuasive. Counsel report that the contract attorneys here were not mere clerks, but exercised judgments typically reserved for lawyers, under the supervision of the firms' regular attorneys. The review of any given document can potentially involve bare reading of some portions and judgmental review of other portions. Efforts to parse these functions in a case of this dimension would be unproductive.

***26** Badzik goes on to suggest that the hourly fees attributed to contract attorneys, even if accepted as part of the basic lodestar, should be excluded from the selected multiplier. With one important exception, this objection too is overruled.

First of all, the drivers of any multiplier are quality and risk. It is with respect to risk, in particular, that the objection loses its allure. Counsel not only paid for the services of the contract lawyers, but also dedicated the time of their regular personnel to supervision. Because the risk is ultimately financial, counsel's recoupment risk in employing contract attorneys is no less uncertain than that relating to the salaries paid to their regular employees.

The charge of a mark-up on the contract attorney payments does not change the result. Law firms are not eleemosynary institutions. Economic rationality dictates that the fees they charge clients be higher than the amounts paid to their timekeeping personnel. The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary. *See also* ABA Comm. on Ethics & Prof'l Resp. Formal Op. 00–420 (Nov. 29, 2000) (opining that a firm may charge a markup to cover overhead and profit if the contract attorney charges are billed as fees for legal services). The ultimate test in *Goldberger's* and *Arbor Hill's* marketplace is what a reasonable client would pay for the individual's time.

Contracted personnel are now a feature in the legal community. *See* Rockas, 40 Boston Bar J. at 8. Reimbursement for these personnel is consistent with the Second Circuit's endorsement of market-driven compensation.

Beyond Badzik, only ten othershareholders objected to the attorney's fees in the settlement. All of those objections were conclusory, essentially stating that the fees sought were "too much ." This Report & Recommendation agrees, to the extent of reducing the fee request by $827,664.40. Otherwise, the paucity of objections to the fee proposal is another factor commending approval of the remaining balance. *See Wal–Mart,* 396 F.2d at 118–19.

Conclusion

This Report & Recommendation draws from the best aspects of various methodologies in an effort to compute a fee that is fair to shareholders, is commensurate with the practices of a thrifty, bill-examining client and provides sufficient rewards and incentives so that these counsel, and others who follow, will enlist in future causes for the public good and innovate where appropriate without fear that their efforts will go uncompensated. The recommended fee of $8,772,335.60 eliminates the types of excesses that have spurred criticism of the lodestar, reflects the compensation structure of the marketplace, embraces the multiplier agreed in mediation and closely tracks the fee approved in the nearest comparable case.

All Citations

Not Reported in F.Supp.2d, 2010 WL 363113, Fed. Sec. L. Rep. P 95,592

Footnotes

1 There is an arithmetical error in counsel's submission. The firms collectively tallied fees of $5, 642, 089.50, but their individual requests aggregate to $5,753,064.50. (Compendium of Exhibits to Memorandum in Support of Derivative Plaintiffs' Motion (["Compendium"], Ex. 12A.)

2 The fundamental conduct underlying this action also formed the basis of the securities and ERISA class actions against the Company.

3 Although defendant AOLTW changed its name to Time Warner, Inc., for clarity and uniformity, this report will follow the Court's practice and continue to refer to the merged entity as "AOLTW," or the "Company."

4 The background section of this report and recommendation is derived from the Court's September 6, 2006 Opinion approving the settlement.

5 By way of comparison, this total is less than half of the 28,000 hours reported in the ERISA litigation and less than 10 percent of the 135,000 hours reported in the securities litigation.

6 Plaintiffs' counsel have challenged Mr. Siegel's standing to object on behalf of his client, David Badzik ("Badzik"). Such disputes over standing are more appropriately within the province of the district court judge, but I have considered the objections, as they are helpful in ventilating the issues and providing a measure of "concrete adverseness which sharpens the presentation of issues." *Hess v. New Jersey Transit Rail Operations, Inc.,* 846 F.2d 114, 115 (2d Cir.1988). If I were not to accept it as an objector's brief, I would nevertheless accept the submission as amicus curiae assistance under the unusual circumstances presented here.

7 Interestingly enough, two of the major dictates of Goldberger, a preference for "moderation and a jealous regard to the rights of those who are interested in the fund," can be traced back to the Supreme Court's seminal verbiage in *Greenough.* 105 U.S. at 537.

8 While not strictly applicable to this derivative action, the Class Action Fairness Act of 2005, 28 U.S.C. § 1712, requires the application of an hourly rate to such injunctive scenarios.

9 Of the *Johnson* elements, only factors 4, 7, 10 and 11 are not subsumed within the *Goldberger* analysis. Item 11—the length of the relationship between attorney and client—is largely irrelevant to this situation.

10 A reduction in excess of 15 percent could be justified. But elsewhere in this report and recommendation, I propose adjustments to certain individual time entries, some of which relate to the pleadings. Limiting the generalized reduction to 15 percent will avoid a double count that would be unfair.

11 As discussed below, any notion that additional travel expense is justified by the lower billing rates of out-of-district counsel is negated by the billing rates utilized here, which are much closer to the prevailing rates in New York City than to the prevailing rates in counsel's home districts.

12 In many instances, counsel billed for review of reports in newspapers, books and other popular publications. Often, several attorneys read the same book or article. Some of these published reports were apparent leads on potential evidence, while others were reports about this case or other matters such as the company's name change or layoffs which, while interesting, would not readily advance the cause of this litigation. Charges for the former were allowed, where clearly justified by the description. Fees for the latter were not.

13 As elaborated below in connection with the fee multiplier, the fee proposed by counsel was the product of an agreement with the Company, mediated by Special Master Watcher. This review ana tne resulting recommendations were not obviated in any respect by that circumstance. Judge Kram directed this review of the time records, knowing of the negotiated fee. In addition, Special Master Wachter did not engage in a review of the attorneys' daily time records. Those records were not even before him.

14 There were few court appearances in this case. The mediation sessions were conducted primarily in California. Depositions were conducted in various locations. Most of the hours, however, were spent on document review, with the use of electronic databases, meaning that the bulk of the work was performed outside of New York.

15 The Altman Weil survey reports a $444 hourly average in the top decile for New York in 2005. Altman Weil at 91. However, that number, and the data for other states as well, cover the entire state. According to another respected survey, the top rate that year for a leading upstate New York firm was $425 while the top partners at leading Manhattan firms were ranging between $600 and $830 per hour. Large Philadelphia firms were billing partners at between $600 and $700 per hour. A large firm in Memphis, Tennessee, the closest major city to Little Rock, reported partner billing rates between $200 and $525 per hour. *See In Focus: Billing, Natl. L.J.* (Dec. 12, 2005).

16 Six other firms seek reimbursement in this action, after acting as local counsel or representing tagalong plaintiffs. The fees sought by those firms collectively, $191,345.75, are barely three percent of the total. Suffice it to say, the hourly rates listed by those firms fall roughly within the range of the other firms, although Arthur Abbey, a noted plaintiffs' lawyer, leads all requesters at $850 for each of his 13.25 hours of work. Three of the firms, Abbey Spanier Rodd Abrams & Paradis, Shalov Stone & Bonner and Daniel Cobrinik, P.C. are based in New York and are therefore not implicated by the question of lower out-of-district rates.

17 To be fair, courts utilizing the lodestar method have accepted hourly rates at the higher end of the prevailing range, including some higher than those sought now. *See* *Goldberger,* 209 F.3d at 46 (hourly rate as high as $550 in 1996); *In re Indep. Energy–Holdings PLC Sec. Litig.,* 2003 WL 22244676, at *9 (S.D.N.Y.2003) (hourly rates from 5 years ago of $650/hour for partners, and $300–$425/hour for associates were "not extraordinary for a top flight New York City law firm"); *In re Telik, Inc. Sec. Litg.,* 576 F.Supp.2d 570, 588–89 (S.D.N.Y.2008) (hourly rates of $700–$750 for partners and $300–$550 for associates fall within "the norm of the rates charged by those attorneys' common adversaries in the defense bar"). Counsel are not seeking rates outside the bounds of those sought from, and often accepted by, prior courts. *Arbor Hill,* however, if faithfully applied, would now require the Court to simulate a hypothetical bargaining exercise between a thrifty client and its prospective attorney, as opposed to retrospectively fixing an hourly rate in quasi-monopolistic fashion.

18 The Court of Appeals has specifically approved the practice of judges and special masters who draw upon their own knowledge when evaluating billing rates. *See, e.g.,* *Assoc. for Retarded Citizens of Conn., Inc. v. Thorne,* 68 F.3d 547, 554 (2d Cir.1995) ("a [court] may 'rely in part on [its] own knowledge of private firm hourly rates in the community' "); *see also* *Goldberger,* 209 F.3d at 56.

19 The Stipulation of Settlement entitles counsel to interest through the date of payment. (Stip. Of Settlement, May 2, 2006, ¶ 15.) But because that Stipulation requires the funds to be held in relatively conservative investment vehicles (*id.,* Ex. E at 1–2), the interest would not match the increase yielded by the application of current hourly billing rates.

20 At least one opinion has construed *Dague's* comment that "no contingency enhancement whatever is compatible with the fee-shifting statutes at issue," *id.,* to mean that an enhancement for risk is virtually never permitted. *See Purdue v.* *Kenny A.,* 532 F.3d 1209 (11th Cir.2008), *cert. granted,* ––– U .S. –––– (2009). Commentators anticipate that the Supreme Court will use *Perdue* to resolve finally the issue whether multipliers are ever permitted, at least in statutory fee cases. *See* Tony Mauro, *Justices Doubt Lawyers Should Be Paid Extra for Winning,* N.Y.L.J., Oct. 16, 2009 at 1.

21 Here, too, there was a minor mathematical error in counsel's submissions. Counsel acknowledge that 1.60 is the correct number.

22 The securities case received preliminary settlement approval in September 2005 and the ERISA case was settled by Special Master Wachter in February 2006.

23 At the time of this settlement, there was only one other corporate reform settlement comparable in structure and magnitude and lacking in discrete financial compensation, *UNITE Nat'l Retirement Fund v. Watts* (No. 04–Cv–03603 [D.N.J.]) (appended at Tab 10, Vol. 1 of counsel's Compendium of Exhibits). Counsel had no reliable means of placing a dollar value on these reforms or significant reservoir of precedent to support their application for a fee under these circumstances.

24 Viewed simplistically, this conclusion might run afoul of the notion that litigation risk should be measured as of when the case is filed. *See* *Goldberger,* 209 F.3d at 55; *DiFilippo v. Morizio,* 759 F.2d 231, 234 (2d Cir.1985). But the risk that counsel would have to settle for non-monetary damages always existed in this case. It merely came into focus later in the proceedings, leaving counsel with a choice of pursuing a potentially elusive monetary goal or the immediate adoption of salutary corporate reforms which the courts probably would not be empowered to decree. By electing the latter course, counsel elevated the interests of their clients far above their own and made their recovery of fees, and the expenses they advanced, a more complicated and uncertain process.

25 "A temporary lawyer usually is hired by other lawyers, law firms and corporate legal departments ... to work on a single matter or a number of different matters, depending upon the firm's staffing needs and whether the temporary lawyer has special expertise not otherwise available to the firm." *George C. Rockas, Lawyers For Hire and Associations of Lawyers: Arrangements that Are Changing the Way Law is Practiced,* 40 Boston Bar J. 8 (1996).

171 F.R.D. 104
United States District Court,
S.D. New York.

In re PAINEWEBBER LIMITED PARTNERSHIPS LITIGATION.
This Document Relates To All Actions.
This Document Also Relates To (But is not Filed in) The Coordinated Action Neidich et al. v. Geodyne Resources Inc. et al. No 94–052860, Pending in the District Court of Harris County, Texas.

No. 94 Civ. 8547(SHS).
|
March 20, 1997.

Synopsis
Parties to securities fraud suit brought by customers against broker sought approval of proposed settlement. The District Court, Stein, J., held that: (1) numerosity and superiority requirements were satisfied in connection with class certification of customers in limited partnership claimed to have been fraudulently represented as safe investments; (2) commonality requirement was satisfied, even though limited partnership in question financed activities in four different categories of business activity; (3) class counsel represented interests of all customers, despite diversity of investment, due to mechanism for securing input of all interests before making settlement proposal; (4) settlement offer was fair, as it secured between 50% and 100% return of investment; and (5) pro-rata allocation of cash to be paid by broker was fair, despite claim that claims of some investors were superior to claims of others.

Settlement approved.

***105** *OPINION AND ORDER*

STEIN, District Judge.

The plaintiff class has moved, pursuant to Fed.R.Civ.P. 23(e), for final approval of the settlement of this class action on the terms set forth in the Stipulation and Agreement of Compromise and Settlement (the "Settlement Agreement") executed by the parties on July 11, 1996. By its Order dated July 17, 1996, this Court granted preliminary approval of the Settlement Agreement as "fair, reasonable and adequate," set a date for a hearing on whether the terms of the Settlement Agreement were fair, reasonable and adequate, and directed Class Counsel to provide notice to the Class. In August of 1996, Class members were notified by mail and newspaper publication of the terms of the Settlement Agreement, including the proposed Plan of Allocation, the proposed award of attorneys' fees, and the date and purpose of the fairness hearing. Objections were subsequently filed by members of the Class ***106** and arguments were presented at a fairness hearing before this Court on October 25 and November 8, 1996, at which testimony was taken and legal arguments heard. On the basis of all the evidence and arguments submitted, and for the reasons set forth below, the proposed Settlement and Plan of Allocation are determined to be fair, reasonable and adequate, and accordingly are hereby approved pursuant to Fed.R.Civ.P. 23(e). The award of attorneys' fees and litigation expenses is not decided in this Opinion and Order and will be the subject of a separate Order.

I.

FACTS

A. *Introduction*
The Settlement Agreement submitted here for approval applies to two distinct but related consolidated lawsuits: the Consolidated Complaint now pending in this Court known as *In Re PaineWebber Limited Partnerships Litigation* (Master File No. 94 Civ. 8547) ("Federal Action"), and the Consolidated Petition currently pending in the District Court of Harris County, Texas, under the caption *Neidich. et al. v. Geodyne Resources, Inc., et al.,* No. 94–052860 ("Texas Action"). Both the Federal and Texas Actions are comprised of multiple litigations and have previously been certified as class actions; they have proceeded on a coordinated basis in this Court during much of the discovery process and throughout the negotiation of the Settlement Agreement.

The plaintiff class in the Federal Action is composed of investors who purchased shares in one or more of 70 limited partnerships and investment trusts ("Partnerships") which were organized, marketed and operated by PaineWebber. (*See* Class Plaintiffs' Memorandum in Support of Approval ("Class Mem.") at 1.) The plaintiff class in the Texas Action, which is entirely encompassed within the Federal Class, is composed of investors who purchased units in 23 of the 29

Geodyne limited partnerships ("Geodyne Units") marketed by PaineWebber. (*See* Notice of Proposed Class Action Settlement ("Settlement Notice") at ¶¶ 4–5.) Unless otherwise noted, the Federal and Texas Classes will be referred to collectively as "the Class," and their members as "Class Members." The defendants in the Federal and Texas Actions are PaineWebber Group, Inc., PaineWebber Incorporated, Ltd., and certain PaineWebber subsidiaries, affiliates and individual officers; they will be referred to collectively as "PaineWebber" or "the Defendants." Defendants and the Class will be referred to together as "the Parties." Finally, certain counsel have been designated by the Texas Court or by this Court to act as Executive Committees on behalf of their respective classes in the Texas and Federal Actions; unless otherwise noted, these counsel will be referred to collectively as "Class Counsel."

The members of the Federal Class have alleged, among other claims, that PaineWebber sold them risky and illiquid Partnerships in an effort to maximize its own fees and commissions, and engaged in a conspiracy to misrepresent those Partnerships as safe investments suitable for most investors. The Federal Class seeks relief pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), federal securities law, and the common law. The members of the Texas Class have alleged, among other claims, that PaineWebber defrauded them by failing to disclose the true nature of the risks presented by the Geodyne partnerships, and by misrepresenting the likely benefits of those investments. They seek relief under the statutes and common law of Texas. The Defendants deny all allegations of wrongdoing and liability. (*See* Settlement Notice at Notice at ¶¶ 4–6.)

On July 11, 1996, PaineWebber and Class Counsel reached an agreement to settle these consolidated class actions, pending approval by this Court. The proposed Settlement would provide a cash recovery of $125 million, plus a variety of "Additional Benefits"—such as guarantees and fee waivers —which the parties assert to be worth at least $75 million. The stated objective of the Settlement is to allow all Class Members to recoup as much of their lost capital investments as possible, and accordingly the settlement proceeds are to be allocated to Class Members pro rata on the basis of "Recognized ***107** Loss," a defined term in the proposed Settlement. (*See infra* Section I.) Payments will not be weighted to reflect possible differences in the relative strength of Class members' claims on the merits. (*See* Class Mem. at 48–51.)

This Opinion and Order sets forth the material facts underlying the Settlement of these class actions, and addresses the legal issues—including those issues that have been raised by objecting Class Members—that are relevant to the determination of the Settlement's fairness, reasonableness and adequacy.

B. *Background of the Federal Action*

Between November 23, 1994 and January 4, 1995, 10 lawsuits were filed in this District by individual plaintiffs against PaineWebber, alleging claims arising from the marketing and sale of the Partnerships and requesting certification as class actions. [1] Shortly thereafter, Judge Charles S. Haight, Jr. of this Court consolidated those actions [2] for pretrial purposes under the caption *In re PaineWebber Limited Partnerships Litigation,* Master File No. 94 Civ. 8547; approved the formation of plaintiffs' counsel into an Executive Committee; and set schedules for the filing of a Consolidated Complaint and for discovery. (*See* Case Management Orders 1 and 2, dated March 3 and 16, 1995.)

On March 27, 1995, eighteen plaintiffs, on behalf of all those similarly situated, filed a First Consolidated Amended Class Action Complaint ("Complaint") in this Court against PaineWebber Group, Inc., PaineWebber Incorporated ("PWI"), various PaineWebber subsidiaries and affiliates, and three individual corporate officers. [3] The Complaint alleges that between 1980 and 1992, PaineWebber developed, marketed and operated numerous investment Partnerships as part of an ongoing conspiracy to defraud investors and enrich itself through excessive fees and commissions. Specifically, the Complaint asserts that the 70 Partnerships, which include limited partnerships in oil and gas, aircraft leasing and research and development, as well as real estate investment trusts (REITs) and other entities, [4] were falsely and ***108** indiscriminately promoted to the public by PaineWebber as low-risk investments, when in fact PaineWebber knew the opposite to be true. (Complaint at ¶¶ 10–20, 116–136.)

Defendants are alleged to have implemented their scheme through the use of "Uniform Sales Materials" and broker "scripts" which stressed the safety of the Partnerships and emphasized PaineWebber's experience, skill and trustworthiness in investigating and selecting high quality investment opportunities. [5] (Complaint at ¶¶ 131–132.) The Partnerships allegedly were marketed as acceptable investments for retirement funding and as alternatives to tax free bonds or certificates of deposit, and PaineWebber brokers allegedly were coached to promote the Partnerships regardless of each customer's investment objectives and without concern for the suitability of such investments. (Complaint at ¶¶ 18, 130–132.) It is also alleged that the marketing of the Partnerships was centrally orchestrated through the use of a uniform series of statements and sales materials, and that the same presentations were used nationwide for virtually all of the Partnerships regardless of the risk associated with the venture or the quality of the particular investment. (*See* Complaint at ¶¶ 12, 116, 118, 128; Affidavit of Nicholas Chimicles submitted in support of the settlement ("Chimicles Aff.") at ¶ 14.) Defendants are alleged to have known, and to have concealed from investors, that the Partnerships were not actually conservative investments, but were in fact highly speculative ventures, and moreover that it would be extremely unlikely, if not impossible, for these investments ever to attain their stated goals, particularly in light of PaineWebber's own substantial up-front fees and commissions. (Complaint at ¶ 136.)

The Complaint further alleges that PaineWebber deliberately circumvented the disclosure requirements of federal securities law by promoting the sale of Partnerships on the sole basis of summary Uniform Sales Materials, and actively discouraging brokers and investors from reading or referring to the Prospectuses. Brokers and prospective investors were allegedly told that the Uniform Sales Materials explained the legal language contained in the Prospectus, when in fact such Sales Materials allegedly glossed over or failed to disclose risks noted in the Prospectus. (Complaint at ¶¶ 138–139; Chimicles Aff. at ¶ 15.) Finally, it is alleged that in order to conceal their initial fraud, induce investors to purchase future offerings, and deceive investors about the true financial condition and performance of their investments, Defendants manipulated quarterly cash distributions and misreported data in investor reports and account statements, so as to make it appear for some time that the Partnerships were in fact meeting their projections. (Complaint at ¶¶ 141–143; Chimicles Aff. at ¶ 16.)

Count I of the Complaint asserts RICO claims pursuant to 18 U.S.C. § 1962(c) and (d); Count II asserts RICO claims pursuant to 18 U.S.C. § 1962(a) and (d); Count III asserts violations of Section 10(b) of the Securities and Exchange Act of 1934, and of Rule 10b–5 under that Act; Count IV asserts violations of Section 11 of the Securities Act of 1933; Count V asserts violations of Section 12 of the Securities Act. The remaining Counts allege common law fraud (Count VI), negligent misrepresentation (Count VII), breach of fiduciary duty (Count VIII), breach of third party contract against PWI (Count IX), and breach of implied covenants against PWI (Count X). (Complaint at ¶¶ 177–248; Chimicles Aff. at ¶ 17.)

By Order dated May 30, 1995, Judge Haight certified the Consolidated Complaint as a class action pursuant to Fed.R.Civ.P. 23(b)(3) in accordance with a prior stipulation of the parties. (*See* Stipulation and Order Regarding Class Certification dated May 30, 1995 ("Certification Order") at ¶ E, § 10.) The Federal Class consists of all persons and entities who purchased units in one or more of the Partnerships from or through PaineWebber between January 1, 1980 and December 31, 1992, and its representatives are the eighteen named plaintiffs in the Consolidated ***109** Complaint.[6] In accordance with Fed.R.Civ.P. 23(a), the Certification Order specified that the Federal Class satisfies all the requirements of class certification. Specifically, it provided that: (a) due to the large number of potential plaintiffs, joinder of class members individually would be impracticable; (b) there are numerous questions of law and fact common to the Class; (c) the Class representatives allegedly purchased Partnership interests in reliance on false representations by PaineWebber, and their claims for relief are typical of the Claims for relief of the Class; and (d) as there is no existing conflict between the Class representatives and the other members of the Class, and as both the representatives and their counsel are willing and able to prosecute this action vigorously, the Class representatives would fairly and adequately protect the interests of the Class. (*See* Certification Order at ¶ E, §§ 3–9.)

C. *Background of the Texas Action*

In late 1994, two lawsuits were filed by individual plaintiffs in the 127th District Court of Harris County, Texas, on behalf of a putative class of investors who had purchased units in 23 "Geodyne" oil and gas limited partnerships marketed by PaineWebber between March, 1987 and June, 1991.[7] They were consolidated by Judge Sharolyn Wood of the Texas District Court on April 26, 1995, under the caption *Neidich. et al. v. Geodyne Resources. Inc., et al.,* No. 94–052860 (Harris County, Texas), and an Executive Committee of plaintiffs' counsel was appointed. (*See* Affidavit of Karen Morris in

Support of the Proposed Settlement ("Morris Aff.") at ¶¶ 2–3.)

In May of 1995, the plaintiffs in those actions filed a Consolidated and Amended Petition ("Texas Petition") in the Texas Court against PaineWebber and other defendants, asserting claims under state law arising from the marketing and sale of the Geodyne Units. The Consolidated Petition charges Defendants with substantially the same course of conduct set forth in the Federal Consolidated Complaint, and alleges, among other claims, that PaineWebber deliberately misled investors by concealing the speculative nature of the Geodyne Units and by misrepresenting the safety and likely benefits of those investments. It is further alleged that PaineWebber knew that their projections for the Geodyne Units were not attainable and that those partnerships were not appropriate for investors seeking to preserve capital. The Petition seeks redress under Texas law for fraud, breach of fiduciary duty and negligent misrepresentation. (*See* Settlement Notice at ¶ 5Notice at ¶ 5.)

The following month, the Consolidated Petition was certified by Judge Wood as a class action pursuant to Rule 42(b)(4) of the Texas Rules of Civil Procedure. The Class in the Texas Action consists of all persons or entities who purchased Geodyne Units from or through PaineWebber.[8] (*See* Notice of Pendency of Class Actions ("Notice of Pendency") at ¶ 7.)

D. *Pretrial Coordination of the Federal and Texas Actions*

In late May and early June of 1995, Judge Haight and Judge Wood issued orders which coordinated the Federal and Texas Actions in the Federal Court for pretrial purposes, in accordance with the stipulation of the Parties. Pursuant to those Stipulations and Orders, the Texas Class agreed to be bound by the Federal Court's final determination of ***110** legal and factual issues concerning the 23 Geodyne Units involved in both actions, and to coordinate with the Federal Class any pleadings or pretrial motion practice relating to Geodyne. The parties also agreed to coordinate investigation and discovery regarding the Geodyne Units. (*See* Case Management Order No. 3 at ¶¶ 1–10.)

On June 7, 1995, pursuant to the Orders of Class Certification, and in accordance with Fed R. Civ. P. 23(c)(2), a joint Notice of Pendency of the Class Action was mailed by the Notice Administrator, Rudolph, Palitz LLP. The Administrator mailed 218,398 copies of the Notice to individuals and companies whose names were provided by PaineWebber, and also to nominees whose names the Administrator maintains on its own database.[9] (Chimicles Aff. at ¶ 23.) Recipients of the Notice included brokers and other record owners of Partnership interests, who were instructed to forward the Notice to beneficial owners, or to provide the names of such owners to Class Counsel. (*See* Notice Of Pendency at ¶ 20.) Within 10 days of this mailing, a summary version of the Notice was also printed in the national editions of *The Wall Street Journal, The New York Times* and *USA Today.* Among other information, the Notice of Pendency summarized the claims asserted in the Complaint and the Texas Petition, defined the Federal and Texas Classes, identified the members of the Executive Committees, apprised Class Members of their right to opt out of the Class, and informed them that any such request must be postmarked or received by July 21, 1995. Subsequently, 5,458 timely requests for exclusion were received by the Notice Administrator. (Chimicles Aff. at ¶ 23.)[10]

E. *Investigation. Discovery and Document Analysis*

Preliminary investigation and discovery was undertaken separately by lawyers in the Texas and Federal Actions prior to the certification and coordination of the two actions. (*See* Affidavit of Karen Morris in Support of Request for Attorneys' Fees ("Morris Fee Aff.") at ¶¶ 26; Chimicles Aff. at ¶ 25.) Thereafter, discovery was coordinated in accordance with Case Management Order No. 3, and PaineWebber produced, on a rolling basis, more than 200 boxes of documents to Class Counsel during the summer of 1995. (Chimicles Aff. at ¶ 25.) Additionally, Class Counsel subpoenaed documents from third parties, including former PaineWebber employees, general partners such as Geodyne, Pegasus and Samson Oil, and certain appraisal and accounting firms. In response to these subpoenas, Counsel obtained eight compact disks of information—each representing approximately 10 boxes of documents. By the early fall of 1995, Class Counsel was in possession of the equivalent of approximately 300 boxes of documents produced by PaineWebber and third parties or obtained from public sources, including prospectuses, marketing materials, quarterly and annual reports, correspondence and memoranda, due diligence materials, broker training materials, reserve reports, and financial records. (*Id.* at ¶¶ 25, 29.)

In addition, Class Counsel conducted interviews with hundreds of Class Members and former PaineWebber brokers regarding the sales tactics used by PaineWebber in its marketing of the Partnerships and the information provided to customers regarding the subsequent performance of those investments. Class Members were also requested to provide Counsel with copies of the written sales materials they had been given by PaineWebber in connection with their purchases of Partnership units. (Chimicles Aff. at ¶ 26.) Between October 1995 and January 1996, pursuant to a deposition protocol negotiated ***111** by the Parties, Class Counsel deposed approximately 30 individuals, including: PaineWebber personnel responsible for the creation and sale of the Partnerships and for due diligence and compliance with state and federal regulations; officers of selected PaineWebber subsidiaries and affiliates; and current and former PaineWebber brokers. (*Id.*) Class Counsel also deposed third parties, including officers and managers of the Pegasus Partnerships, and, in coordination with Texas Counsel, individuals involved in the sale and operations of the Geodyne Partnerships. Certain of the deponents located beyond the subpoena jurisdiction of this Court were deposed on videotape in order to preserve their testimony for trial. (*Id.*; Morris Fee Aff. at ¶ 37.)

The documents obtained by Class Counsel through the discovery process and from public sources were coded in a master database for review and analysis. (Chimicles Aff. at ¶¶ 30–32.) Meanwhile, the 70 Partnerships were subdivided and classified by industry—i.e., real estate, Geodyne, Pegasus, and research & development—and each class was assigned to an attorney working group under the aegis of a member of the Executive Committee. Finally, individual firms, drawn from among plaintiffs' counsel in the original lawsuits, were assigned to review discovery materials with respect to specific Partnerships. (Chimicles Aff. at ¶ 28.) The review and analysis of Geodyne-related documents was coordinated with Counsel in the Texas Action, which had already performed work with respect to those Partnerships. The Executive Committee, in its role as supervisor of the process, prepared analysis guidelines for the working groups, circulated memoranda and status reports, and organized meetings to facilitate the sharing of information. (*Id.*)

Beginning in June of 1995 and running through September of 1996, Class Counsel retained the services of industry and financial experts to provide assistance in analyzing the merits of the various claims and in calculating residual values for each of the 70 Partnerships. The foundation of these analyses was the "initial financial condition summary" prepared in December of 1994 by Kathleen Balon, a financial expert retained by Class Counsel. (*See* Affidavit of Kathleen Balon ("Balon Aff.") at ¶¶ 42–46.) The following experts were engaged: James Vodola of PASCORP (valuation of Real Estate Partnerships and REITs, and Remaining Value Guarantees); Gustavson Associates (valuation of Geodyne Partnerships); Professor William Jordan (assistance with Pegasus and Geodyne, and partnership structure in general); David Treitel of Simat, Helliesen & Eichner, Inc. (valuation of Pegasus Partnerships); Michael Dowd of Equity Research Collaborative and Mark Roth of Korpacz & Associates, Inc. (statistical data affecting the Real Estate Partnerships); and Candace Preston of Princeton Venture Research (valuation of certain Partnerships and of the proposed Additional Benefits). (See Balon Aff. at ¶ 38; Balon Deposition Tr. at 13, 61; Chimicles Aff. at ¶ 33.) [11]

Under Balon's supervision, these individuals analyzed the performance histories, current assets, and financial conditions of each Partnership, including cost structures, debt burdens, likely liquidation periods, and potentials for future income generation. They also reviewed particular industry and market risks for the purpose of discounting future cash flows. (Balon Aff. at ¶¶ 17–18, 39.) [12] Specifically, with regard to the 28 real estate Partnerships, they analyzed individual property financial statements, cash flow projections and, where appropriate, joint venture agreements, for approximately 180 properties. For each of the 29 Geodyne Partnerships, they reviewed up to four years of reserve data, comprising information relating ***112** to three reserve categories as well as operating costs. For the two Pegasus Partnerships, they analyzed the 17 aircraft leases in place, including expected revenue from each lease, the credit quality of the lessees, and the estimated residual market value of each aircraft. With regard to the R & D Partnerships, they evaluated individual royalty contracts and projected revenue. (*Id.* at ¶ 24.) For the remaining Partnerships, including the Fiduciary Capital and Preferred Yield Partnerships, a less extensive analysis was prepared due to lack of available information. (*Id.* at ¶ 25.) On the basis of these studies, Balon and the experts assigned fair market values to the assets and operations remaining in each of the 70 Partnerships, as discounted to January 1, 1996. These residual values would be crucial to Class Counsel's calculation of the "Recognized Losses" suffered by the Class, which calculations would, in turn, provide the touchstone for the negotiation of the Settlement, the Plan of Allocation, and certain Additional Benefits. (*See id.* at ¶¶ 18–19.)

F. *Settlement Negotiations*

On July 27, 1995, PaineWebber announced that it would take a $200 million charge against earnings to cover potential liabilities arising from its marketing and sale of the Partnerships. Such liabilities included any judgments, settlements, fees and costs incurred in connection with the Federal and Texas Actions, opt outs from those actions, other individual or mass litigations and arbitrations, and an ongoing SEC investigation. [13] (Chimicles Aff. at ¶ 100.) PaineWebber also announced that it had entered into settlement negotiations with the SEC. (*Id.*) Several weeks later, PaineWebber made a preliminary settlement offer to Class Counsel; the offer allegedly represented "a small fraction of the ultimate Settlement," and was rejected. (*Id.*) Settlement negotiations between the Parties began in earnest in October, 1995, after the conclusion of the bulk of discovery. (*Id.* at ¶ 37.) In connection with those negotiations, Class Counsel established a Settlement Committee, and also convened a "Sounding Board" from among the named plaintiffs to assist in evaluating settlement proposals and to bring specific investor concerns to the attention of the Settlement Committee. [14] (*Id.* at ¶ 42.)

(1) *Loss Calculations and Negotiation of the Settlement Fund*

Underlying the negotiations between the Parties was Class Counsel's calculation of the losses suffered by investors in each of the Partnerships. Based on the data analyses performed by the various attorney working groups and experts, and in consideration of the risks that would be involved in establishing damages at trial, Class Counsel decided to proceed, for settlement purposes, on a theory of "Recognized Loss." Accordingly, investor losses in each Partnership Unit were deemed to equal the Unit's purchase price, minus all cash distributions received through December 31, 1995, minus the residual value, if any, of the Partnership Unit as of January 1, 1996. (Chimicles Aff. at ¶ 90.) Other legal theories, such as lost investment opportunity, were not included in the evaluation, and no interest component was applied. [15] Distributions were assumed to encompass both income and return on capital; tax benefits, with one exception, were not considered. [16] Finally, with respect to residual values, the asset valuations performed for each ***113** Partnership by Balon with the assistance of the retained experts, as described above, were adopted by Class Counsel. (Balon Aff. at ¶ 32.) [17]

The total capital investment by Class Members in the Partnerships, as adjusted for opt outs and independently settled claims, was determined to be approximately $2.3 billion, of which $1.2 billion (53%) was invested in the Real Estate Partnerships and REITs, $444 million (19%) was invested in the Geodyne oil and gas partnerships, $176 million (8%) was invested in the Pegasus aircraft leasing Partnerships, and $458 million (20%) was invested in partnerships operating in other industries, including research and development, equipment leasing, mezzanine capital, futures trading and media debt. (Class Mem. at 9–10.) Total distributions from the 70 Partnerships through December 31, 1995 were approximately $1.46 billion, with distributions exceeding the amount of investment in 14 cases. (*Id.* at 10.) For the remaining Partnerships, the amount of capital at risk (including capital lost through liquidated Partnerships) was determined to be $913 million, and the residual value of these investments as of January 1, 1996 was deemed to be $589 million. (Chimicles Aff. at ¶ 38.) Based on these figures, Class Counsel estimated that the total Recognized Loss suffered by the Class as of January 1, 1996, again as adjusted for opt outs and other settlements, was approximately $410 million. (Balon Aff. at ¶ 36.) Of this amount, $285.4 million was lost in the Real Estate Partnerships, $115.2 million in Geodyne, $8.99 million in Pegasus, and $530,000 in other Partnerships. (Morris Aff. at ¶ 7 & n. 3.) [18]

The Parties engaged in arm's length negotiations during the late fall of 1995. During the negotiations, there was substantial disagreement over Class Counsel's calculation of the residual values, particularly with regard to the projected earning capacity of the Partnerships. (Chimicles Aff. at ¶ 38.) On December 12, 1995, the Parties entered into an initial Memorandum of Understanding ("MOU"). An amended MOU, together with a Stipulation and Order Approving Appointment of Escrow Agents and Establishing an Account with the Court, was filed with, and signed by, this Court approximately one month later, on January 18, 1996. (Chimicles Aff. at ¶ 48.) The MOU provided for the immediate payment by PaineWebber of $125 million into a cash Settlement Fund for the benefit of the Class, and for the prompt negotiation of Additional Benefits having a further value to the Class of at least $75 million. Pursuant to the MOU and Order, PaineWebber deposited $125 million into an interest-bearing escrow account with the Court Registry Investment System that same day, January 18, 1996. (Chimicles Aff. at ¶ 48.)

(2) *Negotiation of the Additional Benefits*
Following the execution of the MOU, and in accordance with its terms, the Parties proceeded with the negotiation of the Additional Benefits, attempting to confer at least $75 million in economic value on the Class, without any immediate outlay of cash by PaineWebber, at the same time as tailoring the Benefits where possible to the particular needs of investors in the different Partnerships.

At issue in the negotiation was the creation of specific guarantees to protect those Class Members who—because cash flow projections for their investments are determined to be high—might be saddled with artificially low levels of Recognized Loss as of January 1, 1996. Such guarantees would shift a portion ***114** of the risk of future performance from the investor to PaineWebber, and negotiations therefore included an assessment of the amount of risk PaineWebber was willing to assume in each Partnership. In those Partnerships where PaineWebber continued to control the operations, it was willing to assume more risk; conversely, in those Partnerships where it no longer had control or economic interest, such as Geodyne, it was unwilling to provide a "Par" or "Remaining Value" guarantee. (Chimicles Aff. at ¶ 73.)

On July 11, 1996, the Parties concluded the Settlement Agreement, which incorporated Additional Benefits—Par Guarantees, the Remaining Value Guarantee, the Geodyne Guarantee, waived and assigned fees, and other benefits—worth at least $75 million. The Settlement also includes an Additional Benefits Protocol which outlines procedures for any valuations that may be required, as well as for the selection of mutually acceptable appraisers and advisors. [19]

(3) *Development of the Plan of Allocation*
Also during the first six months of 1996, Class Counsel established an Allocation Committee to develop a fair method of distributing Settlement proceeds among Class Members. Within this Committee, separate advocacy teams were created to represent the claims of investors in the four major Partnership groups—Real Estate, Geodyne, Pegasus, and R & D. These advocacy teams were composed of the same law firms and industry experts that had been responsible for each Partnership group during the discovery phase of the litigation. The purpose of the Allocation Committee's structure was to encourage an independent evaluation of each group's claims, and to promote, through an internal adversarial process, an objective comparison of the relative rights of all Class Members. In early 1996, each advocacy team, in conjunction with its assigned expert or experts, reviewed the merits of its constituent investors' claims. In addition, Class Counsel prepared assessments of the impact of various statutes of limitation on all claims. (Chimicles Aff. at ¶ 61.) All the teams met together to assess relative strengths and weaknesses and the opinions of the investor Sounding Board were solicited. (Class Plaintiffs' Supplemental Memorandum in Further Support of Approval ("Class Supp. Mem.") at 18 n. 18.)

The Allocation Committee ultimately determined that while some distinctions existed between the claims asserted by different Class Members, all claims demonstrated substantial merit. [20] Similarly, the Committee found that no reasonable basis existed to treat the Partnerships differently on the basis of possible statute of limitations defenses, at least with regard to RICO liability, where the most substantial such defenses had been raised. (Chimicles Aff. at ¶ 66.) Consequently, the Committee concluded that any differences that might exist among the strengths or weaknesses of particular claims were not sufficient, given the determined basic ability of all plaintiffs to establish liability, to justify "weighting" the distribution of Settlement proceeds in favor of certain Class Members over others. (Class Mem. at 51; Class Supp. Mem. at 14; Chimicles Aff. at ¶ 89.)

It was decided instead that the primary purpose of allocation should be to return to all investors the greatest possible percentage of their invested capital, and that the Plan should therefore be based simply on an investor's pro rata share of Recognized Loss, ***115** without regard to the relative merits of his or her particular claim. (Class Mem. at 50.) This uniform allocation theory, in conjunction with the specific tailoring provided by the Additional Benefits, was deemed by the Committee to be the fairest overall method of apportioning the Settlement proceeds. (*See* Class Supp. Mem. at 12.) [21]

G. *The SEC Investigation*
During the pendency of the Federal and Texas Actions, PaineWebber was also the subject of an investigation by the Securities and Exchange Commission ("SEC") regarding the marketing and sale of certain Partnerships. The existence and purpose of the SEC investigation were disclosed in an article published in the *Wall Street Journal* on November 22, 1994, just prior to the filing of the first lawsuits in the Federal Action. (Complaint at ¶¶ 14, 24.) A second article, published on February 7, 1995, revealed that PaineWebber and the

SEC were involved in negotiations to settle the Commission's claims. (*Id.* at ¶¶ 15, 25.) As noted earlier, PaineWebber announced on July 27, 1995 that it would take a $200 million charge to cover the "costs of resolving the limited partnership issues," and that it expected to conclude settlement talks with the SEC within 90 days. [22]

On January 17, 1996, the Commission issued a highly critical Order Instituting Public Administrative Proceedings, Making Findings, Imposing Remedial Sanctions, and Issuing Cease and Desist Order ("SEC Order"), to which PaineWebber consented without admitting or denying its findings. The Order was filed in this Court on the following day, contemporaneously with the MOU in the Federal and Texas Actions. [23] The SEC Order sets forth extensive findings of violations by PaineWebber of the federal securities laws, and addresses many of the same claims and facts at issue in the Complaint and in the Texas Petition. [24] Pursuant to its agreement with the SEC, PaineWebber agreed to pay a total of $292.5 million for the benefit of aggrieved Partnership investors, including $120 million to settle individual suits and arbitrations, and $40 million for a special claims fund ("SEC Fund") to be allocated among eligible claimants. [25] In addition, the Order required PaineWebber to pay a civil penalty of $5 million, to waive or assign all fees generated from the Partnerships, and to implement certain oversight and management policies. (Class Mem. at 8.) Finally, the Order gave PaineWebber credit for the $125 million it had paid into the Settlement Fund pursuant to the MOU in the Federal and Texas Actions; however, in a "flipback" clause, the Order also specifically provided that the Settlement of these actions must be judicially approved by a specific date—unless that date were extended by this Court—or the $125 million would then be distributed among claimants to the SEC fund.

H. *The Terms of the Proposed Settlement*

The terms of the proposed Settlement are set forth in detail in the Settlement Agreement. In essence, it seeks to compensate ***116** Class Members for as much of their initial investments as possible, either through distributions or through direct payments by PaineWebber. (Class Mem. at 48–50.) The Settlement has a total value of approximately $200 million and is composed of the following two parts: (1) the $125 million Settlement Fund, which has been deposited by PaineWebber into an interest-bearing escrow account, and from which attorneys' fees and litigation expenses will be deducted; and (2) the Additional Benefits, discussed below, which the parties assert to be worth at least $75 million. The Additional Benefits are comprised of three specific performance guarantees—the Par Guarantees, the Remaining Value Guarantee and the Geodyne Guarantee—which collectively have been valued by the Parties at approximately $65 million, as well as a provision for the waiver or assignment of future fees and compensation worth at least $10 million. In addition, the Settlement provides certain groups of Class Members with various non-cash benefits, to which no specific value has been assigned.

Pursuant to the Par Guarantees, PaineWebber promises that investors in the 13 Par Guarantee Partnerships [26] will, by December 31, 2000, have recouped at least the initial purchase price ("Par Value") of their investments. Thus, if on December 31, 2000, the sum of all cash distributions paid out over the life of a covered Partnership, plus the residual value of that Partnership, equal less than the Partnership's Par Value, PaineWebber will pay the difference. [27] For the purposes of this guarantee, "distributions" include any cash payments received from the Settlement Fund or the SEC fund in connection with claims arising from the Partnership. The current economic value of this Guarantee to the Class has been calculated by plaintiff's expert to be at least $10.25 million. (Balon Aff. at ¶¶ 8–9.)

Pursuant to the Remaining Value Guarantee, PaineWebber promises that the aggregate amount recouped by investors in the 12 covered Partnerships [28] as of December 31, 2000, will be $257 million, i.e. approximately $92 million more than the aggregate value of those same Partnerships as of January 1, 1996. Thus, on December 31, 2000, if the sum of all cash distributions paid out by the covered Partnerships, plus the remaining values of those Partnerships, together equal less than $257 million, PaineWebber will pay the difference. Because these guarantees are considered in the aggregate, PaineWebber may use a better-than-projected performance by one Partnership to partially offset payments which would otherwise be due to a poor performer; however, the extent to which extraordinary profits may be used in this way to fulfill the overall guarantee obligation is limited. The current economic value of this guarantee to the Class has been calculated to be at least $42.7 million. (Balon Aff. at ¶¶ 8–9.)

Pursuant to the Geodyne Guarantee, PaineWebber promises to provide protection to investors in the 29 Geodyne Partnerships in the event that oil and/or gas prices fall below specified levels between January 1, 1997 and May 30, 2001. Specifically, if market prices should drop below $18.00 per barrel of oil and $1.80 per MCF of gas during the relevant period, PaineWebber will pay Geodyne investors the difference, in specified quantities, between the market price and the guarantee price. The current economic value of this guarantee to the Class has been ***117** calculated to be at least $12.5 million. (Balon Aff. at ¶¶ 8, 14.)

PaineWebber further agrees to assign or waive for the benefit of Class Members all fees or other compensation which it will earn from the Partnerships—including amounts which it might receive as general partner in any of the Partnerships—from January 16, 1996 through the termination of each Partnership. PaineWebber guarantees that the value to the Class of such waivers and assignments will be at least $10 million as of December 31, 2000. Of this amount, approximately $7.425 million will be in the form of cash from assigned fees and approximately $2.575 million will be in the form of waived fees, particularly loans and costs relating to the liquidation of the Retail Property Investors Partnership (“RPI”). (Balon Aff. at ¶¶ 4, 6.)

In addition to these cash benefits, the Settlement provides various other advantages for which no economic value has been assigned. These include an independent valuation opinion and tax effect assessment of the CMJ Properties Partnership, free facilitation of the liquidation of warrants distributed to Class Members from the R & D Partnerships, and advisory opinions regarding tender offers, roll-up proposals, or other proposals which may be considered by Class Members with regard to the Partnerships. (Balon Aff. at ¶ 4.)

I. *The Terms of the Proposed Plan of Allocation*

The terms of the proposed Plan of Allocation are set out in detail in the Settlement Agreement. Basically, the proceeds of the Settlement are to be allocated pro rata among Class Members on the basis of Recognized Loss. The latter term is comprised of a Class Member's initial investment in a Partnership unit (i.e., the unit's purchase price), minus (a) all distributions paid out or payable on that unit, and (b) any value remaining in the unit as of a specified date. To participate in the Settlement, Class Members must submit a proof of claim form setting forth, among other data, the date and quantity of their purchase and or sale of Partnership units. Upon receipt of all valid claim forms, the Claims Administrator will calculate the aggregate Recognized Loss suffered by all eligible claimants, and the Settlement proceeds will then be allocated to each claimant in the same proportion that his or her own loss bears to the loss of the Class as a whole. As previously noted, the formula for computing Recognized Loss for every Class Member is identical. The Plan of Allocation assumes a comparable potential of all Class Members to prevail on the merits, and accordingly it does not reflect any differences in relative strength that might exist among the claims of investors in different Partnerships.

(1) *Allocation of the Net Cash Settlement Fund.*

The Net Cash Settlement Fund consists of the § 125 million in cash deposited by PaineWebber on January 18, 1996, plus interest. less attorneys' fees and litigation expenses. For the purpose of allocating this fund, Recognized Loss per Partnership unit is determined as of January 1, 1996 in the manner described above. For Class Members who sold their units prior to January 1, 1996, distributions are calculated only through the date of sale, and the price at which the unit was sold is considered in place of the unit's residual value. For Partnerships which have been, or are deemed to be, “liquidated,” Recognized Loss equals the purchase price of the Partnership, minus all cash distributions up to and including the final distribution following liquidation. Finally, for the PaineWebber CMJ Properties Partnership only, tax benefits are deemed to count as cash distributions for the purpose of Recognized Loss.

Based on Class Counsel's valuations of the Partnerships as of January 1, 1996, it is likely that only 44 Partnerships will show Recognized Losses for the purpose of sharing in the Settlement Fund. [29] The specific ***118** amounts that will be paid out on these investments cannot be calculated prior to the submission of all claims and the determination of fees and litigation expenses. In the event that the aggregate Recognized Loss of the Class is less than the amount in the Net Cash Settlement Fund, the balance will be paid into a “Look–Back Fund,” and redistributed on the basis of Recognized Loss as of December 31, 2000. [30]

(2) *Allocation of the Additional Benefits and Look–Back Fund*

The Additional Benefits provide that cash payments may be made by PaineWebber to eligible Class Members pursuant to the Par Guarantees, the Remaining Value Guarantee, and the Geodyne Guarantee. Such payments will be made on a pro rata basis to those Class Members who are covered by each Guarantee, and will not exceed the amount of any Class Member's Recognized Loss as of the end of the year 2000. For the purpose of allocating these payments, Recognized Loss per Partnership unit is calculated as of December 31, 2000 in the manner described earlier. Cash distributions include any value already received in relation to the Partnership unit pursuant to any of the Guarantees, the Net Cash Settlement Fund or the SEC Fund.

The Additional Benefits also provide for the waiver or assignment of PaineWebber's fees and other compensation relating to the Partnerships. All waivers will benefit the Class Members who hold units in the particular Partnerships to which the waivers apply. All assignments, with limited exceptions, [31] will be paid directly into a “Look–Back Fund,” together with any non-allocated funds owed by PaineWebber pursuant to the Guarantees and any amounts which may remain in the Net Cash Settlement Fund. The Look–Back Fund will in turn be allocated among the class as a whole, again on a pro rata basis, to compensate any Class Members who still have Recognized Losses remaining. [32]

J. *Objections to the Proposed Settlement and Plan of Allocation*

As noted above, on July 17, 1996, this Court preliminarily approved the Settlement Agreement, and directed the Parties to provide notice to the Class. On August 5, 1996, almost 200,000 copies of the Settlement Notice were mailed to all identifiable class members, setting forth the material terms of the Settlement, including the Plan of Allocation and the proposed award of attorneys' fees. [33] Class members were also apprised of the deadline for filing any objections to the settlement, as well as the date, location and purpose of the fairness hearing. A summary version of the same notice was subsequently published in the national editions of *The Wall Street Journal, The New York Times* and *USA Today* on August 12 and 15, 1996. Three objections to the Settlement terms were received from Class Members in response ***119** to these notices. [34] Two of the objections involved individual situations and have been addressed and resolved. [35]

The third objection to the proposed Settlement was lodged by Robert and Vera Jacobson of Chicago, Illinois, on behalf of all Class Members in the Pegasus I and Pegasus II Partnerships and needs to be considered in some depth. The filing of this objection was part of an extended effort on the part of the Jacobsons and their counsel to participate in the litigation and settlement of the Pegasus-related claims against PaineWebber.

On March 28, 1995, the Jacobsons filed a class action complaint against PaineWebber and other defendants in state court in Chicago, alleging fraud, breach of fiduciary duty and negligent misrepresentation. After the Jacobsons received the Notice of Pendency, they sought access to all discovery materials produced by PaineWebber to Class Counsel in this litigation, in order to assist them in deciding whether or not to opt out of the Class. This Court directed that they be provided with discovery materials relating to the Pegasus Partnerships. (*See* Transcript of Oral Argument, July 19, 1995, at 54–56.) After reviewing those documents, the Jacobsons moved: (a) to intervene in this action and to be appointed as representatives of a Pegasus subclass pursuant to Fed.R.Civ.P. 23(c)(4)(B); (b) to have their counsel appointed as lead counsel on behalf of that subclass; and (c) to have their counsel appointed to plaintiffs' Executive Committee. (*See* Sandier Aff. in Supp. of Motion to Intervene at ¶ 1.) The Jacobsons alleged that the Class as certified was overly broad and inherently conflicted, and that its representatives and counsel therefore could not fairly represent the interests of Pegasus investors, whose claims were stronger on the merits than those of most other Class Members. (*Id.* at ¶¶ 15–17; Transcript of Oral Argument, January 19, 1996, at 13–14.) That motion was subsequently denied. (See Order dated February 26, 1996.)

The Jacobsons later sought and received further discovery and an extension of their time to file an objection. (*See* Transcript of Oral Argument, September 30, 1996, at 25; Order dated August 16, 1996, at 2.) Their objection was filed on October 3, 1996, together with notice of their intention to appear at the fairness hearing, and a list of exhibits and intended witnesses. Subsequently, the Jacobsons deposed several of Class Counsel's experts, including Kathleen Balon and David Treitel, and Class Counsel deposed the Jacobsons' two proposed expert witnesses, Susan Koniak and Carmen Macca.

The fairness hearing was held before this Court on October 25 and November 8, 1996. Following the presentation of argument by counsel for the Parties and for the Jacobsons, Susan Koniak and Carmen Macca were called to the stand as expert witnesses. Koniak, a Professor of Law at Boston University, was presented as an expert in legal ethics and class actions, and stated that her most recent research and writing have focused specifically on “the ethics of class counsel and class action abuse.” (Transcript of Fairness Hearing, November 8, 1996, at 13–15, 28–29.) [36] She did not claim to have particular expertise in securities law, nor did she profess to hold a view concerning the fairness and adequacy of the proposed Settlement; ***120** the proper method of allocating that Settlement; the merits and settlement value of the claims in this case; or the creation of subclasses. (*Id.* at 26–27, 34–35, 70–73.) Rather, as set forth more particularly below, Koniak testified that in her opinion Class Counsel rendered inadequate representation to the Class, and may have colluded with the Defendants to the detriment of the Class Members. (*Id.* at 30, 46–47.)

Carmen Macca, a Certified Public Accountant who has reviewed class action settlement notices for clients on "over fifty" occasions, (*Id.* at 100–101), testified that he had reviewed the Settlement Notice, the Settlement Agreement, the Data Appendix, and "various correspondence among the attorneys," and that in his opinion, an individual Class Member would not be able to determine from those documents how much money he or she would stand to receive in the proposed Settlement. (*Id.* at 103–105.) The latter point is conceded by Class Counsel. (*Id.* at 106.)

The heart of the Jacobsons' objection is the claim that the Pegasus investors' recovery under the Settlement is too small, both in terms of their potential damages at trial and in comparison with the recoveries of other Class Members. The objection raises at least six distinct issues. First, the Jacobsons allege that the Class—and the Pegasus investors in particular—have been deprived of the adequate representation of counsel that is mandated by Fed.R.Civ.P. 23(a). Specifically, they contend that the Parties stipulated to a hasty Class certification in order to advance their own interests at the expense of the plaintiffs, that the Court improperly approved that certification without undertaking an independent investigation, and that consequently the Class is too broad and is fraught with conflicts among members whose claims are of vastly differing strengths. [37] Although Class Counsel purports to represent the interests of all Class Members simultaneously and has opposed all efforts to create subclasses, the Jacobsons assert that Class Counsel is in fact inherently conflicted, and that its representation of the Class is therefore inadequate. (*See* Jacobsons' Objection to Proposed Settlement ("Obj.Mem.") at 23–24; Jacobsons' Supplemental Memorandum in Further Support of Objection ("Obj.Supp.Mem.") at 5, 38–40; Transcript of Fairness Hearing, October 25, 1996 Tr. 10/25/96 at 54–57.) Evidence of such inadequacy can be found, the Jacobsons contend, in the Settlement itself, which fails to take account of variances among the claims, yet at the same time obtains different results for different Class Members with no merit-based explanation. (Obj. Supp. Mem. at 40–44; Tr. 11/08/96 at 30–33.)

Second, the Jacobsons claim that the Settlement Notice is inadequate because it ignores differences between Class Members' claims, obfuscates complexities contained in the Settlement, and glosses over special exceptions that have been made for particular Partnerships. (Obj. Mem. at 15–18, 20; Obj. Supp. Mem. at 7; Tr. 10/25/96 at 52.) In addition, the Jacobsons emphasize that because of missing or incomplete information, it would be impossible for an individual Class Member to determine from the Notice and its supporting documents what he or she might expect to receive from the settlement. (Obj. Mem. at 3–4; Obj. Supp. Mem. at 8.) This lack of accurate information, they suggest, led to the low number of objections that have been received from other Class Members. (Tr. 10/25/96 at 47.)

Third, the Jacobsons charge that the Settlement provides an inadequate recovery—both for the Class as a whole and for Pegasus investors in particular—given the magnitude of the legal damages that have been claimed and the relatively low risk of prevailing at trial. The proposed Settlement, they contend, represents a small fraction of the total amount invested by Class Members in the Partnerships. (Obj. Mem. at 2, 4–5.) More importantly, however, they assert that Class Counsel has made no attempt to relate the Settlement to any reasonable range of amounts that the Class, if successful, would stand to recover at trial. (Tr. 10/25/96 at 43–44.) Instead, the amount of the Settlement is justified by Class Counsel in terms of ***121** "Recognized Loss," a measure which, the Jacobsons contend, was invented for these proceedings, is arbitrary and unfair, and bears little or no resemblance to actual economic loss or legal damages. (Obj. Supp. Mem. at 28.) In particular, it is asserted that the Settlement ignores the time value of money, collapses the distinction between taxable income and return of capital, and relies on residual value calculations without regard to marketability discounts. (Obj. Mem. at 20; Obj. Supp. Mem. at 28–29.) With regard to the Pegasus Partnerships specifically, the Jacobsons contend that pursuant to the various theories of legal damages claimed in the Complaint, they would stand to recover between \$0.52 and \$2.15 per dollar invested if they were to prevail at trial. (Obj. Supp. Mem. at 22–30.) Accordingly, even assuming a discount to reflect the risks of litigation, the Jacobsons claim that their likely cash recovery under the Settlement—zero for Pegasus I, and between 3 and 8 cents on the dollar for Pegasus II—is an inadequate result. (Obj. Supp. Mem. at 30–37.)

Fourth, the Jacobsons claim that the Settlement is unfair because although it purports to treat all Class Members equally, in fact it provides better recoveries to some than to others, and it does so with no adequate explanation. Specifically. they contend that the various Additional Benefits guarantees, if they create any real economic value at all, do so selectively and without any relation to the merits of Class Members' claims. (Obj. Supp. Mem. at 40–44; Tr. 11/08/96 at 33.) They also contend that there is no reason for the Par Guarantee for Pegasus II and another Partnership to be capped, except as an accommodation to PaineWebber. (Obj. Supp. Mem. at 34–35, 42.) Finally, the Jacobsons assert that the Settlement unfairly and inexplicably favors certain Partnerships with special rules and exceptions relating to the calculation of Recognized Loss. (Obj. Mem. at 15–19.)

The fifth, and most important, claim made by the Jacobsons is that the Plan of Allocation, while ostensibly uniform in its application, is unfair in its effect, because it fails to take account of differences that exist among the claims in this case, both in terms of substantive merit and in terms of vulnerability to statute of limitations defenses. (*See* Obj. Supp. Mem. at 15–21 & App. A.) The Jacobsons further note that when this issue was raised in connection with their earlier motion to create a subclass, Class Counsel assured the Court that any conflicts between the merits of different claims would be resolved in the Plan of Allocation. (Obj. Supp. Mem. at 5; Tr. 1/19/96 at 25–26.) Instead, the Jacobsons contend, the proposed loss-based (rather than merits-based) Plan of Allocation will divert the bulk of Settlement proceeds to Class Members whose claims are weak on the merits and most vulnerable to limitations defenses, while the Pegasus investors, whose claims are ostensibly among the strongest in the Class,[38] will emerge with little or no cash recovery. (Obj. Mem. at 5–7, 20–21.)

Finally, the Jacobsons claim—largely through Prof. Koniak—that the terms of the Settlement and the circumstances of its negotiation raise the possibility of collusion between the Parties, and undermine the fundamental requirement of arm's length negotiation. In support of this allegation, the Jacobsons point to the Parties' common interest in settling as many claims as possible in the wake of the liability exposure created by the SEC investigation. (Tr. 10/25/96 at 53.) In particular, they contend that the filing of the $125 million settlement on January 18, 1996, one day after the issuance of an SEC Order which included a $125 million "flipback" provision, indicates that the size of the settlement was driven by PaineWebber's interest and was not the product of arm's length negotiation. (Obj. Supp. Mem. at 18; Tr. 1 1/08/96 at 48–49.) The Jacobsons offer the following alleged ***122** indicia of collusion: (a) the certification of the Class by stipulation of the Parties and on a conditional basis, and PaineWebber's subsequent announcement of a charge to earnings to cover all liabilities, which together suggest that the Class is akin to a "settlement class"; (b) the failure of the Parties to provide Class Members with a second opportunity to opt out following the Settlement, and the cooperation of the Parties in resisting the creation of subclasses; (c) the terms of the Settlement and Plan of Allocation, which "roll up" many dissimilar claims and in some instances benefit PaineWebber at the expense of Class Members; and (d) the Parties' alleged concealment of relevant documents and overall lack of candor regarding the settlement process and the substance of the recovery, particularly with regard to the comparative merits of the various claims. (Obj. Mem. at 23–25; Obj. Supp. Mem. 18–19; Tr. 10/25/96 at 53, 67–74; Tr. 11/08/96 at 43–49.) The effect of these indicia, the Jacobsons claim, is to raise the level of scrutiny the Court should utilize in evaluating the Settlement's fairness, and to defeat the traditional presumption of deference to the recommendations of Counsel. (Obj. Mem. at 2; Obj. Supp. Mem. at 20.)

On the basis of these allegations, the Jacobsons have requested that this Court refuse to approve the Settlement in its entirety, or, in the alternative, refuse to approve the Settlement insofar as it relates to Pegasus I and II investors. (Obj. Supp. Mem. at 44.) Those issues are addressed below.

II.

DISCUSSION

A. *The Federal Class Certification is Fair*

The certification of the Federal Class was so ordered by Judge Haight on May 30, 1995, in accordance with the stipulation of the Parties. That stipulation addressed the elements of Rules 23(a) and 23(b)(3) and provided that "the requirements for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure are satisfied." (*See* Certification Order at ¶ E, §§ 3–9.) The fairness of the certification, particularly with regard to adequacy of representation, was subsequently challenged by the Jacobsons in their motion to intervene and create a subclass, which was denied. (*See* Order dated February 26, 1996 at 7.) *See also*

In re PaineWebber Inc. Ltd. Partnerships Litig., 94 F.3d 49, 51–52 (2d Cir.1996). Although the present objection by the Jacobsons is largely duplicative of that earlier motion, the fairness of the Class certification will be revisited briefly here in light of this Court's affirmative obligation to insure that all class members have been adequately represented. *See* *Malchman v. Davis,* 706 F.2d 426, 432–33 (2d Cir.1983); *Plummer v. Chemical Bank,* 668 F.2d 654, 659 & n. 4 (2d Cir.1982).

As a starting point, it is worth noting that although the Class was certified without the benefit of an adversarial hearing, it is not a "settlement class" as that term is properly defined. A settlement class "is a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement ... Because the court indulges the assumption of the class's existence only until a settlement is reached or the parties abandon the negotiations, settlement classes are also sometimes referred to as temporary or provisional classes." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 786 (3d Cir.1995) ("*GM Trucks* "). *See* *Weinberger v. Kendrick,* 698 F.2d 61, 72 (2d Cir.1982); *Malchman,* 706 F.2d at 433–34 (2d Cir.1983); *Manual for Complex Litigation* § 30.45 (3d ed.1995). In this action, class certification took place long before any settlement was reached or negotiated, and it is undisputed that extensive discovery and litigation efforts were undertaken by the Parties in the interim. Accordingly, the "higher" or "closer" level of scrutiny that applies to the judicial review of settlements involving settlement classes [39] is not required here.

In determining whether a federal class should be certified, the Court must consider the four factors set forth in Rule 23(a)—i.e., numerosity, commonality, typicality and representativeness ***123** —and must also determine, pursuant to Rule 23(b), whether a class action is the appropriate avenue of recovery. *See* Fed R. Civ. P. 23; *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 290 (2d Cir.1992); *In re Prudential Sec. Inc. Ltd Partnerships Litig.,* MDL No. 1005, M–21–67 (MP), 1995 WL 798907 at *12 (S.D.N.Y. Nov. 20, 1995).

Rule 23(a)(1), which requires that "the class [be] so numerous that joinder of all members is impracticable," is clearly satisfied here. Tens of thousands of investors purchased Partnership shares from or through PaineWebber between 1980 and 1992; joinder of all such plaintiffs individually would obviously be unmanageable. Similarly, Rule 23(b)(3), which requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy" is also satisfied here. Given the difficulty and expense involved in the prosecution of the claims in this case, the interests of justice and judicial efficiency underscore the superiority of the class action device.

Rule 23(a)(2), which requires the existence of "questions of law or fact common to the class," and Rule 23(b)(3), which requires that such questions "predominate over any questions affecting only individual members," are both satisfied here. The Complaint asserts essentially the same claims on behalf of all Class Members, and "alleges, in numerous places, that PaineWebber defrauded investors in *all* the applicable entities pursuant to a uniform pattern of conduct." (emphasis in original) (Order dated Feb. 26, 1996 at 4.) Common questions of law and fact include: whether PaineWebber's sales materials were false or misleading; whether PaineWebber engaged in a "common course of conduct" with respect to the statements made and the sales materials used; whether PaineWebber misrepresented the suitability of investments for individual clients or failed to take sufficient steps to insure such suitability; whether a conspiracy existed among two or more Defendants; whether a RICO "pattern" existed; whether Defendants' actions constituted fraud, negligence, breach of fiduciary duty or violation of the federal securities laws; and whether the Class Members were injured by Defendants' actions. (*See* Certification Order at ¶ E, § 5.) These questions of law and fact overwhelmingly predominate over any issues that might affect individual Class Members only.

Rule 23(a)(3), which requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class," is also satisfied here. The named class representatives are investors in 20 of the 70 Partnerships, including Pegasus II. (*See* Order dated Feb. 26, 1996 at 1–2; Complaint at ¶¶ 27–45.) Their claims are materially indistinguishable from those of other Class Members.

Finally, Rule 23(a)(4), which requires that "the representative parties will fairly and adequately protect the interests of the class," is satisfied here as well. The standard for adequate representation has two parts: first, "class counsel must be 'qualified, experienced and generally able' to conduct the litigation"; and second, "the class members must not have interests that are 'antagonistic' to one another." *Drexel,* 960 F.2d at 291 (citing *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir.1968)). The Jacobsons focus their attack on the second prong of this test, contending, just as they did in their prior motion, that inherent conflicts among investors in the different entities prevent the current named plaintiffs and their attorneys from adequately representing Pegasus I and II investors. In support of this objection, they assert primarily that the Pegasus plaintiffs' recovery under the Settlement does not adequately reflect the strength of their claims on the merits.

This position is no more persuasive now than it was one year ago. Potential conflict between class members is often a danger in large class actions, but those conflicts are best resolved through "the normal pull and tug" of factions within the class itself. (Tr. 1/19/96 at 29.) The Court's role in this process is not to substitute its own judgment for that of Class Counsel, but rather to insure that the interests of all class members are fairly and impartially represented throughout the negotiation of the settlement and allocation ***124** plan. In this action, the assignment of separate law firms and independent experts to represent each Partnership group was a reasonable and adequate means of protecting the interests of all Class Members; the Jacobsons' contention that their recovery should be greater is an insufficient basis on which to conclude that those safeguards failed or were corrupted in any way. Accordingly, the Rule 23(a)(4) requirement of adequate representation is satisfied.

Because the record establishes that all necessary elements of Rule 23 have been met, the fairness of the class certification is reaffirmed and the Jacobsons' renewed request for decertification of the class or the creation of a subclass is denied.

B. *The Notice of Settlement is Adequate*

Fed.R.Civ.P. 23(e) provides that "notice of [a] proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." On July 17, 1996, this Court held that the Settlement Notice in this case "meet[s] the requirements of F[ed]. R. Civ. P. 23 and due process, constitute[s] the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto." (Preliminary Order dated July 11, 1996 at ¶¶ 5–6.) The Jacobsons now challenge the adequacy of the Settlement Notice on the grounds that it is misleading and incomplete, and does not provide sufficient information to allow a Class Member to calculate his or her actual recovery under the settlement.

Notice of settlement in a class action "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.' " *Weinberger,* 698 F.2d at 70 (citing *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 122 (8th Cir.1975)). The notice need not be highly specific, and indeed "[n]umerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved 'very general description[s] of the proposed settlement.' " *Id.; see also In re Michael Milken & Assoc. Sec. Litig.,* 150 F.R.D. 57, 60 (S.D.N.Y.1993) (relying on *Handschu v. Special Servs. Div.,* 787 F.2d 828, 833 (2d Cir.1986)). Nor does the adequacy of notice turn on the ability of an individual Class Member to calculate the amount of his or her actual recovery under the settlement. *See Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374 (9th Cir.1993); *In re Catfish Antitrust Litig.,* 939 F.Supp. 493, 499 (N.D.Miss.1996); *Cannon v. Texas Gulf Sulphur Co.,* 55 F.R.D. 308, 313 n. 2 (S.D.N.Y.1972).

The Settlement Notice in this case meets the required standard. Its level of detail apprises the class members of the salient terms of the settlement and affords them a reasonable opportunity to present any objections. *See Milken,* 150 F.R.D. 57 at 60. Moreover, it is by design "only a summary of the litigation and of the proposed settlement," and it incorporates by reference all remaining documents on file with this Court. (Settlement Notice at ¶ 73Notice at ¶ 73.) Accordingly, the Notice of Settlement is fair and is approved.

C. *The Proposed Settlement is Fair, Reasonable and Adequate*

Fed.R.Civ.P. 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court." The decision to grant or deny such approval lies squarely within the discretion of the trial court, *see* *In re Ivan F. Boesky Sec. Litig.,* 948 F.2d 1358, 1368 (2d Cir.1991); *Newman v. Stein,* 464 F.2d 689, 692 (2d Cir.1972), and this discretion should be exercised in light of the general judicial policy favoring settlement. *Weinberger,* 698 F.2d at 73; *In re Michael Milken & Assoc. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993); *Chatelain v. Prudential–Bache Sec., Inc.,* 805 F.Supp. 209, 212 (S.D.N.Y.1992). Ultimately, the Court, as protector of the interests of absent class members, must determine whether the proposed settlement is "fair, reasonable and adequate." *Weinberger,* 698 F.2d at 73; *Malchman* 706 F.2d at 433.

This determination "involves consideration of two types of evidence." *Weinberger,* 698 F.2d at 73; ***125** *Women in City Gov't United v. City of New York,* No. 75 Civ. 2868(MJL), 1989 WL 153059 at *4 (S.D.N.Y. Dec. 13, 1989). The Court's primary concern is with "the substantive terms of the settlement compared to the likely result of a trial," *Malchman,* 706 F.2d at 433, and to that end "the trial judge must 'apprise[ ] himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim[s] be litigated.' " *Weinberger,* 698 F.2d at 74 (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968)).

The Court's second concern is with "the negotiating process by which the settlement was reached," *Weinberger,* 698 F.2d at 73, which must be examined "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *Malchman,* 706 F.2d at 433 (citing *Weinberger,* 698 F.2d at 73). The Court has a fiduciary duty to ensure that the settlement is not the product of collusion. *In re Warner Communications Securities Litigation,* 798 F.2d 35, 37 (2d Cir.1986). So long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement, *Chatelain,* 805 F.Supp. at 212 (citing *Ross v. A.H. Robins Co., Inc.,* 700 F.Supp. 682, 683 (S.D.N.Y.1988)), and "great weight" is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *Id.* (citing *Cannon v. Texas Gulf Sulphur Co.,* 55 F.R.D. 308 (S.D.N.Y.1972)).

(1) *Substantive Fairness: The Grinnell Factors*

The analytical framework for evaluating the substantive fairness of a class-action settlement was set forth by the Second Circuit in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974), more than two decades ago, and is now well established. In determining whether to approve a proposed Settlement a district court should consider the following nine 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 in light of all the attendant risks of litigation.

Id. at 463 (internal citations omitted). In its consideration of these factors, "[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Id.* at 462. As discussed below, the facts in this case satisfy the elements of the *Grinnell* test and support approval of the Settlement.

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

"Avoiding wasteful litigation and expense are factors which 'lay behind the Congressional infusion of a power to compromise.' " *Milken,* 150 F.R.D. 46 at 55 (citing *Florida Trailer and Equip. Co. v. Deal,* 284 F.2d 567, 571 (5th Cir.1960)). Accordingly, this Court must consider the complexity, expense and likely duration of the litigations that the parties seek to avoid. This factor weighs heavily in favor of the proposed Settlement. The legal and factual issues presented in both the Federal and Texas Actions are complex, and would, if litigated, require substantial expenditures of both private and public resources. The Consolidated Federal Complaint involves 70 partnerships, tens of thousands of potential plaintiffs, and claims arising under RICO, federal securities laws, and state common law. The RICO allegations alone raise such multifaceted issues of fact as whether a pattern exists and whether underlying predicate acts and a RICO injury can be established. *See Prudential,* 1995 WL 798907 at * 11. The Consolidated Texas Petition is similarly complex, involving 23 Partnerships, ***126** thousands of class members, and multiple statutory and common-law claims.

The parties' litigation of these claims during the past nearly 1,000 days has already consumed large sums of money and many thousands of hours of labor. Absent a settlement, these costs will only escalate as a result of discovery proceedings, motion practice, trials, and likely appeals. Such burdensome and protracted litigation would carry with it no guarantee of success for the plaintiff class, and a recovery would in any event be eroded by the costs of prosecuting the action. Accordingly, the first element of the *Grinnell* test supports approval of the proposed Settlement.

(b) *The Reaction of the Class to the Settlement.*

The second factor to be considered by the Court is the reaction of the Class to the proposed settlement. A favorable reception by the Class constitutes "strong evidence" of the fairness of a proposed settlement and supports judicial approval. *See* *Grinnell,* 495 F.2d at 462. In particular, "the absence of objectants may itself be taken as evidencing the fairness of a settlement." *Ross v. A.H. Robins,* 700 F.Supp. 682, 684 (S.D.N.Y.1988) (citing *Weiss v. Drew National Corp.,* 465 F.Supp. 548, 551 (S.D.N.Y.1979)); *see also* *Torrisi v. Tucson Electric Power Co.,* 8 F.3d 1370, 1378 (9th Cir.1993). As set forth previously in this Opinion, notice of the proposed Settlement was mailed to the entire Class in August of 1996, and summary notice was published in the national editions of *The Wall Street Journal, The New York Times* and *USA Today.* Class Members were thereby informed of all material terms of the Settlement and were apprised of the deadline for filing objections and the date and purpose of the fairness hearing. In response to these notices, only three objections to the substantive terms of the settlement [40] were received from Class Members, two of which have subsequently been resolved. This is an extremely favorable response, particularly in light of the large size of the Class. [41] Accordingly, as the Class appears to have acquiesced in the Settlement by an overwhelming margin, the second element of the *Grinnell* test is satisfied.

(c) *The Stage of the Proceedings and the Amount of Discovery Completed.*

The stage of the proceedings and the amount of discovery completed at the time a Settlement is reached is relevant to the parties' knowledge of the strengths and weaknesses of the various claims in the case, and consequently affects the determination of the settlement's fairness. *See Milken,* 150 F.R.D. 46 at 55–56. It is undisputed that extensive discovery took place prior to the commencement of settlement negotiations in October of 1995; that the discovery documents had been analyzed and losses had been calculated for each Partnership prior to the execution of the Memorandum of Understanding in January of 1996; and that a comprehensive evaluation of the facts and merits of each Partnership had been performed prior to the execution of the Settlement Agreement in July of 1996. It is therefore apparent that Class Counsel "has had sufficient information to act intelligently on behalf of the class," *Schwartz v. Novo Industri A/S,* 119 F.R.D. 359, 362 (S.D.N.Y.1988), and accordingly this third element of the *Grinell* test weighs in favor of approval of the Settlement.

(d) *The Risks of Establishing Liability*

Litigation inherently involves risks. Indeed "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F.Supp. 917, 934 (S.D.N.Y.1969). In the absence of a settlement in this ***127** case, substantial litigation risks would exist for the Class at trial.[42]

Importantly, the Class would face serious obstacles to establishing the elements of its claims. The central allegation in the Texas and Federal Actions is that PaineWebber marketed and sold Partnership units to investors on the basis of false or misleading statements. PaineWebber denies making any such misrepresentations, and contends that its prospectuses provided adequate disclosures of risk. PaineWebber further contends that any losses suffered by Class Members were caused not by any fraud on its part, but rather by unforeseeable market downturns.

In order to establish fraud as a common law claim, the Class would have to prove "the hotly contested elements of falsity, materiality, scienter and reliance." *In re Ambase Corp.,* No. 90 Civ.2011(CHS), 1995 WL 619856 at *1 (S.D.N.Y. Oct. 23, 1995). These elements might also be required to establish the Class's RICO claims, which are predicated on alleged acts of mail fraud, wire fraud and fraud in the offer and sale of securities. (Complaint at ¶¶ 179–81, 190–91). See, e.g., *Compania Sud–Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.,* 785 F.Supp. 411, 424 (S.D.N.Y.1992); *Morin v. Trupin,*711 F.Supp. 97, 105 (S.D.N.Y.1989). But see *Shaw v. Rolex Watch U.S.A., Inc.,* 726 F.Supp. 969, 972 (S.D.N.Y.1989); *GLM Corp. v. Klein,* 684 F.Supp. 1242, 1244–45 (S.D.N.Y.1988). At a minimum, in order to establish the predicate acts of mail or wire fraud for RICO purposes, the Class would have to show that PaineWebber "participated in a scheme to defraud" and evinced a "specific intent to defraud." *See* *Vapores,* 785 F.Supp. at 424 (citing *U.S. v. Rodolitz,* 786 F.2d 77, 80 (2d Cir.1986) and *U.S. v. Gelb,* 700 F.2d 875, 879 (2d Cir.1983)). Specifically, the Class would have to prove that risky and unprofitable Partnerships were knowingly or recklessly portrayed by PaineWebber as safe investments; it would not be sufficient merely to show that the Partnerships failed to perform as predicted. *See* *Olkey v. Hyperion 1999 Term Trust Inc.,* 98 F.3d 2, 9 (2d Cir.1996). In addition, it is uncertain whether the Class would be able to prove the existence of an overarching fraud or cover-up conspiracy, since such a scheme would implicate an enormous number of PaineWebber employees and third parties in offices all over the country, who dealt with tens of thousands of clients over the course of 12 years.

Assuming that the Class could prove predicate acts of fraud as well as the other requirements to establish a substantive violation of 18 U.S.C. § 1962, it still would not have standing to recover treble damages or attorneys' fees under RICO unless it could also show injury and causation. *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 767 (2d Cir.1994). It is possible that no RICO injury will be found to exist here, since "as a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite," and in this case most of the Partnerships are still operating and could provide distributions beyond the life of the litigation. *Id.,* 27 F.3d at 768 (relying on *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1104 (2d Cir.1988)).

In addition, even if it could be proven that Class Members were induced to invest in the Partnerships by misrepresentations or omissions on the part of PaineWebber, plaintiffs cannot prevail unless they further prove that any losses suffered by the Class were actually caused by those misrepresentations rather than by external market conditions. A civil RICO suit requires pleading and proof of loss "by reason of" the defendant's violation. 18 U.S.C. § 1964(c). "In the context of predicate acts grounded in fraud," the plaintiff must show that "the misstatements were the reason the transaction turned out to be a losing one." *Gelt Funding,* 27 F.3d at 769 ***128** (relying on *Citibank N.A. v. K–H Corp.,* 968 F.2d 1489, 1495 (2d Cir.1992)). Thus, "when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions." *Id.* (relying on *Brandenburg v. Seidel,* 859 F.2d 1179, 1196 (4th Cir.1988)). Many of the assets owned by the Partnerships in this action arguably were subject to price fluctuations, economic shifts, regulatory and governmental actions, and other factors that PaineWebber could argue were primary or intervening causes of the diminution in Partnership values. *See* *Bastian v. Petren Resources Corp.,* 892 F.2d 680, 684 (7th Cir.1990); *Porter v. Shearson Lehman Bros., Inc.,* 802 F.Supp. 41, 60 (S.D.Tex.1992); *Platsis v. E.F. Hutton & Co.,* 642 F.Supp. 1277, 1299 (W.D.Mich.1986).

PaineWebber would have at least two potentially strong defenses at trial. First, it would argue that the Prospectuses for certain of the Partnerships in this case carry obvious warnings, i.e., they "bespeak caution," and that investors are therefore charged with knowledge of those warnings and may not rely on oral statements to the contrary. *See* *Hyperion,* 98 F.3d at 8–9; *Brown v. E.F. Hutton Group Inc.* 991 F.2d 1020, 1032–33 (2d Cir.1993). Class Members, whatever their actual level of sophistication, would be held to a "reasonable investor" standard regarding whether they had been put on notice of investment risks. *Dodds v. Cigna Sec., Inc.,* 12 F.3d 346, 351 (2d Cir.1993).

In addition, PaineWebber would undoubtedly raise statute of limitations defenses. The applicable statute of limitations for RICO is four years from the moment when a plaintiff discovers or "should have discovered" the injury. *Rhoades,* 859 F.2d at 1103. "[W]here plaintiffs acquire an interest in a limited partnership in reliance on allegedly fraudulent offering material—the injury ... is the actual purchase of the partnership interest." *Ackerman v. Nat'l Property Analysts, Inc.,* 887 F.Supp. 494, 503 (S.D.N.Y.1992). The plaintiff's duty of inquiry with regard to that injury arises—and the RICO cause of action thereby accrues—when "the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.,* 930 F.Supp. 68, 76 (S.D.N.Y.1996), (quoting *Armstrong v. McAlpin,* 699 F.2d 79, 88 (2d Cir.1983)). Here, PaineWebber would likely contend that diminished quarterly distributions and letters sent to Class Members stating that Partnerships would not perform as well as predicted constituted "storm warnings" sufficient to place investors on notice of their injuries and thus start the running of the statute of limitations prior to November 23, 1990. *See* *Prudential,* 930 F.Supp. at 75. Accordingly, there is a risk that most Class Members [43] are potentially subject to limitations defenses against their RICO claims. [44]

Finally, the Class's ability to prevail at trial would be further hampered by the fact that much of its case will depend on the testimony of witnesses who are employees, agents or affiliates of PaineWebber, and therefore likely to be hostile, as well as on complex expert testimony likely to be contested by PaineWebber's own witnesses. In any event, there can no guarantee of what the jury will conclude. For all of the foregoing reasons, the Class would face substantial risks of establishing liability should this litigation go to trial, and accordingly the fourth element of the *Grinnell* test supports approval of the proposed Settlement.

(e) *The Risks of Establishing Damages*

Even if the Class were to prevail on liability against PaineWebber, it would still face substantial risks in proving its damages at trial. "In class actions, the 'complexities of calculating damages increase geometrically.' " *Chatelain,* 805 F.Supp. at 214 (citation omitted). In this action, the plaintiffs' damage claims under tort, contract and RICO ***129** depend in large part on calculations of residual values for each of the nonliquidated Partnerships, and those calculations are driven in turn by speculative projections of future earnings. At trial, PaineWebber would most likely present evidence of higher earning projections for each Partnership, which would correlate to higher residual values and thus lower damages. The issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance.

With regard to the Class's RICO claim, there is a substantial risk that the Class would be limited to out of pocket damages, since New York law precludes the recovery of lost profits in fraud actions, and the RICO claim in this case is predicated on fraud. *See* *First Nationwide Bank v. Gelt Funding Corp.,* 820 F.Supp. 89, 95 (S.D.N.Y.1993) (relying on *AFA Protective Sys., Inc. v. A.T. & T. Co.,* 57 N.Y.2d 912, 456 N.Y.S.2d 757, 442 N.E.2d 1268 (1982)); *Ostano Commerzanstalt v. Telewide Sys., Inc.,* 794 F.2d 763, 766 (2d Cir.1986). Moreover, as previously noted, there is authority in this Circuit that RICO damages cannot be definitively calculated or recovered while the Partnerships continue to operate and generate distributions. *Gelt Funding,* 27 F.3d at 768–69. With regard to contract damages, Class Members would bear the risk of establishing lost profits with reasonable specificity based on the promised returns for each Partnership. Finally, damages are a matter for the jury, whose determinations can never be predicted with certainty. For all of these reasons, proving damages would be a lengthy, time-consuming and ultimately uncertain process, and accordingly this element of the *Grinnell* test weighs in favor of approval of the proposed Settlement.

(f) *The Risks of Maintaining the Classes Through the Trial.*

As previously noted, the Federal and Texas Classes were certified in 1995. While the certification of the Texas Class has not been challenged, the structure of the Federal Class and the adequacy of Class Counsel's representation have already been the subject of two motions and an appeal to the Second Circuit. The fairness and adequacy of the Federal Class has been affirmed by this Court in its Order dated February 26, 1996 as well as in this Opinion. Nevertheless, in the absence of a settlement of these actions, there can be no guarantee that the Jacobsons or other objectors will not continue to challenge the maintenance of the Classes as certified. Accordingly, this element of the *Grinnell* test weighs in favor of approval of the Settlement.

(g) *The Ability of the Defendants to Withstand a Greater Judgment.*

The ability of the defendant to pay a judgment greater than the amount offered in a settlement can be relevant to the Court's determination of the Settlement's fairness. In particular, evidence that the defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement, since the "prospect of a bankrupt judgment debtor down at the end of the road does not satisfy anyone involved in the use of class action procedures." *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 746 (S.D.N.Y.1985) (quoting *City of Detroit v. Grinnell Corp.,* 356 F.Supp. 1380, 1389 (S.D.N.Y.1972)). However, the converse is not necessarily true; i.e., the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate. Regardless of whether one looks at PaineWebber's total equity of § 1.6 billion—as the Jacobsons maintain—or at its "excess net capital" of approximately $350 million—as Class Counsel contends—PaineWebber has the ability to withstand a judgment in this action of greater than $200 million. (*See* Obj. Supp. Mem. at 17 n. 12; Class Men. at 45.) Accordingly, this element of the *Grinnell* test weighs neither for nor against approval of the Settlement.

(h, i) *The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation.*

Fundamental to analyzing a settlement's fairness is "the need to compare the terms of the compromise with the likely rewards of litigation." *Weinberger,* 698 F.2d at 73 (citing ***130** *TMT Trailer Ferry,* 390 U.S. at 424–25, 88 S.Ct. at 1163). This determination "is not susceptible of a mathematical equation yielding a particularized sum," but turns on whether the settlement falls within "a range of reasonableness." *Milken,* 150 F.R.D. 57 at 66 (citing *Newman,* 464 F.2d at 693.) The adequacy of the amount offered in settlement must be judged "not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case." *In re "Agent Orange" Prod, Liab. Litig.,* 597 F.Supp. 740, 762 (E.D.N.Y.1984) (citing *Grinnell,* 495 F.2d at 455). However, as noted above, it is not necessary in making this determination for the Court "to try the case which is before it for settlement," since such a procedure "would emasculate the very purpose for which settlements are made." *Grinnell,* 495 F.2d at 462. Rather, the Court is called upon "to consider and weigh 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." *Id.*

The size of the largest possible recovery in this action is speculative and can only be estimated in the most general terms. The Class's capital investment in the Partnerships equals approximately $2.3 billion, of which roughly $1.46 billion has already been returned to Class Members through cash distributions. Although the parties contend that the aggregate value remaining in the unliquidated Partnerships is approximately $600 million, in order to make a conservative estimate of remaining values, the Court will assume that only half of the amount claimed, or $300 million, is valid.

The Class would seek compensatory damages at trial under tort theories, which would compensate the plaintiffs for their lost investment, less distributions and remaining value. Based on the figures set forth above, the amount of that loss is approximately $540 million. In addition, prejudgment interest would be assessed at 9% in accordance with New York

C.P.L.R. §§ 5001(a) and 5004, starting from a range of possible dates extending back into the mid–1980's, (*See* Class Mem. Data App. at Exh. B, § 1), or, if necessary for ease of administration, a single designated point such as the date of the filing of this action. *See* N.Y. CPLR § 5001(b); *Conway v. Icahn & Co.,* 16 F.3d 504, 512 (2d Cir.1994); *In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154, 1167 (E.D.N.Y.1996). Depending on what that starting date is determined to be, tort damages at trial would likely reach $1 billion and conceivably could rise as high as approximately $3 billion.

In the alternative, the Class seeks rescission damages, which would equal Class Members' lost investments, plus interest, minus distributions, without regard to any remaining value in the Partnerships. Because the remaining values of the Partnerships are assumed here to be relatively low, however, rescission damages would not be significantly different from the estimate for tort damages.

The Class also seeks treble damages pursuant to RICO. Since RICO plaintiffs are entitled to damages proximately caused by the alleged predicate acts, *American Nat'l Bank and Trust Co. v. Haroco, Inc.,* 473 U.S. 606, 608–9, 105 S.Ct. 3291, 3291–92, 87 L.Ed.2d 437 (1985), and the predicate acts in this case are of fraud, the Class's RICO damages would involve the same basic calculations as for its fraud claim, *see* *Crazy Eddie,* 948 F.Supp. at 1167, but with a sharply decreased likelihood of an award of prejudgment interest. *See* *Abou–Khadra v. Mahshie,* 4 F.3d 1071, 1083 (2d Cir.1993); *Wickham Contracting Co. v. Local Union No. 3, IBEW,* 955 F.2d 831, 834 (2d Cir.1992); *Bingham v. Zolt,* 810 F.Supp. 100, 101–102 (S.D.N.Y.1993); *Crazy Eddie,* 948 F.Supp. at 1166; *Nu–Life Construction Corp. v. Board of Educ. of the City of N.Y.,* 789 F.Supp. 103, 105 (E.D.N.Y.1992). Accordingly, the Class's foreseeable RICO recovery, inclusive of trebling, would likely be less than $2 billion.

Finally, the Class also seeks to recover contract damages on the theory that PaineWebber promised to produce particular annual returns to Partnership investors. Assuming that such a contractual duty could be proven, Class Members would be entitled to recover the benefit of their bargains, but such damages are too speculative to be estimated for the purposes of assessing the fairness of this Settlement.

***131** Thus, the most optimistic estimates of the Class's recovery would range between approximately $1 billion and an upper limit of approximately $3 billion. The cash portion alone of the proposed Settlement, which will return $125 million to Class Members, represents between 4% and 12.5% of Defendants' exposure, and with the Additional Benefits, the Settlement recovery increases to between 7% and 20% of the most generous forecasts of recovery. Class Members in virtually all of the Partnerships are expected to recover at least 50%, and in some instances up to 100%, of their original investments—a very favorable result. (*See* Class Mem. at 46.) *See also Prudential,* 1995 WL 798907 at *15.

However, the dollar amount of the settlement by itself is not decisive in the fairness determination, and the fact that the settlement fund may equal only a fraction of the potential recovery at trial does not render the settlement inadequate. “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.” *Grinnell,* 495 F.2d at 455 n. 2. Naturally, the settlement does not provide for a full recovery of legal damages; but that is the hallmark of compromise. Given the very considerable litigation risks that would be faced by the Class at trial, the amount of the settlement cash fund is very much within the “range of reasonableness” required for judicial approval.

The Jacobsons further contend that the settlement is unfair because it treats different Class Members differently with regard to the Additional Benefits. However, “there is no rule that settlements benefit all class members equally,” *In re “Agent Orange” Product Liability Litigation,* 611 F.Supp. 1396, 1411 (E.D.N.Y.1985) (citing *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1148 (11th Cir.1983)), as long as the settlement terms are “rationally based on legitimate considerations.” *Id.* The record in this action indicates that the Additional Benefits were not arbitrarily assigned, but rather were the direct result of negotiations between Class Counsel and PaineWebber. Specifically, in those Partnerships where PaineWebber would continue to control the operations, PaineWebber was willing to assume more risk in the form of the Remaining Value Guarantees. (*See* Class Mem. at 54; Chimicles Aff. at ¶ 73.) By working to maximize the performance and distributions of these Partnerships, PaineWebber would be able to avoid making cash payouts later. The risk that PaineWebber was willing to assume in the Par Guarantees was a function of the asset composition of each Par Guarantee Partnership. (*Id.*) For the Geodyne Partnerships, where PaineWebber no longer has any control or economic interest, Remaining Value and Par guarantees were not offered, although PaineWebber assumed some risk in the form of price guarantees. (*Id.*) A settlement requires compromises by both sides, and it is not unreasonable for concessions to have been made to PaineWebber's interests in this way.

As noted above, the applicable standard for approval is whether the settlement is fair, reasonable and adequate, not whether it is perfect, or whether every Class Member receives an identical recovery. The guiding principle of this settlement is to return as much lost investment as possible to all Class Members, and the Additional Benefits contribute to that goal. Moreover, Class Members get a second bite at the apple in the Look–Back Fund, which is distributed among all plaintiffs who still have Recognized Loss following the payment of the Additional Benefits, further mitigating any potential inequalities. Indeed, the assignment of Additional Benefits may actually produce yet a fairer result, since the settlement fund is otherwise allocated on a straight pro rata basis without consideration of any differences between Partnerships. (*See* Settlement Notice at Notice at ¶¶ 24–41.)

Finally, the Pegasus investors do quite well under the Additional Benefits; their par guarantees (albeit capped for Pegasus II) are a very favorable benefit compared to most other investors. If they ultimately receive a relatively small cash recovery through these guarantees (or via the cash fund), it will be because their investments have retained more value than others, or because they will already have received higher cash distributions ***132** than other investors as of December 31, 2000.

For all of these reasons, the proposed Settlement is well within the range of reasonableness in light of the best recovery at trial and all the attendant risks of litigation, and accordingly the final elements of the *Grinnell* test weigh heavily in favor of approval.

(2) *Procedural Integrity*

The second fundamental indicator of a settlement's fairness is the fact that it was properly negotiated at arm's length by the Parties. As long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides. Accordingly, the Court has an obligation to satisfy itself that the settlement process has not been corrupted and that the Class Members have been adequately represented by qualified counsel. *See* *Weinberger,* 698 F.2d at 74; *Malchman,* 706 F.2d at 433; *Chatelain,* 805 F.Supp. at 212. The Jacobsons assert that Class Counsel's representation of the Class was not adequate in this case, and they further suggest that collusion may have occurred between the Parties.

The first of these contentions is rejected for the reasons set forth *supra* in Section A of this Part. As for their second allegation, the Jacobsons contend that the negotiation process was undermined by the alignment of Class Counsel's interests with those of PaineWebber to resolve this case quickly and to roll up as many claims as possible in the Settlement. If proven, such collusion might prevent the approval of the Settlement, and at the very least would raise the Court's scrutiny and rebut the presumption of deference to the recommendations of counsel.

However, an allegation of collusion will not stand in the absence of any credible evidence. *See, e.g., Smith v. Alleghany Corp.,* 394 F.2d 381, 391–92 (2d Cir.1968). The Jacobsons have had every opportunity over the last eighteen months to develop the facts supporting their theory. They have obtained discovery documents from Class Counsel, they have filed numerous submissions—both in support of their present objection and in connection with two previous related motions—and they have appeared before this Court on at least five occasions, including at the fairness hearing. Nevertheless, they have mustered only the weakest of circumstantial evidence of any possible collusion between Paine Webber and Class Counsel. In particular, the testimony at the fairness hearing of the Jacobson's witness, Professor Koniak, added virtually nothing to the record to indicate that any improper behavior actually occurred in this case or that the integrity of the settlement negotiation process was corrupted in any way.

Indeed, Professor Koniak's testimony suggested that any class certification is collusive if it is conditional or stipulated to by the Parties, a position which is obviously untenable. Nor is the Court swayed by the Jacobsons' argument that the settlement must be collusive because it does not return an adequate recovery to Pegasus investors. Accordingly, as there is no credible evidence that the integrity of the negotiating process was impaired, this Court finds that the Settlement was achieved at arm's length.

For all of the aforementioned reasons, the proposed Settlement is fair, reasonable and adequate, and is found to be in the best interests of the Class.

D. *The Plan of Allocation is Fair and Reasonable*

The Court's responsibility for ensuring that the proposed Settlement is equitably allocated among Class Members derives from the requirement of Rule 23(e) that the settlement of a class action have court approval, and the standard of fairness, adequacy and reasonableness "applies with as much force to the review of the allocation [plan] as it does to the review of the overall settlement.' " *Agent Orange,* 611 F.Supp. at 1402 (E.D.N.Y.1985) (citing *In re Chicken Antitrust Litig. Am. Poultry,* 669 F.2d 228, 238 (5th Cir.1982)). The review of the plan of allocation is squarely within the discretion of the district court, *In re Equity Funding Corporation of America Securities Litigation,* 603 F.2d 1353, 1362 (9th Cir.1979); ***133** *State of West Virginia v. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.1971), and in this function—as in its review of the settlement itself—the Court acts as the fiduciary of all Class Members. This role is especially important where, as here, Class Members were required to bind themselves to the Class before the terms of any Settlement had been determined.

The Jacobsons object to the Plan of Allocation on the ground that it does not account for variations in the strengths of different Class Members' claims. At a minimum, it is obvious that 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. To determine precisely "the distribution of the settlement fund among the myriad claimants" in such a class would require counsel or the district court "to weigh the strengths and weaknesses of the claims of each class member" and would be an "almost impossible task." *Equity Funding,* 603 F.2d at 1365 (9th Cir.1979); *see also* *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 219 (5th Cir.1981). In such cases, the requirements of efficiency and administrability "undoubtedly would permit alternative methods of disbursement." *Agent Orange,* 611 F.Supp. at 1403; *see also Women in City Gov't,* 1989 WL 153059 at *5.

However, it is also true that when real and cognizable differences exist between the "likelihood of ultimate success" for different plaintiffs, "it is appropriate to weigh 'distribution of the settlement ... in favor of plaintiffs whose claims comprise the set' that was more likely to succeed." *Agent Orange,* 611 F.Supp. at 1411 (citing *Corrugated Container,* 643 F.2d at 220). Such merit-based weighting has been approved by courts in this Circuit and elsewhere where substantially different or additional claims have been asserted by certain class members and not others (*see* *Agent Orange,* 611 F.Supp. at 1410–11;) *In re Salomon Inc. Sec. Litig.,* No. 91 Civ. 5442(RPP), 1994 WL 265917 at *6–7 (S.D.N.Y. June 16, 1994); where the liability of a defendant has been altered in relation to some class members because of a separate settlement or judicial determination (*Equity Funding,* 603 F.2d at 1363–67; *In re Investors Funding Corp. of N.Y. Sec. Litig.,* 9 B.R. 962, 965 (S.D.N.Y.1981); *Milken,* 150 F.R.D. 46 at 50–51); where different plaintiffs have "substantially" different vulnerabilities to statute of limitations defenses (*see* *Corrugated Container,* 643 F.2d at 220; *see Prudential,* 1995 WL 798907 at * 11); and where the injuries claimed by different class members have been sustained under significantly different legal or factual circumstances (*see, e.g., Women in City Gov't,* 1989 WL 153059 at *4; *Dunn v. H.K. Porter Co.,* 78 F.R.D. 50, 53 (E.D.Pa.1978); *Cagan v. Anchor Savings Bank,* No. CV–88–3024, 1990 WL 73423 at *4 (E.D.N.Y. May 22, 1990); *Salomon* 1994 WL 265917 at *12; *Prudential,* 1995 WL 798907 at *11; *Investors Funding,* 9 B.R. at 965). As a general rule, 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. *See* *Corrugated Container,* 643 F.2d at 219–20; *Milken,* 150 F.R.D. 46 at 55; *Dunn,* 78 F.R.D. at 53–54.

Class Counsel has performed a thorough and detailed analysis of the merits of all the claims in this case. The Executive Committee performed initial calculations of losses for each Partnership in late 1995, and more importantly, throughout the allocation process in early 1996, each Partnership group was represented by a separate law firm and by outside experts.[45] Specifically, the Pegasus investors were represented by the firm of Goodkind Labaton Rudoff & Sucharow, and the merits of the Pegasus claims were reviewed ***134** and analyzed by two independent experts, i.e., Prof. Jordan and Mr. Treitel. (*See* Tr. 1/19/96 at 23–

24.) Reports by each Partnership team were presented to the Allocation Committee, and the conclusions of those reports are set forth in the record. (*See* Compendium of Affidavits and Reports of Experts Retained by Class Counsel in Support of Settlement and Plan of Allocation, Exh. 1–8; Chimicles Aff. at ¶¶ 62–65.)

The dispositive question, therefore, is whether Class Counsel's decision in this case to allocate the settlement fund on a pro rata basis was fair and reasonable in light of the information collected and the analyses performed. Class Counsel assert that the plan should be approved because although the claims of all Class Members are not identical, their similarities greatly outweigh any differences, and every Class Member would have a comparable chance of success on the merits at trial. In other words, it is contended that the Plan of Allocation is indeed "based on a rational analysis of the relative strengths and weaknesses of the claims related to each of the Partnerships," *Prudential,* 1995 WL 798907 at * 19, but that the appropriate weighting of the plan in this case in fact is no weighting at all.[46] The Jacobsons contend that this is an unreasonable result, because certain plaintiffs, and in particular the Pegasus investors, have stronger claims than others on the facts and with regard to statute of limitations defenses.

With regard to the facts, the Jacobsons allege that Pegasus I and II units were marketed pursuant to a unique and uniform "sales pitch" which was orchestrated by PaineWebber's Direct Investment Department and which involved misrepresentations not involved in the marketing of other Partnerships. The Jacobsons also contend that Pegasus investors have a stronger litigation position because the SEC's Consent Order made specific findings with regard to PaineWebber's marketing and sale of Pegasus units.

These arguments are unpersuasive. As previously set forth in this Court's Order of February 26, 1996 as well as here, the claims asserted by all Class Members in the Consolidated Complaint are materially the same. In every case there are allegations of Uniform Sales Materials and scripts and of centralized fraud and conspiracy by PaineWebber. (Order dated Feb. 26, 1996 at 4–5.) Furthermore, the Allocation Committee analyzed the merits of all claims and found evidence of similar illegal activity by PaineWebber in every Partnership group. (*See* Chimicles Aff. at ¶¶ 62–65.) Based on these findings, it was reasonable for Class Counsel to conclude that all plaintiffs would have generally comparable odds of prevailing at trial and that any differences between their claims are not appreciable compared to their similarities. The fact that certain Partnerships were discussed in the SEC's Consent Order does not alter this result, since, as previously noted, the SEC Order is not admissible at trial to prove liability.

With regard to statutes of limitations, the Jacobsons contend that the Plan of Allocation fails to account for different levels of risk faced by different Class Members. Class Counsel asserts that no sufficient basis exists for differentiating between Class Members, because all RICO claims and certain state law claims are subject to the doctrine of "equitable tolling" and could be timely depending on when Class Members discovered or should have discovered their injuries. It is sufficient to state that the determination of when such notice occurred for various Class Members is a question to be resolved by motion or at trial, *see* *Prudential,* 930 F.Supp. at 75–76; *Butala v. Agashiwala,* 916 F.Supp. 314, 318 (S.D.N.Y.1996), as would be such issues as whether the damages suffered are sufficiently definite to constitute a RICO injury and start the limitations clock. *See* *Bingham,* 66 F.3d at 561; *Gelt Funding,* 27 F.3d at 768; *Cruden v. Bank of N.Y.,* 957 F.2d 961, 977–78 (2d Cir.1992). In its role as arbiter of the fairness of the proposed Settlement, this Court is not called upon to determine these statute of limitations issues. Indeed, settlements are reached precisely to ***135** avoid such binding judicial determinations. The existence of these unresolved issues is sufficient to support the reasonableness of the Parties' determination that "no distinction should be made between or among Partnerships based on statute of limitations grounds" for the purposes of the proposed Settlement.[47]

This Court's review of the proposed Plan of Allocation is informed not only by the goal of matching each plaintiffs recovery to the strength of his or her claim, *Grinnell,* 495 F.2d at 455, but also "by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *Chicken Antitrust,* 669 F.2d at 238. Efficiency, ease of administration and conservation of public and private resources are highly relevant to the reasonableness of a settlement, *see Women in City Gov't,* 1989 WL 153059 at *5 (citing *In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 145, 183), particularly where, as here, the issues are complex, the outcome of the litigation unclear, and the class large. Based on the extensive record in this case, a pro rata distribution of the Settlement on the basis of Recognized Loss will provide a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims. Accordingly, the Plan of Allocation is fair and reasonable and is approved.

III.

CONCLUSION

For all of the foregoing reasons, the Court concludes that the proposed Settlement and the proposed Plan of Allocation are fair, reasonable and adequate, and are in the best interests of the Class. Accordingly, all objections are overruled, the present motion is GRANTED, and the settlement of this class action is hereby APPROVED pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Settlement Agreement is fair, reasonable and adequate and is in the best interests of the Class.

2. The Settlement Agreement shall have the full force and effect of an Order of this Court and shall be implemented in accordance with its terms and provisions.

3. The "Settled Claims" as defined in the Settlement Agreement are dismissed on the merits and with prejudice.

4. The Clerk of Court is directed to enter judgment dismissing the Consolidated Complaint with prejudice in favor of the Settling Defendants.

5. This Court retains exclusive jurisdiction over the Parties and Class Members for all matters relating to this litigation, including the award of attorneys' fees and costs, and the administration, interpretation and enforcement of this Opinion and Order.

SO ORDERED.

All Citations

171 F.R.D. 104

Footnotes

1 *Rittmaster v. PaineWebber Group, Inc., et al,* No. 94 Civ. 8547; *Schwartz. et al. v. PaineWebber Group, Inc.,* No. 94 Civ. 8549; *Romine v. PaineWebber Group. Inc. et al,* No. 94 Civ. 8558; *Tiefer v. PaineWebber Group, Inc.,* No. 94 Civ. 8609; *Fine, Bryant & Wah P.T. Chartered Profit Sharing Trust v. PaineWebber Group, Inc.,* No. 94 Civ. 8637; *Clark v. PaineWebber Group, Inc.,* No. 94 Civ. 8712; *Nassirzadeh v. PaineWebber Group, Inc.,* No. 94 Civ. 8762; *Williams v. PaineWebber Group, Inc.,* No. 94 Civ. 8772; *McLeod v. PaineWebber Group, Inc., et al.,* No. 94 Civ. 8934; and *Sanfilippo v. PaineWebber Group, Inc.,* No. 95 Civ. 0056.

2 Three additional cases—*Danziger v. PaineWebber Group, Inc.,* No. 95 Civ. 3370; *Paulson v. PaineWebber Group, Inc.,* No. 95 Civ. 4570; and *Beckwith v. PaineWebber, Inc.. et al.,* No. 95 Civ. 7755 (September 8,1995)—have since been added to the Consolidated Complaint.

3 *See* Complaint at ¶¶ 50–112. The named individual defendants are: Joseph J. Grano, Jr. (President of Retail Sales and Marketing for PWI and a Director of PaineWebber); Paul B. Guenther (President of PWI and a Director of PaineWebber); and Donald B. Marron (Chairman and CEO of PaineWebber, Chairman and CEO of PWI, and, at various times, President of PWI and Chairman of PaineWebber Properties, Inc.). (Complaint at ¶¶ 108–110.)

4 The 70 Partnerships are the following: PaineWebber/Geodyne Energy Income Limited Partnerships I–A through I–F; PaineWebber/Geodyne Energy Income Limited Partnerships II–A through II–H; PaineWebber/Geodyne Energy Income Limited Partnerships III–A through III–G; PaineWebber/Geodyne Inst/Pension Energy Income P–I through P–8 Limited Partnerships; Kagan Media Partners; PaineWebber CMJ Properties, L.P.; PaineWebber Development Partners IV, Ltd.; PaineWebber Equity Partners I through III Limited

Partnerships; Fiduciary Capital Partners, L.P.; Fiduciary Capital Pension Partners, L.P.; PaineWebber Growth Properties I, L.P. and II, L.P.; PaineWebber Growth Partners III, L.P.; PaineWebber Guaranteed Futures Fund, L.P.; PaineWebber Income Properties Limited Partnership; PaineWebber Income Properties Two through Eight Limited Partnerships; PaineWebber Independent Living Mtge. Fund, Ltd.; PaineWebber Independent Living Mtge. Inc., II; PaineWebber Insured Mortgage Partners IA L.P. and IB L.P.; PaineWebber IRB Property Fund Limited Partnership; PaineWebber Mortgage Partners V, L.P.; Participating Income Properties III Limited Partnership; PaineWebber Preferred Yield Fund, L.P.; PW Preferred Yield II, L.P.; PaineWebber Qualified Plan Property Fund, L.P.; PaineWebber Qualified Plan Property Fund Two, L.P. through Four, L.P.; PaineWebber R & D Partners, L.P.; PaineWebber R & D Partners II, L.P. and III, L.P.; Realty Southwest Fund II, Ltd. and III, Ltd.; Retail Property Investors, Inc.; Pegasus Aircraft Partners, L.P.; Pegasus Aircraft Partners II, L.P.

5 For example, brokers were allegedly encouraged to promote the PaineWebber Insured Mortgage Partners Partnership as an investment that "eliminates the volatility of the stock market." (Complaint at ¶¶ 126–127.)

6 Excluded from the Class are the following: officers and directors of PaineWebber, their families and heirs; those who acquired Partnership units from a source other than PaineWebber; those who have settled their Partnership claims against PaineWebber and have signed a release; and those who have resolved their Partnership claims against PaineWebber in a separate litigation or arbitration.

7 The Geodyne Units at issue in the Texas Action are the following: PaineWebber/Geodyne Energy Income Limited Partnerships II–A through II–H; PaineWebber/Geodyne Energy Income Limited Partnerships III–A through III–G; and PaineWebber/Geodyne Inst/Pension Energy Income P–1 through P–8 Limited Partnerships. Six additional Geodyne Partnerships (PaineWebber/Geodyne Energy Income Limited Partnerships I–A through I–F) are part of the Federal Action but are not included in the Texas Action.

8 Exclusions from the Texas Class are the same as for the Federal Class. *See supra* note 6.

9 The number of mailed copies exceeds the number of potential Class Members because investors with multiple accounts received multiple notices. The number of potential class members has been estimated by Class Counsel to be approximately 150,000. (*See* Class Mem. at 2, 29.)

10 Since the expiration of the exclusion deadline, this Court has received a number of motions by Class Members seeking to opt out late. These have been decided on an individual basis pursuant to the legal standard of "excusable neglect." In addition, duplicative proceedings commenced by Class Members in other jurisdictions have been enjoined by Order of this Court or by stipulation of the Parties. (*See* Opinion and Order dated June 28, 1996; Stipulation and Order dated December 11, 1996.)

11 In addition, Counsel for the Texas Class retained the following experts with respect to the Geodyne Partnerships: Frank Webster (valuations); Huddleston & Co. (reserve analysis); Corporate Capital Consultants, Inc. (analysis of prospectuses); Hugh Lamle (valuation and consulting); Eisner & Co. (forensic accounting analysis); and Ten Eyck Associates, Inc. (forensic accounting, analysis of public filings regarding Partnership performance).

12 Balon also prepared alternative scenario valuations using such factors as third-party appraisals, general partner repurchase offers, and secondary market activity and pricing. (*Id.* at ¶¶ 32–33.)

13 *See infra* Section G.

14 The Sounding Board, created in September 1995, represented diverse geographical areas and Partnership interests. Its members included investors in R & D Partners I–III, Equity Partners II, Qualified Plan Property Fund III, Geodyne Institutional/Pension Energy Income Partners P–5, and Pegasus Aircraft Partnership II. (Chimicles Aff. at 42.)

15 Class Counsel's expert has estimated that a standard interest component would probably double the amount of damages, and that a loss theory aimed at compensating Class Members for the promised return on the Partnerships would probably result in damages of over one billion dollars. (*See* Balon Aff. at ¶ 34.) Such an amount was deemed by Class Counsel to be "unmanageably large" in light of the funds available for settlement. (Class Mem. at 41 n. 19.)

16 Tax benefits were counted as distributions only for the CMJ Properties Partnership, which was structured specifically as a tax shelter and produced no other benefits. (*See* Class Mem. at 60.)

17 These values would continue to be refined in early 1996 for the purpose of negotiating the Additional Benefits and the Plan of Allocation. In general, the expert valuations approximated the findings of PaineWebber's own third-party appraisers, with the exception of the Geodyne Partnerships, whose residual values came out lower than secondary market prices. (Balon Aff. at ¶ 35.)

18 Until all claims are filed, these estimates remain subject to several variables, including the demographics of investors who purchased units in the secondary market or sold units prior to January 1, 1996, or who have opted out of the Class or settled their claims independently. (Balon Aff. at ¶ 37.) Specific distribution and residual value figures for each Partnership appear in the Data Appendix to the Settlement Agreement.

19 For a summary of the terms of the Additional Benefits, see *infra* Section H.

20 For example, the advocacy team responsible for the Real Estate Partnerships concluded that PaineWebber had committed marketing abuses constituting fraud and breach of fiduciary duty, had engaged in questionable financing techniques, had failed to disclose the full extent of fees and commissions, and had stockpiled property purchases indiscriminately. The Geodyne Team, led by Texas Counsel, found, *inter alia,* that PaineWebber had defrauded investors, particularly with regard to the safety and likely profitability of the Geodyne Partnerships. Similarly, the Pegasus team concluded that a fraud had been committed on Pegasus investors with regard to the safety and income potential of the aircraft leases (including the likely resale value of the leased aircraft), and that in particular PaineWebber had failed to disclose that a nearly identical aircraft leasing plan was rejected by Shearson–Hutton in 1988. (*See* Chimicles Aff. at ¶¶ 61–65.)

21 For a summary of the terms of the Plan of Allocation, *see infra,* Section I.

22 The impact of the SEC investigation on these actions is primarily relevant to Class Counsel's request for attorneys' fees, and will be examined more fully in a separate Order addressing that request.

23 The Order was filed in an action entitled *SEC v. PaineWebber Inc.,* 96 Civ 0331(SHS), commenced—and simultaneously resolved—in this Court as a related case to the Consolidated Complaint.

24 In several respects, however, the findings in the SEC Order are narrower than the claims in these actions. Most notably, while the SEC Order focuses on PaineWebber's marketing of the Geodyne units, and also addresses Pegasus and four of the mortgage Partnerships, it does not make specific findings regarding the Real Estate and R & D Partnerships, which represent approximately 65% of the sales at issue in these actions. Nor does the Order address units purchased from 1980 through 1985. Finally, while the Order is primarily concerned with PaineWebber's marketing and sale of “unsuitable” investments to individual customers, these actions additionally allege a company-wide pattern of sales fraud, including prospectus fraud. (*See* Morris Fee Aff. at ¶ 73.)

25 Qualified members of the Federal and Texas Classes may file claims in both settlements, but may not recover twice for the same alleged loss.

26 The Par Guarantee Partnerships are: Fiduciary Capital Partners, L.P.; Fiduciary Capital Pension Partners, L.P.; PaineWebber Independent Living Mtge. Fund, Ltd.; PaineWebber Independent Living Mtge, Inc. II; PaineWebber Insured Mortgage Partners IB, L.P.; Participating Income Properties III Limited Partnership; PaineWebber Preferred Yield Fund, L.P.; PW Preferred Yield II, L.P.; PaineWebber R & D Partners, L.P.; PaineWebber R & D Partners II, L.P. and III, L.P.; Pegasus Aircraft Partners, L.P.; and Pegasus Aircraft Partners II, L.P.

27 PaineWebber's obligation is capped with respect to two of the Par Guarantee Partnerships, PW Preferred Yield II, L.P. (maximum payment of $7 million) and Pegasus Aircraft Partners II, L.P. (maximum payment of $12 million).

28 The Remaining Value Guarantee Partnerships are: PaineWebber Equity Partners I through III Limited Partnerships; PaineWebber Growth Properties I through III, L.P.; PaineWebber Income Properties Four through Eight Limited Partnerships; and PaineWebber Mortgage Partners V, L.P.

29 Those 44 Partnerships are the following: PaineWebber/Geodyne Energy Income Limited Partnerships I–A through I–C; PaineWebber/Geodyne Energy Income Limited Partnerships II–A through II–H; PaineWebber/

Geodyne Energy Income Limited Partnerships III–A through III–G; PaineWebber/Geodyne Inst/Pension Energy Income P–I through P–8 Limited Partnerships; PaineWebber Development Partners IV, Ltd.; PaineWebber Equity Partners I through III Limited Partnerships; PaineWebber Growth Properties I, L.P. and II, L.P.; PaineWebber Growth Partners III, L.P.; PaineWebber Income Properties Four through Eight Limited Partnerships; PaineWebber Mortgage Partners V, L.P.; PW Preferred Yield II, L.P.; Pegasus Aircraft Partners II, L.P.; PaineWebber Development Partners IV, L.P. (liquidated); Realty Southwest Fund II, Ltd. and III, Ltd. (liquidated); and Retail Property Investors, Inc. (liquidated).

30 *See* discussion, *infra* Subsection 2.

31 Because the Par Guarantees for the Pegasus II and Preferred Yield II Partnerships are capped, assigned fees and compensation arising from those Partnerships will be held in separate escrow accounts and applied specifically toward the recoupment of Par Value for those Partnerships' investors. Once those investors have recovered 100% of their Recognized Losses, any remaining balance of assigned fees and compensation will revert to the Look–Back Fund.

32 12% of the Look–Back Fund (not to exceed $2.5 million) will be segregated in a special escrow account for the benefit of any Geodyne investors who have not recovered their initial investments.

33 *See* Affidavit of Rudolph, Palitz LLP in Connection with Notice by Mailing and Publication, dated October 8, 1996. As with the Notice of Pendency, the number of copies mailed exceeds the potential number of Class Members, in part because investors with multiple accounts received multiple notices.

34 A small number of objections to the proposed award of attorneys' fees were also received and will be addressed in this Court's forthcoming Order regarding those fees.

35 One objection, by Richard G. Clemens, concerned an issue relevant only to the PaineWebber CMJ Properties Partnership, and was resolved with the issuance of a Supplemental Notice to all CMJ investors (see Order dated December 11, 1996). The second objection, by Jerome Petrisko, involved the effect of certain proposed Settlement language on a pending litigation he had brought in Pennsylvania; that objection was ultimately withdrawn. (*See* Transcript of Fairness Hearing, October 25, 1996, at 9–10.)

36 Class Counsel have challenged Koniak's qualifications as an expert in class actions, citing her admitted lack of such expertise in 1994 when she testified in another class action fairness hearing. Class Counsel also emphasize Koniak's failure to review many of the relevant documents in this case, including the affidavits of Class Counsel and experts. See Class Supp. Mem. at 24. It is unnecessary to reach a decision regarding Koniak's expert status, however, because her actual testimony was substantively indistinguishable from legal argument, and is considered as such by this Court.

37 This is essentially the same argument that was made by the Jacobsons in their earlier motion to intervene and to create a subclass for Pegasus investors.

38 The Jacobsons assert that the Pegasus claims are stronger than those of other investors because, among other grounds, (1) they are the subject of specific findings in the SEC report; (2) there is evidence that the Pegasus Uniform Sales Materials were orchestrated by the Direct Investment Department ("DID") at PaineWebber headquarters; and (3) Pegasus units were purchased later than most other Partnerships and so are subject to fewer limitations defenses. (Obj. Mem. at 7–13; Obj. Supp. Mem. at 21–22.)

39 *See Manual for Complex Litigation* § 30.44 (3d ed.1995); *Weinberger,* 698 F.2d at 73.

40 As previously noted, objections to the amount of attorneys' fees will be the subject of a separate Order.

41 The number of opt-out requests received from class members is normally also taken into account in the determination of a settlement's fairness. *See, e.g., Chatelain,* 805 F.Supp. at 213. In the present case, however, the number of opt-out requests is not an appropriate factor to consider in the fairness evaluation, because the exclusion deadline—July 21, 1995—expired more than a year before the terms of the proposed settlement were known to the Class Members.

42 It should be noted that when settlement negotiations began, PaineWebber had already announced that it would take a $200 million charge and that it expected to reach a settlement with the SEC regarding Partnership-related claims. Also, the Settlement in this action was concluded nearly six months after the filing

of the SEC Consent Order, which contains extensive findings against the Defendants. However, the SEC Order, by its terms, does not adjudicate the merits of any claims and is not admissible "to prove underlying facts of liability." *U.S. v. Gilbert,* 668 F.2d 94, 97 (2d Cir.1981).

43 Some investors in 11 of the 70 Partnerships apparently purchased units after November 23, 1990 and would not be vulnerable to a RICO limitations defense. *See* Obj. Mem. at Exh. 7.

44 The applicable statute of limitations for common law fraud in this case may also be subject to equitable tolling. *See* *Weisl v. Polaris Holding Co.,* 226 A.D.2d 286, 641 N.Y.S.2d 288, 289 (1st Dep't 1996).

45 At a hearing before this Court on January 19, 1996 regarding the Jacobsons' motion to create a subclass, Class Counsel described the structure of the Allocation Committee as follows:

> Mr. Labaton's firm represents Pegasus. He sits on the committee representing the Pegasus experts. Miss Rodriguez's firm represents the real estate partnerships. They have retained a real estate expert [Vitola] ... Mr. Bert Finkelstein [and Texas Counsel] represent the Geodyne partnerships exclusively, and they have retained experts in that field. Bernstein Liebowitz represents the R & D Partnerships ... Therefore, each of those firms has now been given its own mandate to represent its client ... and get as much as they can for their partnerships.

(Tr. 1/19/96 at 28.)

46 The Executive Committee is no stranger to the process of weighting an allocation plan; many of its member firms were involved in the creation of such plans in other class action settlements. *See, e.g,, Prudential,* 1995 WL 798907; *Milken,* 150 F.R.D. 57; *Investors Funding,* 9 B.R. 962.

47 In this regard, it bears noting that the Geodyne plaintiffs, many of whose claims are subject to the fewest statute of limitations defenses, have not objected to a pro rata allocation of the Settlement.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Tremont Securities Law, State Law and Insurance Litigation, 2nd Cir.(N.Y.), June 26, 2017

396 F.3d 96
United States Court of Appeals,
Second Circuit.

WAL–MART STORES, INC., The Limited, Inc., Sears Roebuck and Co., Safeway Inc., Auto–Lab of Farmington Hills, Bernie's Army–Navy Store, Burlington Coat Factory Warehouse Corporation, Circuit City Stores, Inc., The Coffee Stop, Inc. d/b/a Torreo Coffee & Tea Company, Computer Supplies Unlimited, Denture Specialists, Inc., Payless Shoesource, Inc., Shoes Etc., Inc. d/b/a Arnold's Shoes, Scrub Shop, Inc., Sportstop, Inc., Geneva White, D.M.D., UCC Kwik Doc., Inc., f/k/a UCC Express, Inc., International Mass Retail Association, National Retail Federation, and Food Marketing Institute, Plaintiffs–Appellees, Constantine & Partners PC, et al., Class Counsel–Appellees–Cross–Appellants, Dow Jones and Company, Inc., Intervenor–Plaintiff–Appellee,
v.
VISA U.S.A. INC. and MASTERCARD INTERNATIONAL, INC., Defendants–Appellees, Citigroup, Inc., Pulse EFT Association, and Edgar, Dunn and Company, Interested Parties,
v.
Reyn's Pasta Bella LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, Hat–In–The–Ring, Inc. d/b/a Eddie Rickenbacker's, Objectors–Appellants, Nucity Publications, Inc., Objector–Appellant, Lupita Llamas Martinez d/b/a Del Yaqui Restaurant, Armenta's Mexican Food, Inc., Objectors–Appellants, Leonardo's Pizza By The Slice, Inc., 710 Corp., Objectors–Appellants–Cross–Appellees, Roman Buholzer d/b/a The Continental Garden Restaurant, Objector–Cross–Appellee, Preston Center Personal Training, Inc., UCC Kwik Doc., Inc., f/k/a UCC Express, Inc., Duke Products, Inc., Southern Network Services, Inc., Sound Deals, Inc., Digital Solutions, Inc., Village Fabrics and Furnishings, Inc., Rental Solutions, Inc., Rent Tech, Inc., G & G Enterprises, NSG Enterprises, Inc., S & GJ Enterprises, Inc., Jac Vaca, Inc., John Wenturine, Y.P.I., Inc., Mobil Town USA, Inc., Young Pioneers, Inc., Digital Playroom, Inc., Wagner's Bakery, Inc., Beaches N Cream, Kickers' Corner of the Americas, Inc., MSV Records & Production, Inc., Southern Lady Flowers, Round House, Inc., Ron Jen, Inc., d/b/a The Boathouse, and Ron Fred, Inc., Objectors.

Nos. 04–0344, 04–1052, 04–0514, 04–1055.
|
Argued: Aug. 25, 2004.
|
Decided: Jan. 4, 2005.

Synopsis
Background: Appeal was taken from an order of the United States District Court for the Eastern District of New York, Gleeson, J., 297 F.Supp.2d 503, approving a class settlement in antitrust action brought by merchants against credit card companies and awarding attorney fees.

Holdings: The Court of Appeals, Wesley, Circuit Judge, held that:

release of merchants' horizontal boycott claims against credit card companies and their member banks in class action settlement of antitrust tying case against credit card companies was valid even though members banks were non-parties;

objecting merchants' claims brought against credit card companies in separate suits, which were released in exchange for settlement of class action brought against credit card companies, were adequately represented prior to settlement by class representatives;

objecting merchants received adequate notice of release of claims brought in separate suits against credit card companies and non-party member banks;

settlement was substantively fair; and

attorney fees of $220,290,160.44 awarded to lead counsel was reasonable.

Affirmed.

Attorneys and Law Firms

***100** Richard J. Archer, Archer & Hanson, Occidental, CA (James A. Kopcke, Golden Kopcke, LLP, San Francisco, CA, on the brief) for Objectors–Appellants Reyn's Pasta Bella, LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat–In–The–Ring, Inc. d/b/a Eddie Rickenbacker's.

Stanley M. Grossman (H. Adam Prussin, John Balestriere, Murielle J. Steven Walsh, on the brief), Pomerantz Haudek Block Grossman & Gross, LLP, New York, N.Y. (Howard Langer, John Grogan, Langer and Grogan, P.C., Philadelphia, PA, on the brief; Joseph Goldberg, Sara Berger, Alexandra Freedman Smith, Zachary Ives, Freedman Boyd Daniels Hollander Goldberg & Cline, P.A., Albuquerque, NM, on the brief) for Objector–Appellant Nu–City Publications, Inc.

John Rasmussen (Dale W. Robinson, on the brief), Johnson, Rasmussen, Robinson & Allen, P.L.C., Mesa, AZ for Objectors–Appellants Armenta's Mexican Food, Inc. and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant.

N. Albert Bacharach, Jr., Gainesville, FL for Objectors–Appellants–Cross–Appellees Leonardo's Pizza By the Slice, Inc. and 710 Corp. Inc.

M. Laurence Popofsky (Stephen V. Bomse, Marie L. Fiala, Peggy J. Williams, Russell P. Cohen, on the brief), Heller Ehrman White & McAuliffe LLP, San Francisco, CA (Philip H. Curtis, Robert C. Mason, Arnold & Porter LLP, New York, NY, on the brief; Kevin J. Arquit, Joseph F. Tringali, Mariya S. Treisman, Simpson Thacher & Bartlett LLP, New York, NY, on the brief; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, on the brief; Keila D. Ravelo, Clifford Chance U.S. LLP, New York, N.Y. on the brief) for Defendants–Appellees.

Lloyd Constantine (Robert L. Begleiter, Matthew L. Cantor, Stacey Anne Mahoney, Michelle A. Peters, Amy N. Roth, Gordon Schnell, Jonathan Shaman, Jeffrey I. Shinder, on the brief), Constantine & Partners, New York, N.Y. for Class Counsel–Appellees–Cross–Appellants and for Class Plaintiffs–Appellees.

Lawrence W. Schonbrun, Law Offices of Lawrence W. Schonbrun, Berkeley, CA on submission for Objector–Cross–Appellee Roman Buholzer d/b/a The Continental Garden Restaurant.

Before: CABRANES and WESLEY, Circuit Judges. *

Opinion

WESLEY, Circuit Judge.

Appellants challenge the district court's approval of a class action settlement, including the award of attorneys' fees. The class action involved approximately five million merchants and alleged, *inter alia,* that defendants Visa U.S.A. Inc. and MasterCard International Inc. tied merchant use of defendants' debit products to use of defendants' credit cards, in violation of the ***101** Sherman Act. Plaintiffs contended that Visa and MasterCard used their power in the credit card market to force merchants to accept an artificially-inflated transaction fee when accepting payment from consumers using debit cards operated by Visa or MasterCard. Plaintiffs further alleged that defendants employed a scheme of anti-competitive conduct to bar competition in the debit card market. In this bitterly contested lawsuit fought by expert counsel on all sides, the parties agreed to settle just before trial commenced. The resulting settlement was the largest in the history of antitrust law. As part of the settlement, defendants agreed not to tie their debit and credit products together and to pay more than $3 billion to plaintiffs in exchange for the release of any and all claims that were or could have been filed against defendants or their member banks (non-parties in this action) based on the conduct alleged.

On appeal, appellants contest the validity of the settlement's release of non-parties, the adequacy of class representation, the adequacy of notice, the fairness of settlement, and the reasonableness of attorneys' fees. We **AFFIRM** the district court's order in all respects.

BACKGROUND

This case involves a clash of commercial titans. Plaintiffs, a class of merchants approximately five million strong led by Wal–Mart, the world's largest retailer, and several other large and sophisticated merchants, including The Limited, Sears, and Safeway, filed suit on October 25, 1996 against Visa U.S.A. Inc. and MasterCard International, Inc. ("Visa" and

"MasterCard," respectively), [1] seeking damages amounting to tens of billions of dollars for alleged violations of Sections One and Two of the Sherman Act, 15 U.S.C. §§ 1, 2. [2] First, plaintiffs claimed that the defendants' "Honor All Cards" policy, which forced merchants who accepted Visa and MasterCard credit cards to accept Visa and MasterCard debit cards, was an illegal "tying arrangement" that violated Section One of the Sherman Act. [3] Second, plaintiffs alleged that defendants used their Honor All Cards policy in conjunction with other anti-competitive conduct to monopolize the debit market, in violation of Section Two of the Sherman Act. As a consequence, plaintiffs claimed that they incurred supra-competitive "interchange fees" (described in the next subheading) during every debit and credit transaction made between October 1992 and June 2003.

A. Visa and MasterCard Transactions

Essentially, every debit or credit card transaction using a Visa or MasterCard ***102** product involves five entities: (1) Visa or MasterCard, (2) a "card-issuing" bank, (3) an "acquiring" bank, (4) a consumer, and (5) a merchant. At the outset, either Visa or MasterCard, each an association, grants a license to a member bank to issue credit and debit cards with its brand name. A "card-issuing" member bank then issues a credit or debit card to a cardholder with either the Visa or MasterCard brand name. An "acquiring" bank, a member of Visa and MasterCard, contracts with a merchant to accept payment through Visa and MasterCard. When a cardholder makes a purchase with either a Visa or MasterCard product, the acquiring institution reimburses the merchant for the cardholder's purchase, less a "discount fee." The discount fee is determined by the acquiring institution. The card-issuing bank charges an "interchange fee" each time it provides funds to the acquiring bank as payment to a merchant for the cardholder's purchase. Visa and MasterCard set the interchange fee that all card-issuing banks charge. Economics demands that the discount fee be greater than the interchange fee the acquiring institution must pay to the card-issuing institution. *See* *Visa Check II,* 192 F.R.D. at 72. The following illustrates this network of transactions:

> Bank A issues a Visa credit card to Consumer X, who purchases a garment for $100 at Store Y, which was "acquired" for Visa by Bank B. Visa rules mandate that Bank B must pay Bank A an interchange fee of 1.25% of the amount of the transaction, *i.e.,* $1.25. Bank B will charge Store Y a "discount fee" higher than $1.25 in order to recover the mandated interchange fee and other fees that Visa rules mandate Bank B to pay Visa on each and every Visa credit card (and debit card) transaction and to earn a profit for itself. Thus, Bank B may charge a discount fee of 1.60% of the transaction amount (or $1.60) to Store Y. When Store Y presents Consumer X's $100 Visa transaction to Bank B, the bank will credit Store Y's account for $98.40, send the Visa mandated $1.25 interchange fee to Bank A and retain the $.35 balance of the "discount fee."

2d Am. Compl. ¶ 8(*o*).

B. Procedural History

Plaintiffs originally filed their complaint on October 26, 1996. The district court certified plaintiffs as a class in February 2000. *See* *Visa Check II,* 192 F.R.D. at 71. The class includes "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept Visa[ ]Check and/or MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statute of limitations," *id.* at 90, which is the period from October 25, 1992 through June 21, 2003, *Visa Check III,* 297 F.Supp.2d at 514 n. 12, 519. Plaintiffs' discovery included "a review of approximately five million pages of documents, almost 400 depositions, discovery from roughly 200 non parties, 54 expert reports, and 21 expert depositions." *Id.* at 511 n. 8. In June 2002, plaintiffs sent a notice of pendency to all class members. On April 30, 2003, "after complete and exhaustive discovery, summary judgment proceedings, and substantial mediation," *id.* at 511, Visa and MasterCard each signed a memorandum of understanding setting forth a preliminary settlement agreement with plaintiffs, *id.* at 508. The final settlement agreements were signed on June

4, 2003 (collectively, the "Settlement").[4] Later that month, the district ***103** court approved the notice of settlement, which described the terms of settlement and quoted the Settlement's release verbatim. *Id.* at 509 n. 5, 516; Notice of Settlement ¶¶ 14, 18–19.[5] Eighteen merchants, in this class of approximately five million, filed objections to the Settlement and the allocation plan. *Id.* at 509. In September 2003, the district court held a fairness hearing during which it offered each objector the opportunity to be heard. *Id.* On December 19, 2003, after considering these objections, the district court issued a Memorandum and Order (a) approving the proposed settlement agreements between plaintiffs and Visa and MasterCard and the plan of allocation to distribute funds to class members, and (b) awarding attorneys' fees. *Id.* at 507, 526. The court entered final judgments on January 30, 2004. Each appellant filed a timely appeal.

C. The Settlement

The Settlement is the culmination of approximately seven years of hard-fought litigation and represents "the largest antitrust settlement in history." *Id.* at 508. The district court described the Settlement as providing for, among other things:

(1) the cessation, as of January 1, 2004, of defendants' "Honor All Cards" rules, by which the defendants' debit card services to merchants were tied to their credit card services;

(2) the creation of a $3.05 billion settlement fund;

(3) the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards by January 1, 2007 (80% by July 1, 2005), so merchants and consumers can distinguish these products from credit cards;

(4) the lowering, by roughly one third, of the interchange rates on debit products for the period from August 1, 2003, through December 31, 2003;[6]

(5) other injunctive relief, such as the provision of signage from defendants to merchants communicating the merchants' acceptance of defendants' untied debit products; and a prohibition on defendants enacting any rules that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards, including by discounting other forms of payment;

***104** (6) the Court's continuing jurisdiction to ensure compliance with the Settlement; and

(7) the release of Visa and MasterCard from claims arising out of the conduct at issue in the action prior to January 1, 2004.

Id. (internal citations and footnote omitted). Visa and MasterCard will make cash payments totaling $2,025,000,000 and $1,025,000,000, respectively, in annual installments during the next ten years. *Id.* The district court concluded that "[t]he discounted present value of the total compensatory relief ... amounts to $3,383,400,000." *Id.* at 509.

D. Issues on Appeal

1. Scope of the Release and Adequacy of Representation

At the district court, five of the eighteen objecting merchants challenged the scope of the release provided in the Settlement. All five of these merchants appealed. They are Reyn's Pasta Bella, LLC, Jeffrey Ledon DeWeese, M.D., Barry Leonard d/b/a Critter Fritters, and Hat–In–The–Ring, Inc. d/b/a Eddie Rickenbacker's (collectively, "Pasta Bella"), and NuCity Publications, Inc. The Settlement's release precludes actions for conduct occurring prior to January 1, 2004 that was or could have been alleged in the complaint. If approved by this Court, the release will bar class actions previously filed by Pasta Bella and NuCity.

Pasta Bella, purporting to represent a class, initiated an action against Visa and MasterCard and three member banks (collectively, the "*Reyn's* defendants") in the United States District Court for the Northern District of California on June 24, 2002. *Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.,* 259 F.Supp.2d 992 (N.D.Cal.2003) ("*Reyn's* ").[7] Prior to the fairness hearing in this case, the California district court dismissed all but one of the *Reyn's* claims. *Id.* at 1004. The surviving claim alleged that the *Reyn's* defendants fixed credit card interchange fees charged by issuing banks to acquiring banks, which, in turn, set merchant discount fees charged by acquiring banks to merchants. *See id.* at 998. On March 4, 2004, the District Court for the Northern District of California dismissed *Reyn's* with prejudice, finding that the Settlement released the *Reyn's* defendants from further liability.

NuCity initiated a putative class action in the United States District Court for the Southern District of New York on November 13, 2001. *In re Visa/MasterCard Membership Rules Antitrust Litigation,* No. 01–CV–10027 ("*Membership Rules* ").[8] *Membership Rules* arose out of *United States v. Visa U.S.A., Inc.,* 163 F.Supp.2d 322 (S.D.N.Y.2001), *modified by* 183 F.Supp.2d 613 (S.D.N.Y.2001), *aff'd* 344 F.3d 229 (2d Cir.2003), *cert. denied,* 125 S.Ct. 45 (2004) ("*Government's Membership Rules* "). In *Government's Membership Rules*, the Government established that Visa and MasterCard's "exclusionary rules" (also known as "membership rules"), which prohibited member banks from issuing competing payment cards, such as American Express or Discover, constituted an illegal boycott and an unreasonable restraint ***105** of trade in the credit card market.[9] *Government's Membership Rules,* 344 F.3d at 229. NuCity filed *Membership Rules* on behalf of merchants injured by the boycott proven in *Government's Membership Rules.* Pursuant to an order by the district court in that case, *Membership Rules* remains in limbo pending the outcome of this appeal.

On appeal, Pasta Bella and NuCity argue that the release is overbroad. Alternatively, they argue that the release is not valid with respect to them because their interests were inadequately represented during settlement. Issues involving the release of claims are discussed in Part I of the Discussion section of this opinion.

2. Notice to the Class

The Settlement established a notice plan that required mailing the settlement notice to class members and publishing a condensed version of the settlement notice in numerous widely-distributed publications (collectively, the settlement notice and summary notice are referred to as the "Settlement Documents"). As part of the notice plan, plaintiffs' counsel provided direct notice via first class mail to 8,148,276 class members and published notices in publications with a combined circulation of more than 151 million.[10] All of this information was printed in English only.

On appeal, Pasta Bella and NuCity argue that they were denied due process because the Settlement Documents did not specifically apprise class members that approval of the Settlement would release the pending claims in *Reyn's* and *Membership Rules.*

Armenta's Mexican Food, Inc. and Lupita Llamas Martinez d/b/a Del Yaqui Restaurant (collectively, "Armenta's"), argue that the Settlement Documents and notice plan did not afford them due process or comply with Federal Rule of Civil Procedure 23. Armenta's claims that it learned of the Settlement by observing a summary notice in an English-language magazine.[11] Afterward, it retained counsel, filed its objections to the Settlement and also filed a motion to intervene. Counsel for Armenta's appeared and argued at the September 2003 fairness hearing in support of its client's objections to the Settlement. The district court's approval of the Settlement implicitly denied the motion to intervene; Armenta's appealed.

These notice arguments are discussed in Part II of the Discussion section of this opinion.

***106** 3. Fairness of the Settlement

Pasta Bella, Armenta's, 710 Corp., Inc., and Leonardo's Pizza by the Slice, Inc. challenge the fairness of the Settlement. NuCity seeks limited discovery to determine whether class counsel independently valued the *Membership Rules* claims, and, if so, the amount of that valuation. Pasta Bella argues that the parties should be judicially estopped from asserting the release against the *Reyn's* claims because Visa and MasterCard failed to comply with Rule 3–13 of the Local Rules of Practice in Civil Proceedings before the United States District Court for the Northern District of California ("Northern District of California Local Rule 3–13"), which required that they file a notice of pendency in that court concerning the instant action. Part III of the Discussion section of this opinion examines all of these issues.

4. Attorneys' Fees

Class counsel submitted a fee petition to the district court seeking $609,012,000 in fees. The court found this request "excessive," "fundamentally unreasonable, and wholly out of character for a group of counsel whose commitment to the corner store merchants they represent has, until now, been admirable and unflagging." *Visa Check III,* 297 F.Supp.2d at 522–23. Choosing between awarding fees under the "lodestar" method or the "percentage of the fund" method, *id.* at 520–21, the court awarded plaintiffs' attorneys 6.5% of the Settlement's compensatory relief under the "percentage of the fund" method, *id.* at 524. This amounted to a fee award of $220,290,160.44. *Id.* at 507, 524–26. The court granted counsel an additional $18,716,511.44 in costs and expenses. *Id.* Objectors 710 Corp., Inc. and Leonardo's Pizza by the Slice, Inc. (collectively, "Leonardo's") appealed the fee award on the ground that it was too high. Class counsel cross-appealed on the ground that the award was too low. Roman Buholzer d/b/a The Continental Garden Restaurant responded in opposition to class counsel's cross-appeal. The district court's fee award is examined in Part IV of the Discussion section of this opinion.

DISCUSSION [12]

PART I

THE RELEASE IS VALID

Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, "[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Stephenson v. Dow Chem. Co.,* 273 F.3d 249, 254 (2d Cir.2001), *aff'd in part by an equally divided court and vacated in part,* 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003).

Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief. Plaintiffs' authority to release claims is limited by the "identical factual predicate" and "adequacy of representation" doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement. Adequate representation of a particular ***107** claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim.

A. Identical Factual Predicate Doctrine

The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the "identical factual predicate" as the settled conduct. *TBK Partners, Ltd. v. W. Union Corp.,* 675 F.2d 456, 460 (2d Cir.1982). [13]

1. Identical Factual Predicate Doctrine Permits Release of *Membership Rules* Claims

The Settlement precludes lawsuits relating to any conduct that was alleged in the complaint or was, or could have been, asserted in this litigation. NuCity argues that the district court strayed from the identical factual predicate rule by approving release of the *Membership Rules* claims based simply on the court's recognition of the similarities between the claims in this case and those in *Membership Rules.* [14] We disagree.

The plaintiffs in *Membership Rules* alleged that Visa and MasterCard's exclusionary rules, which prohibited member banks from issuing or providing services to other credit cards (such as Discover or American Express), inflated the cost of credit card transactions, in violation of Section One of the Sherman Act. *Id.* at 515. As part of their tying claim, plaintiffs in the case before us claimed that the exclusionary rules solidified Visa and MasterCard's power in the credit card market, enabling Visa and MasterCard to force plaintiffs to accept their debit cards. *Id.* Thus, the "exclusionary rules have been central to this case from its inception." *Id.* [15] In fact, in January 2000, more than one year before it approved the Settlement, the district court had concluded ***108** that this action and *Government's Membership Rules*—the precursor to *Membership Rules*—alleged common claims. *In re Visa Check/MasterMoney Antitrust Litig.,* 190 F.R.D. 309, 312, 315 (E.D.N.Y.2000). Finding that *Government's Membership Rules* involved "essentially the same issues" as the case at bar, Judge Gleeson granted the Government's motion to intervene so that plaintiffs' discovery could be used to assist the Government in its case. *Id.* at 315; *see id.* at 315 n. 3 (describing the Government's contention that the exclusionary rules were a common issue between both cases).

NuCity stresses the difference between the elements of an antitrust tying case—this case—and a horizontal boycott case—*Membership Rules*—to argue that the same factual predicate does not underlie both. Specifically, NuCity argues that

> [p]laintiffs' own description of their damage theory indicates that the

> damages they sought to recover stemmed from the effects of the illegal tying arrangement and [the effects] other associated anticompetitive conduct (which may or may not include the exclusionary rules) had in retarding the development of "regional *debit* networks" from entering the market—not the exclusion of major competing *credit* card brands like American Express and Discover.

NuCity Br. at 31 (emphasis added).

NuCity misses the mark. When considering the permissibility of a release, the overlap between elements of *claims* is not dispositive. Class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims. *TBK Partners,* 675 F.2d at 460; *see* *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 221 (5th Cir. Apr.1981) ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint.") (quoting *Patterson v. Stovall,* 528 F.2d 108, 110 n. 2 (7th Cir.1976)). [16]

Based on the foregoing, the district court did not abuse its discretion by concluding that the claims in *Membership Rules* are based on the identical factual predicate as the claims in this case.

2. Identical Factual Predicate Doctrine Permits Release of Non–Parties

Even though the *Reyn's* claims may be released with respect to Visa and MasterCard, ***109** Pasta Bella objects to the release of the member banks, since they were not parties to this action. However, "class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *In re Lloyd's Am. Trust Fund Litig.,* 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002); *see, e.g.,* *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d 139, 143, 160–65 (E.D.N.Y.2000) (approving class settlement with broad releases against non-parties, including insurance carriers, other banks, and Swiss governmental entities); *see also* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 12:16, at 318 (4th ed. 2002) ("NEWBERG") ("A settlement may ... seek to discharge parties who have not been served with process and are therefore not before the court."). The district court did not, therefore, err by finding that the non-party banks could be released from liability for conduct premised on the identical factual predicate of claims alleged in this action.

The banks' settlement contributions further support the district court's conclusion. The banks "not only contributed to the Settlement[ ], but virtually all of the relief comes from them." *Visa Check III,* 297 F.Supp.2d at 514. They agreed to lower temporarily their interchange rates, notify merchants of the cessation of the tying arrangement, and reconfigure their debit cards. *Id.* Moreover, the banks' membership fees may contribute to the compensatory relief paid by Visa and MasterCard. *Id.* We cannot find that the district court abused its discretion by releasing nonparties, particularly where, as here, those nonparties are members of the defendants and have contributed to the settlement. Indeed, it is hard to imagine that defendants would have settled without also releasing their member banks from liability; to do so would have invited relitigation of the same factual allegations against the banks.

B. Due Process Requires that Released Claims be Adequately Represented [17]

A determination that all of the settled claims arose from the same factual predicate does not necessarily end the inquiry. Claims arising from a shared set of facts will not be precluded where class plaintiffs have not adequately represented the interests of class members. On appeal, Pasta Bella interprets the adequacy of representation doctrine to require that "settled claims of absent class members [be] adequately represented as a matter of fact before they can be barred." Pasta Bella Br. at 23. Consequently, Pasta Bella presses that the Settlement inadequately represents the *Reyn's* claims because it does not require payment from the member banks who were defendants in *Reyn's.* In the same vein, NuCity argues that *Membership Rules* seeks damages for billions of dollars stemming from the boycott of credit cards, whereas the Settlement is based merely on damages stemming from alleged tying arrangements in the debit card market and the concomitant effect on interchange rates. Respondents counter that these arguments amount to baseless allegations that the plaintiffs "left significant ***110** claims on the table." [18] We agree. Adequate representation is not solely an assessment of effort. Rather, an examination of the interests of the settling plaintiffs and of the Settlement's effect on those who would be bound by it leads us to the conclusion that lead plaintiffs, who are also members of the classes led by Pasta Bella and NuCity, adequately represented the claims asserted in *Reyn's* and *Membership Rules* in this case.

As support for its claim that adequate representation requires vigorous pursuit of class claims, Pasta Bella cites *Stephenson. Stephenson* involved two Vietnam War veterans who sued several chemical manufacturers for Agent Orange-related injuries. Their injuries manifested after a $180 million class action settlement—involving the same manufacturers and similar allegations—was exhausted. *Stephenson,* 273 F.3d at 251–52. The settlement purported to resolve all future claims, but only provided for recovery for those individuals whose exposure-related death or disability was discovered prior to 1994. *Id.* at 260. Since the settlement covered class members who had not yet manifested injury, *id.* at 252, the defendants argued that the settlement barred the *Stephenson* plaintiffs from recovery, *id.* at 256. This Circuit held that the claims of the *Stephenson* plaintiffs had not been adequately represented in the earlier action because, at the time of the Agent Orange settlement, future claims had not been considered separate from claims involving current injury. *Id.* at 261 ("[A] class which purports to represent both present and future claimants may encounter internal conflicts."). Thus, the plaintiffs could proceed with their action. *Id.* at 258.

Stephenson is not directly on point, however, because that case involved future claimants, whereas this case does not. Here, injured parties may obtain remuneration from the settlement fund if they accepted Visa or MasterCard within a finite period—October 25, 1992 through June 21, 2003. *Visa Check III,* 297 F.Supp.2d at 514 n. 12, 519. Conduct occurring after December 31, 2003 is not precluded from being the subject of a future suit. *See supra* n. 5 (quoting relevant portion of release). Thus, the essential question in determining whether the Settlement complies with the adequate representation doctrine is whether the interests that were served by the Settlement were compatible with those of Pasta Bella and NuCity when plaintiffs negotiated a release of the *Reyn's* and *Membership Rules* claims.

National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir.1981) ("*Super Spuds* "), guides the first step in our inquiry to determine whether class representatives impermissibly sacrificed the interests of current class claims in exchange for settlement. *Super Spuds* was a class action seeking damages for the loss in value to potato futures contracts as a result of the defendant's wrongful conduct. *Id.* at 11. The class was composed of plaintiffs who held liquidated long positions in potato futures. *Id.* However, a subset of the class also held unliquidated contracts. The subset did not receive additional settlement proceeds in exchange for the release of their unliquidated contracts. *Id.* at 16. We reversed approval of the settlement, holding that a settlement could not be fair where "a class member holding one liquidated and one unliquidated contract receives no more than another class member holding only one liquidated contract." *Id.* at 19.

***111** *Super Spuds* is inapposite to the instant case, however, because *Super Spuds* hinged on the fact that the class representatives did not possess the unliquidated futures. *Id.* at 17. On this basis, we held, "The named plaintiffs in a class action 'cannot represent a class of whom they are not a part.' " *Id.* (quoting *Bailey v. Patterson,* 369 U.S. 31, 32–33, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) (per curiam)). Here, every member of the *Reyn's* class and every member of the *Membership Rules* class is a member of the instant class. *See Visa Check III,* 297 F.Supp.2d at 514 n. 12. Thus, the lead plaintiffs are necessarily a part of the *Reyn's* and *Membership Rules* classes and their interests are, therefore, aligned with the interests of those classes.

In *Joel A. v. Giuliani,* 218 F.3d 132 (2d Cir.2000), we considered whether a subset of a class can ever lack adequate representation when the lead plaintiffs of that class possess the claims of that subset. *Joel A.* arose when objectors to a class action settlement filed a separate class action for redress of the particular harms they claimed to have endured. The class in the first action, *Marisol A. ex. rel. Forbes v. Giuliani,* 929 F.Supp. 662 (S.D.N.Y.1996) ("*Marisol A.*"), was composed of New York City children at risk of neglect or abuse. *Id.* at 669–72. The class in *Joel A.,* objectors in *Marisol A.,* was composed of homosexual children contending that the *Marisol A.* settlement discriminated against them. *Joel A.,* 218 F.3d at 137. In *Marisol A.,* plaintiffs alleged that the City and State of New York deprived them of appropriate child welfare services. After two years of discovery, the *Marisol A.* class negotiated settlement agreements that provided for a variety of administrative improvements designed to improve care for *all* class members. *Id.* at 137, 140–41. The settlement released the City and State of New York from related lawsuits for approximately two years. *Id.* at 137, 144. Dissatisfied with the general relief provided in the *Marisol A.* settlement, homosexual members of the *Marisol A.* class commenced *Joel A.* seeking redress of their particular grievances. *Id.* at 137–138. They argued that the *Marisol A.* settlement could not have adequately represented their interests because they were victims of "bias-related violence, harassment and discrimination at the hands of their heterosexual peers" in the class. *Id.* at 137–38. They sought "concrete relief for bias-related victimization by their peers[ ] and systemic discrimination based on sexual orientation." *Id.* (internal quotation marks omitted).

The *Joel A.* panel found that the *Marisol A.* class adequately represented the *Joel A.* class. *Id.* at 144. While the remedy contemplated in the *Marisol A.* settlements was broader than the relief sought by the *Joel A.* sub-class, the remedy provided in the *Marisol A.* settlement was "likely to deal with these complaints." *Id.* at 142. We held that "our precedents do not dictate that the settlement be invalidated because [the *Joel A.* class] claims are subsumed within a more generalized claim." *Id.* That is precisely the case here.

NuCity hopes that *In re Auction Houses Antitrust Litigation,* 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001) ("*Auction Houses* "), *aff'd* 42 Fed.Appx. 511 (2d Cir.2002), will persuade us that *Joel A.* does not end our inquiry into the adequacy of representation.[19] In *Auction Houses,* auction patrons filed class actions against auction houses that allegedly conspired to fix auction terms. *Id.* at *1. Shortly before the parties reached settlement, new class actions arose involving foreign auctions affected ***112** by the same alleged conspiracy. *Id.* at *2. Thereafter, the parties to the initial action reached a settlement that included a release of all claims that could be brought in U.S. courts or foreign courts under U.S. law. *Id.* at *2–*3, *11. Realizing that the proposed settlement would preclude U.S.-law claims involving foreign auctions, the district court refused to approve the settlement as long as it required the release of those claims. *Id.* at *18. The court reasoned that a class could not settle its claims by sacrificing other claims of class members that "were not within the description of claims assertable by the class." *Id.* at *12 (quotation marks omitted). "[T]he key point is that an expanded release requires the allocation of at least some of the settlement consideration to the holders of the claims prejudiced by the expansion unless the class action judgment would bar the released claims by application of principles of former adjudication." *Id.* at *13.[20]

Respondents, however, distinguish *Auction Houses,* and, for that matter, *Super Spuds,* by explaining that, in those cases, marginalized groups did not receive any benefit in exchange for the releases contemplated, whereas here, every claimant in *Membership Rules* benefits from the settlement. *Visa Check III,* 297 F.Supp.2d at 514. They argue, therefore, that the central issue in determining adequacy of representation is the alignment of class members' interests. Since Wal–Mart, the world's largest retailer, and other large and sophisticated lead plaintiffs, such as The Limited, Sears, and Safeway, stood to gain from damages for the *Membership Rules* claims, respondents contend there is no basis to conclude that plaintiffs did not seek to obtain the best settlement by obtaining the highest possible amount for the exclusionary rules claims.

A recent Eighth Circuit case, *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 357 F.3d 800 (8th Cir.2004) ("*General American* "), supports respondents' position. In *General American,* plaintiff brought an action in the state court of New Mexico against General American Life Insurance Company even though she had participated in a class action (the "*General American Class Action* ") against the same defendant in the Eastern District of Missouri that obtained a minimum of $55,000,000 in settlement proceeds. *Id.* at 802. The *General American* plaintiff brought her action against the insurer based on alleged omissions and non-disclosures concerning particular aspects of its billing procedures, while the *General American Class Action* had pursued recovery for more general claims concerning the same conduct. *Id.*

The Eighth Circuit found that the language used in the class action settlement agreement encompassed the *General American* plaintiff's state court claims as a subset of the claims released. *Id.* at 803. Since the notice to the class in *General American Class Action* was clear and fair—providing class members the opportunity to opt out if they wished—the court found that releasing certain claims was not problematic. *Id.*

Thus, the court affirmed the dismissal of *General American* plaintiff's claim on the ground that the *General American Class Action* settlement agreement and the class notice clearly articulated a release of future claims. *Id.* at 803. In light of the valid and "very broad" ***113** settlement release in the class action, which included known and unknown causes of action, the court held that "[w]e have no difficulty in concluding that the [class] judgment bars the New Mexico action." *Id.* The court articulated the give-and-take nature of the settlement process and the court's role in scrutinizing the efforts of lead plaintiffs:

> The release of [a particular] category of claims was one of a series of benefits conferred on the defendant by the class as part of the settlement. On the other side, defendant conferred benefits on the plaintiff class, including a monetary settlement, from which the plaintiff in this [related] case has benefitted, and a ... procedure that could produce additional relief. No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. This is the way settlements usually work. It was the judgment of the class representative that [a particular category of claims], known and unknown, was a proper thing to give up to obtain the benefits offered by [the defendant] .... [W]e have no way to criticize the judgment of the class representative. Accordingly, we hold that the representation afforded was adequate, and that the provisions of Fed.R.Civ.P. 23 were fully met.

Id. at 805.

The Eighth Circuit's analysis of the settlement process is especially compelling here, where class representatives possessed the released claims and did not agree to preclude lawsuits arising out of similar conduct in the future. We agree with respondents that due process does not require that all class claims be pursued. Instead, where different claims within a class involve the identical factual predicate, adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim. Thus, the district court did not err in ruling that plaintiffs' release of the *Reyn's* and *Membership Rules* claims did not violate due process, where plaintiffs are members of the *Reyn's* and *Membership Rules* classes and the release was part of the consideration necessary to obtain the largest antitrust settlement in history. *Visa Check III,* 297 F.Supp.2d at 508, 524; *see* *Joel A.,* 218 F.3d at 142 (release may include "claims [that] are subsumed within a more generalized claim").[21]

Like the plaintiff in *General American,* who complained that "the class representative gave away all modal-billing claims (in the release) and received nothing in exchange for them," 357 F.3d at 805, Pasta Bella and NuCity seek greater compensation for the claims asserted in their respective lawsuits. Their contention that they were inadequately represented is more appropriately cast as a challenge to the Settlement's fairness than as a due process claim, since their positions are grounded in the notion that the Settlement resulted in a class recovery that was too low.

PART II

NOTICE TO CLASS MEMBERS WAS ADEQUATE

The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. ***114** *See* *Soberal–Perez v. Heckler,* 717 F.2d 36, 43 (2d Cir.1983); Fed.R.Civ.P. 23(e). 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." *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir.1982) (internal quotation marks and brackets omitted). Notice is "adequate if it may be understood by the average class member." 4 NEWBERG § 11:53, at 167.

A. Pasta Bella Received Adequate Notice

Since the class notice did not name the banks as parties and the settlement notice did not specifically inform class members that the *Reyn's* claims would be included in the Settlement, Pasta Bella argues that it was denied due process because class members were not given the opportunity to opt out after the settlement notice was issued. Although Pasta Bella forfeited this contention by failing to preserve it at the district court, *see Krumme v. WestPoint Stevens Inc.,* 238 F.3d 133, 142 (2d Cir.2000), we note that even if it had been preserved, the argument cannot prevail. The Ninth Circuit's decision in *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268 (9th Cir.1992), is directly on point. That case involved class action claims arising from the default of $2.25 billion in bonds issued to finance power plants in the State of Washington. *Id.* at 1273. Pursuant to a settlement between the parties, the State obtained a release in that action even though it was not a party and was not mentioned in the notice of pendency. *Id.* at 1288, 1290–91. On appeal, the Ninth Circuit affirmed the district court's approval of settlement by determining that a federal court may release a claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*" *Id.* at 1287 (quoting *TBK,* 675 F.2d at 460 (emphasis added in *Class Plaintiffs*)). Since the parties had been given notice of the action, the opportunity to opt out, notice of the proposed settlement, and the opportunity to object, the court held that it was not required to grant those who objected to the proposed settlement a second opportunity to opt out. *Id.* at 1289.

Here, although the member banks were not named as defendants, the complaint described "[a]pproximately 4,400 banks that have issued Visa and/or MasterCard credit cards and also issued *Visa Check* and/or *MasterMoney* debit cards" as co-conspirators.2d Am. Compl. ¶ 32. The notice of pendency, which incorporated the allegations in the complaint, alleged a conspiracy between Visa, MasterCard, and "their member banks." Notice of Pendency ¶ 3. Attempting to distinguish the *Reyn's* claims from those in the instant action, Pasta Bella's amended complaint in *Reyn's* states, "Plaintiffs do not contest in this action, as averred in other litigation, any tying arrangement, of the VISA and MASTERCARD debit charges with other charges." *Reyn's* 1st Am. Compl. ¶ 11. Yet, Pasta Bella's attempt to distinguish the claims in *Reyn's* from the claims in the instant action does not alter the fact that the claims in both cases arise out of the identical factual predicate. Indeed, Pasta Bella's artful language belies its recognition of the potential for overlap between the two lawsuits. Thus, Pasta Bella cannot reasonably argue that it was not on notice of the possibility that, pursuant to settlement in this action, the banks would be released from future claims. Pasta ***115** Bella was required to opt out at the class notice stage if it did not wish to be bound by the Settlement.

B. NuCity Received Adequate Notice

NuCity argues that the settlement notice denied the *Membership Rules* class due process because it failed to disclose:

1. the judgment against Visa and MasterCard in *Government's Membership Rules;*
2. the pending claims in *Membership Rules;*
3. the prospect that the Settlement's contemplated release would extinguish all claims in *Membership Rules;*
4. the value attributed by plaintiffs' counsel to the *Membership Rules* claims; and
5. the value received by the class in exchange for release of the *Membership Rules* claims.

NuCity points to the notice of settlement in *Auction Houses* and argues that the settlement notice in this case comes up short. In *Auction Houses,* the notice explicitly informed class members that the settlement would permanently bar them from pursuing claims based on auctions held outside the U.S., and that class members with potential claims arising out of foreign auctions "should consider whether or not to forego the benefits of the proposed settlement." *Auction Houses,* 2001 WL 170792, at *3. In this case, NuCity asserts that the need to include cautionary language in the settlement notice was especially great, since the notice of pendency also lacked an explanation of the action's impact on *Membership Rules.* NuCity further asserts that since the *Membership Rules* class was not yet certified, *see supra* note 8, claimants could not have been expected to intuit that their *Membership Rules* claims would be released by the Settlement. Thus, NuCity contends class members did not know they were releasing live claims in an already-filed action seeking billions in damages when they neglected to opt out of the class or object to the Settlement.

Underscoring the need for additional disclosure, NuCity relies on *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir.1977) ("*Nissan Motor* "), where the Fifth Circuit found that the class notice serves as the class members' "primary, if not exclusive, source of information for deciding how to exercise their rights under rule 23." *Id.* at 1104. *Nissan Motor* required that class members be given "information reasonably necessary to make a decision [whether] to remain a class member and be bound by the final judgment or opt out of the action," though the notice need not include "every material fact" or be "overly detailed." *Id.* at 1104–05. In light of this standard, the Fifth Circuit held that, where a partial settlement was proposed between plaintiffs and a group of defendants before notice of a class action had been sent to class members, the notice must apprise class members of the proposed partial settlement, because the relief obtained in the proposed settlement would be an "essential factor" in an absent class member's decision whether to opt out of the class. *Id.* at 1105.

In this case, the settlement notice quoted verbatim the Settlement's release. Respondents argue that (1) the law does not require parties to describe pending actions covered by a release in a proposed settlement notice, and, in any event, (2) quoting a release word for word in the settlement notice is sufficient to inform class members of the scope and effect of the release. In support of its approval of the settlement notice, the district court relied on *Weinberger,* 698 F.2d at 70, for the proposition that the law merely requires a class notice ***116** to describe effectively the scope of a release. *Visa Check III,* 297 F.Supp.2d at 516. Since the release was quoted in its entirety, the court concluded that "the expansive reach of the release[ ] could not have been clearer. This is all that was required." *Id.* We agree with the district court and do "not believe that due process requires further explanation of the effects of the release provision in addition to the clear meaning of the words of the release." *O'Brien v. Nat'l Prop. Analysts Partners,* 739 F.Supp. 896, 902 (S.D.N.Y.1990). *Accord* *Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1317–18 (3d Cir.1993); *Maher v. Zapata Corp.,* 714 F.2d 436, 452–53 (5th Cir.1983). [22]

C. Armenta's Lacks Standing to Challenge its Notice

Armenta's appeals the district court's approval of the Settlement on the ground that the English-only Settlement Documents violated due process and Federal Rule of Civil Procedure 23 because an identifiable class—Spanish-speaking class members who could not read and understand the English-only Settlement Documents—was not afforded notice. [23]

Armenta's does not provide sufficient evidence that it represents an identifiable subclass of claimants who could not comprehend the Settlement Documents. While the representatives of the purported subclass describe a significant preference for Spanish, they do not claim that they cannot read English or that they cannot conduct business in English. *See* Armenta Aff. ¶¶ 4–5; Martinez Aff. ¶¶ 4–5. Further, the statistics provided by Armenta's to the district court—statistics concerning the number of Spanish-speaking families and businesses in the United States—even if taken as true, do not establish that Spanish-speaking class members could not understand the Settlement Documents. Thus, we do not find error in the district court's conclusion that "a lack of comfort [in the English language] does not mean there was a significant defect in the notice." *Visa Check III,* 297 F.Supp.2d at 517.

PART III

THE SETTLEMENT IS FAIR

A. The Settlement is Entitled to a Presumption of Fairness

A court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Joel A.,* 218 F.3d at 138. A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement. *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001). 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." *Manual for Complex Litigation, Third,* § 30.42 (1995). We are mindful of the "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). ***117** "The compromise of complex litigation is encouraged by the courts and favored by public policy." 4 NEWBERG § 11:41, at 87.

In the instant case, the district court rightly praised the efforts of plaintiffs' lead counsel. *Visa Check III,* 297 F.Supp.2d at 524. "Constantine & Partners is a premiere plaintiffs' litigation firm, specializing in antitrust litigation particularly and complex commercial litigation generally." *Id.* Counsel for the class took and defended approximately 400 depositions, including 21 expert depositions, and reviewed more than 5 million pages of documents during approximately seven years of litigation, *id.* at 507–08, 511 n. 8. Clearly, counsel conducted meaningful discovery. Of course, "the quality of representation is best measured by results." *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 55 (2d Cir.2000). Here, plaintiffs' counsel "produced the largest antitrust settlement ever." *Visa Check III,* 297 F.Supp.2d at 524. The Settlement includes $3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more. *Id.* at 509, 512. According to settlement mediator Eric Green, "the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties." Green Decl. ¶ 12. Concluding that "there could not be any better evidence of procedural integrity" than the aggressive litigation spanning nearly a decade and the impassioned settlement negotiations that produced an agreement on the brink of trial, the district court affirmed Green's sentiments by finding that "[c]ollusion or coercion could not conceivably have tainted the process." *Visa Check III,* 297 F.Supp.2d at 510.

We agree with this assessment and conclude that the district court did not abuse its discretion in determining that a presumption of fairness arose.

B. The Settlement is Substantively Fair

When reviewing a district court's approval of a settlement, a "trial judge's views are accorded 'great weight ... because he is exposed to the litigants, and their strategies, positions and proofs.... Simply stated, he is on the firing line and can evaluate the action accordingly.' " *Joel A.,* 218 F.3d at 139 (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 454 (2d Cir.1974)).

In this Circuit, courts examine the fairness, adequacy, and reasonableness of a class settlement according to the "*Grinnell* factors." *Id.* at 138. The factors are:

(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;

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted).

***118 1. Complexity, Expense and Likely Duration of Litigation**

Federal antitrust cases are complicated, lengthy, and bitterly fought. *See Weseley v. Spear, Leeds & Kellogg,* 711 F.Supp. 713, 719 (E.D.N.Y.1989). "Few areas of federal antitrust law are more confusing than the law that governs tying arrangements." Herbert Hovenkamp, *Tying Arrangements and Class Actions,* 36 VAND. L. REV.. 213, 213 (1983). The district court concluded that this case would have taken three months to try and several years for appellate review. *Visa Check III,* 297 F.Supp.2d at 510. None of the appellants argue that this case was uncomplicated or would have resulted in a short trial.

2. Reaction of the Class to the Settlement

On the whole, the class appears to be overwhelmingly in favor of the Settlement. Only eighteen class members out of five million objected to the Settlement. *Id.* at 511. "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." 4 NEWBERG § 11.41, at 108; *see also* *D'Amato,* 236 F.3d 78, 86–87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement). This Court is certainly aware that "[l]ack of objection by the great majority of claimants means little when the point of objection is limited to a few whose interests are being sacrificed for the benefit of the majority." *Super Spuds,* 660 F.2d at 16. But here, the absence of substantial opposition is indicative of class approval, since every member of the class in *Reyn's* and *Membership Rules* is also a member of the instant class.

3. Stage of Proceedings and Amount of Discovery Completed

"If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement." 4 NEWBERG § 11:45, at 129. Here, plaintiffs entered into settlement only after a thorough understanding of their case. As noted earlier, extensive discovery proceedings spanning over seven years and millions of pages of documents preceded the Settlement. *Visa Check III,* 297 F.Supp.2d at 511 n. 8. The parties also underwent summary judgment proceedings and mediation before they struck a deal at the courthouse steps. *Id.* at 508, 511. Certainly, a substantial amount of work had been completed, leaving relatively few unknowns prior to trial.

4. Risks of Class Prevailing (Establishing Liability, Establishing Damages, Maintaining the Class through Trial)

Characterizing the defendants' "Honor All Cards" policy as having at least some pro-competitive features, the district court concluded that establishing liability "was no sure thing" for the plaintiffs. *Id.* at 511. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y.1998); *see, e.g., United States Football League v. Nat'l Football League,* 644 F.Supp. 1040, 1042 (S.D.N.Y.1986) ("[T]he jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages as a result of the NFL's unlawful conduct."), *aff'd,* 842 F.2d 1335, 1377 (2d Cir.1988). That said, we must acknowledge that the Government's ***119** successful prosecution of *Government's Membership Rules* improved plaintiffs' likelihood of success in this case. Yet, on balance, it is certainly fair to conclude that even if the plaintiffs had prevailed in establishing their tying claim, they would have faced significant challenges in proving damages. *Visa Check III,* 297 F.Supp.2d at 511. [24]

5. Ability of Defendants to Withstand a Greater Judgment

The compensatory relief provided in the Settlement constitutes "the largest settlement ever approved by a federal court." *Id.* (quoting plaintiffs' expert Professor John C. Coffee, Jr. of Columbia University Law School). Additionally, the injunctive relief—valued at approximately $25 to $87 billion or more, *id.* at 511–12—adds great value to the Settlement. Yet, Pasta Bella insists that a settlement requiring payment from the banks could have been substantially higher. We cannot agree with this argument. It is hardly surprising that the district court did not make explicit findings with respect to the ability of the member banks to withstand a significantly greater damages award, since the banks are not defendants in this case. Even if such a finding were helpful, our concern about financial resources of member banks would be assuaged by the district court's finding that virtually all of the relief in the Settlement already comes from the banks. *Id.* at 514.

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

> [T]here is a range of reasonableness with respect to a settlement—a range which 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—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein, 464 F.2d 689, 693 (2d Cir.1972). Here, the statistics concerning the Settlement are staggering: the compensatory relief by itself constitutes the largest settlement ever approved by a federal court; the injunctive relief will save the class $25 to $87 billion or more. Since the district court found that experienced and able counsel fought this litigation "aggressively" and

> "negotiated feverishly," *Visa Check III,* 297 F.Supp.2d at 510, and that "virtually all of the relief comes from" the banks, *id.* at 514, there is little reason to believe that additional money would have been put into the settlement pot had the banks been named as parties. The banks' participation in the settlement speaks volumes of their stake in the litigation. Moreover, given that the *Reyn's* and *Membership Rules* plaintiffs are substantially similar to the instant plaintiffs, it cannot be said that the settlement fund was unreasonably small or particularly unfair to a subset of plaintiffs.

Indeed, the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry. Having considered this factor along with the others, we conclude that the district court did not err in finding the Settlement substantively fair. [25]

*120 C. NuCity is Not Entitled to Discovery

NuCity appeals the district court's denial of its motion for limited discovery to examine whether the Settlement included consideration for claims asserted in *Membership Rules,* the value attributed to claims foregone, and the justification for such valuation. Generally, such a discovery request depends on "whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery." *Grinnell,* 495 F.2d at 462–63.

As noted by the *Grinnell* analysis described above, the district court possessed an abundance of facts to make a fairness determination. Plaintiffs were not required to bargain separately for relief in exchange for the *Membership Rules* claims. "No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. This is the way settlements usually work." *General American,* 357 F.3d at 805. Thus, the district court did not abuse its discretion in denying NuCity's discovery motion.

D. The Parties are Not Judicially Estopped from Including the *Reyn's* Claims in the Settlement

Northern District of California Local Rule 3–13 provides that:

> Whenever a party knows or learns that an action filed or removed to this district involves all or a material part of the same subject matter and all or substantially all of the same parties as another action which is pending in any other federal ... court, the party must file with the Court in the action pending before this Court ... a Notice of Pendency of Other Action ....

N.D. Cal. Civil L.R. 3–13(a). Instead of filing the required notice in the Northern District of California, Visa and MasterCard settled the instant action and then sought to dismiss *Reyn's* on the ground that the claims in that case were barred by the Settlement. Pasta Bella argues that Visa and MasterCard knowingly violated Northern District of California Local Rule 3–13 to escape liability for the conduct alleged in *Reyn's.* According to Pasta Bella, if the actions are related, then compliance with Rule 3–13 would have caused *Reyn's* to have been transferred to the Eastern District of New York and consolidated with the instant action. *See* N.D. Cal. Civil L.R. 3–13(b)(3)(B); *cf.* 28 U.S.C. § 1407 (providing a mechanism for the transfer of "civil actions involving one or more common questions of fact" pending in different districts "for coordinated or consolidated pretrial proceedings"). Pasta Bella contends that if *Reyn's* had been consolidated with this action, the class recovery would have been higher. Thus, Pasta Bella urges us to estop Visa and MasterCard from benefitting from their failure to comply with the Northern District of California's local rules.

We have previously held that "judicial estoppel applies only when a tribunal in a prior separate proceeding has relied on a party's inconsistent factual representations and rendered a favorable decision." *Adler v. Pataki,* 185 F.3d 35, 41 n. 3 (2d Cir.1999) (emphasis omitted); *see also* *Rodal v. Anesthesia Group of Onondaga, P.C.,* 369 F.3d 113, 118 (2d Cir.2004). We need not determine whether defendants' ***121** alleged failure to file a notice of pendency constituted "inconsistent factual representations," for there is no evidence that the Northern District of California relied on that failure and "rendered a favorable decision." Estoppel is therefore inappropriate here.

PART IV

THE DISTRICT COURT'S FEE AWARD IS REASONABLE

At the district court, lead counsel for the plaintiffs sought a fee of $609,012,000—approximately 18% of the present value of the Settlement's compensatory relief, 2.14% of the present value of the Settlement (inclusive of injunctive relief), and 9.68 times the lodestar figure of $62,940,045.84. [26] *Visa Check III,* 297 F.Supp.2d at 522. Seventeen merchants objected to counsel's fee petition. *Id.* at 509 n. 6, 522 n. 27. The court found the fee petition excessive despite the excellence of plaintiffs' representation, *id.* at 522, 524. Assessing the fee petition with a careful eye for the interests of all class members, the court awarded fees in the amount of $220,290,160.44 plus an additional $18,716,511.44 in costs and expenses. *Id.* at 507, 524–26. Leonardo's argues that the district court's fee award was too high, while Constantine & Partners ("C&P"), plaintiffs' lead counsel, contends that the fee award was too low.

A. "Percentage of the Fund" is an Appropriate Method

The district court utilized the "percentage of the fund" method to calculate attorneys' fees. *Visa Check III,* 297 F.Supp.2d at 524. Courts may award attorneys' fees in common fund cases under either the "lodestar" method or the "percentage of the fund" method. *See* *Goldberger,* 209 F.3d at 50. The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. *Id.* at 47. 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. *Id.* The trend in this Circuit is toward the percentage method, *Visa Check III,* 297 F.Supp.2d at 520, 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 re Lloyd's Am. Trust Fund Litig.,* 2002 WL 31663577, at *25. In contrast, the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.,* 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002) (internal quotation marks omitted).

B. The *Goldberger* Factors Confirm the Reasonableness of the Fee Award

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.

***122** *Goldberger,* 209 F.3d at 50 (citation omitted); *see, e.g., Baffa,* 2002 WL 1315603, at *1 ("district courts should continue to be guided by the [*Goldberger* factors]"). Recognizing 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. *Goldberger,* 209 F.3d at 52; *see also* *In re Indep. Energy Holdings PLC,* 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003) ("[T]he percentage used in calculating any 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.").

The district court concluded that the *Goldberger* factors compel an "extraordinary" fee under these circumstances: lead counsel devoted tremendous time and labor to this case for seven years; antitrust cases, by their nature, are highly complex; this case was especially large and complicated, involving almost every U.S. bank and more than five million U.S. merchants; the risk of the litigation was very high; lead counsel devoted 52% of its legal staff to work on a case that spanned seven years without any guarantee of recovery; plaintiffs' counsel achieved extraordinary results; plaintiffs' counsel did not have the benefit of "piggybacking" off of a previous case—instead, the Government piggybacked off of plaintiffs' counsel's work by using it in *Government's*

Membership Rules; even a very large fee award would be a small percentage of the settlement fund; and the Settlement produced "significant and lasting benefits for America's merchants and consumers." *Visa Check III,* 297 F.Supp.2d at 523–24. Asserting its jealous regard for absent class members, the court sought to compensate plaintiffs' counsel handsomely and at the same time limit the percentage of the award so that plaintiffs' counsel would not receive a windfall detrimental to the class:

> Were the Fund not so large, dwarfing the funds in all of the cases Lead Counsel have cited, a larger percentage might be appropriate. But given the circumstances as they are, my award is appropriate. Only in comparison to the amount sought can it be considered anything but generous.

Id. at 525 (footnote omitted). C&P argues that the district court's fee award was insufficient because (a) the fee award provides a meager percentage of the settlement fund and (b) the fee award reduces the incentive to class lawyers to seek maximum relief.

1. The Fee Award is Based on a Reasonable Percentage of the Fund

C&P cites *In re Linerboard Antitrust Litigation,* 2004 WL 1221350 (E.D.Pa. June 2, 2004) ("*Linerboard* "), in support of its argument against a declining percentage approach to large fee awards. In that case, the court found that "the sliding scale approach is economically unsound." *Id.* at *17. The *Linerboard* court explained that it is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws. *Id.* C&P contends that not only was the court's percentage award low, but also the court did not adequately compensate counsel for the substantial injunctive relief it obtained for the class. Thus, C&P argues that the district court's fee award severely inhibits the strong public policy articulated in *Linerboard* that favors providing incentives to attorneys to pursue maximum relief for their clients.

***123** We need not dispute whether the sliding scale approach is economically rational in the context of ensuring competent and committed counsel. Public policy concerns oftentimes redefine the focus of the court. In this case, the district court's decision in favor of protecting the instant class from an excessive fee award militates against awarding attorneys' fees based purely on economic incentives. Satisfied that its ruling would not deter plaintiffs' attorneys from pursuing similar claims, the district court remarked, "If [this fee award] amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases." *Visa Check III,* 297 F.Supp.2d. at 525. We agree.

While courts in megafund cases often award higher percentages of class funds as fees than the district court awarded in this instance, *see* *id.* at 525 n. 33, the sheer size of the instant fund makes a smaller percentage appropriate. As a "cross-check" to a percentage award, courts in this Circuit use the lodestar method. *Goldberger,* 209 F.3d at 50. Here, the lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances. [27] *See* *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 742 (3d Cir.2001) (finding lodestar multiplier of 1.35 to 2.99 common in megafunds over $100 million); *NASDAQ Market–Makers,* 187 F.R.D. at 489 ("multipliers of between 3 and 4.5 have become common") (internal quotation marks omitted). Thus, the district court did not abuse its discretion in awarding plaintiffs' counsel a generous fee based on a somewhat low percentage of the fund.

2. The District Court Was Not Required to Adhere to the Fee Agreement Between Plaintiffs' Counsel and Lead Plaintiffs

Plaintiffs' counsel argues that the district court was aware that class counsel had negotiated a fee arrangement with five of the nation's largest merchants that exceeded the 18% fee class counsel requested from the court and far exceeded the fee the court awarded. [28] Thus, class counsel argues that the district court ignored the *Goldberger* proviso that "market rates, where available, are the ideal proxy for [class counsel's] compensation." *Goldberger,* 209 F.3d at 52. As further proof of class satisfaction with counsel's fee request, counsel argues that none of the large and sophisticated merchants in this class action objected to its fee petition. *But see* *Goldberger,* 209 F.3d at 53 ("[Class members] have no real incentive to mount a challenge that would result in only a minuscule *pro rata* gain from a fee reduction.") (internal quotation marks omitted). For the reasons discussed in the prior ***124** subsection, we cannot say that the district court abused its discretion merely because it chose not to heed the terms of an agreement purportedly reached between lead plaintiffs and their counsel when settlement payments to approximately five million absent class members are at stake.[29]

A final word is in order here. Measuring the difficulties of a large antitrust action and the degree of success by counsel in forging a settlement is not an easy task. In our view, the district court carried out its responsibility with admirable care and thoroughness, and with an eye to a just result. There is no doubt this case dominated the lives of all involved for many years. In approving the district court's fee award, we recognize the sacrifice and commitment plaintiffs' counsel made to its clients while preserving as much as possible for those who were harmed.

CONCLUSION

The settlement release is enforceable against the claims in *Reyn's* and *NuCity* because the claims in those cases arose out of the identical factual predicate as the claims in this case and were adequately represented here. The settlement notice was adequate because it fairly apprised members of the terms of settlement, including the scope of the release. Under a *Grinnell* analysis, the Settlement is fair. As a result, NuCity is not entitled to discovery. Judicial estoppel is not appropriate here, where the defendants did not benefit from any concealment. The district court's fee award is reasonable, as confirmed by the *Goldberger* factors.

We **AFFIRM** the district court in all respects.

All Citations

396 F.3d 96, 2005-1 Trade Cases P 74,661

Footnotes

* Because the Honorable Chester J. Straub recused himself prior to oral argument, this case was decided by a two-judge panel. *See* *Murray v. NBC,* 35 F.3d 45 (2d Cir.1994).

1 Visa and MasterCard are national bank card associations. Their members include more than 6,000 banks. *See* 2d Am. Compl. ¶¶ 30–31, 43.

2 The district court described plaintiffs' claims, and the factual basis for those claims, in its resolution of the parties' motions for summary judgment, *In re Visa Check/Mastermoney Antitrust Litig.,* 2003 WL 1712568 (E.D.N.Y. Apr.1, 2003) ("*Visa Check I* "), and its decision to certify the instant class, *In re Visa Check/MasterMoney Antitrust Litig.,* 192 F.R.D. 68 (E.D.N.Y.2000) ("*Visa Check II* "), *aff'd,* 280 F.3d 124 (2d Cir.2001). We assume familiarity with those decisions and with the decision by the district court giving rise to this appeal, *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503 (E.D.N.Y.2003) ("*Visa Check III* ").

3 "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.' " *Yentsch v. Texaco, Inc.,* 630 F.2d 46, 56 (2d Cir.1980) (quoting *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)).

4 Although the first page of each settlement agreement states that the agreement was made "as of the 4th day of June 2003," the district court found that the agreements were dated June 5, 2003. We do not know the basis on which the court concluded that the settlement agreements were dated June 5th, but this discrepancy is inconsequential to the issues before us.

5 In pertinent part, the release states:

> [T]he Released Parties shall be released and forever discharged from all manner of claims ... against the Released Parties ... that any Releasing Party ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein, including, without limitation, claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act, 15 U.S.C. § 1 et seq.

Visa Check III, 297 F.Supp.2d at 512 (citing settlement agreements) (emphasis added in cited case and removed here). The "Released Parties" include Visa, Visa International Service Association, MasterCard, and the member financial institutions of Visa and MasterCard. *Id.* (citing settlement agreements).

6 This reduction caused a savings to the class of approximately $846 million. *Id.* at 509.

7 For the purpose of discussing the effect of the Settlement on *Reyn's* claimants, this opinion assumes that the putative *Reyn's* class was certified even though *Reyn's* was dismissed before a motion for class certification had been filed.

8 For the purpose of discussing the effect of the Settlement on *Membership Rules* claimants, this opinion assumes that the putative class in *Membership Rules* is certified even though a motion for class certification has not yet been filed.

9 The exclusionary rules are described in Visa By-law 2.10(e) and MasterCard's Competitive Programs Policy ("CPP"). Visa By-law 2.10(e) provides in pertinent part: "the membership of any member shall automatically terminate in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards or American Express Cards, or any other card deemed competitive by the Board of Directors." *Visa U.S.A., Inc.,* 163 F.Supp.2d at 379 (emphasis added in cited case and removed here). MasterCard's CPP states that "members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs" other than with Visa. *Id.* at 381.

10 This group of more than eight million included not only the original class members, but also "new merchants" who began accepting Visa and MasterCard after June 20, 2002 and who self-registered after the class notice was distributed. Lead Counsel Status Report, dated September 18, 2003, at 2.

11 Armenta's claims that it never received the settlement notice in the mail. Class counsel disputes this claim, arguing that Armenta's was among the approximately 8 million class members to receive settlement notices. Regardless, whether Armenta's received personal notice is of no importance to the analysis in this opinion. At the very least, it received actual notice by publication.

12 We review questions of law raised in this appeal *de novo.* *Abrahamson v. Bd. of Educ.,* 374 F.3d 66, 71 (2d Cir.2004). We review the district court's approval of the instant class action settlement for abuse of discretion. *Joel A. v. Giuliani,* 218 F.3d 132, 139 (2d Cir.2000). The district court's fee award is also subject to review under the abuse of discretion standard. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000).

13 The Eighth Circuit notes, "There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 357 F.3d 800, 805 (8th Cir.2004). The Fifth Circuit has noted, "The weight of authority establishes that ... a court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint." *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 221 (5th Cir. Apr.1981) (quoting *Patterson v. Stovall,* 528 F.2d 108, 110 n. 2 (7th Cir.1976)). The Third Circuit has found that refusing to grant a broad settlement release would undermine multi-district class settlements because defendants would be concerned that their exposure to liability would be too great. *In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 261 F.3d 355, 366–67 (3d Cir.2001); *see also* *City*

P'ship Co. v. Atl. Acquisition Ltd. P'ship, 100 F.3d 1041, 1044 (1st Cir.1996) (discussing the identical factual predicate doctrine); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1287–88 (9th Cir.1992) (same).

14 The district court found that "*Reyn's* is a virtual clone of the centerpiece of this case." *Visa Check III,* 297 F.Supp.2d at 513. Pasta Bella does not challenge this conclusion or plaintiffs' right under the identical factual predicate doctrine to release the *Reyn's* claims against defendants in this action.

15 In describing the exclusionary rules, the complaint alleged that:

> Visa members collectively adopted a rule barring their members from issuing any plastic cards competitive with Visa cards. This rule exempted MasterCard, permitting Visa's dual members to continue issuing MasterCard plastic cards. Visa members then turned around and, acting as MasterCard members, adopted the same non-competition rule. The effect of these rules was to deprive existing and new competitors of a marketing outlet at the 6,000 largest and most appropriate vendors of their products., *i.e.,* the dual bank members of Visa and MasterCard.

2d Am. Compl. ¶ 50. Another part of the complaint alleged that Visa and MasterCard asked members to boycott American Express and Discover cards. *Id.* ¶¶ 52–54.

16 NuCity also argues that the parties' conduct prior to settlement displays their clear understanding that the *Membership Rules* claims and the instant claims were distinct. As proof, NuCity highlights the fact that defendants did not move to consolidate *Membership Rules* and this action pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, or to dismiss one of the cases on the ground that one cause of action had been split into two cases. NuCity's retelling of the procedural facts is not accurate. In fact, class plaintiffs sought collateral estoppel against defendants based on the guilty verdict in *Government's Membership Rules, see* Status Conference Transcript, dated June 21, 2002, and the district court chose to delay briefing and argument on the estoppel issue until *Government's Membership Rules* was concluded on appeal, Order, dated June 24, 2002. Since this Circuit decided the appeal of *Government's Membership Rules* months after the parties signed the settlement agreement, the need to brief the estoppel issue never arose. *See* *Government's Membership Rules,* 344 F.3d 229 (publishing decision on September 17, 2003).

17 "Due process requires adequate representation at all times throughout the litigation ...." *Stephenson,* 273 F.3d at 260 (internal quotation marks omitted). "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process ...." *Twigg v. Sears, Roebuck & Co.,* 153 F.3d 1222, 1226 (11th Cir.1998).

18 Since the interests of class counsel and defendants are, in essence, aligned in this appeal, both parties are collectively referred to as "respondents" in this opinion.

19 Pasta Bella did not raise this argument.

20 By the time it issued its opinion, the district court had already dismissed the foreign auction claims, *see id.* at *11, leaving only the opportunity to bring those claims in foreign courts. Concluding that the foreign auction claims therefore lacked significant value, the district court nonetheless refused to approve even this minimal sacrifice without due consideration. *Id.*

21 Defendants argue that the release is "no broader than the effect of *res judicata* from the district court's judgment." Case No. 04–0344, Defs. Br. at 31 n. 11; Case No. 04–1052, Defs. Br. at 33 n. 16. We need not consider this argument because we conclude that the Settlement validly released the non-party banks.

22 We note, however, that class notices do sometimes include specific reference to pending actions. *See, e.g.,* *Auction Houses,* 2001 WL 170792, at *3–4; *Fradette v. Am. Serv. Corp.,* 1979 WL 1756, *1 (S.D.Fla. Aug.29, 1979) (finding information concerning "related litigation" in class notice to be material to a reasonable person). Obviously, this information is helpful to class members. We strongly encourage the inclusion of such information in the future.

23 As previously defined, "Settlement Documents" is the term used in this opinion to refer collectively to the settlement notice and the summary notice.

24 The record does not include evidence concerning the likelihood of maintaining the class through trial, though decertification is always possible as a case progresses and additional facts are developed. *See* *Visa Check II,* 192 F.R.D. at 89.

25 By failing to plead it at the district court, Pasta Bella forfeited its argument that the Settlement perpetuated illegal price-fixing because it set a fixed interchange rate during the period from August 1, 2003 through December 31, 2003. *See* *Krumme,* 238 F.3d at 142.

26 The district court described the fee award as "9.68% times the lodestar figure." *See* *Visa Check III,* 297 F.Supp.2d at 522. This is clearly a typographical error.

27 As noted in subsection A of this Part, the lodestar method calculates attorneys' fees by multiplying hours reasonably expended against a reasonable hourly rate; courts may use their discretion to increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys. Here, the lodestar calculation yields $62,940,045.84, *Visa Check III,* 297 F.Supp.2d at 522, which is approximately 29% of the district court's award of $220,290,160.44 to class counsel, *id.* at 507.

28 This argument is based on an assertion made by Lloyd Constantine, managing partner of Constantine & Partners, lead counsel, in a declaration submitted to the court. In that declaration, Mr. Constantine stated, "I declare that the fee arrangement embodied in [the retention agreements C&P has with its large merchant clients] is much less favorable to the Class than the fee for which C&P has applied on behalf of itself and the 29 other Class Counsel firms." Constantine Supp'l. Decl. ¶ 8. Mr. Constantine offered to make these agreements available to the court for an inspection *in camera. Id.*

29 At the district court, Leonardo's failed to contest class counsel's fee petition. "The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, ... waiver will bar raising the issue on appeal." *United States v. Braunig,* 553 F.2d 777, 780 (2d Cir.1977). The Special Master found only one sentence addressing the fee petition in Leonardo's ten-page brief objecting to the Settlement. That sentence asked the court to "carefully consider the amount of attorneys' fees and expenses requested by class counsel, an issue which Objectors expressly reserve for further argument when the matter of fees is considered." Special Master's Report and Recommendation, at 18. The record is clear: Leonardo's did not preserve for appeal its challenge to the fee award.

End of Document

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> (2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.
>
> (4) An applicant for an order shall
>
> (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings. 2005, c. 32, s. 15.

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 205, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Abbey, 2017 ONCA 640
DATE: 20170804
DOCKET: C57750

Doherty, Laskin and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Warren Nigel Abbey

Appellant

David E. Harris and Ravin Pillay, for the appellant

Alexander Alvaro, for the respondent

Heard: February 15, 2017

On appeal from the conviction entered by Justice J. David McCombs of the Superior Court of Justice, sitting with a jury, on March 28, 2011.

LASKIN J.A.:

A. INTRODUCTION

[1] Warren Abbey has been tried twice before a judge and jury for the first degree murder of a young man named Simeon Peter. At his first trial Abbey was acquitted. At the second trial – after the Crown successfully appealed his

acquittal and obtained an order for a new trial – Abbey was convicted. He appeals his conviction.

[2] The main issue at both trials was the identity of the murderer: who killed Peter? And the Crown's theory at both trials was identical: Abbey, who was an associate of a street gang, shot and killed Peter because he believed – though mistakenly – that Peter was a member of a rival street gang.

[3] However, the Crown's evidence against Abbey at the two trials differed in one important way. At Abbey's first trial the trial judge ruled that the Crown's expert on gang culture, Mark Totten, could not give an opinion on the meaning of a teardrop tattoo, which Abbey had obtained under his right eye some four months after the murder. At Abbey's second trial – after this court overturned the trial judge's ruling – Totten gave evidence about the meaning of a teardrop tattoo on the face of a young male gang member.

[4] Totten testified that a teardrop tattoo meant one of three things: the wearer of the tattoo had lost a loved one or a fellow gang member; the wearer had spent "hard" time in prison; or the wearer had murdered a rival gang member. Then, Totten buttressed his opinion with a powerful set of statistics, which were drawn from six studies he authored between 1995 and 2005, and which the Crown relied on to argue Abbey had obtained a teardrop tattoo to signify he had killed a rival gang member.

[5] On this appeal Abbey seeks to introduce fresh evidence to impeach the credibility and reliability of Totten's statistical evidence. The fresh evidence has three components: the evidence of Totten elicited by the Crown in an unrelated murder trial, *R. v. Gager*,[1] which took place after Abbey's second trial; eight research studies on street gangs conducted by Totten, of which six predated Abbey's two trials and formed the basis for Totten's statistical evidence on teardrop tattoos; and data from Statistics Canada on the number of homicides in Ontario.

[6] Almost all of the information on which Totten was cross-examined in *Gager*, including the six research studies he relied on for his opinion, were available to the defence before Abbey's two trials. Yet the defence chose not to adduce this evidence at either trial, and instead took a different approach to Totten's cross-examination. Thus, whether the fresh evidence is admissible turns on its cogency and on the effect of Abbey's failure to adduce it at trial.

[7] Abbey submits that the fresh evidence shows Totten's trial evidence about teardrop tattoos to be fabricated, or at least unsupported by the six studies he claimed he relied on. Thus the fresh evidence is sufficiently cogent that if the trial judge had the benefit of it Totten would not have been qualified as an expert on the meaning of a teardrop tattoo and the jury would not have heard his evidence.

---

[1] See 2012 ONSC 1472, in which Clark J. provides his reasons for permitting Totten to testify on certain issues.

The absence of Totten's evidence could reasonably be expected to have affected the verdict. The defence's failure to adduce this evidence at trial should not bar its admissibility on appeal. The interests of justice warrant its admission to prevent a miscarriage of justice. Abbey asks that we overturn his conviction and enter an acquittal, or at least order a new trial.

[8] For the most part the Crown does not challenge the fresh evidence. But the Crown submits that the fresh evidence would not have the effect of disqualifying Totten as an expert witness. At most, it might affect the weight a jury would give to his evidence. Most important, the fresh evidence should not give this court any concern about the reliability of Abbey's conviction or the possibility of a miscarriage of justice. The defence made a tactical decision not to adduce this evidence at trial and should not be entitled to revisit that decision on appeal. The Crown asks that Abbey's application to introduce fresh evidence and his appeal be dismissed.

[9] Although this appeal turns almost entirely on Abbey's fresh evidence application, Abbey also submits that the trial judge made one error in his charge to the jury: he failed to instruct the jury not to consider Totten's evidence on the timing of obtaining a teardrop tattoo. The issues on this appeal may therefore be stated as follows:

(1) Is the fresh evidence sufficiently cogent to have disqualified Totten from giving expert evidence about the meaning of a teardrop tattoo?
(2) Would the absence of Totten's evidence reasonably be expected to have affected the verdict?
(3) Does the defence's failure to adduce the fresh evidence at trial affect its admissibility on appeal?
(4) Did the trial judge err by failing to instruct the jury not to consider Totten's evidence on the timing of obtaining a teardrop tattoo?
(5) What is the appropriate remedy?

[10] I would answer "yes" to the questions posed in issues 1 and 2, and "no" to the questions posed in issues 3 and 4. In essence, I have concluded that the fresh evidence shows Totten's opinion evidence on the meaning of a teardrop tattoo to be too unreliable to be heard by a jury. If the trial judge had known about the fresh evidence he would have ruled Totten's evidence inadmissible. And the absence of Totten's evidence would reasonably be expected to have affected the jury's verdict. I would admit the fresh evidence, allow Abbey's appeal, overturn his conviction and order a new trial.

B. BACKGROUND

(a) The murder of Simeon Peter

[11] On January 8, 2004, in the middle of the afternoon, Simeon Peter was shot and killed in Caronia Square, near Sheppard Avenue East and Morningside Avenue in Scarborough. He was 19 years old. Abbey, then 18 years old, was charged with first degree murder.

[12] Abbey was an associate of the Malvern Crew, a street gang in Scarborough. Back in 2004 the Malvern Crew was engaged in a brutal turf war with another Scarborough street gang, the Galloway Boys. The Crown alleged that Abbey killed Peter, believing him to be a member of the Galloway Boys. Sadly he was not. He was simply in the wrong place at the wrong time.

(b) The first trial

[13] The first trial took place in 2007. The parties agreed that whoever shot Peter was guilty of murder. As I have said, the main issue at trial was identity: who was the shooter. The secondary issue was whether the murder was planned and deliberate, thus elevating it to first degree murder.

[14] The Crown relied on the evidence of three other Malvern Crew gang members, each of whose evidence implicated Abbey. The Crown also sought to lead evidence about the meaning of Abbey's teardrop tattoo. That evidence was to come from Totten and the three gang members. Totten was prepared to give evidence that one of the meanings of a teardrop tattoo was that the wearer had killed a rival gang member. The three Malvern Crew gang members were prepared to testify to a similar understanding of the teardrop tattoo. Totten claimed that his opinion was based on academic literature and his own clinical research; the three gang members said that their understanding came from television and movies.

[15] The trial judge ruled that neither Totten nor the three gang members could give evidence about the meaning of a teardrop tattoo because the evidence was too unreliable. Abbey did not testify. As I have said, the jury acquitted him.

(c) The second trial

[16] The Crown appealed Abbey's acquittal and its appeal was allowed: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 ("*Abbey #1*"). Doherty J.A., writing for the panel, held that the trial judge had erred in not permitting Totten to give opinion evidence on the meaning of a teardrop tattoo, and in not permitting the three gang members to testify about their understanding of what a teardrop tattoo meant. This court set aside Abbey's acquittal and ordered a new trial.

[17] The new trial took place in the winter of 2011. The Crown led footprint impression evidence, cellphone tower evidence and the evidence of several eyewitnesses, including Peter's girlfriend, who was walking ahead of him when he was shot. None of this evidence, however, conclusively pointed to Abbey as the shooter. Indeed, none of the eyewitnesses could identify Abbey as the shooter, and the trial judge commented to the jury that their evidence was "particularly unclear and confusing".

[18] Thus the two principal components of the Crown's case were the evidence of the three Malvern Crew gang members, Sams, Burton and Williams, implicating Abbey, and the evidence about the meaning of a teardrop tattoo.

(i) The evidence of Sams, Burton and Williams pointing to Abbey as the shooter

[19] Sams, Burton and Williams gave potentially compelling evidence against Abbey.

[20] Sams testified that during the morning of the murder he was in Burton's car and they were driving in the Morningside Avenue and Sheppard Avenue East area when they saw a girl, Clorie-Ann Anderson, whom they recognized, together with a male wearing a hood and a bandana. Sams thought that the male might be a member of the Galloway Boys. They decided to approach the male but wanted a gun before they did so.

[21] So they went to Abbey's house and told him whom they had seen. Abbey got in the car with them. As they were driving they saw Anderson and the male on the bus. They followed the bus and watched the two as they got off. Abbey then got out of the car and walked away. Sams saw Abbey the next day and asked him what had happened. Abbey said he thought the guy had a gun and was pulling it out so he shot him.

[22] Burton gave a different account of what happened the day of the shooting. On his version, Abbey was with him and Sams from the outset. Burton was driving; Sams was in the front passenger seat; and Abbey was in the backseat. At the intersection of Morningside and Sheppard East they saw Anderson with a

male in a fur jacket and a hood, and wearing a bandana over his face. Burton believed him to be a member of the Galloway Boys. Abbey then said he wanted to visit a friend. So Burton dropped him off. Burton claimed that no one in the car said anything about having a gun or wanting to get a gun. And he also said that Sams never asked to go to Abbey's house to get a gun.

[23] Within days of the shooting, the media began circulating details and pictures of the car believed to have been involved in the shooting. Burton at first believed the car to be his – a bright blue Honda. He wondered why a car similar to his was in the news so he questioned Abbey. Abbey denied he had anything to do with the shooting and said if the police contacted Burton "just don't say anything". Abbey, however said the guy who was shot had robbed him two weeks earlier. Burton then confronted Abbey and accused him of being the shooter. Abbey replied he was "not going to really say if it's me or not."

[24] The Crown then refreshed Burton's memory with the statement Burton had given to the police incriminating Abbey. And Burton acknowledged Abbey had told him that he had followed the victim to Caronia Square, pulled out a gun and fired a couple of times shooting the victim in the leg. The victim started running away and Abbey shot him again, then stood over him and shot him a few more times. He pointed the gun at Anderson but realized it was empty so he fled.

[25] Williams testified that in the summer of 2004, while in custody, he questioned Abbey about the shooting. Williams claimed Abbey told him four people were involved but the others were "afraid to do what had to be done, so he took it into his own hands and did it". Williams said Abbey told him he shot the person in the leg and then shot him again. He tried to shoot Anderson but his gun was empty. He then ran back to his house.

[26] Despite their evidence implicating Abbey, the testimony of Sams, Burton and Williams was problematic for the Crown. Sams' and Burton's accounts of the incident differed. What Abbey apparently told each of the three also differed. And most important, each was a most unsavoury witness, and Sams and Burton had made a deal with the Crown to testify.

[27] Although Williams had not made a deal with the Crown, he was a jailhouse informant with a lengthy criminal record. At the time of the murder he was serving a twelve-year sentence for a home invasion robbery at gunpoint. He defied a court order and refused even to testify at Abbey's second trial. His evidence from the first trial had to be read in to the jury.

[28] Sams and Burton did testify for the Crown but only in exchange for immunity from prosecution for numerous serious offences, many arising from a police raid on the Malvern Crew known as Project Impact.

[29] As a result of Project Impact Sams was charged with a lengthy list of offences, including attempted murder, conspiracy to commit an indictable offence, drug dealing, various firearms offences and participating in a criminal organization. He was also facing prosecution for a separate attempted murder charge. He pleaded guilty to the criminal organization charge and was sentenced to time served. All the other charges against him were stayed.

[30] In May 2004, Burton was out on bail for several offences resulting from a police chase, including dangerous driving and drug and weapon offences. He then was arrested in the Project Impact raid and charged with additional offences, including possession of drugs and weapons and participating in a criminal organization. His bail was revoked. Anxious to get out of jail, he agreed to testify against Abbey in exchange for his freedom. Like Sams he pleaded guilty to the criminal organization charge. All other charges against him were withdrawn. So too were the deportation proceedings he was facing. It is hardly surprising that Burton agreed in cross-examination that his arrangement with the Crown was “a dream come true”.

[31] The trial judge strongly cautioned the jury – a “*Vetrovec*” caution – about the danger of relying on the evidence of Sams, Burton or Williams without independent confirmation by other evidence. The trial judge emphasized to the jury that each of the three gang members had no compunction about lying or

falsely implicating another to further his own interest or gain an advantage for himself.

(ii) The evidence about the meaning of a teardrop tattoo

[32] The Crown's case therefore rested significantly on the evidence concerning the meaning of a teardrop tattoo. Sams and Burton gave evidence about their understanding of what a teardrop tattoo meant to the wearer. But the source of their evidence was anecdotal – television, movies and "stuff like that". The trial judge told the jury their evidence was unreliable, and had little force without Totten's evidence.

[33] By elimination then, Totten's evidence played a prominent role in the Crown's case. I will review his evidence in detail when I discuss the first issue on appeal, the cogency of the fresh evidence.

[34] In her closing address the Crown relied heavily on Totten's evidence in arguing to the jury that Abbey obtained a teardrop tattoo about four months after Peter was murdered to signify that he believed he had killed a member of the Galloway Boys. The agreed statement of facts filed by the parties gave force to the Crown's argument. The parties stipulated that no Malvern Crew gang member or associate was killed in 2003 or 2004, and that before June 1, 2004 Abbey had not spent time in custody. Also, no direct evidence was led at trial that

Abbey had lost a family member, though Burton testified that when he asked Abbey about his teardrop tattoo Abbey told him he had lost a family member.

[35] The trial judge charged the jury on Totten's evidence. He said "his evidence is of considerable importance in this case". And, although the trial judge cautioned the jury about accepting Totten's evidence, and reviewed details of the defence's attack on its reliability, he told the jury they had to decide what weight to give to the evidence.

[36] Abbey again did not testify at his trial. This time, however, he was convicted of first degree murder.

(d) The *voir dire* in *R. v. Gager*

[37] Gager, too, was charged with murder. The Crown alleged that Gager was a member of a Toronto street gang and that the motive for the murder was a rivalry between his gang and another street gang. At this trial, however, the defence, not the Crown, proposed to call Totten as an expert on street gangs. The defence wanted to show, through Totten's opinion evidence, that Gager did not have the characteristics of a gang member.

[38] The Crown did not concede that Totten was qualified to give expert evidence. Instead, at the beginning of the trial in February 2012, it challenged Totten's qualifications on a *voir dire* into the admissibility of his evidence. And the

Crown's cross-examination revealed weaknesses and discrepancies in Totten's opinions. The Crown's impeachment of Totten on the *voir dire* forms an important part of Abbey's fresh evidence, and indeed was the catalyst for his fresh evidence application. I will address the relevant details about the Crown's cross-examination later in these reasons when I discuss the fresh evidence.

[39] Despite his reservations, the trial judge in *Gager*, Clark J., did qualify Totten to give expert evidence in several areas. In doing so he said that a court should be reluctant to disqualify an expert called by the defence. But in his lengthy ruling Clark J. was quite scathing of Totten and his proposed opinion evidence. For example, he regarded Totten's claim that he is a "Canadian expert on gangs" to signify the "sort of puffery" that suggests "a degree of immodesty on the witness' part that is not in keeping with the detachment and objectivity properly to be expected of an expert witness". He also found Totten's answers to questions about the sample size in his studies "both evasive and troubling". And he found Totten's answers to questions on his methodology also "evasive".

[40] Although Clark J. did qualify Totten to give opinion evidence, the defence, no doubt concerned by the Crown's cross-examination on the *voir dire*, elected not to call him.

(e) Summary of the relevant chronology

[41] The following is a bullet point summary of the relevant chronology and Totten’s role:

- 1995-2005: Totten authors six studies, which he relies on for his opinion on the meaning of a teardrop tattoo.
- January 2004: Simeon Peter is murdered.
- 2007: The first Abbey trial is held. The Crown proposes to call Totten to give expert evidence on the meaning of a teardrop tattoo, but the trial judge rules he is not qualified to give that evidence because it is too unreliable. Abbey is acquitted.
- 2009: This court allows the Crown’s appeal, sets aside Abbey’s acquittal and orders a new trial. The court holds that Totten is qualified to give opinion evidence on the meaning of a teardrop tattoo.
- Winter 2011: The second Abbey trial is held. The Crown calls Totten as its expert witness on the meaning of a teardrop tattoo. Abbey is convicted of first degree murder.
- February 2012: In *R. v. Gager*, an unrelated murder trial, the defence proposes to call Totten as an expert witness on street gangs. The Crown objects to the admissibility of his evidence and cross-examines him on a *voir dire*. The defence then decides not to call Totten.
- February 2017: Abbey’s appeal from his conviction is argued.

C. THE LEGAL FRAMEWORK

[42] On this appeal we must apply the test for the admission of fresh evidence on appeal to the test for the admission of expert evidence.

(a) The test for the admission of fresh evidence on appeal

[43] Under s. 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, an appellate court has a broad discretion to receive evidence on appeal "where it considers it in the interests of justice" to do so. The burden is on the applicant – here Abbey – to establish that the fresh evidence is admissible.

[44] Although the overriding test for the admission of fresh evidence is "the interests of justice", appellate courts have structured their discretion under this broad standard by prescribing a specific set of criteria to be addressed. The leading Supreme Court of Canada case, decided nearly 40 years ago, is *Palmer v. The Queen*, [1980] 1 S.C.R. 759. A decade ago in *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at para. 92, a five judge panel of this court reformulated the *Palmer* test. In these reasons I will use our court's reformulation. It consists of three criteria, each set out by a question:

> 1. Is the evidence admissible under the operative rules of evidence? (admissibility criterion)
>
> 2. Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict? (cogency criterion)
>
> 3. What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence? (due diligence criterion)

[45] The present appeal turns on the second and third criteria – the cogency and due diligence criteria. Except in one respect – the Statistics Canada data –

the first criterion is not at issue. Thus although Clark J.'s ruling on the *voir dire* in *Gager* is obviously not admissible, the relevant portions of the Crown's cross-examination of Totten are admissible under our rules of evidence for the purpose of impeachment. So too are Totten's studies on gangs. The Statistics Canada data are a relatively minor component of Abbey's fresh evidence application, which I will deal with later in these reasons.

(b) The test for the admissibility of expert evidence

[46] The modern Canadian law on the admissibility of expert evidence began with the judgment of Sopinka J. in *R. v. Mohan*, [1994] 2 S.C.R. 9. But in the last two decades since *Mohan* was decided the law on expert evidence has changed significantly. In *Abbey #1* itself – on the Crown's appeal from the acquittal at the first trial – my colleague Doherty J.A. reformulated the *Mohan* test for admissibility to make it easier to apply. And recently in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, Cromwell J. adopted with "minor adjustments" Doherty J.A.'s reformulation of *Mohan*.[2]

[47] The test in *White Burgess* is now the governing test for the admissibility of expert evidence. It adopts a two-stage approach, first suggested in *Abbey #1*: the

[2] For an excellent summary of the development of the law from *Mohan* to *Abbey #1* to *White Burgess* see Lisa Dufraimont, "Update on Admissibility of Expert Evidence", (paper presented to the Law Society of Upper Canada, Six Minute Criminal Lawyer 2016, April 9, 2016).

first stage focuses on threshold requirements of admissibility; the second stage focuses on the trial judge's discretionary gatekeeper role. Each stage has a specific set of criteria.

[48] The test may be summarized as follows:[3]

Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

a. The evidence must be logically relevant;

b. The evidence must be necessary to assist the trier of fact;

c. The evidence must not be subject to any other exclusionary rule;

d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. Impartial,

ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,[4]

---

[3] In setting out this test I have largely adopted Lisa Dufraimont's useful summary at (2015), 18 C.R. (7th) 312-313.

b. Necessity,

c. Reliability, and

d. Absence of bias.[5]

[49] In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.

[50] On this appeal, of the threshold requirements for admissibility, only the fourth criterion – whether Totten is a properly qualified expert – is in issue. It is not in dispute that Totten's expert evidence on gang culture was logically relevant to the key issue in the case, the identity of the shooter; that it was necessary to assist the jury in determining who the shooter was, in the sense that the meaning

---

[4] In *Abbey #1*, Doherty J.A. distinguished between the "logical relevance" of the evidence, which is a threshold requirement for admissibility, and "legal relevance", which trial judges must consider in their gatekeeper role. By legally relevant evidence Doherty J.A. means evidence that is sufficiently probative to justify its admission. In *White Burgess*, Cromwell J. referred expressly to logical relevance as a threshold requirement, but only relevance, not legal relevance, at the gatekeeper stage. Nonetheless, as confining relevance to logical relevance at the gatekeeper stage would be redundant, and as Cromwell J. said at para. 22 he would adopt the approach in *Abbey #1* with only "minor adjustments", I conclude that at the gatekeeper stage he meant legal relevance. I acknowledge that my conclusion introduces a small measure of duplication because the reliability of the evidence is a key component of legal relevance and Cromwell J. lists reliability as a separate factor.

[5] At para. 54, Cromwell J. lists these four factors but suggests they are not exhaustive.

of a teardrop tattoo was beyond the knowledge of the jurors; and that it was not subject to any other exclusionary rule. And it is not in dispute that the fifth criterion, as framed, has no application as Totten's opinion was not based on novel science or on a novel scientific theory. See *Abbey #1*, at para. 116.

[51] Of the enumerated factors to be considered at the gatekeeper stage, the three that are applicable are legal relevance, reliability and the absence of bias.

[52] Before leaving the *White Burgess* test for the admissibility of expert evidence, I make three additional points, which I will elaborate on when discussing the fresh evidence.

[53] First, recent case law, including *White Burgess* itself, has emphasized the importance of the trial judge's gatekeeper role. No longer should expert evidence be routinely admitted with only its weight to be determined by the trier of fact. As Cromwell J. said in *White Burgess*, at para. 20, "[t]he unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role". Cromwell J.'s observation echoes the point Binnie J. made in the earlier Supreme Court of Canada decision *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 28: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."

[54] Second, case law since *Mohan* has also emphasized the importance of the reliability of the evidence to its admissibility. See, for example, *R. v. J.-L.J.* and *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. In *Abbey #1*, at para. 87, Doherty J.A. pointed out that at the gatekeeper stage of admissibility the reliability of the proposed expert evidence is central to its probative value and thus to the benefits of admitting it. And as I will discuss, the unreliability of Totten's opinion evidence on teardrop tattoos, as demonstrated by the fresh evidence, is what disqualifies its admission.

[55] The third and final point is that in *White Burgess*, at para. 45, Cromwell J. resolved a debate in the case law and held that an expert's lack of impartiality and independence and an expert's bias go to the admissibility of the expert's evidence as well as to its weight, if admitted. At the admissibility stage these qualities are relevant to the threshold requirement of a properly qualified expert, and they are again relevant at the gatekeeper stage. Cromwell J., however, did point out at para. 49 of his reasons that rarely will a proposed expert's evidence be ruled inadmissible for failing to meet this threshold requirement.

D. THE ISSUES

1. Is the fresh evidence sufficiently cogent to have disqualified Totten from giving expert evidence about the meaning of a teardrop tattoo?

[56] The cogency criterion for the admission of fresh evidence on appeal asks: is the evidence sufficiently cogent that it could reasonably be expected to have

affected the verdict? In this case that question must be applied to the test for the admission of expert evidence. Because the two are intertwined, I think the analysis is easier to understand if the cogency question is divided into two separate questions:

- Is the fresh evidence sufficiently cogent to have disqualified Totten from giving expert evidence about the meaning of a teardrop tattoo?
- If the answer to the first question is yes, would the absence of Totten's evidence about the meaning of a teardrop tattoo reasonably be expected to have affected the verdict?

[57] As I said at the outset of these reasons, I would answer "yes" to both questions. In this section I will deal with the first question, and in the next section of my reasons with the second question. Before discussing the cogency of the fresh evidence, I will summarize Totten's resume or curriculum vitae, his two reports for Abbey's trials and his evidence at the second trial on the meaning of a teardrop tattoo.

(a) Mark Totten's curriculum vitae

[58] On paper Totten has a most impressive curriculum vitae. It spans 28 pages of the appeal book. He has a B.A. in Social Behaviour from Queen's University (1985), a Masters of Social Work from Carleton University (1986) and a PhD in Sociology, concentrating on youth gangs and violence, also from

Carleton University (1996). Since 1997 he has been president of his own consulting company, Totten and Associates.

[59] Totten has published four books, delivered numerous reports to governments and community organizations and received a large number of research and evaluation grants. According to his curriculum vitae, since 1990 he has delivered over 500 keynote speeches, addresses, lectures, papers and workshops for international, national and local audiences on topics related to, among others, youth gangs, youth violence and youth homicides.

(b) Totten's two reports for Abbey's trials

[60] Before the first trial, Totten delivered two reports. The first is dated December 8, 2006 and is titled "Street Gangs and the Significance of the Teardrop Tattoo". The second is dated January 3, 2007 and is titled "Street Gang Research Methodology and Implications for R. v. Abbey". The Crown relied on these two reports for the second Abbey trial. Totten did not produce a separate or supplementary report for the second trial.

[61] Totten's first report is relatively brief and it includes no statistical data on teardrop tattoos. Totten, however, does say in this report that "[i]t is common for *young recruits* to get teardrop tattoos to display that they have passed the test of murdering a rival gang member" (emphasis in original). And he concludes his report with the following opinion: "it is clear to me that Warren Abbey's teardrop

tattoo on his right cheek below the eye represents the fact that he killed a rival gang member, most likely in 2004".

[62] Totten's second report is lengthier and more detailed. In it he discusses his research methods and interview techniques. And he focuses on the meaning of a teardrop tattoo to a gang member, and the statistical data generated by his six studies, which he relies on for his opinion. The meanings Totten ascribes to a teardrop tattoo and his statistical data were replicated in his evidence at trial, to which I now turn.

(c) Totten's evidence at the second trial

[63] In the light of this court's 2009 judgment, the trial judge qualified Totten, without objection from the defence, to give expert opinion evidence for the Crown "in relation to street gang culture and symbology … in particular with respect to the interpretation of tattoos and more particularly the teardrop tattoo." In giving his opinion Totten said he relied on his clinical experience over two decades, his research projects, and his review of the academic literature.

[64] His opinion on the meaning of a teardrop tattoo had two branches: a qualitative branch and a quantitative branch. The fresh evidence challenges the quantitative branch, not the qualitative branch. But the two branches are intertwined.

[65] First, the qualitative branch. Totten testified that a teardrop tattoo on the face of a young member of a street gang means one of three things:

- The death of a family member of the wearer of the tattoo or of a fellow gang member;
- The wearer of the tattoo had served time in a correctional facility, usually ten years or more; or
- The wearer of the tattoo had murdered a rival gang member. Totten also said if this was the reason for the tattoo, typically the wearer would obtain it within six months of the homicide.

[66] Second, the quantitative branch of Totten's opinion. Totten's evidence was that between 1995 and 2005 he conducted six studies on young gang members. The six studies yielded the following dramatic statistics:

- Totten studied a total of 290 young gang members;
- Of the 290, 97 gang members had been convicted of a homicide, either murder or manslaughter;
- Of the 97, 71 male gang members had teardrop tattoos; and
- Each of the 71 told Totten he had obtained a teardrop tattoo to signify he had killed a rival gang member.

In his evidence at trial Totten gave no breakdown of the number of homicides or teardrop tattoos attributable to each study.

[67] That Totten's statistics are based on his six studies is critical to my assessment of the cogency of the fresh evidence. The six studies in chronological order are the following:

- Youth Services Bureau ("YSB") Survey (May 1999): a one-month study to get a snapshot of the youth who were living on the street in Ottawa;
- Guys, Gangs and Girlfriend Abuse (2000): an 18-month study of various forms of physical and sexual violence against women;
- Understanding Serious Youth Violence (2001): a three-month study to investigate various forms of extreme violence;
- When Children Kill (2002): a study into the lives of 19 young persons convicted of murder or manslaughter;
- Youth Literacy and Violence Prevention Research Project (2003): a study of the literacy level of young people engaging in violence; and
- The Gays in the Gang (2005): a report on the experiences of young gay, bisexual and transgender gang members who engaged in serious street violence.

[68] The ages of the subjects studied ranged between 12 and 20. Most were male, but in a couple of the studies some of the subjects were female. None of the studies was geared toward the study of tattoos.

(d) The fresh evidence

(i) Introduction

[69] Abbey has filed as fresh evidence relevant portions of the Crown's cross-examination of Totten in *Gager*, Totten's research studies and a small amount of

Statistics Canada data. The purpose of the fresh evidence is to impeach the credibility and reliability of Totten's statistical evidence, which was a critical component of his opinion on the meaning of a teardrop tattoo. The fresh evidence seeks to demonstrate that Totten's opinion is replete with weaknesses, misrepresentations and even falsehoods.

[70] Specifically, the fresh evidence mainly seeks to undermine the four key numbers that Totten said came from his six research studies and which he relied on for his opinion: 290 gang members; 97 convicted of a homicide; 71 wore a teardrop tattoo; all 71 obtained a teardrop tattoo to signify the killing of a rival gang member. In addition, the fresh evidence seeks to show duplication in Totten's studies, contrary to his sworn evidence in *Gager*, and misrepresentations in how he conducted his interviews.

[71] The Crown has not disputed any of Abbey's fresh evidence, other than to contend that the Statistic Canada data are inadmissible because they are hearsay. The Crown has not filed any reply material. And neither side sought leave to call Totten to give evidence on the fresh evidence application. Thus for the purpose of this appeal I treat as unchallenged any problems with the reliability of Totten's opinion revealed by the fresh evidence.

(ii) 290 gang members

[72] Totten testified that the total number of gang members in his six research studies was 290, broken down as follows:

- YSB Survey: 51
- Guys, Gangs and Girlfriend Abuse: 90
- Understanding Serious Youth Violence: 31
- When Children Kill: 9
- Youth Literacy and Violence Prevention Research Project: 84
- The Gays in the Gang: 25

[73] Abbey challenges the figure of 90 gang members said to be between 13 and 17 years of age in what was Totten's biggest study up to the time of trial and also his doctoral dissertation: Guys, Gangs and Girlfriend Abuse. Abbey submits that 90 is a misrepresentation and that a review of the study shows that the accurate figure is 22, thus reducing Totten's sample size from 290 to 222. I agree with Abbey's submission.

[74] In *Gager*, Totten was extensively cross-examined on his use of the figure of 90. He gave two explanations, neither of which I find convincing.

[75] His first explanation was that the figure of 90 gang members reflected a continuum of gang involvement. Some were hard core gang members and others

"belong[ed] to anti-social peer groups where violence was common". In this study (at p. 58) Totten does refer to "a continuum of male peer groups/gangs, spanning from 'groups of friends' to 'hard-core criminal gangs'".

[76] But Totten produced two charts (at pp. 59 and 60), one distinguishing between "abusers" and "non-abusers", and the other characterizing abusive behaviour in various situations, for example living at home or in school. In each chart Totten identifies among the 90 participants the number of "gang members". That number is 22. And in his chart distinguishing between abusers and non-abusers, only 60 participants are said to be abusers. For the 90 participants to be gang members, as Totten claimed in his evidence, all 30 non-abusers would have to be considered gang members. That would be surprising, and in my view, highly unlikely.

[77] Totten does not define "gang member" in his study but in his charts he considered that only 22 qualified. And on any reasonable definition of a gang member it is not realistic to think people in a "group of friends" would be classified as gang members. Further, in his report in *Gager* Totten defines street gangs as "visible, hardcore groups that come together for profit-driven criminal activity and severe violence." That definition obviously restricts the number of gang members in his study to 22.

[78] That 22 is the correct figure is also evident later in Totten's study. Of the 90 participants he singled out 30 for in depth interviews. He has a chart (at p. 166) dividing the 30 into "gang members" and "peer group members". Only 17 of the 30 are classified as gang members, again showing that the figure of 90 is an inflated figure.

[79] Totten's second explanation for using the figure 90 was even less convincing: it was nonsensical. Totten claimed that his definition of gang member had changed over time. It was broader when he did the study than when it was 12 years later when he testified in *Gager*. But, of course, on that explanation there should be even fewer gang members now, not more. Even the Crown fairly conceded that Totten's explanation "didn't make sense".

[80] Totten also misrepresented his sample size of gang members in one of two more recent studies, produced after the second trial in this case but before the *voir dire* in *Gager*. The two studies – one in Prince Albert and the other in Regina, Saskatchewan – looked at aboriginal gangs, not conventional street gangs. According to Totten's evidence in *Gager* these two studies added 229 additional gang members to his overall sample size – 151 in the Prince Albert study and 78 in the Regina study – for a total sample size of 519 gang members. But a review of the Prince Albert study shows that the figure of 151 is inflated,

and indeed false. The study itself states that only 49 percent of the 151, or about 72 participants, were current or recent gang members.

[81] Sample size is obviously important to Totten. In his second report for the first trial he claimed that his sample size of 290 street gang members was "considerably larger" than the sample size in any existing gang study,[6] and was large enough that his results could be "generalized" to other parts of Canada. In his report for *Gager* he claimed that his sample size of 519 was "many times larger" than the sample size used in previous Canadian studies. And, sample size is indeed important. The larger the sample the more significant the results derived from the data and the more confidence we can have in the inferences sought to be drawn from those results.

[82] But inflating his sample size as Totten has done by misrepresenting the number of gang members casts a dark cloud over the reliability of his statistical evidence. The number of gang members in his study of Guys, Gangs and Girlfriend Abuse is 22 not 90, and his accurate total sample size is 222, not 290. The reduction in Totten's sample size likely affects, to an extent unknown, the numbers derived from it – 97 who committed a homicide, 71 of which had a teardrop tattoo.

[6] The report states that the sample size was 300 gang members. In his testimony in *Gager*, Totten clarified that 300 was a typographical error and the correct number is 290.

(iii) 97 gang members were convicted of a homicide[7]

[83] Totten claimed that of his sample size of 290 gang members, 97, fully one third, were convicted of homicide, either murder or manslaughter. Leaving aside that the sample size should be 222 not 290, I find it impossible to discern how Totten arrived at the figure of 97 or any number close to it from his six studies. The number may be correct but it cannot be found in the six studies.

[84] The only study that expressly addresses homicides is When Children Kill, a small study of 19 children. All 19 killed another person but at most nine out of the 19 were gang members and none of the nine killed a rival gang member. At best one can assume nine gang members could have contributed to the 97 who committed a homicide. But none of the nine could have contributed to the 71 who obtained a teardrop tattoo to signify the killing of a rival gang member.

[85] Very few individuals interviewed in Totten's five other studies were convicted of homicide. The details are as follows:

- The YSB May 1999 Youth Survey focused on the living circumstances of clients of the Ottawa Youth Services Bureau over the course of one month, April 1999. Of the 309 participants Totten identified 51 as gang members. According to Totten, 82 of the 309 participants committed a major physical assault. Homicide is not mentioned. And nowhere in the report does Totten suggest that any of the 51 gang members committed a murder or manslaughter;

---

[7] Totten was not clear whether all 97 were male or whether some were female.

- In Guys, Gangs and Girlfriend Abuse, none of the gang members studied was reported to have been convicted of a homicide. The study looked at abuse towards girlfriends. Totten defined physical abuse as an assault, aggravated assault, assault with a weapon or assault causing bodily harm. His definition does not include murder or manslaughter. The gang members studied were abusive to their girlfriends but none had killed a girlfriend, let alone a rival gang member;

- The Gays in the Gang was a study of 25 gay, bisexual and transgender gang members between ages 14 and 20. All 25 had committed extreme acts of violence, which could include murder. But only eight of the 25 were interviewed at a correctional facility. So, likely at most, the study could contribute less than ten to the figure of 97;

- In the first Abbey trial Totten admitted that none of the participants in the Understanding Serious Youth Violence study had been convicted of a homicide; and

- In the Youth Literacy and Violence Prevention Research Report, 84 participants with an average age of 17.7 years self-identified as gang members. None of the 84 was said to have been convicted of a homicide.

[86] In summary, only in the two studies When Children Kill and The Gays in the Gang did Totten specify that some of the gang members had committed a homicide. But the number who did was relatively small, less than ten in each study. The total of less than twenty falls far short of the 97 Totten claimed in his evidence.

[87] Abbey filed Statistics Canada data as part of his fresh evidence application to support his argument that the figure of 97 is false. The Crown objected to the admissibility of these data on the ground that they were simply appended to an affidavit of an assistant to counsel on appeal, Mr. Harris, and thus were hearsay.

[88] In my opinion, the Statistics Canada data are admissible in the form in which they were filed under the common law public documents exception to the rule against hearsay. See *R. v. P.(A.)* (1996), 109 C.C.C. (3d) 385 (C.A.).[8] Although the Statistics Canada data are admissible, I do not find them helpful. They do not distinguish between when a person committed a homicide or was charged or convicted of a homicide, and therefore cannot be compared to Totten's data.

[89] Even without the Statistics Canada data the number of 97 is not supported by the written studies Totten authored. Neither that number nor any number close to it is disclosed by the six studies he claimed to have relied on. For that

---

[8] Under this exception four requirements must be met for the document to be admissible without proof:

- The document must be made by a public official;
- The public official must have made the document in discharging a public duty or function;
- The document must have been made with the intention that it be a permanent record; and
- The document must be available for public inspection.

The rationale for the exception is that we presume the accuracy of the public document because we assume public officials will act in accordance with their duty. Also requiring public officials to testify routinely about public documents would cause considerable inconvenience.

The Statistics Canada data meet the four requirements for the public documents exception to the rule against hearsay. Section 3(e) of the *Statistics Act*, R.S.C. 1985, c. S-19 requires Statistics Canada to "promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces". Section 26 requires the courts to furnish criminal statistics to the government. Presumably these statistics create a permanent record. And the statistics are publicly accessible on the internet.

reason whether 97 young gang members in his studies were convicted of a homicide cannot be assessed or verified.

(iv) 71 males of the 97 gang members convicted of a homicide had a teardrop tattoo

[90] Totten claimed that, of the 97 gang members in his studies who were convicted of murder or manslaughter, 71 males obtained a teardrop tattoo. This claim is even more troubling, even assuming the accuracy of the figure of 97. Not a single study lists the number of gang members who had a teardrop tattoo. Indeed, the texts of the six studies contain only a few references to tattoos and no reference at all to teardrop tattoos.

[91] Nonetheless, Totten testified at the *Gager voir dire* that all six studies asked questions about tattoos. But the studies say otherwise. Here is what each study says about tattoos and questions on tattoos:

- The YSB May 1999 Youth Survey does not list what questions were asked of the participants and contains no discussion of tattoos;
- Appendices A and B of the Guys, Gangs and Girlfriends Abuse study list the questions asked of each participant. The questionnaire is detailed: 40 initial screening questions followed by in depth interview questions. Yet the questionnaire does not include a single question about tattoos. And the study itself, including the various charts, does not discuss or refer to tattoos. The absence of questions about tattoos and references to them in the study is hardly surprising. The purpose of the study was to explore how male youth made sense of their abusive behaviour towards their girlfriends;

- In Understanding Serious Youth Violence, question 6 of the interview questions asks: “Do you have any tattoos? Can you show me? What does/do the tattoo(s) mean to you?” Question 7 asks: “How do you communicate with gang members … Probe for … tattoo.” The report has a section on case studies and several of the subjects discuss their tattoos. But the report contains no discussion of teardrop tattoos;

- Appendix A in When Children Kill lists the questions asked of the 19 participants. None of the questions asks about tattoos. The book itself does contain a few references to tattoos but none to teardrop tattoos;

- Appendix A in the Youth Literacy and Violence Prevention Research report lists the questions to be asked to the participants and the list does include questions on tattoos. Question 18 asks: “Can you tell me how gang members communicate with each other in your gang? With rival gang members? With other people? Probe for details around … tattoos.” Question 19 asks: “Do you have any tattoos? Can you show them to me?” Question 20 asks: “What does the tattoo mean to you (probe for each tattoo)?” But again the report contains no discussion of teardrop tattoos; and

- The Gays in the Gang study does not list the questions asked to the participants. In the body of the study Totten says questions about tattooing were included in the study, and indeed the study does discuss the tattoos of a few of the participants. But once again the study has no discussion of teardrop tattoos.

[92] In summary, in two of the six studies questions about tattoos were listed; in two they were not; and two were silent about the questions asked. And no study contained any discussion of or reference to teardrop tattoos, or a list of how many participants had them. Totten said it was not unusual that his studies failed to include questions on tattoos. But again his evidence cannot be verified by a review of the studies.

[93] In his 2009 judgment in *Abbey #1*, at para. 119, Doherty J.A. suggested that in assessing the reliability of an expert's opinion that relies on data collected through various means such as interviews – as Totten's opinion does – one important question to ask is whether the data are accurately recorded, stored and available. In *Gager* the Crown asked Totten essentially this very question.

[94] The Crown asked Totten for a breakdown of the number of tattoos, including teardrop tattoos, in each study, for a list of the 71 male gang members who had a teardrop tattoo and for the raw data supporting her request. Totten said he did not have the data with him. However, Totten told the Crown he had "masses of data" at home, and had collected and maintained his data on teardrop tattoos. He testified: "I can give you the numbers with teardrops, with the teardrop tattoo out of those six studies". He promised to get the data and bring them to court.

[95] Surprisingly, after the luncheon recess, Totten did an about-face. He told the Crown and the trial judge he had no data on teardrop tattoos as he had destroyed all of his data in accordance with the guidelines of the "tri-council ethics committee". Totten said that under these guidelines he was bound to keep his raw data for 10 years, and then destroy them. Totten was not asked and did not say when he destroyed his data, and he did not produce a copy of the committee's guidelines.

[96] The Crown argues that we cannot rely on Totten's evidence about the destruction of his data because that issue arose for the first time in the *Gager* trial. In Abbey's first trial, the defence made no complaint about the lack of disclosure. I do not agree with the Crown's argument. The *Gager* trial took place about eleven months after Abbey's second trial, and it is thus likely that the state of Totten's raw data was the same at the time of both trials. Indeed if we accept Totten's evidence that he destroys his data after ten years most of the data from his studies would have been destroyed before the second trial. Neither the Crown nor Totten has suggested otherwise.

[97] More important, Totten's evidence raises serious concerns about his credibility and the reliability of his assertion that 71 of the 97 gang members had teardrop tattoos. The concerns are twofold. First, Totten's over-lunch about-face regarding whether he had his data is, at least, suspicious. Second, without access to the underlying data a court cannot test the reliability of Totten's claim that in his sample drawn from his six studies, 71 young male gang members who had been convicted of a homicide had a teardrop tattoo.

(v) Each of the 71 told Totten he had obtained a teardrop tattoo to signify the killing of a rival gang member

[98] At trial the Crown asked Totten the following question:

> I just want to be certain I understand. So the 71 who had been convicted of murder or manslaughter that had a teardrop tattoo all indicated, told you, when you

> asked, that the teardrop signified killing of a rival gang member; is that right?

[99] Totten answered: “That’s right”. His answer undoubtedly was one of the most powerful pieces of evidence, if not the most powerful piece of evidence, supporting the Crown’s allegation that Abbey had murdered Peter. Yet on its face the answer seems implausible. Totten had testified that a young gang member would get a teardrop tattoo for one of three reasons. But according to his evidence not a single gang member among the 71 obtained a teardrop tattoo to signify the loss of a family member or fellow gang member, or to signify having been in a correctional facility. The implausibility of Totten’s answer raises a concern about whether he had become a partisan advocate for the Crown, instead of an objective and impartial expert witness.

[100] Even more significant, Totten’s assertion that all 71 obtained a teardrop tattoo to signify the killing of a rival gang member cannot be tested or verified. All six of his studies are silent – none contains even a single reference to a teardrop tattoo, let alone the number of gang members who had one. In at least two of his studies the listed interview questions do not include a question on tattoos. Moreover, the figure from which the 71 is drawn, 97 who were convicted of a homicide, is itself suspect. And Totten claims to no longer have the raw data that could support his assertion.

(vi) Duplication

[101] In *Gager*, Totten was asked: "Is there any duplication between the participants in any of these studies? Did you ever use gang members more than once in different studies?" He replied: "Never". His reply was false.

[102] At least three participants were used in both Guys, Gangs and Girlfriend Abuse (2000) and The Gays in the Gang (2005). Their names are Bob, Phil and Brian. Identical quotes from these three participants are found in the interview summaries in both studies.

[103] Other aspects of this duplication are even more concerning. Totten said that the primary research for Guys, Gangs and Girlfriend Abuse was done in 1993-4, and the interviews for The Gays in the Gang was done ten years later in 2004. Despite the ten-year gap the verbatim quotes attributed to Bob, Phil and Brian are identical in the two studies, as is the age of each one. In the first study, Guys, Gangs and Girlfriend Abuse, none of the three are overtly said to be gay (although there are suggestions that Bob and Phil are questioning their sexuality); in the second study The Gays in the Gang, all three are said to be gay.

[104] The amount of duplication uncovered by the fresh evidence is small. But that it exists at all, contrary to Totten's sworn testimony, raises further concerns

about the credibility and reliability of his opinion evidence. Indeed, the duplication raises a legitimate concern that Totten's interview summaries are fabrications.

(vii) Interview discrepancies

[105] Totten's YSB May 1999 Youth Survey, a one-month study of the living circumstances and behaviour of Ottawa youth who were clients of the Youth Services Bureau, included interviews of 309 participants. The survey itself says that over one half of the interview questionnaire was completed by the young person "alone" and the remainder by the young person together with one of Totten's staff.

[106] In his evidence at trial, however, Totten claimed that he was present for all the interviews and that each interview was at least one hour long. By the time he testified at the *Gager voir dire* each interview had become one to three hours long. He backtracked somewhat in his re-examination in *Gager*, and admitted some of the interviews were done by the staff and some were short. But he maintained that he was present at every interview. As Clark J. aptly commented at para. 54 of his ruling:

> Allowing time for sleep and other necessary daily activities, inasmuch as there are only 744 hours in the month of May, even using the lower figure of one hour for each interview simple arithmetic makes it difficult to accept that he could have performed that number of interviews in that time frame.

(e) Positions of the parties and analysis

[107] This first and central issue on the appeal turns on the degree of cogency of the fresh evidence. Abbey submits it is so cogent that if known by the trial judge it would have been sufficient to disqualify Totten from testifying before the jury about the meaning of a teardrop tattoo. Abbey contends the fresh evidence shows that Totten's opinion evidence was largely fabricated or concocted, or at the very least was not supported by the studies he claims he relied on. Thus he was a biased witness – he was not fair, objective and non-partisan; or his evidence was of dubious reliability. On either basis, the fresh evidence demonstrates his evidence should not have been heard by the jury.

[108] The Crown acknowledges that the fresh evidence has demonstrated what he categorizes as "irregularities" in Totten's testimony. But the Crown submits these irregularities are not so cogent that they would have prevented Totten from testifying; at most, they might affect the weight the jury would give to his evidence. The Crown contends that the fresh evidence does not call into question the heart of Totten's opinion, that the teardrop tattoo on a young gang member can mean only one of three things, one of which is the killing of a rival gang member. Moreover the Crown says this court cannot make a finding that Totten concocted his evidence because he was not given an opportunity either in *Gager* or on this appeal to explain much of the fresh evidence Abbey now relies on.

[109] I agree with Abbey's submission that the fresh evidence is sufficiently cogent that if it had been put before the trial judge he would have ruled Totten's opinion evidence about the meaning of a teardrop tattoo inadmissible. However, even though the fresh evidence does raise concerns about whether Totten was a fair and objective witness, I do not think it establishes a case of bias. Even with the fresh evidence I am satisfied that Totten's expert evidence would meet the threshold requirements for admissibility at the first stage of the *White Burgess* test. Cromwell J. noted in *White Burgess* that only in a rare case will expert evidence fail to meet the threshold requirement of being impartial and unbiased. This is not one of those rare cases. Nor do I think this is a case where Totten's evidence would be rendered inadmissible at the second gatekeeper stage because of bias.

[110] And I agree with the Crown's contention to the extent that on this record I would not conclude Totten had concocted his evidence. It would not be fair to Totten to make that finding when he has had no opportunity to explain or meet some of the fresh evidence put against him. But I do not think it is necessary to go as far as finding fabrication or concoction to render Totten's opinion evidence inadmissible.

[111] The fundamental problem with Totten's trial evidence, which was brought to light by the fresh evidence, is its reliability, or more accurately its unreliability. If the trial judge had known about the fresh evidence, then at the gatekeeper stage

he would have exercised his discretion and ruled that Totten's evidence could not go to the jury because of its unreliability.

[112] A trial judge's gatekeeper role is crucial in ensuring that expert evidence is sufficiently reliable to be admitted into evidence. Under the test in *White Burgess* for the admissibility of expert evidence, "reliability" is an express factor the trial judge must consider at the gatekeeper stage; and reliability is a key component of the evidence's probative value and thus of another express factor, "legal relevance".

[113] The focus on the reliability of expert evidence at the gatekeeper stage was also a theme in the important report of the *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008) authored by our former colleague Stephen Goudge. He observed at vol. 3, p. 470: "The evidence at this Inquiry demonstrated that the legal system is vulnerable to unreliable expert evidence, especially when it is presented by someone with [the expert's] demeanour and reputation". And so he emphasized at pp. 478-479 that the gatekeeper must keep unreliable evidence from being heard by the trier of fact. To repeat what Binnie J. said in *R. v. J.-L.J.*, at para. 28: "In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of 'gatekeeper'".

[114] The trial judge as gatekeeper is engaged in a cost-benefit analysis. That analysis is applied to many areas of the law of evidence, not just the law governing the admissibility of expert evidence. For expert evidence, the trial judge must decide whether opinion evidence that meets the threshold requirements of admissibility should still be ruled inadmissible because the potential harms to the trial process from admitting it outweigh its potential benefits. Put the other way around and in familiar terms, the trial judge must decide whether the probative value of the expert evidence outweighs its potential prejudice: see *R. v. Bingley*, 2017 SCC 12, 345 C.C.C. (3d) 306, at para. 6, and *Abbey #1*, at paras. 76-79.

[115] Expert evidence of dubious or questionable reliability has little probative value, and offers little benefit to the trial process. At the same time, evidence of questionable reliability risks distorting and prejudicing the fact-finding process: see *Mohan*, at p. 21.

[116] Many criteria may bear on the reliability of expert evidence. Doherty J.A. has a useful list of criteria in *Abbey #1*, at para. 119. The Goudge Report at p. 488 has a similar list. Neither list is said to be exhaustive. On this appeal two criteria bearing on the reliability of Totten's expert opinion on teardrop tattoos are particularly pertinent:

- The opinion must accurately represent the data and studies on which it is based; and

- When the opinion is based on data obtained through interviews, the data must be accurately recorded in the studies on which the opinion is based, and must be available so that they may be examined and verified by the court.

In the light of the fresh evidence, Totten's expert opinion fails to meet either of these criteria.

[117] First, Totten's opinion evidence at trial misrepresented the data in his studies. The most serious misrepresentation was the size of his sample. Totten claimed the total sample size in his six studies was 290 gang members. He inflated the number in his evidence, likely to try to demonstrate his sample size was the largest of any Canadian study on gangs. The accurate number is at most 222, a significant reduction. This reduction calls into question Totten's other figures, such as the 97 who committed a homicide and the 71 who wore a teardrop tattoo. Other misrepresentations, which I have reviewed, are Totten's claim he never used a gang member more than once in his studies and his claim to have sat through every interview in at least one of his studies.

[118] Second, however, and in my view more important, the key statistical components of Totten's opinion evidence on the meaning of a teardrop tattoo are not supported by the six studies on which his opinion evidence is based. And, the underlying interview data, which Totten claims support his opinion evidence, are no longer available for the court's examination because he said he destroyed them.

[119] In his article on the Goudge Report, “Taking a ‘Goudge’ out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13 Can. Crim. L. Rev. 135, Professor David Paciocco, now Paciocco J.A. of this court, aptly commented that courts now take what he called, and what the Goudge Report called, an evidence-based approach to the evaluation of the reliability of expert evidence. He wrote at p. 146: “In effect, the ‘trust me’ approach, once typical in Canadian courts, has been replaced by a ‘persuade me’ standard”. And near the end of his article, at p. 155, in words directly relevant to the reliability of Totten’s opinion evidence, he wrote: “…the essence of an evidence-based approach is that the tribunal be given all of the data it needs to assess the opinion it is being asked to accept. Anything less and a ‘trust me’ approach is used.”

[120] Totten’s opinion evidence asks us to trust him. He asked us to trust him that:

- In his six studies a total of 97 gang members were convicted of a homicide, even though the studies report less than 20;
- All gang members in his six studies were asked questions about tattoos, even though only two of the studies specified questions about tattoos;
- 71 male gang members in his six studies obtained a teardrop tattoo, even though none of the studies lists or even refers to a gang member wearing a teardrop tattoo, and the underlying interview data are not available; and

- All 71 male gang members obtained a teardrop tattoo to signify the killing of a rival gang member, even though none of the studies refer to the number of gang members with a teardrop tattoo, let alone each gang member's purpose in getting one, and again the underlying interview data to verify Totten's evidence are not available.

[121] The fresh evidence, in my view, shows that Totten's evidence is too unreliable to go to a jury. Because of its unreliability, its probative value and its benefit to the trial process would be minimal at best, and the prejudice and harm from admitting it would be great both because it would consume too much valuable court time and because the jury would likely be unable to effectively and critically assess the evidence. In short, the fresh evidence is so cogent that if known by the trial judge at the gatekeeper stage he would have ruled Totten's evidence on the meaning of a teardrop tattoo inadmissible.

[122] The Crown is correct that the fresh evidence does not challenge the qualitative branch of Totten's opinion – the teardrop tattoo on a young gang member could mean one of three things and one of those meanings is to signify the killing of a rival gang member. But that distinction does not help the Crown. The qualitative branch of Totten's opinion is inseparable from the quantitative branch of his opinion. The quantitative branch gives the qualitative branch the veneer of being grounded in powerful scientific data, and thus the appearance of being objectively reliable. The fresh evidence all but washes away that veneer, and with it the reliability of Totten's opinion.

[123] The Crown is also correct that on the *voir dire* in *Gager* Totten was not confronted with a good deal of the fresh evidence. And on this appeal Totten was not asked to explain any of the deficiencies and inaccuracies in his evidence and research. But the absence of any explanation from Totten cannot assist the Crown in its objection to the admissibility of the fresh evidence. The Crown did not seek leave to call Totten on the fresh evidence application. Nor did the Crown offer evidence that might explain these flaws in Totten's testimony and research revealed by the fresh evidence. These flaws remain unchallenged.

[124] Still, as Totten has not been directly confronted with some of these deficiencies and inaccuracies in his testimony and research I think it would be unfair to make the positive finding that Abbey urges us to make: Totten fabricated or concocted part of his research, or gave deliberately misleading testimony. But when assessing the reliability of Totten's opinion, I see nothing unfair in taking into account that the many serious problems in both Totten's evidence and research, which were identified by the fresh evidence, remain entirely unexplained.

[125] I conclude that the fresh evidence was sufficiently cogent that if it had been known by the trial judge, Totten's opinion evidence on the meaning of a teardrop tattoo would have been held inadmissible.

2. Would the absence of Totten's evidence about the meaning of a teardrop tattoo reasonably be expected to have affected the verdict?

[126] The Crown submits that the fresh evidence should not give this court strong reason to doubt the accuracy of the verdict against Abbey. That submission might have merit if the fresh evidence only diminished the weight the jury might give to Totten's evidence. But I have concluded the fresh evidence is sufficiently cogent that if known by the trial judge Totten's proposed expert testimony would have been ruled inadmissible. And in my view, if the Crown had been precluded from leading Totten's evidence about the meaning of a teardrop tattoo it could reasonably be expected the verdict would have been different. I say this for four reasons.

[127] The first and most obvious reason is the different results of the two trials. At the first trial, the trial judge ruled that the Crown could not lead Totten's evidence and Abbey was acquitted. At the second trial, the Crown did lead Totten's evidence about the meaning of a teardrop tattoo and Abbey was convicted.

[128] Second, the rest of the Crown's case against Abbey – which I summarized earlier in these reasons – was not overly strong. The eyewitness identification evidence was inconclusive, as was the footprint impression evidence and the cellphone tower evidence. Each of the three Malvern Crew members, Sams, Burton and Williams, did testify about their understanding of the meaning of the

teardrop tattoo, and each implicated Abbey in the murder. But their evidence was problematic. Their understanding of the meaning of a teardrop tattoo came from movies and the like, so the trial judge appropriately instructed the jury it was unreliable. Their evidence implicating Abbey in the murder was severely compromised by its inconsistencies; by each of their unsavoury pasts; in the case of Sams and Burton by the highly beneficial deals each made with the Crown in exchange for his testimony; and in the case of Williams by his refusal to testify at the second trial.

[129] Third, Totten's evidence implicating Abbey would likely have significantly influenced the jury. Totten had extensive and impressive academic, research and clinical credentials. He claimed to have special access to the secret world of street gangs and gang symbology, realms almost certainly foreign to the members of the jury. And one aspect of his evidence was especially compelling: although a teardrop tattoo could have one of three meanings in his six studies all 71 gang members who had a teardrop tattoo and had been convicted of a homicide told Totten he obtained the teardrop tattoo to signify the killing of a rival gang member. For the Crown that evidence could not be improved on.

[130] Finally, in her closing address to the jury the Crown relied on Totten's evidence. She argued:

> All of those 71, who had been convicted of murder or manslaughter and had a teardrop tattoo, said that the

> tattoo signified the killing … His [Totten's] opinion rested, in part, on the explanation given for the teardrop tattoo by all 71 of the interviewed gang members who had both tattoos and had been convicted of murder or homicide related offence. Their responses linking their teardrop tattoos with the murders of rival gang members could not have been motivated by a desire to avoid criminal liability or responsibility because they had already been convicted.

[131] And, after excluding the other two possible meanings of a teardrop tattoo, the Crown concluded this portion of her closing address by stating that Abbey had obtained a teardrop tattoo for only one reason: he believed he had killed a member of the Galloway Boys.

[132] The absence of Totten's evidence would therefore reasonably be expected to have affected the verdict at trial.

3. Does the defence's failure to adduce the fresh evidence at trial affect its admissibility on appeal?

[133] Once a party meets the first two criteria for the admissibility of fresh evidence on appeal – as Abbey has done – the court must still consider the third criterion, the due diligence criterion. The court asks whether an explanation has been offered for the failure to address the evidence at trial and whether any explanation offered affects the admissibility of the evidence on appeal.

[134] The question is important because the "interests of justice" include not just Abbey's interests but the public interest in preserving and promoting the integrity of the trial process. Even fresh evidence that could be expected to have affected

the verdict can be ruled inadmissible if no satisfactory explanation is given for not leading it at trial. On the other hand, fresh evidence may be so cogent that it should be admitted on appeal even without a satisfactory explanation for not adducing it at trial: see *Truscott (Re)*, at paras. 101-102.

[135] Here, Abbey offers no explanation for the defence's failure to adduce the fresh evidence at either trial. Instead, Abbey submits simply the fresh evidence is so cogent that not to admit it may result in a miscarriage of justice.

[136] The Crown acknowledges that the due diligence criterion will yield where its "rigid application" may result in a miscarriage of justice. Thus the Crown accepts that were we to hold that the fresh evidence showed Totten had concocted his trial testimony, we should admit the fresh evidence even absent due diligence. But I have not concluded that Totten concocted his evidence. And I take the Crown's submission to be that without a conclusion of concoction the absence of due diligence and the importance of "finality" in our criminal justice system weigh in favour of dismissing Abbey's application to introduce fresh evidence.

[137] The Crown points to a number of considerations in support of its submission:

- Almost all of the fresh evidence is not "fresh" in the sense that most of the information the Crown relied on to cross-examine Totten on the *voir dire* in *Gager* was available to Abbey's defence counsel even before the first trial;

- The defence has never complained about disclosure from the Crown or that it was denied any material it had requested;

- On appeal Abbey makes no claim of ineffective assistance of trial counsel, yet offers no explanation for the failure to adduce this evidence at either trial;

- To the contrary, defence counsel at trial made a strategic and tactical decision to cross-examine Totten in a particular way. Unlike the cross-examination of Totten in *Gager*, which was before a judge alone, defence counsel's cross-examination of Totten in this case was before a jury. Defence counsel was legitimately concerned about getting bogged down in numbers before the jury. So in his closing address he told the jury: "I don't want to put everyone to sleep … I tend to get baffled by statistics …";

- Defence counsel's approach to cross-examining Totten yielded a number of useful concessions, some of which defence counsel relied on in his closing address and some of which the trial judge pointed out in his charge to the jury; and

- Defence counsel knew from before the first trial that the reliability of Totten's data was an issue. However, twice he deliberately decided to avoid getting into the details of Totten's six studies. The defence now wants a third opportunity to cross-examine Totten and he should be denied that opportunity.

[138] The Crown's position has merit, but I cannot accept it. As I have demonstrated, the fresh evidence was so cogent that it almost entirely undermines the reliability of what seemed to be compelling statistical evidence supporting Totten's opinion on the meaning of a teardrop tattoo. The fresh evidence is at a level of cogency that not merely diminishes the weight of Totten's evidence but serves to disqualify him from giving it.

[139] Although I would order a new trial rather than enter an acquittal, to refuse to admit the fresh evidence because of a lack of due diligence would risk a miscarriage of justice. And it would risk a miscarriage of justice for a young man facing a life sentence with no eligibility for parole for 25 years. Because of the serious consequences for Abbey I think we should be reluctant before allowing the lack of due diligence to override such cogent fresh evidence.

[140] There is another reason not to give effect to the defence's lack of due diligence – and it is an important reason. Totten was the Crown's witness, a key witness for the Crown. Yet in *Gager* the Crown sought to impeach Totten's credibility and the reliability of his evidence on several matters that were relevant to his opinion in this trial. And then on this appeal the Crown made no attempt to contest the deficiencies, inaccuracies, and even falsehoods in Totten's trial testimony, as demonstrated by the fresh evidence. In saying this I intend no criticism whatsoever of Mr. Alvaro. He argued the Crown's position well with his usual candour and fairness. The same may be said for Mr. Harris' and Mr. Pillay's arguments on behalf of Abbey.

[141] But the Crown is not an ordinary litigant. Its role is not to obtain a conviction, but to try to ensure a fair process and a just result. The Crown has impeached Totten, its own key witness, albeit in another proceeding, and yet by its silence in this proceeding must be taken not to have challenged the many serious problems in Totten's trial testimony shown by the fresh evidence. In

these circumstances, it seems to me to be fundamentally unfair and unjust for the Crown to rely on Abbey's lack of due diligence to defeat his fresh evidence application.

[142] I would allow Abbey's application to admit his fresh evidence.

4. Did the trial judge err by failing to instruct the jury not to consider Totten's evidence on the timing of obtaining a teardrop tattoo?

[143] Although I conclude that Abbey is entitled to succeed on his appeal based on the fresh evidence, for the sake of completeness I will briefly address his argument on the jury charge.

[144] The trial judge's charge to the jury was impeccable. Still, Abbey contends the trial judge made one error. This contention rests on a footnote in Doherty J.A.'s judgment in *Abbey #1*. At para. 63 of his reasons, in discussing the scope of an expert's proposed opinion evidence, Doherty J.A. added the following footnote:

> Note 6: Dr. Totten's *voir dire* evidence affords an example of the need to consider different parts of the proposed opinion evidence individually. Whatever may be said about the admissibility of Dr. Totten's opinion concerning the meaning of a teardrop tattoo, his evidence as to the timing of the inscription of the tattoo (para. 51) does not seem founded either in his research or his clinical experience, but rather seems a product of what Dr. Totten thought was common sense. It may be that this aspect of Dr. Totten's evidence would not be admissible even if his main opinion was admitted.

[145] At trial Totten testified that typically a gang member who had killed a rival gang member would obtain a teardrop tattoo within six months of the killing. Abbey obtained his teardrop about four months after Peter was murdered. The defence not only did not object to this aspect of Totten's evidence, in the pre-charge conference the defence agreed with the Crown that Totten could testify about the timing of obtaining a teardrop tattoo.

[146] In his charge the trial judge did not refer to Totten's evidence on timing. Again the defence did not object or ask for a specific instruction. Now on appeal, however, Abbey submits, consistent with Doherty J.A.'s footnote, that the trial judge should have instructed the jury to ignore Totten's evidence about the timing of obtaining a teardrop tattoo. I do not accept Abbey's submission for four reasons.

[147] First, Doherty J.A.'s comment in the footnote was not mandatory. He left to the trial judge the decision whether to exclude the evidence on timing or at least instruct the jury not to consider it.

[148] Second, on my reading of Totten's testimony (and not taking into account the reliability concerns brought to light by the fresh evidence), his evidence about timing did seem to have a basis in his clinical experience.

[149] Third, Totten's evidence on timing was equivocal, as at least one part of it helped the defence. Totten testified that he would not expect a gang member to

get a teardrop tattoo where the gang member finds out shortly after the murder that the person he killed was not a rival gang member. The defence argued to the jury that Abbey would have known within four months after the murder that Peter was not a member of the Galloway Boys. Thus relying on this aspect of Totten's evidence the defence submitted that Abbey did not obtain a teardrop tattoo to signify he had killed a rival gang member.

[150] Fourth, even if the trial judge erred in not giving the instruction now asked for – and I do not concede that he did err – the error was minor and harmless. It was highly unlikely to have affected the verdict.

[151] I would not give effect to this ground of appeal.

5. What is the appropriate remedy?

[152] The choice is an acquittal or a new trial. Abbey submits that we ought to enter an acquittal. He has been in custody for nine years. And once Totten's evidence on a teardrop tattoo is excluded, the Crown's case rests principally on the dubious testimony of the three Malvern gang members, Sams, Burton and Williams.

[153] I would not give effect to Abbey's submission. In my view the appropriate order is for another new trial, as unpalatable as that order may be over 13 years after the murder. Admittedly without Totten's evidence on the meaning of a teardrop tattoo, the Crown's case is not overly strong. But it is not wholly devoid

of substance. The evidence of Sams, Burton and Williams, each implicating Abbey in the murder, remains. And I note as well, their evidence on their understanding of the meaning of a teardrop tattoo was, along with Totten's evidence, excluded at the first trial, yet held admissible by this court's 2009 judgment in *Abbey #1*, at para. 160. In the light of their evidence I cannot say that no reasonable jury, properly instructed, would convict Abbey.

[154] The Crown is entitled to retry Abbey if it wishes to do so. The interests of Abbey must be taken into account, but so too must the interests of the family of the victim, and the public interest.

E. CONCLUSION

[155] I would admit the fresh evidence, allow the appeal, set aside Abbey's conviction for first degree murder and order a new trial.

Released: "D.D." August 4, 2017

"John Laskin J.A."
"I agree. Doherty J.A."
"I agree. L.B. Roberts J.A."

822 Fed.Appx. 40 (Mem)
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

IN RE: FACEBOOK, INC.,

IPO Class Action Settlement *

John Gregory, on behalf of himself and all other similarly situated, Plaintiff, Institutional Investor Group, Banyan Capital Master Fund Ltd., Arkansas Teacher Retirement System, Fresno County Employees' Retirement Association, Avatar Securities, LLC, Meredith Bailey, on behalf of themselves and all others similarly situated, Dmitri Bougakov, on behalf of themselves and all others similarly situated, Ryan Cefalu, on behalf of themselves and all others similarly situated, Lorrain Chin, on behalf of themselves and all others similarly situated, First New York Securities L.L.C., Atish Gandhi, on behalf of themselves and all others similarly situated, Phillip Goldberg, on behalf of themselves and all others similarly situated, Eric Hamrick, on behalf of themselves and all others similarly situated, Steve Jarvis, Joe Johnson, on behalf of themselves and all others similarly situated, Nuhket Kayahan, David Kenton, on behalf of themselves and all others similarly situated, Dennis Kuhn, on behalf of themselves and all others similarly situated, Benjamin Levine, on behalf of themselves and all others similarly situated, Katerhine Loiacono, on behalf of themselves and all others similarly situated, Crystal McMahon, on behalf of themselves and all others similarly situated, George Michalitsianos, on behalf of themselves and all others similarly situated, Randy Teresa Mielke, on behalf of themselves and all others similarly situated, Jacinto Rivera, on behalf of themselves and all others similarly situated, Faisal Sami, on behalf of themselves and all others similarly situated, Sanjeev Sharma, Colin Suzman, on behalf of themselves and all others similarly situated, T3 Trading Group, LLC, Vijay Akkaraju, Alexis Alexander, as custodian for Chloe Sophie Alexander, Brian Roffe Profit Sharing Plan, Individually and on behalf of all others similarly situated, Jose Galvan, Mary Galvan, Robert Herpst, Individually, on behalf of all others similarly situated, Sanjay Israni, on behalf of themselves and all others similarly situated, KBC Asset Management NV, and the Employees' Retirement System of the Government of the Virgin Islands (Collectively, the Institutional Investors), Douglas M. Lightman, Individually and on behalf of all others similarly situated, Dennis Palkon, Individually and on behalf of all others similarly situated, Rick Pond, Jacob Salzmann, Individually and on behalf of all others similarly situated, Michael Spatz, Maren Twining, Individually and on behalf of all others similarly situated, Goldrich Cousins P.C. 401(k) Profit Sharing Plan &Trust, Irving S. Braun, Individually on behalf of all others similarly situated, Edward Childs, Derivately on Behalf of Himself and All Others Similarly Situated, Kathy Reichenbaum, Individually and on behalf of all others similarly situated, Jun Yan, on behalf of herself and all others similarly situated, Elbita Alfonso, Steve Griffis, Vicky Jones, Phyllis Peterson, Jerry Rayborn, on behalf of themselves and all others similarly situated, Edward Vernoff, Justin F. Lazard, on behalf of himself and all others similarly situated, Sylvia Gregorcyzk, on behalf of herself and all others similarly situated, Peter Brinckerhoff, Lidia Levy, on behalf of herself and all others similarly situated, Garrett Garrison, David Goldberg, individually and on behalf of all others similarly situated, Kevin Hyms, individually and on behalf of all others similarly situated, Richard P. Eannarino, Individually and on behalf of all others similarly situated, Peter Mamula, Individually and on behalf of all others similarly situated, Khodayar Amin, on behalf of himself and all others similarly situated, Elliot Leitner, individually and on behalf of all others similarly situated, Barbara Steinman, on behalf of herself and all others similarly situated, Howard Savitt, on behalf of himself and all others similarly situated, Chad Roderick, Eugene Stricker, individually and on behalf of all others similarly situated, Steve Sexton, Individually and on behalf of all others similarly situated, Keith Wise, Individually and on behalf of all others similarly situated, Jonathan R. Simon, James Chang, individually and on behalf of all others similarly situated, Sameer Ansari, individually and on behalf of all others similarly situated, Darryl Lazar, individually and on behalf of all others similarly situated, Michael Lieber, individually and on behalf of other members of the general public similarly situated, Thoma J. Ahrendtsen, Aaron M. Levine, Individually, and on behalf of all others similarly situated, Karen Cuker, individually and on behalf of all others similarly situated, Brian Gralnick, individually and on behalf of all others similarly situated, Jennifer Stokes, individually and on behalf of all others similarly situated, William Cole, Derivatively on Behalf of Facebook, Inc., Vernon R. DeMois, Jr., Individually and On Behalf of All Others Similarly Situated, Hal Hubuschman, Edward Shierry, Individually and On Behalf of All Others Similary Situated, North Carolina Department of State Treasurer, Thomas E. Nelson, individually and behalf of all others similarly situated, Janis Fleming, Gaye Jones, Holly McConnaughey, Robert Lowinger, Mark Eshehata, Stewart D. Pollack, as executor of the state of Lawrence Corneck, Rock Southward, Derivatively on Behalf of Himself & All Others Similarly Situated, Sharon Morley, Eric Rand, Paul Melton, Lynn Melton, Plaintiffs-Appellees,

v.

The Nasdaq Stock Market, LLC, a Foreign Limited Liability Company, Marc L. Andreessen, Barclays Capital Inc., Erskine B. Bowles, James W. Breyer, David A. Ebersman, Facebook, Inc., a Delaware corporation, Goldman Sachs & Co., Donald E. Graham, Reed Hastings, J.P.Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. Incorporated, David M. Spillane, Peter A. Thiel, Mark Zuckerberg, Allen & Company LLC, BMO Capital Markets Corp., Blaylock Robert Van LLC, C.L. King & Associates, Inc., Cabrera Capital Markets, LLC, CastleOak Securities, L.P., Citigroup Global Markets Inc., Cowen & Company LLC, Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., E*TRADE Securities LLC, Itau BBA USA Securities, Inc., Lazard Capital Markets LLC, Lebenthal & Co., LLC, Loop Capital Markets LLC, M.R. Beal & Company, Macquarie Capital (USA) Inc., Morgan Stanley & Co. LLC, Muriel Siebert & Co., Inc., Oppenheimer & Co. Inc., Pacific Crest Securities LLC, Piper Jaffray & Co., RBC Capital Markets LLC, Raymond James & Associates, Inc., Samuel A. Ramirez & Co. Inc., Sheryl K. Sandberg, Stifel, Nicolaus & Company, Incorporated, The Williams Capital Group, L.P., Wells Fargo Securities, LLC, William Blair & Company, L.L.C., Goldman Sachs & Co., Nasdaqomx Group, Inc., Jill D. Simon, Citigroup Global Markets Inc., Kevin Hicks, individually and on behalf of all others similarly situated, Linh Luu, individually and on behalf of all others similarly situated, Harvey Lapin, Individually and On Behalf of All Others Similarly Situated, Nick E. Tran, Nasdaq Stock Market, Incorporated, Uma M. Swaminathan, Cipora Herman, Defendants-Appellees, NASDAQ OMX Group, Inc., Lawrence Corneck, Individually and on behalf of all others similarly situated, Robert Greifeld, Anna M. Ewing, Defendants, James J. Hayes, Objector-Appellant.

18-3845

|

September 23, 2020

Appeal from a judgment of the United States District Court for the Southern District of New York (Sweet, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR PLAINTIFFS-APPELLEES: JOHN JAMES RIZIOHAMILTON (Salvatore J. Graziano, on the brief), Bernstein Litowitz Berger & Grossmann LLP, New York, NY; Thomas A. Dubbs, James W. Johnson, Thomas G. Hoffman, Jr., Labaton Sucharow LLP, New York, NY; Frank R. Schirripa, Hach Rose Schirripa & Cheverie LLP, New York, NY; Nicholas Diamand, Lieff, Cabraser, Heimann & Bernstein, LLP, New York, NY.

FOR DEFENDANTS-APPELLEES: CHARLES S. DUGGAN (James P. Rouhandeh, Andrew Ditchfield, on the brief), Davis Polk & Wardwell LLP, New York, NY; Andrew B. Clubok, Susan E. Engel, Samir Deger-Sen, Latham & Watkins LLP, Washington, DC.

FOR OBJECTOR-APPELLANT: James J. Hayes, pro se, Annandale, VA.

PRESENT: DENNIS JACOBS, GERARD E. LYNCH, RICHARD J. SULLIVAN, Circuit Judges.

***43 SUMMARY ORDER**

Objector-Appellant James J. Hayes, proceeding pro se, appeals the district court's decision approving the settlement of a multi-district securities class action. Several institutional and individual plaintiffs, on behalf of similarly situated investors, sued Facebook, Inc., several of its directors and officers, and the underwriters of Facebook's 2012 initial public offering ("IPO"), claiming that they misled investors about Facebook's revenue prior to the IPO in violation of the Securities Act of 1933 (the "Securities Act"). The district court appointed certain institutional investors as Lead Plaintiffs pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 77z-1(a)(3)(B). The district court later certified two subclasses: an institutional investor subclass and an individual retail investor subclass, and appointed certain individual plaintiffs as Class Representatives of the retail investor subclass. After years of litigation, the parties settled the action for $35 million. In August and September 2018, Hayes filed pro se objections to the settlement, primarily arguing that the Lead Plaintiffs erred in failing to raise fraud claims under the Securities Exchange Act of 1934 (the "Exchange Act") against one of the underwriter defendants, Morgan Stanley & Co. LLC. Hayes had previously contacted the Lead Plaintiffs and Class Counsel, in 2015, protesting their failure to raise Exchange Act claims in the action; counsel responded that they had declined to bring such claims for strategic reasons. The district court rejected Hayes's objections and approved the settlement in November 2018. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

A class action settlement must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). We review a district court's "determination that a settlement in a class action lawsuit is fair, reasonable, and adequate" for abuse of discretion. *McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009) (internal quotation marks omitted). In determining the procedural fairness of a settlement, a court considers whether "the settlement resulted from arm's-length negotiations," and whether class counsel "possessed the experience and ability, and ha[d] engaged in the discovery, necessary to effective representation of the class's interests." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (internal quotation marks omitted). A district court must also consider a host of other factors to assess the settlement's substantive fairness. *See McReynolds*, 588 F.3d at 804.

Here, the district court considered all the relevant factors in its thorough November 26, 2018 opinion approving the settlement. On appeal, Hayes does not challenge the court's holding that the settlement was procedurally and substantively fair. Instead, he primarily reiterates his argument that the Lead Plaintiffs and Class Counsel should have raised fraud claims against Morgan Stanley pursuant ***44** to the Exchange Act. But, as the district court correctly held, Lead Plaintiffs and Class Counsel acted well within their discretion in choosing not to raise such claims. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1080 (2d Cir. 1995) (holding that the district court did not abuse its discretion in rejecting objector's "mere proffer of the prospect of a claim" that the lead plaintiffs had not raised); *cf. Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 n.13 (2d Cir. 2004) (noting that lead plaintiffs in securities class actions "exercise control over the litigation as a whole"). Further, Hayes knew since at least October 2015 that Lead Plaintiffs were not raising Exchange Act claims, and he could have brought an individual action raising such a claim if he so wished.

Hayes also argues that there was a conflict of interest between the Lead Plaintiffs and the retail investor subclass because only the retail investor subclass could raise his proposed Exchange Act claims. As an initial matter, Hayes failed to timely raise this argument in district court, raising it for the first time in a letter filed after the settlement hearing and over a month after objections were due. Further, the Class Representatives included class members from *both* the institutional investor subclass and the individual retail subclass. In any event, our Court has previously held that the presence of potential claims under both Exchange Act and Securities Act claims in the same action does not create a "fundamental conflict." *See* *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009); *see also* *Hevesi*, 366 F.3d at 82, 82 n.13 (holding that district courts are not required to choose lead plaintiffs that have standing to sue "on every available cause of action" because requiring "a different lead plaintiff [to] be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff—namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole").

Finally, Hayes argues, for the first time on appeal, that the Lead Plaintiffs lacked standing to raise their Securities Act claims. But the argument is meritless because the Lead Plaintiffs sufficiently alleged that they had purchased Facebook stock, the defendants' misleading statements resulted in a decline of that stock's value, and that injury was redressable through damages under the Securities Act. *See* *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 158, 164–65 (2d Cir. 2012) (finding that such a showing satisfied standing requirements).

We have considered all of Hayes's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

822 Fed.Appx. 40 (Mem)

Footnotes

* For the purposes of this summary order, the above caption has been shortened. The full caption is attached as Addendum A.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Indiana State Dist. Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc., E.D.Ky., October 12, 2007

366 F.3d 70
United States Court of Appeals,
Second Circuit.

Alan G. HEVESI, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems and as Trustee of the New York State Common Retirement Fund, The Fresno County Employees' Retirement Association, The County of Fresno, and HGK Asset Management, Inc., on behalf of purchasers and acquirers of all WorldCom, Inc. publicly traded securities during the period beginning April 29, 1999 through and including June 25, 2002, Plaintiffs–Respondents,
v.
CITIGROUP INC., Citigroup Global Markets Inc. f/k/a/ Salomon Smith Barney Inc., and Jack Grubman, Defendants–Petitioners,
ABN Amro, Inc., Banc of America Securities LLC, Blaylock & Partners, L.P., BNP Paribas Securities Corp., Caboto Sim S.P.A. (f/k/a/ Caboto Holding Sim S.P.A.), Chase Securities Inc. LLC (n/k/a/ J.P. Morgan Securities Inc.), Credit Suisse First Boston LLC (f/k/a/ Credit Suisse First Boston Corporation), Deutsche Banc Alex. Brown, Inc. (n/k/a/ Deutsche Bank Securities, Inc.), Fleet Securities, Inc., Goldman, Sachs & Co., J.P. Morgan Chase & Co., Lehman Brothers Inc., Mizuho International PLC, Tokyo–Mitsubishi International PLC, UBS Warburg LLC, Utendahl Capital Partners, L.P., and WestLB AG (f/k/a/ Westdeutsche Landesbank Girozentrale), Underwriter–Related Defendants–Petitioners, Bernard Ebbers, Scott Sullivan, David Myers, Buford Yates, Jr., James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbitt, Francesco Galesi, Clifford Alexander, Stiles A. Kellett, Jr., Gordon S. Macklin, John A. Porter, Bert C. Roberts, Jr., John W. Sidgmore, Lawrence C. Tucker, Arthur Andersen LLP, Defendants.

Nos. 03–8044, 03–8045.
|
Submitted: Dec. 5, 2003.
|
Order Filed: Dec. 31, 2003.
|
Opinion Filed: May 7, 2004.

Synopsis
Background: State-employee pension fund, as lead plaintiff for proposed class of investors, brought securities fraud action against corporation, its officers, directors, auditors, underwriting syndicates, and its most influential outside analyst and his investment bank. The United States District Court for the Southern District of New York, 219 F.R.D. 267, Cote, J., certified class. Analyst, bank, and underwriting syndicates sought leave to bring interlocutory appeal.

Holdings: The Court of Appeals, Jose A. Cabranes, Circuit Judge, held that:

bank and analyst could bring interlocutory appeal based on novel legal question, namely applicability of fraud-on-the-market doctrine to analyst's opinions without proof of opinions' effect on market prices, but

underwriters could not bring interlocutory appeal based on theory that pension fund had not been subjected to scrutiny required by Private Securities Litigation Reform Act (PSLRA), or any other theory.

Petitions granted in part.

Attorneys and Law Firms

***73** Jay B. Kasner (Susan L. Saltzstein, Cyrus Amir–Mokri, Steven J. Kolleeny, of counsel), Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, for Underwriter–Related Defendants–Petitioners.

Martin London (Richard A. Rosen, Brad S. Karp, Eric S. Goldstein, Walter Rieman, Marc Falcone, Joyce S. Huang, of counsel), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, N.Y. (Louis R. Cohen, Robert B. McCaw, Seth P. Waxman, Peter K. Vigeland, of counsel, Wilmer, Cutler & Pickering, New York, NY), for Defendants–Petitioners

Citigroup Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., and Jack Grubman.

Leonard Barrack (Gerald J. Rodos, Jeffrey W. Golan, Mark R. Rosen, Jeffrey A. Barrack, Pearlette V. Toussant, of counsel), Barrack, Rodos & Bacine, Philadelphia, PA, (Max W. Berger, John P. Coffee, Steven B. Singer, C. Chad Johnson, Beata Gocyk–Farber, Jennifer L. Edlind, John Browne, of counsel, Bernstein Litowitz Berger & Grossman LLP, New York, NY) for Plaintiffs–Respondents.

Before: OAKES, CABRANES, and SACK, Circuit Judges.

Opinion

JOSE A. CABRANES, Circuit Judge.

These petitions ask us to decide whether two groups of defendants should be permitted, pursuant to Federal Rule of Civil Procedure 23(f), to file an interlocutory appeal from an order of the United States District Court for the Southern District of New York (Denise Cote, *Judge*) certifying a plaintiff class. One group of defendants—Citigroup, its affiliate Salomon Smith Barney ("SSB"), and SSB research analyst Jack Grubman (collectively, "Citigroup Defendants")—argue that an interlocutory appeal should be permitted because the District Court, for the first time in the class certification context, extended the fraud-on-the-market doctrine of *Basic Inc. v. Levinson,* 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), to opinions expressed by a research analyst. A second group defendants—underwriters of WorldCom, Inc. ("WorldCom") bonds (collectively, the "Underwriters")—argue that an interlocutory appeal should be permitted because, *inter alia,* the District Court certified a class of stockholders and bondholders even though the only class representatives who have standing to bring an action on behalf of the bondholders have not been subjected to the lead plaintiff scrutiny of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u–4 (2000).

On December 31, 2003, we entered an order granting the Citigroup Defendants' petition and denying the Underwriters' petition. This opinion explains that ruling.

BACKGROUND

The following basic facts are drawn principally from the District Court's Opinion and Order of October 24, 2003. *See* *In re Worldcom, Inc. Sec. Litig.,* 219 F.R.D. 267 (S.D.N.Y.2003) ("Class Opinion"). Further detail is provided in that opinion and in other opinions of the District Court.

On June 25, 2002, WorldCom issued the first of several announcements that its certified financial results had to be restated. By late July 2002, WorldCom had filed the largest bankruptcy in United States history. *Id.* at 273–74.

On April 30, 2002, even before the restatement announcements, the first securities class action against WorldCom and numerous other defendants had been filed in the United States District Court for the ***74** Southern District of New York. Subsequent securities actions related to WorldCom's collapse were assigned to the Southern District of New York by the Judicial Panel on Multi–District Litigation, and transferred to that District for pre-trial proceedings. [1] By order dated August 15, 2002, the securities class actions in the Southern District were consolidated under the caption *In re Worldcom, Inc. Securities Litigation* ("Securities Litigation"). *See Albert Fadem Trust v. Worldcom, Inc.,* No. 02 Civ. 3288, 2002 WL 31059859, at *1 (S.D.N.Y. Aug 15, 2002). In the same order, the District Court appointed the New York State Common Retirement Fund ("NYSCRF") as lead plaintiff in the Securities Litigation. *Id.* at *3. NYSCRF had purchased WorldCom stock, WorldCom MCI tracking stock, and WorldCom debt securities, and lost over $300 million from those investments.

On October 11, 2002, NYSCRF filed a Consolidated Amended Complaint (the "Complaint"). The Complaint added HGK Asset Management, Inc. ("HGK"), the County of Fresno, California ("Fresno"), and the Fresno County Employees' Retirement Association ("FCERA") as named plaintiffs in the putative class action. Each of these additional named plaintiffs, unlike NYSCRF, purchased bonds in massive WorldCom bond offerings on May 24, 2000 and May 15, 2001 (the "2000 and 2001 Offerings").

In the Complaint, the plaintiffs asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77a *et seq.,* on behalf of purchasers of WorldCom bonds who relied on registration statements for the 2000 and 2001 Offerings. The plaintiffs also asserted claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78a *et seq.,* on behalf of purchasers of publicly traded securities of WorldCom from April 29, 1999 to June 25, 2002 (the "Class Period"). The

Complaint named numerous defendants, including former WorldCom executive officers, WorldCom's former directors, the Underwriters, WorldCom's former accountants, and the Citigroup Defendants.

The Complaint alleges that the Underwriters failed to conduct proper due diligence in connection with the 2000 and 2001 Offerings. The Complaint alleges further that the Citigroup Defendants had a close and self-serving relationship with WorldCom and its executives from which both sides derived substantial benefit. Specifically, plaintiffs allege that WorldCom benefitted from Jack Grubman's relentlessly positive, but materially false, research reports about the company while SSB and Grubman were well remunerated for their support of WorldCom with investment banking business. By Opinion and Order dated May 19, 2003, the defendants' motions to dismiss the claims in the Complaint were largely denied. *See* *In re WorldCom, Inc. Sec. Litig.,* 294 F.Supp.2d 392 (S.D.N.Y.2003).

On June 4, 2003, NYSCRF and the three additional named plaintiffs moved for certification of a plaintiff class consisting of all persons and entities who purchased or otherwise acquired publicly traded debt or equity securities of WorldCom during the Class Period and who were injured thereby. On October 24, 2003, the District Court granted the class motion, and certified NYSCRF, HGK, Fresno, and FCERA as class representatives.

***75** On November 12, 2003, the Citigroup Defendants and the Underwriters petitioned this Court for permission to appeal the District Court's order granting class certification. The Citigroup Defendants argued that the District Court erred in applying the "fraud-on-the-market" doctrine of *Basic Inc. v. Levinson,* 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), under which the element of reliance on alleged misrepresentations is presumed, to expressions of opinion by a research analyst. According to the Citigroup Defendants, because reliance must be proved individually if the "fraud-on-the-market" doctrine is not applied, class issues do not predominate, and a class may not be certified under Federal Rule of Civil Procedure 23(b)(3). [2]

The Underwriters offered three separate arguments in support of their petition: First, they contended that the District Court erred when it certified a class that includes bondholders even though NYSCRF, the sole lead plaintiff under the PSLRA, did not purchase any bonds in the 2000 or 2001 Offerings. Second, they asserted that the three additional named plaintiffs are inadequate class representatives because their fee arrangements with counsel do not require them to pay their *pro rata* share of the total litigation costs. Third, they argued that because some of the bondholders asserting claims against the Underwriters with respect to the 2000 Offering purchased their securities more than one year after that offering, these bondholders will bear the burden of proving reliance on the registration statement that accompanied the offering, [3] and class issues do not predominate.

On December 31, 2003, we entered the following order granting the Citigroup Defendants' petition and denying the Underwriters' petition:

> The petition of Citigroup Inc., Citgroup Global Markets Inc. F/K/A/ Salomon Smith Barney Inc., and Jack Grubman for permission to appeal pursuant [to] Federal Rule of Civil Procedure 23(f) is hereby granted. The petition of the underwriter-related defendants for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f) is hereby denied. An opinion explaining this Court's ruling will follow. The Clerk is directed to schedule this appeal on an expedited basis and assign it to a merits panel in the normal course.

This is the opinion to follow.

DISCUSSION

A. Rule 23(f)

Federal Rule of Civil Procedure 23(f) provides that:

> ***76** [a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made

> to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed.R.Civ.P. 23(f). In applying Rule 23(f), courts of appeals enjoy "unfettered discretion" to grant or deny permission to appeal based on "any consideration that the court of appeals finds persuasive." Fed.R.Civ.P. 23(f), advisory committee's notes.

In *In re Sumitomo Copper Litigation,* 262 F.3d 134 (2d Cir.2001), we articulated the following standard for determining when leave to appeal under Rule 23(f) should be granted:

> [P]etitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate *either* (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, *or* (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution. [4]

Id. at 139 (emphases added).

Sumitomo involved a class action alleging that various defendants conspired to manipulate the prices of copper futures contracts in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.,* the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(a)(2), and New York law. *Id.* at 136. En route to certifying a class consisting of copper futures contract traders injured by the defendants' alleged conspiracy, the district court concluded that the "fraud-on-the-market" doctrine could be used to satisfy the reliance requirement of a common-law fraud claim under New York law. *Id.* at 142. We denied the defendants' petition to appeal that ruling under Rule 23(f). We determined first that, for reasons not relevant here, the petitioners had not made "a substantial showing that the district court's decision to grant certification is questionable." *Id.* at 140. We then determined that the petitioners had not raised a significant legal question that required immediate resolution. *Id.* at 142. Although we recognized that the "uncertainty of the [fraud-on-the-market issue] tips in favor of a grant of interlocutory review," *id.* at 143, we nevertheless denied the petition on the grounds that (1) the defendants had not shown that the district court's ruling could not be fully reviewed after final judgment, *id.* at 142, and (2) "the [fraud-on-the-market] issue [was] insufficiently connected to the district court's certification order," *id.* at 143. The connection between the fraud-on-the-market issue and the certification order was lacking because "[e]ven if the ... defendants were to prevail on the issue, it would not alter the district court's grant of certification with respect to the plaintiffs' RICO and CEA claims, and *arguably* would not [even] alter the district court's grant of certification with respect to the common-law fraud claim." *Id.* (emphasis added and citation omitted).

There are just two published decisions of this Court applying the standard set ***77** forth in *Sumitomo, see In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 132 n. 3 (2d Cir.2001); *Nat. Asbestos Workers Med. Fund v. Phillip Morris, Inc.,* 270 F.3d 984, 984 (2d Cir.2001), and no decisions that have applied the standard in anything other than summary fashion. Accordingly, we take this opportunity to explain why, under the framework laid out in *Sumitomo,* we have exercised our broad discretion to grant the Citigroup Defendants' Rule 23(f) petition and to deny the Underwriters' petition.

B. The Citigroup Petition

In our view, the Citigroup Defendants' petition falls within the second category of appealable decisions identified in *Sumitomo,* because the certification order "implicates a legal question about which there is a compelling need for immediate resolution." *Sumitomo,* 262 F.3d at 139. That question is whether a district court may certify a class in a suit against a research analyst and his employer, based on the fraud-on-the-market doctrine, without a finding that the analyst's opinions affected the market prices of the relevant securities. The fraud-on-the-market doctrine, as described by the Supreme Court in *Basic v. Levinson,* creates a rebuttable presumption that (1) misrepresentations by an issuer affect the price of securities traded in the open market, and (2) investors rely on the market price of securities as an accurate measure of their intrinsic value. *See* *Basic,* 485 U.S. at 245–47, 108 S.Ct. 978; *accord, e.g.,* *In re Ames Dep't Stores Inc. Stock Litig.,* 991 F.2d 953, 967 (2d Cir.1993). This presumption, if unrebutted, thus allows plaintiffs to satisfy the element of reliance in securities fraud claims under the 1934 Act. As the District Court explained, the doctrine "arose as a practical response to the difficulties of proving direct reliance in the context of modern securities markets, where impersonal trading rather than a face-to-face transaction is the norm." *Class Opinion,* 219 F.R.D. at 291. Although the fraud-on-the-market doctrine clearly applies to statements made by *issuers,* as in *Basic,* we have never addressed whether it also applies to reports by *analysts.*

"[A] novel legal question will not compel immediate review unless it is of fundamental importance to the development of the law of class actions and it is likely to escape effective review after entry of final judgment." *Sumitomo,* 262 F.3d at 140. Although we did not grant the defendants' Rule 23(f) petition in *Sumitomo,* we suggested in that decision that a district court's extension of the fraud-on-the-market doctrine should, in some circumstances, be reviewed on an interlocutory basis. *See id.* at 142–43 (noting that the uncertainty surrounding whether the "fraud-on-the-market" doctrine could be applied to common-law fraud claims "tips in favor of a grant of interlocutory review"). Similarly, in *West v. Prudential Securities, Inc.,* 282 F.3d 935, 937 (7th Cir.2002), the Seventh Circuit concluded that a district court's application of the fraud-on-the-market doctrine to a stockbroker's statements to his customers "present[ed] a novel and potentially important question of law." *Cf.* *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 165 (3d Cir.2001) (granting Rule 23(f) petition where certification decision raised "fundamental questions about what type of private securities claims merit class certification").

The application of the fraud-on-the-market doctrine in a novel context can have a significant effect on the law of class actions because the presumption of reliance created by the doctrine is often essential to class certification in securities suits. Reliance is an element of securities fraud claims under the 1934 Act. *See, e.g.,* *Harsco* ***78** *Corp. v. Segui,* 91 F.3d 337, 342 (2d Cir.1996). To the extent that members of a plaintiff class of securities purchasers can invoke the *Basic* presumption by alleging fraud on the market, they need not prove individual reliance on alleged misrepresentations by an issuer. By contrast, if plaintiffs are not entitled to the *Basic* presumption because they cannot plead fraud on the market, reliance must be proved separately as to each class member, and common issues may not predominate over individual issues. *See* *Basic,* 485 U.S. at 242, 108 S.Ct. 978 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action [under Fed.R.Civ.P. 23(b)(3)], since individual issues then would have overwhelmed the common ones.").

Based on the close connection between the *Basic* presumption and the requirement that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," Fed.R.Civ.P. 23(b)(3), the Seventh Circuit in *West* reversed a district court's order certifying a class consisting of all purchasers of Jefferson Savings Bancorp stock during the period when a stockbroker was falsely telling his clients that Jefferson would be acquired. *West,* 282 F.3d at 940. The Court determined first that the *Basic* presumption could not be applied to a stockbroker's statements to his customers because "[t]he district court did not identify any causal link between non-public information and securities prices, let alone show that the link is as strong as the one deemed sufficient (by a bare majority) in *Basic*.... " *Id.* at 938. Having determined that the *Basic* presumption could not be applied in the absence of such a causal link, the Court then concluded that common issues did not predominate and the certification decision could not stand. *See id.* (explaining that "[a] district judge may not duck hard questions [at the certification stage] by observing that each side has some support").

Here, in certifying a class over the Citigroup Defendants' objections, Judge Cote applied the fraud-on-the-market doctrine to an analyst's expression of opinion as opposed to an issuer's statement of fact. In so doing, Judge Cote declined to "wade into th[e] battle of the experts" as to the existence of a causal link between Grubman's analyst reports and movements in the price of WorldCom securities; instead, Judge Cote credited the plaintiffs' allegation that Grubman's statements of opinion changed the prices of WorldCom securities during the Class Period.[5] Class Opinion, 219 F.R.D. at 299–300 & n. 42. Thus, like the district court in *West,* the District Court in the instant case has applied the fraud-on-the-market doctrine in a novel context[6] without identifying a causal link ***79** between the statements at issue and the price of securities.

The Citigroup Defendants contend that the *Basic* presumption may not be extended to analyst research reports without a specific finding by the District Court that the analysts' misrepresentations actually affected the price of securities traded in the open market. In support of this contention, the Citigroup Defendants point out that Federal Rules of Civil Procedure 23(b)(3) requires "findings" by the District Court. *See* Fed.R.Civ.P. 23(b)(3) (allowing an action to be maintained "as a class action" only if "the court *finds* that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" (emphasis added)). They argue that by extending the *Basic* presumption to opinions expressed by an analyst without any "finding" that the analyst's statements affected market prices, the District Court ignored a crucial distinction between, on the one hand, the uniquely authoritative statements of issuers and, on the other hand, expressions of opinion by analysts. According to the Citigroup Defendants, in light of the direct connection between the *Basic* presumption and the certification criteria in Rule 23(b)(3), the mere allegation that an analyst's statement affected the price of securities traded in the market must be thoroughly tested at the certification stage.

We need not decide what evidentiary showing, if any, the plaintiffs must make at the class certification stage in order to benefit from the *Basic* presumption in an action against research analysts and their employers. For the purposes of this petition, we simply observe that the Citigroup Defendants have offered a substantial legal argument in support of their position.[7] We also note that, like in *West* but unlike in *Sumitomo,* the District Court's extension of the fraud-on-the-market doctrine in the instant case is closely connected to its certification decision, because, in order to recover from the Citigroup Defendants, each class member will have to prove reliance on one or more of Grubman's statements of opinion—either individually or with the benefit of the *Basic* presumption.[8] ***80** Finally, it is our view that the issue presented in this case is not only novel but also significant, because the application of the fraud-on-the-market doctrine to opinions expressed by research analysts would extend the potentially coercive effect of securities class actions to a new group of corporate and individual defendants—namely, to research analysts and their employers.[9] Based on these considerations, we conclude that the Citigroup Defendants have presented an issue that is "of fundamental importance to the development of the law of class actions," *Sumitomo,* 262 F.3d at 140.

We also conclude that, in the circumstances presented, the District Court's decision to apply the *Basic* presumption at the certification stage "is likely to escape effective review after entry of final judgment." *Id.* As the Seventh Circuit noted in *West,* "very few securities class actions are litigated to conclusion, so review of [a] novel and important legal issue [concerning the scope of the *Basic* presumption] may be possible only through the Rule 23(f) device." *West,* 282 F.3d at 937. Moreover, numerous courts and scholars have warned that settlements in large class actions can be divorced from the parties' underlying legal positions. *See id.* ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal."); *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 148 (2d Cir.2001) (Jacobs, J., dissenting) ("One sound basis for granting jurisdiction under Rule 23(f) is ... the circumstance that the class certification 'places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability.' " (quoting *Newton v. Merrill Lynch,* 259 F.3d 154, 164 (3d Cir.2001)))[10]; *see* ***81** *also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497 (1991).

These concerns about the effect of class certification weigh heavily in the instant case, which "arises from the largest corporate fraud and accounting scandal in United States history." (Compl.¶ 1) This is not the run-of-the-mill class action, or even the run-of-the-mill securities class action. As the District Court noted, "WorldCom issued billions of shares and billions of dollars of debt securities during the Class Period, and it is uncontested that tens of thousands of investors are putative class members." Class Opinion, 219 F.R.D. at 280. Reflecting on the large number of parties to this litigation, as well as the staggering amount of money to which the class members could be entitled after final judgment, the

District Court observed that "however deep the pockets of the defendants, the losses suffered through the WorldCom debacle are greater." *Id.* at 304. Based on this extraordinary observation, coming from a seasoned district judge who is intimately familiar with the pleadings and the record, it is hard to conceive of many cases that are less likely than the instant case to yield an appealable final judgment. With that in mind, we conclude that the novel question presented in this case is not only legally significant but also "likely to escape effective review after entry of final judgment." *Sumitomo,* 262 F.3d at 140.

C. The Underwriters' Petition

In contrast to the Citigroup Defendants' petition, the Underwriters' petition does not present legal questions that meet the criteria for interlocutory review laid out in *Sumitomo.* Accordingly, the Underwriters will have to wait until there is an appealable final judgment before they can challenge the certification order.

The Underwriters' first argument is that the class cannot be certified because the additional named plaintiffs have not been subjected to lead plaintiff scrutiny under the PSLRA. That statute requires a district court to appoint a person or persons to serve as lead plaintiff before proceeding with the adjudication of a private suit under the federal securities laws. Two objective factors inform the district court's appointment decision: the plaintiffs' respective financial stakes in the relief sought by the class, and their ability to satisfy the requirements of Rule 23. *See* 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I). [11] According to the Underwriters, NYSCRF does not meet the typicality requirement of Rule 23(a) [12] because it did not purchase ***82** bonds in either the 2000 or the 2001 offering and therefore lacks standing to sue the petitioners under Sections 11 and 12 of the 1933 Act on behalf of WorldCom bondholders. Moreover, in the Underwriters' view, NYSCRF's deficiencies as a lead plaintiff cannot be cured through the appointment of three named plaintiffs who have not satisfied the rigors of the PSLRA's lead plaintiff scrutiny.

In rejecting these arguments, the District Court determined (1) that the participation of FCERA, Fresno, and HGK as named plaintiffs and proposed class representatives "ensures that the litigation will continue to focus on the claims raised by bondholders, and that there are representatives of the Class with claims typical of purchasers of both types of securities," and (2) that NYSCRF is a suitable lead plaintiff because its claims "are based on misrepresentations in the Registration Statements and on the same core course of conduct at issue in the Sections 11 and 12 claims." *Class Opinion,* 219 F.R.D. at 281. These determinations, which are part and parcel of the District Court's management of the consolidated class action, are not proper subjects for Rule 23(f) review. *Cf.* Fed.R.Civ.P. 23(f), advisory committee's notes (explaining that "[p]ermission [to appeal under Rule 23(f)] is most likely to be granted when the certification decision turns on a novel or unsettled question *of law* " (emphasis added)).

In an attempt to fit their arguments into one of the categories identified in *Sumitomo,* the Underwriters propose that we adopt a *per se* rule that a class may not be certified where a lead plaintiff does not have standing to bring every available claim and none of the named plaintiffs who have standing to bring the additional claims has been vetted under the PSLRA. This *per se* rule has little to recommend it. Nothing in the PSLRA indicates that district courts must choose a lead plaintiff with standing to sue on every available cause of action. Rather, because the PSLRA mandates that courts must choose a party who has, among other things, the largest financial stake in the outcome of the case, it is inevitable that, in some cases, the lead plaintiff will not have standing to sue on every claim. *See* *In re Initial Pub. Offering Sec. Litig.,* 214 F.R.D. 117, 123 (S.D.N.Y.2002) ("[T]he fact that the lead plaintiff is to be selected in accordance with objective criteria that have nothing to do with the nature of the claims ... strongly suggests the need for named plaintiffs in addition to any lead plaintiff."). [13] In those cases, just as a class representative can establish the requisite typicality under Rule 23 if the defendants "committed the same wrongful acts in the same manner against all members of the class," ***83** *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 208 (S.D.N.Y.1995) (internal quotation marks omitted), so too can lead plaintiffs.

Moreover, the PSLRA does not in any way prohibit the addition of named plaintiffs to aid the lead plaintiff in representing a class. *See* Class Opinion, 219 F.R.D. at 286 ("Although the lead plaintiff must 'otherwise satisfy the requirements of Rule 23,' nothing in the text of the PSLRA indicates that every named plaintiff who satisfies the requirements of Rule 23 must also satisfy the criteria established under the PSLRA for appointment as lead plaintiff and actually be appointed as a lead plaintiff."); *In re Oxford Health Plans, Inc. Sec. Litig.,* 191 F.R.D. 369, 380–81 (S.D.N.Y.2000) ("The Court believes on reflection that it probably has the power to designate a Class Representative under Rule 23 who is not a Lead Plaintiff, simply because there is nothing in the statute which prevents it."). Based on this silence in the text of the statute, along with the statement in the Conference Report on the PSLRA that "[t]he provisions of the bill relating to the appointment of a lead plaintiff are not intended to affect current law with regard to challenges to the adequacy of the class representative or typicality of the claims among the class," Conf. Rep. No. 104–369, at 34, *reprinted in* 1995 U.S.C.C.A.N. 730, 733, there is no reason to believe that the PSLRA altered the preexisting standard by which class representatives are evaluated under Rule 23.

For all of these reasons, the Underwriters have not made a "substantial showing that the district court's decision" to name HGK, Fresno, and FCERA as class representatives "is questionable." *Sumitomo,* 262 F.3d at 139. They also have not shown that the District Court's decision implicates a "legal question about which there is a compelling need for immediate resolution." *Id.* First, as noted above, the District Court's determination that the addition of three named plaintiffs would help the lead plaintiff represent the interests of the class as a whole was not a legal decision that we review *de novo;* instead, it was a managerial judgment that is entitled to deference. *See* Fed.R.Civ.P. 23(d) (granting broad discretion to district courts to "make appropriate orders" in order to facilitate management of class actions); *Parker v. Time Warner Entm't Co.,* 331 F.3d 13, 28 (2d Cir.2003) (Newman, J., concurring) (discussing district courts' broad discretion to adopt procedural innovations in order to facilitate management of class actions). Moreover, even if the Underwriters have managed to contrive a "legal question" by proposing that we announce a *per se* rule against named plaintiffs such as HGK, Fresno, and FCERA, that question is not "of fundamental importance to the development of the law of class actions," *Sumitomo,* 262 F.3d at 140, because, among other things, we perceive no substantial legal argument in support of such a *per se* rule.

The other determinations of the District Court challenged by the Underwriters also do not meet the criteria for an interlocutory appeal under Rule 23(f). The Underwriters argue that the three additional named plaintiffs are inadequate class representatives because they have not agreed to assume ultimate responsibility for a portion of the litigation costs incurred in prosecuting this class action, in alleged violation of Disciplinary Rule 5–103 of the New York Lawyer's Code of Professional Responsibility. That Rule provides that an attorney may only advance or guarantee the expenses of litigation "provided the client remains ultimately liable for such expenses." N.Y. Comp.Codes R. & Regs. tit. 22, § 1200.22(b)(1). In rejecting this argument, the District Court noted that, in managing class actions, "strong federal interests require that the repayment ***84** of expenses provision in DR 5–103 be disregarded" and that "the underlying goal of DR 5–103—that litigation be controlled by the client, not the attorney—remains fully protected" by the procedures established by Rule 23. Class Opinion, 219 F.R.D. at 284. The Court also found that "[t]here is no indication that the assumption by their attorneys of the financial risk of litigation has diminished NYSCRF's diligence in supervising the lawsuit." *Id.* at 286. We are not well positioned to second-guess these largely managerial decisions of the District Court, and we decline to use Rule 23(f) for that purpose.

Finally, the Underwriters argue that, under the 1933 Act, some of the bondholders asserting claims with respect to WorldCom's 2000 Offering will have to show individualized reliance on the registration statement in question, because these plaintiffs purchased their securities "after the issuer ... made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. § 77k(a). According to the Underwriters, if some of the plaintiffs will have to prove individual reliance with respect to even one of the bond offerings, common questions do not predominate.

The District Court rejected this argument on several grounds: First, the Court explained that "any 'earning statement' under Section 11 must comply with the governing SEC regulations. It must include, for instance, such 'material information as is necessary to make the required statements, in the light of the circumstances under which they are made, not misleading,' and be prepared 'in accordance with generally accepted accounting principles.' " Class Opinion, 219 F.R.D. at 293 (quoting 17 C.F.R. § 210.4–01(a)). The Court went on to conclude that because WorldCom admitted that its financial statements for the years 1999 through the first quarter of 2002 grossly overstated the company's income, these statements could not be considered "earning statements" for the purposes of Section 11. *See id.* at 294 ("It would be illogical indeed if any filing—no matter how inaccurate or misleading, and despite its perpetuation of the very misrepresentations at stake in the Section 11 claim—were sufficient to shift the burden to the plaintiffs to establish reliance on the Registration Statement.").

As an alternative basis for rejecting the Underwriters' predominance argument, the District Court concluded that "even if an admittedly flawed WorldCom SEC filing were considered an 'earning statement' for purposes of Section 11 ..., issues common to the class would continue to predominate." *Id.* The Court concluded first that "[t]he fraud on the market presumption should apply to the plaintiffs' Section 11 claims, just as it does to the Section 10(b) claims." *Id.* The Court then found that, *regardless* of whether the fraud-on-the-market presumption were applied to Section 11 claims, "common questions would [still] predominate." *Id.*

In light of Judge Cote's last determination—namely, that common issues would predominate *even if* some of the plaintiffs could not benefit from the *Basic* presumption with respect to one of the registrations statements at issue, Class Opinion, 219 F.R.D. at 294—we decline to consider the reliance issue presented by the Underwriters on an interlocutory basis. Like the reliance issue presented in *Sumitomo,* the reliance issue presented by the Underwriters in the instant case is "insufficiently connected to the district court's certification order." *Sumitomo,* 262 F.3d at 143. In *Sumitomo,* the reliance issue was insufficiently connected to the certification order because most of the plaintiffs' claims ***85** did not require proof of reliance and, moreover, imposing the burden of proof on plaintiffs "arguably" would not have altered the grant of certification even with respect to the plaintiffs' common law fraud claim. *Id.* Here, the District Court found that common issues would continue to predominate even if some of the plaintiffs need to prove individualized reliance, and that determination is entitled to deference. *See* *Sumitomo,* 262 F.3d at 139 (noting "our longstanding view that the district court is often in the best position to assess the propriety of the class and has the ability, pursuant to Rule 23(c)(4)(B), to alter or modify the class, create subclasses, and decertify the class whenever warranted"). Accordingly, it is more than "arguable" that imposing the burden of proof on some of the plaintiffs with respect to reliance on the 2000 Offering would not alter the District Court's grant of certification. [14]

CONCLUSION

For the reasons stated, we exercise our discretion to grant the Citigroup Defendants' petition for leave to appeal the certification order and to deny the Underwriters' petition.

All Citations

366 F.3d 70, Fed. Sec. L. Rep. P 92,815, 58 Fed.R.Serv.3d 415

Footnotes

1 WorldCom sought Chapter 11 protection in the Southern District of New York on July 21, 2002. Once WorldCom filed for bankruptcy, the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, took effect, preventing litigation against WorldCom from going forward. Thus, the actions have proceeded against the numerous defendants besides WorldCom.

2 Federal Rule of Civil Procedure 23(b)(3) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: the court finds that the *questions of law or fact common to the members of the class predominate over any questions affecting only individual members,* and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already

commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3) (emphasis added).

3 The Securities Act of 1933 requires purchasers to show reliance on a registration statement if they "acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. § 77k(a).

4 Despite laying out this two-part test, we emphasized in *Sumitomo* that the Rule 23(f) standard is a flexible one that should not be reduced to any bright-line rules. *See* *In re Sumitomo Copper Litig.,* 262 F.3d 134, 140 (2d Cir.2001) (leaving open the possibility that "a petition failing to satisfy either of the [alternative] requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal").

5 It would not be precisely accurate to say that Judge Cote simply *accepted* the allegations in the Complaint as true for the purposes of the class certification motion. Rather, she stated that "SSB Defendants have not sufficiently shown that [their expert's] analysis will succeed in rebutting the presumption of reliance such that it is appropriate to conclude that there will be no such presumption at trial and that individual issues will come to predominate over common ones." 219 F.R.D. at 300. Judge Cote also observed, based on Grubman's $20 million per year salary and his research reports that were highly favorable to WorldCom, that "it comports with both common sense and probability to apply the presumption here." *Id.* at 299. However, Judge Cote did not state what standard of proof, if any, the plaintiffs were required to meet at the class certification stage with respect to the *Basic* presumption.

6 Although the fraud-on-the-market doctrine has been invoked to reject motions to dismiss complaints brought against research analysts, *see* *Demarco v. Lebman Bros.,* 309 F.Supp.2d 631, 636, 2004 WL 602668, at *3 (S.D.N.Y. 2004) (Rakoff, J.) (on a motion to dismiss, declining to exempt analyst reports from the fraud-on-the-market doctrine as a matter of law); *DeMarco v. Robertson Stephens Inc.,* No. 03 Civ. 590, 318 F.Supp.2d 110, 120, 2004 WL 51232, at *7 (S.D.N.Y. Jan.9, 2004) (Lynch, J.) (same); *In re Credit Suisse First Boston Corp. Sec. Litig.,* No. 97 CIV. 4760, 1998 WL 734365, at *8 (S.D.N.Y. Oct.20, 1998) (Koeltl, J.) (same); *In re WRT Energy Sec. Litig.,* No. 96 CIV. 3610, 1997 WL 576023, at *11 (S.D.N.Y. Sept.15, 1997) (Keenan, J.) (same), it has not previously been invoked at the class certification stage. On motions to dismiss, of course, courts are required to assume the truth of well-pleaded allegations, including allegations that an analyst's misrepresentations affected the market price of securities.

7 We note that at least one prominent scholar of federal securities law, Professor Coffee of Columbia Law School, has opined that analyst opinions should be treated differently from issuer statements. *See* John C. Coffee, Jr., *Security Analyst Litigation,* N.Y.L.J. Sept. 20, 2001, at 5 ("Only in a case where the publication of the [analyst] report clearly moved the market in a measurable fashion would the 'fraud on the market' doctrine seem fairly applicable.").

8 Count IX of the Complaint asserts that SSB and Grubman violated Section 10(b) of the 1934 Act in connection with the material misstatements and omissions contained in the 2000 and 2001 Registration Statements and by conspiring with WorldCom and its CEO Bernard Ebbers to misrepresent WorldCom's financial condition in connection with the 2000 and 2001 Offerings. Count X alleges that SSB and Grubman also violated Section 10(b) in connection with Grubman's analyst reports and his adoption of Ebbers's material misstatements. Finally, Count XI of the Complaint pleads claims under Section 20(a) of the 1934 Act against Citigroup and SSB as controlling persons of Grubman, and Citigroup as a controlling person of SSB and its employees, managers, and directors. *See* Class Opinion, 219 F.R.D. at 278. There is no dispute that, in order to

recover from the Citigroup Defendants, the class members will have to prove reliance on Grubman's opinions, either on an individual basis or with the benefit of the *Basic* presumption.

9 Although it is not central to our decision to grant the petition, we note that several courts in the Southern District of New York are currently grappling with the application of the fraud-on-the-market doctrine to analyst reports. *See* *Demarco v. Lehman Bros.,* 309 F.Supp.2d 631, 636, 2004 WL 602668, at *3 (S.D.N.Y. 2004) (Rakoff, J.) (declining, on a motion to dismiss, to exempt analyst reports from the fraud-on-the-market presumption as a matter of law); *DeMarco v. Robertson Stephens Inc.,* No. 03 Civ. 590, 318 F.Supp.2d at 120, 2004 WL 51232, at *7 (S.D.N.Y. Jan.9, 2004) (Lynch, J.) (same). As noted, these securities actions have not yet progressed beyond motions to dismiss.

10 NYSCRF's reliance on the majority's statement in *In re Visa Check/MasterMoney Antitrust Litigation,* 280 F.3d 124, 145 (2d Cir.2001), that "[t]he effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants ... [and] cannot defeat an otherwise proper certification," is unfounded. When we decided *Visa Check,* we had *already* granted the plaintiffs' Rule 23(f) petition, and we drew a clear distinction between the Rule 23(f) inquiry and the review on the merits. *See id.* at 145–46 ("Even assuming *arguendo* that we found this to be a 'death knell' case [in which certification would effectively terminate the litigation], under *Sumitomo* that finding would bear only on our decision to grant the interlocutory appeal. Now that we have granted the appeal and found the district court's certification decision to be thorough, accurate, and not an abuse of discretion, the dissent's argument about coercion loses its force."). Further, with respect to the Rule 23(f) inquiry, we specifically noted that "[w]e need not decide whether this is such a 'death knell' certification because the other basis for granting a Rule 23(f) appeal—the existence of legal questions requiring resolution—is present." *Id.* at 145. Thus, in discussing the potentially coercive effect of class actions, we focused solely on the first basis for granting interlocutory review under Rule 23(f)—"*that the certification order will effectively terminate the litigation* and there has been a substantial showing that the district court's decision is questionable," *Sumitomo* 262 F.3d at 139 (emphasis added). We simply assumed that the alternative requirements for interlocutory appeal were met, including the requirement that the certification order was "likely to escape effective review after entry of final judgment," *Sumitomo,* 262 F.3d at 140.

11 That provision provides in relevant part that "[t]he court shall adopt a presumption that the most adequate [lead] plaintiff in any private action arising under this chapter is the person or group of persons that ... in the determination of the court, has the largest financial interest in the relief sought by the class; and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I).

12 That section provides in relevant part that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if ... (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ...." Fed.R.Civ.P. 23(a)(3).

13 Also, considering that the role of the lead plaintiff is "to empower investors so that they—not their lawyers—exercise primary control over private securities litigation," S.Rep. No. 104–98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683, any requirement that a different lead plaintiff be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff—namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole. *See* *In re Initial Pub. Offering Sec. Litig.,* 214 F.R.D. at 123 ("The only other possibility—that the court should cobble together a lead plaintiff group that has standing to sue on all possible causes of action—has been rejected repeatedly by courts in this Circuit and undermines the purpose of the PSLRA."); *In re Razorfish, Inc. Sec. Litig.,* 143 F.Supp.2d 304, 308 (S.D.N.Y.2001) ("To allow an aggregation of unrelated plaintiffs to

serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff." (quoting *In re Donnkenny Inc. Sec. Litig.,* 171 F.R.D. 156, 157–58 (S.D.N.Y.1997))).

14 Because the District Court found that common issues would predominate even if some plaintiffs would not benefit from the *Basic* presumption, we need not address the Underwriters' argument that any earnings statement covering a period of at least twelve months, no matter how inadequate or misleading, is sufficient to shift the burden to prove reliance to the plaintiffs. By the same token, we need not review the District Court's determination that the *Basic* presumption applies to Section 11 claims.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF CANNTRUST HOLDINGS INC. ET AL.

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF CCAA REPRESENTATIVE COUNSEL
(Sanction Hearing)
(Returnable 11 June 21)

STROSBERG SASSO SUTTS LLP
1561 Ouellette Avenue
Windsor, ON N8X 1K5
David R. Wingfield (LSO #28710D)
dwingfield@strosbergco.com
Tel: (416) 432-1443
Fax: (866) 316-5308

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9
Marie Henein (LSO #33289T)
mhenein@hhllp.ca
Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca
Tel: (416) 368-5000
Fax: (416) 368-6640

WEISZ FELL KOUR LLP
5600-100 King St W,
Toronto, ON M5X 1C9
Steven Weisz (LSO #32102C)
sweisz@wfklaw.ca
Tel: 416.613.8281
Fax: 416.613.8290

KALLOGHLIAN MYERS LLP
Suite 200, 150 King St. W
Toronto, ON M5H 1J9
Serge Kalloghlian (LSO# 55557F)
serge@kalloghlianmyers.com
Tel: (647) 812 5615
Fax: (647) 243 6620

A DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION
G101-360 Rue Saint-Jacques
Montreal, QC H2Y 1P5
A. Dimitri Lascaris (LSO#50074A)
alexander.lascaris@gmail.com
Tel: (514) 941-5991
Fax: (519) 660-7845

CCAA Representative Counsel