UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION This Document Applies To: *In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523 (LAK)	Case No. 09-MD-2017 (LAK) ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANT ERNST & YOUNG LLP AND APPROVAL OF PLAN OF ALLOCATION

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TABLE OF ABBREVIATIONS

ABBREVIATION	DEFINED TERM
"ACERA"	Alameda County Employees' Retirement Association
"Action"	*In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK)
"Bernstein Litowitz"	Bernstein Litowitz Berger & Grossmann LLP
"Claim Form" or "Proof of Claim Form"	Form that claimants must complete and submit or have already submitted in connection with either the D&O Settlement or UW Settlements in order to be potentially eligible to share in the distribution of the proceeds of the Settlement
"Complaint" or "TAC"	The Third Amended Class Action Complaint filed with the Court on April 23, 2010 (ECF No. 212)
"D&O Defendants"	Former Lehman officers Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, and Ian Lowitt; and former Lehman directors Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman, and John D. Macomber
"D&O Settlement"	The $90 million dollar settlement with the D&O Defendants in this Action approved by order of the Court dated May 24, 2012 (ECF No. 414)
"EY" or "E&Y"	Defendant Ernst & Young LLP
"*Equity/Debt* Action" or "*Equity/Debt*"	*In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK)
"Examiner"	Anton R. Valukas, Esq., the court-appointed examiner in Lehman's Chapter 11 bankruptcy proceedings, *In re Lehman Brothers Holdings Inc.*, 08-13555 (JMP) (Bankr. S.D.N.Y.)
"Examiner's Report"	Report of Anton R. Valukas, Examiner, dated March 11, 2010
"Exchange Act"	Securities Exchange Act of 1934
"Fee and Expense Application"	Lead Counsel's application for an award of attorneys' fees and reimbursement of litigation expenses on behalf of all Plaintiffs' Counsel
"Fee Memorandum"	The Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses in Connection with the EY Settlement
"GCG"	The Garden City Group, Inc., the Court-approved claims administrator for the Settlement
"GGRF"	Government of Guam Retirement Fund

ABBREVIATION	DEFINED TERM
"Individual Action Plaintiffs"	Plaintiffs named in the Individual Actions who do not request removal from the excluded list in accordance with the Stipulation and the Notice
"Individual Actions"	The actions listed on Appendix C to the Stipulation
"Joint Declaration"	Joint Declaration of David Stickney and David Kessler in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendant Ernst & Young LLP and Approval of Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses
"Kessler Topaz"	Kessler Topaz Meltzer & Check, LLP
"Lead Counsel"	Bernstein Litowitz and Kessler Topaz
"Lead Plaintiffs"	ACERA, GGRF, NILGOSC, Lothian, and Operating Engineers
"Lehman" or "Company"	Lehman Brothers Holdings Inc.
"Lothian"	The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund
"NILGOSC"	Northern Ireland Local Governmental Officers' Superannuation Committee
"Notice"	Notice of Pendency of Class Action and Proposed Settlement with Defendant Ernst & Young LLP, Settlement Fairness Hearing and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses
"Notice Order"	Order Concerning Proposed Settlement With Defendant Ernst & Young LLP filed December 3, 2013 (ECF No. 542)
"Notice Packet"	The Notice, Claim Form and a cover letter, sent to potential members of the Settlement Class
"Oklahoma FF"	Oklahoma Firefighters Pension and Retirement System
"Operating Engineers"	Operating Engineers Local 3 Trust Fund
"Plaintiffs" or "Settlement Class Representatives"	Lead Plaintiffs and Oklahoma FF
"Plaintiffs' Counsel"	Lead Counsel and all other legal counsel who, at the direction and under the supervision of Lead Counsel, represent any Plaintiffs in the Action, including the following: Grant & Eisenhofer P.A.; Kirby McInerney LLP; Labaton Sucharow LLP; Law Offices of Bernard M. Gross, P.C.; Murray Frank LLP; Saxena White P.A.; and Spector Roseman Kodroff & Willis, P.C.
"PSLRA"	The Private Securities Litigation Reform Act of 1995

ABBREVIATION	DEFINED TERM
"Repo 105"	A repurchase agreement (*i.e.*, a "repo") that Lehman accounted for as a sale instead of a financing, which removed the assets from Lehman's balance sheet. In a second step, Lehman used the cash obtained in exchange for the assets to pay down other liabilities. The Repo 105 transactions reduced the size of Lehman's balance sheet and reduced its net leverage ratio. The transactions were called Repo 105 because Lehman provided 5% overcollateralization. Repo 105 and Repo 108 are referred to collectively as "Repo 105"
"Repo 108"	Similar to Repo 105 transactions, except Lehman provided 8% overcollateralization instead of 5%
"SEC"	U.S. Securities and Exchange Commission
"Securities Act"	Securities Act of 1933
"Settlement Amount"	$99 million in cash
"Settlement Class"	All investors who (a) purchased or otherwise acquired Lehman Securities identified in Appendix A to the Stipulation, (b) purchased or otherwise acquired Lehman Structured Notes identified in Appendix B to the Stipulation, and/or (c) purchased or otherwise acquired Lehman common stock or call options and/or sold Lehman put options, during the Settlement Class Period (*i.e.*, the period between June 12, 2007 and September 15, 2008, through and inclusive). Excluded from the Settlement Class are (i) the named defendants in the Complaint, (ii) Lehman, (iii) the executive officers and directors of each Defendant or Lehman, (iv) any entity in which any Defendant or Lehman have or had a controlling interest, (v) members of any Defendant's immediate families, (vi) the plaintiffs named in the actions listed on Appendix C to the Stipulation who do not request removal from the excluded list in accordance with Paragraph 34 of the Stipulation, (vii) any person or entity that has (a) litigation claims in any forum against EY arising out of the purchase of Lehman Securities during any portion of the Settlement Class Period and received a judgment, or (b) settled and released claims against EY arising out of the purchase of Lehman Securities during any portion of the Settlement Class Period (as identified on a confidential exhibit that will be produced by EY on a confidential basis to the Claims Administrator, but shall not be provided to Lead Counsel or Lead Plaintiffs or to any other person or entity), and (viii) the legal representatives, heirs, successors or assigns

ABBREVIATION	DEFINED TERM
	of any such excluded party. Also excluded from the Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the Notice
"Settlement Class Period"	The period between June 12, 2007 and September 15, 2008, through and inclusive
"Settlement Fairness Hearing" or "Final Approval Hearing"	The hearing scheduled for April 15, 2014 at 4:30 p.m. at which the Court will consider, among other things, whether the Settlement, the Plan of Allocation and Lead Counsel's Fee and Expense Application are fair, reasonable and adequate
"Settlement Memorandum"	The Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendant Ernst & Young LLP and Approval of Plan of Allocation
"SNP Settlement Class"	The settlement class as certified by the Court's order granting final approval of the SNP Settlement on December 13, 2013 (ECF No. 544)
"SNP Settlement"	The settlement with UBSFS for $120 million related to Lehman structured notes that was approved by order of the Court on December 13, 2013 (ECF No. 544)
"Stipulation"	Stipulation and Agreement of Settlement between Plaintiffs and EY dated as of November 20, 2013
"Summary Notice"	Summary Notice of Pendency of Class Action and Proposed Settlement with EY, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses
"UBSFS"	UBS Financial Services, Inc.
"UW Defendants"	The underwriters named as defendants in the Action and with whom settlements were reached, as approved by the Court on May 2, 2012 (ECF No. 397)
"UW Settlements"	The settlements in this Action with the UW Defendants totaling $426,218,000 approved by order of the Court on May 2, 2012 (ECF No. 397)

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs and Class Representative Oklahoma Firefighters Pension and Retirement System (collectively, the "Plaintiffs") respectfully submit this memorandum of law in support of their Motion for Final Approval of Class Action Settlement with Defendant Ernst & Young LLP and Approval of Plan of Allocation.[1]

PRELIMINARY STATEMENT

Plaintiffs, on behalf of themselves and the Settlement Class, have agreed to settle all claims asserted in the above-captioned action (the "Action") against Defendant Ernst & Young LLP ("EY") in exchange for $99,000,000 in cash (the "Settlement Amount"). Plaintiffs respectfully submit that the proposed Settlement represents a favorable result obtained in the face of significant litigation risks and satisfies the standard for final approval under Rule 23 of the Federal Rules of Civil Procedure. The Settlement with EY, combined with the previously approved D&O Settlement and UW Settlements, brings the total recovery for Lehman investors by Lead Counsel through this class action to $615,218,000.

As detailed in the Joint Declaration of David Stickney and David Kessler in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendant Ernst & Young LLP and Approval of Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl.") submitted concurrently herewith, Plaintiffs and Lead Counsel had extensively litigated the Action against EY for years and had a thorough understanding of the strengths and weaknesses of the claims with respect to EY.

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[1] All terms with initial capitalization not otherwise defined herein or in the "Table of Abbreviations" set forth above, shall have the meanings ascribed to them in the Stipulation of Settlement and Release dated as of November 20, 2013 (ECF Nos. 535-1 and 535-2) and the accompanying Joint Declaration.

Over the course of three and one-half years, Plaintiffs, thorough Lead Counsel, undertook significant efforts to identify, preserve and vigorously prosecute the Settlement Class's claims against EY. Lead Counsel: (i) entered into a tolling agreement with EY in order to preserve Plaintiffs' rights to claims (Joint Decl. ¶¶4, 15); (ii) conducted an extensive investigation into the Settlement Class's claims against EY (*Id.* ¶¶14-17); (iii) drafted the detailed Complaint which named EY as a defendant in the Action for the first time (*id.* ¶18); (iv) opposed EY's motion to dismiss the Complaint (*id.* ¶¶20-21); (v) engaged in class discovery, including participating in depositions of Oklahoma FF, ACERA and experts (*id.* ¶¶22-25); (vi) successfully moved for class certification over EY's opposition (*id.* ¶¶23, 26-27); (vii) engaged in extensive discovery, including reviewing over 26 million pages of documents obtained from EY, the Lehman Estate, and various other third parties and using the information from this extensive review to prepare for and conduct more than fifty depositions on three continents, including depositions of key EY auditors, former Lehman officers and directors, and witnesses with knowledge of EY's investigation into the whistleblower's Repo 105 allegations (*id.* ¶¶28-42; 49-57); (viii) successfully moved the U.K. Court pursuant to the Hague Convention for the production by EY U.K. of certain documents relating to its review and audit of Lehman's Repo 105 transactions (*id.* ¶¶34-35); (ix) coordinated discovery efforts with plaintiffs in related state and federal litigation (*id.* ¶¶43-48); and (x) consulted extensively with numerous experts and consultants in the fields of, among others, market efficiency, financial disclosure and accounting principles, liquidity and solvency, credit ratings, loss causation and damages (*id.* ¶¶58-60).

Moreover, the Settlement was reached only after a protracted and difficult settlement process, including in-person and telephonic discussions, as well as formal mediation facilitated by the Honorable Layn R. Phillips. *Id.* ¶¶63-65. Following the substantial completion of fact discovery, the parties reached an agreement in principle to settle the Action for $99 million. *Id.* ¶65.

When evaluating and agreeing to the Settlement, Plaintiffs considered the myriad risks of continued litigation. As a result of motion practice, the sustained claims against EY were for an alleged false statement in a quarterly review opinion for Lehman's unaudited financial statements for the second quarter of 2008. *See* Joint Decl. Section II.B. The Settlement is a particularly significant result when considered in light of the risks to continued litigation. As set forth below, EY asserted serious defenses to liability – including the absence of loss causation, scienter and a materially false statement -- that, if successful, would have resulted in no recovery. And even if Plaintiffs established liability at trial, EY asserted proportionate fault defenses to reduce liability by assigning fault for losses to others. In addition to these risks, the Settlement avoids the uncertainty of external developments in the securities class certification landscape which could limit or negatively impact any future recovery, such as the Supreme Court's review of the fraud-on-the-market presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978 (1988). *See Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 134 S. Ct. 636, 187 L. Ed. 415 (Mem) (Nov. 15, 2013).

Following notice to the Settlement Class, the reaction to the Settlement has been favorable. In accordance with the Court's December 3, 2013 Notice Order (ECF No. 542), the Court-authorized Claims Administrator, The Garden City Group, Inc. ("GCG"), disseminated more than 916,000 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Settlement Class Members and their nominees.[2] As ordered by the Court and set forth in the Notice, any objections to the Settlement, the Plan of Allocation or the request for attorneys' fees and reimbursement of litigation expenses, and any requests for exclusion from the Settlement Class, are due to be received no later than March 25, 2014. To date, only three

[2] *See* Affidavit of Jose C. Fraga Regarding (A) Mailing of the EY Notice and EY Claim Form; (B) Publication of the EY Summary Notice; (C) Report on Requests for Exclusion Received to Date; and (D) Report on Requests for Removal from the Excluded List by Individual Action Plaintiffs (the "Fraga Aff."), at ¶¶5-8, attached as Exhibit 1 to the Joint Declaration.

potential objections have been received. *See* Joint Decl. ¶82 and n.5. In addition, to date, GCG has received only three requests for exclusion from the Settlement Class. *Id.*; *see also* Fraga Aff. ¶13.

Lead Counsel believe that the Settlement is fair, reasonable and adequate and in the best interests of the Settlement Class. Plaintiffs, sophisticated institutional investors of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), also approve the Settlement. In addition to seeking final approval of the Settlement, Plaintiffs seek approval of the proposed Plan of Allocation as fair and reasonable and certification of the Settlement Class for settlement purposes only. As discussed below, Lead Counsel believe that the Plan of Allocation – a plan that is largely based on the plan previously approved by the Court in connection with the D&O Settlement – is a fair and reasonable method for allocating the Net Settlement Fund to the Settlement Class.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must obtain Court approval. The Settlement should be approved if the Court finds it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). As a matter of public policy, courts favor the settlement of disputed claims, particularly in complex class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) ("federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources").

In ruling on final approval of class settlements, courts examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012); *In re Giant Interactive Grp.*,

Inc. Sec. Litig., 279 F.R.D. 151, 160 (S.D.N.Y. 2011). The Court may presume that a settlement negotiated at arm's-length by experienced counsel is fair and reasonable.[3] Moreover, recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) *abrogated on other grounds by Goldberger v. Integrated Res. Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also Veeco*, 2007 WL 4115809, at *5.

A. The Settlement Negotiations Demonstrate Procedural Fairness

An initial presumption of fairness attaches to a proposed settlement if it is "reached by experienced counsel after arm's length negotiations." *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011); *see also Veeco*, 2007 WL 4115809, at *5 ("A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws.") (citation omitted); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (presumption of fairness applies whether "the settlement resulted from 'arm's-length negotiations and . . . plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interest'").

The parties negotiated the Settlement at arm's-length with the assistance of a highly-respected neutral, former U.S. District Judge Layn R. Phillips, and through extensive direct

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[3] *See IMAX*, 283 F.R.D. at 189; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) ("A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws.") (citation omitted).

negotiations led by senior attorneys for Lead Counsel. *See* Joint Decl. Section III.A.1. The negotiation process included in-person and telephonic discussions, as well as a formal mediation session in December 2011, for which the parties prepared detailed mediation statements setting forth each side's respective positions.[4] It was not until fact discovery had been substantially completed and the parties overcame an impasse through direct negotiations that they reached an agreement in principle to settle the Action against EY for $99,000,000. Joint Decl. ¶65. Thereafter, the parties negotiated the specific terms of their agreement, executing the Stipulation on November 20, 2013.

Lead Counsel who negotiated the Settlement have extensive experience and expertise in prosecuting complex securities class action litigation like this one and were well informed about the strengths and weaknesses of Plaintiffs' claims against EY. The opinion of Lead Counsel is entitled to "great weight." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (Courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation"); *accord Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992).

B. Application Of The *Grinnell* Factors Supports Approval Of The Settlement As Fair, Reasonable And Adequate

An analysis of the *Grinnell* factors, which the Second Circuit has held are to be considered when determining if a proposed settlement is fair, reasonable and adequate,

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[4] *Id.* The mediator's involvement further supports procedural fairness. *See D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Bear Stearns Cos., Inc. Sec. Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. Nov. 9, 2012) (approving settlement where parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Giant Interactive*, 279 F.R.D. at 160 (approving settlement and finding it was entitled to a presumption of fairness where the "settlement was the product of prolonged, arms-length negotiation" facilitated by Judge Phillips, "a respected mediator").

demonstrates that the Court should grant final approval. These factors include the following:

> (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 (citations omitted), *see also D'Amato*, 236 F.3d at 86; *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 464 (S.D.N.Y. 2004). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *Global Crossing*, 225 F.R.D. at 456 (citation omitted). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement clearly satisfies the criteria for approval articulated by the Second Circuit in *Grinnell.*

1. The Complexity, Expense And Likely Duration Of The Litigation Support Approval Of The Settlement

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp.*

S.p.A. Sec. Litig., 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted); *see also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, Nos. MDL 1500, 02-5575 (SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006) (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials").

This Action involved complex legal and factual issues surrounding the liability of EY for its role in connection with Lehman's issuance of materially false financial statements through the use of Repo 105 transactions before Lehman's historic bankruptcy. The Complaint alleged that the auditor's public statements in Lehman's Forms 2Q07 10-Q, 3Q07 10-Q, 2007 10-K, 1Q08 10-Q and 2Q08 10-Q filed with the SEC, were materially false and misleading concerning Lehman's use of undisclosed Repo 105 transactions to artificially deflate Lehman's reported net leverage ratio and create the appearance of a stronger balance sheet and Lehman's failure to disclose material facts concerning its concentration of risk assets. Joint Decl. Section II.B. EY successfully moved to dismiss all claims, except for the alleged false statement in EY's quarterly review opinion for Lehman's unaudited financial results for the second quarter of 2008. Plaintiffs confronted numerous complexities in pursuing the claims against EY, including, among others, contested issues with respect to loss causation, scienter, and the existence of a materially false statement – that, if successful, would have resulted in no recovery. Even if Plaintiffs established liability at trial, EY asserted proportionate fault defenses to reduce liability by assigning fault for losses to others.

The Settlement avoids the considerable risks, delay and expense of, among other things, summary judgment motions, *Daubert* motions, motions in *limine*, a lengthy trial and appeal. Whatever the outcome at trial, it is virtually certain that an appeal (or appeals) would be taken, and any recovery the Settlement Class may have been able to recover at trial would likely be delayed for years. *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."); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

The proposed $99 million Settlement provides a substantial and certain recovery, without the further expense, delay and risk of a smaller recovery or potentially no recovery for the Settlement Class presented by continued litigation. Accordingly, this factor favors approval of the Settlement.

2. The Stage Of The Proceedings And Amount Of Discovery Support Approval Of The Settlement

This factor examines whether plaintiffs had a sufficient amount of information available about the claims and defenses to ensure that plaintiffs were able to properly evaluate the case and assess the adequacy of the settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983); *Global Crossing*, 225 F.R.D. at 458 (this requirement "is intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them'") (citation omitted). After three and one-half years of litigation that included an extensive investigation, motion practice, substantial discovery and consultation with multiple experts, there is no question that this Action had reached the point where Plaintiffs and their counsel had a thorough understanding of the strengths and weaknesses of their claims and of EY's defenses and could make intelligent, informed appraisals of their chances of success had this Action continued to be litigated. *See In re Excess Value Ins. Coverage Litig.*, Nos. M-21-84RMB, MDL-1339, 2004 WL 1724980, at *12 (S.D.N.Y. July 30, 2004) ("The investigation, discovery and motion practice conducted to date provided Plaintiffs with 'sufficient information to make an informed judgment on the reasonableness of the settlement proposal.'") (citation omitted).

The parties reached settlement only after Lead Counsel developed a record to support Plaintiffs' claims and had a thorough understanding of the strengths and weaknesses of the claims and defenses. Document discovery was complete, and Lead Counsel obtained testimony from over fifty witnesses through depositions. Joint Decl. Sections II.D. and II.E. Moreover, expert reports were due to be filed just days prior to reaching the Settlement. *Id.* Section II.E.3.

Accordingly, as a result of the foregoing, Plaintiffs and Lead Counsel clearly had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy" of the Settlement. *AOL Time Warner,* 2006 WL 903236, at *10. Based on the stage of the litigation and the amount of information obtained by the time the Settlement was reached, Plaintiffs and Lead Counsel respectfully submit that this factor strongly supports approval of the Settlement.

3. The Risks Of Establishing Liability And <u>Damages Support Approval Of The Settlement</u>

In assessing this factor, the Court is not required to "decide the merits of the case or resolve unsettled legal questions," *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 998 (1981), or to "foresee with absolute certainty the outcome of the case," *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Global Crossing,* 225 F.R.D. at 459. While Plaintiffs and Lead Counsel believe that the claims asserted against EY have merit, they also recognize that there were considerable risks in pursuing the Action against EY, an outside audit firm, through summary judgment, trial and beyond.

a) <u>Risks To Establishing EY's Liability</u>

Although Plaintiffs' TAC survived EY's motion to dismiss, the Court, in ruling on this motion, dismissed Plaintiffs' § 11 and § 10(b) claims for purchases of Lehman stock made prior to the issuance of EY's review report contained in Lehman's Form 10-Q filed with the SEC on July 10, 2008. Joint Decl. ¶¶4, 21. By eliminating EY's liability based on its 2007 year-end

audit opinion and 1Q08 review report, all that remained was a single false statement on a single quarterly review (not an audit) and Plaintiffs' burden of proving the existence of a false statement and EY's scienter became substantially more difficult. *Id.* ¶71. Throughout, EY argued, among other things, that it had only limited responsibilities when conducting a quarterly interim review, as contrasted with an audit of year-end financial statements. "The objective of a review of interim financial information differs significantly from that of an audit conducted in accordance with [GAAP]." *Id.* (quoting PCAOB, AU § 722.07).

b) <u>Risks To Establishing Causation And Damages</u>

With respect to loss causation, there were no Repo 105 "corrective disclosures" during or immediately following the relevant time period (July 11, 2008 through September 14, 2008). Joint Decl. ¶72. The market learned of Lehman's misuse of Repo 105 in March 2010 when the Examiner's Report became public – eighteen months after Lehman filed for bankruptcy. *Id.* While Plaintiffs developed a record through extensive discovery to support their assertion that EY's alleged false statement caused investor losses because it concealed risks that later materialized, this issue was complex and hotly-contested. *Id.* EY vigorously contested Plaintiffs' "materialization of the risk" theory of loss causation throughout the Action, maintaining that neither Lehman's Repo 105 transactions nor EY's quarterly review report were the cause of investor losses but rather Lehman's liquidity crisis amidst a global, financial meltdown was the cause. *Id.*

EY also vigorously challenged and raised significant defenses in connection with the amount of damages for which EY could potentially be responsible. When, as here, Plaintiffs partially settled claims against co-defendants, the non-settling defendant (*i.e.,* EY) is entitled to a judgment credit of at least the proportionate fault of the settling defendants. *See* 15 U.S.C. § 78u-4(a)(7)(B). Joint Decl. ¶73. EY assigned all or most of the fault to others, such as Lehman's officers and directors. *Id.* If successful, EY's proportionate fault arguments would substantially reduce or eliminate any recovery for the Settlement Class from EY. *Id.*

The presentation of damages would be a complex matter that would require the presentation of expert testimony. As a result, Lead Counsel knew that, even presuming Plaintiffs' damages expert could overcome the inevitable *Daubert* motions, a trial of the Action would ultimately involve a "battle of experts" on this issue. Although Plaintiffs and Lead Counsel believe that they could present convincing expert testimony on the issue of damages, it is always possible that, in the unavoidable "battle of experts," a jury might disagree with Plaintiffs' damages expert, or find EY's expert more persuasive. *See, e.g., 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."); *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants").

4. The Risks Of Maintaining The Class Action Through Trial Support Approval Of The Settlement

In connection with the Settlement, the parties stipulated to certification of the class that was previously approved in connection with the D&O Settlement. Although Plaintiffs believe they would have been able to maintain certification of the class previously certified by the Court had the Settlement not been reached, there is always the risk that a certified class could be decertified or modified by the Court, or on appeal after a trial. *See Chatelain*, 805 F. Supp. at 214 ("Even if certified, the class would face the risk of decertification.").

Plaintiffs invoked the fraud-on-the-market presumption to demonstrate class-wide issues of reliance. The Supreme Court, however, issued its writ of *certiorari* in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 134 S. Ct. 636, 187 L. Ed. 415 (Mem) (Nov. 15, 2013) (granting *certiorari* to review the fraud-on-the-market presumption recognized in *Basic*, 485 U.S. 224, 108 S. Ct. 978). The Settlement avoids any uncertainty with respect to these issues.

5. The Inability Of Defendant To Withstand Substantially Greater Judgment Supports Approval Of The Settlement

The parties hotly contested the calculation of damages caused by EY's alleged untrue review opinion, as opposed to other causes. Leaving aside disputes over methodology, causation, proportionate fault, and disaggregation, EY faced a hypothetical judgment of billions of dollars due to Lehman's bankruptcy. Joint Decl. ¶70. However, EY's ability to pay a hypothetical future judgment of billions of dollars (after a trial and inevitable appeals) is improbable. *Id.* ¶74. 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," especially where, as here, the other *Grinnell* factors weigh heavily in favor of settlement approval. *See Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) (citation omitted); *AOL Time Warner*, 2006 WL 903236, at *12 ("the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair").

6. The Range Of Reasonableness Of The Settlement In Light Of The Best Possible Recovery And All Attendant Risks Support Approval Of The Settlement

Courts typically combine their analysis of 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." *Grinnell*, 495 F.2d at 463; *accord Global Crossing*, 225 F.R.D. at 460. In its analysis of 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. 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." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984); *see also Visa*, 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") (citation omitted). Particularly when weighed against the risks of continued litigation, the proposed Settlement with EY for $99 million is a significant result for the Settlement Class and falls within the "range of reasonableness."

Although the potential damages against EY amounted to billions of dollars in the aggregate (before taking into account causation or other defenses to damages), there were substantial risks to obtaining such an amount. The Settlement Amount is reasonable notwithstanding the fact that it represents a small percentage of potential damages. Joint Decl. ¶70. Had a jury (or the Court) credited some or all of EY's arguments – such as disputing evidence of loss causation, scienter, and a materially false statement, and assigning fault to others – the potential recoverable damages would be dramatically reduced or eliminated.

Moreover, this is the only recovery to date on behalf of the Lehman investors against EY arising from the Lehman bankruptcy. The Department of Justice ("DOJ") and the SEC declined to bring charges or claims against EY. In September 2013, *The New York Times* reported that the SEC and DOJ decided against asserting claims when "[t]hey discovered that Repo 105 had nothing to do with Lehman's failure and was technically allowed under an obscure accounting rule." *See* Ben Protess and Susanne Craig, *Inside the End of the U.S. Bid to Punish Lehman Executives*, N.Y. Times, Sept. 8, 2013 ("[P]rosecutors and the FBI lost interest in the case.). Joint Decl. ¶8. 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.

7. The Reaction Of The Settlement Class To Date Supports Approval Of The Settlement

Pursuant to the terms of the Notice Order, GCG began mailing copies of the Notice Packet to potential members of the Settlement Class on December 18, 2013. *See* Fraga Aff. ¶¶5-8. As of March 5, 2014, more than 916,000 copies of the Notice Packet have been mailed to potential members of the Settlement Class and their nominees. *Id.* ¶8. In addition, the Summary Notice was published in *Investor's Business Daily* and the national edition of *The Wall Street*

Journal on January 2, 2014. *Id.* ¶9. The Notice sets out the essential terms of the Settlement and informs potential members of the Settlement Class of, among other things, their right to request exclusion from the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting a Claim Form if they did not previously submit a valid Claim Form in connection with the D&O Settlement or UW Settlements.

The reaction of a class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). As set forth in the Notice, the deadline for Settlement Class Members to submit objections to the Settlement, the Plan of Allocation and/or Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses or request exclusion from the Settlement Class is March 25, 2014. To date, only three potential objections to the Settlement have been received from individuals – none of which provide any valid basis for rejecting the Settlement.[5] In addition, only three requests for exclusion from the Settlement Class have been received. *Id.* Lead Counsel will address all objections, including the objections to the Settlement received to date, along with all exclusions, in their reply papers to be filed with the Court on April 8, 2014.

The Notice Order also set March 25, 2014, as the deadline for Individual Action Plaintiffs (those plaintiffs named in one of the Individual Actions set forth on Appendix C to the Stipulation and excluded by definition from the Settlement) to request removal from the excluded list and participate in the Settlement. Lead Counsel mailed a copy of the Notice Packet

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[5] *See* Joint Decl. ¶82. Specifically, objections have been received from Raymond Gao (ECF No. 545), who also submitted an objection in connection with the D&O Settlement which the Court found to be without merit (ECF No. 345), and Robert J. Kreps (ECF No. 1377 in 09-md-02017 (LAK)). Lead Counsel have also received a correspondence from William Brady which they are treating as an objection.

to each of the Individual Action Plaintiffs or, as applicable, their counsel of record. To date, two requests for removal have been received on behalf of Individual Action Plaintiffs. Fraga Aff. ¶¶14-15.

In sum, all of the *Grinnell* factors support a finding that the Settlement is fair, reasonable and adequate.

II. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See, e.g., IMAX*, 283 F.R.D. at 192; *Giant Interactive*, 279 F.R.D. at 163; *AOL Time Warner*, 2006 WL 903236, at *17. Generally, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable. *See In re Telik Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strengths and values of different categories of claims."). Plans of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see also Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007) ("Exactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate."). Moreover, in assessing a proposed plan of allocation, courts give great weight to the opinion of informed counsel. *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *21 (the conclusion of "experienced and competent counsel . . . that the Plan of Allocation is fair and reasonable is . . . entitled to great weight"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.").

Plaintiffs have proposed a plan for allocating the net proceeds of the Settlement among members of the Settlement Class who (i) previously submitted valid Claim Forms in connection with the D&O Settlement or UW Settlements or (ii) submit timely and valid Claim Forms to the

Claims Administrator in connection with this Settlement, in accordance with the requirements established by the Court, and which are approved for payment. Joint Decl. ¶83. Lead Counsel prepared the proposed Plan of Allocation (the "Plan"), which is set forth in Appendix D to the Notice, in consultation with Plaintiffs' damages consulting expert. *Id.* ¶84. The Plan is largely based on the plan developed and approved in connection with the D&O Settlement. *Id.* Lead Counsel believe that the Plan provides a fair and reasonable method to equitably distribute the settlement proceeds among eligible Settlement Class Members.

The objective of the proposed Plan is to equitably distribute the net Settlement proceeds to those members of the Settlement Class who suffered economic losses as a result of the alleged misrepresentations alleged in the Action. Joint Decl. ¶83. Under the Plan, a Recognized Loss or Recognized Gain amount will be calculated for transactions in Lehman common stock and exchange-traded options during the Settlement Class Period based principally on the differences in the estimated amounts of artificial inflation (or deflation) in these securities on the date of purchase and the date of sale. *Id.* ¶85. For transactions in Lehman Preferred Stock, Lehman Senior Unsecured Notes and Subordinated Notes, and Lehman common stock purchased or acquired in the Secondary Offering, a Recognized Loss or Recognized Gain amount will be calculated using the § 11 measure of damages and is generally based on the difference between the purchase price of the security (not to exceed the issue price) and either its sale price or the price on the date the suit was filed (*i.e.*, October 28, 2008).[6]

The Plan also takes into account the Court's dismissal of certain claims asserted by the Settlement Class for acquisitions made prior to the issuance of EY's review report on Lehman's Form 10-Q filed with the SEC on July 10, 2008. Accordingly, Recognized Loss, Recognized

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[6] *Id.* There is no Recognized Loss or Recognized Gain if the Lehman common stock, Lehman Preferred Stock, or Lehman Senior Unsecured Notes and Subordinated Notes were sold before June 9, 2008 or if the call options were sold, exercised or expired (or put options were re-purchased, exercised or expired) before June 6, 2008. *Id.*

Gain, Trading Loss and Trading Gain calculations for (i) purchases of Lehman Securities (other than Lehman exchange-traded options) and (ii) sales of Lehman exchange-traded options between June 12, 2007 and July 10, 2008, inclusive, will be multiplied by 10% to reflect the substantially lower likelihood of success on the dismissed claims, which would be viable only if the Court's dismissal was reversed on appeal, and such claims would then face the additional risk of proof due to passage of time. *See American Bank Note,* 127 F. Supp. 2d at 429 ("Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim.").

Each Claimant's Recognized Claim will be calculated by combining his, her, or its Recognized Losses in all eligible securities and offsetting all Recognized Gains. An Authorized Claimant's Distribution Amount under the Plan will be his, her or its *pro rata* share of the Net Settlement Fund based on the size of his, her or its Recognized Claim compared to the aggregate Recognized Claims of all Authorized Claimants.[7] Pursuant to the Plan, no distribution will be made to a Claimant with a Distribution Amount of less than $10.00.[8]

To date, only one objection has been received which relates to the proposed Plan of Allocation.[9] Accordingly, for all of the reasons set forth herein and in the Joint Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

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[7] *Id.* ¶87. If a Claimant has an overall trading gain on his, her or its transactions in eligible securities during the relevant time period, that Claimant will not be eligible for a recovery from the Settlement, and if a Claimant's overall trading loss is less than his, her or its Recognized Claim, then his, her or its Recognized Claim will be capped at the amount of the Claimant's overall trading loss. *Id.*

[8] The Court approved a similar $10.00 minimum pay-out in connection with the D&O Settlement and UW Settlements, given the administrative costs involved and to prevent depletion of the settlement funds to pay *de minimis* claims. *See* ECF No. 494 (pp. 8-9 n.9) and ECF No. 503 (p. 3). Joint Decl. ¶88.

[9] The objection submitted by Mr. Gao (ECF No. 545), as noted in footnote 5 above, includes certain questions or objections relating to the Plan of Allocation. Lead Counsel will address this objection in their reply papers to be filed with the Court on April 8, 2014.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

For purposes of effectuating the Settlement, the parties stipulated to certification of the Settlement Class, consisting of:

> All investors who (a) purchased or otherwise acquired Lehman Securities identified in Appendix A to the Stipulation; (b) purchased or otherwise acquired Lehman Structured Notes identified in Appendix B to the Stipulation, and/or (c) purchased or otherwise acquired Lehman common stock or call options and/or sold Lehman put options, during the Settlement Class Period (i.e., the period between June 12, 2007 and September 15, 2008, through and inclusive). Excluded from the Settlement Class are (i) the named defendants in the Complaint, (ii) Lehman, (iii) the executive officers and directors of each Defendant or Lehman, (iv) any entity in which any Defendant or Lehman have or had a controlling interest, (v) members of any Defendant's immediate families, (vi) the plaintiffs named in the actions listed on Appendix C to the Stipulation (the "Individual Actions") who do not request removal from the excluded list in accordance with Paragraph 34 of the Stipulation (the "Individual Action Plaintiffs"); (vii) any person or entity that has (a) litigated claims in any forum against EY arising out of the purchase of Lehman Securities during any portion of the Settlement Class Period and received a judgment, or (b) settled and released claims against EY arising out of the purchase of Lehman Securities during any portion of the Settlement Class Period (as identified on a confidential exhibit that will be produced by EY on a confidential basis to the Claims Administrator, but shall not be provided to Lead Counsel or Lead Plaintiffs or to any other person or entity); and (viii) the legal representatives, heirs, successors or assigns of any such excluded party. Also excluded from the Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the Notice.

In its December 3, 2013 Notice Order, the Court found upon a preliminary evaluation, and for purposes of the Settlement only, that the Settlement Class met the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and directed that notice of the Settlement be provided to potential members of the Settlement Class. Plaintiffs respectfully move the Court for final certification of the Settlement Class, certification of the Settlement Class Representatives, and approval of Class Counsel.[10]

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[10] The proposed Settlement Class Representatives for the Settlement Class are all of the Lead Plaintiffs (*i.e.*, Alameda County Employees' Retirement Association, Government of Guam

(Cont'd)

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger*, 698 F.2d at 73; *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); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (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"). While a settlement class, like other certified classes, must satisfy the requirements of Rules 23(a) and (b), the manageability concerns of Rule 23(b) are not at issue when certifying a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 593, 117 S. Ct. 2231, 2235 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested . . . ").

Here, the proposed Settlement Class preliminarily certified by the Court is substantially similar to the settlement class previously certified for purposes of the D&O Settlement. Like the D&O settlement class, the proposed EY Settlement Class readily satisfies the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Nothing has changed to alter the propriety of certification and, for all the reasons stated in Plaintiffs' prior submission (ECF No. 535, pp. 4-8), incorporated herein by reference, Plaintiffs now request that the Court reiterate its prior ruling, certifying (i) the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3); (ii) Plaintiffs as Settlement Class Representatives; and (iii) Lead Counsel as class counsel for the Settlement Class.

Retirement Fund, Northern Ireland Local Government Officers' Superannuation Committee, The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, and Operating Engineers Local 3 Trust Fund) and Court-appointed Class Representative Oklahoma Firefighters Pension and Retirement System. *See* ECF No. 542 ¶4.

IV. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF THE PSLRA, RULE 23 AND DUE PROCESS

Notice to class members of a settlement satisfies Rule 23(e) and due process where it fairly apprises "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." *Visa*, 396 F.3d at 114; *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (citation omitted). Notice need not be perfect or received by every class member, but instead be reasonable under the circumstances. *See* Fed. R. Civ. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal."); *Visa*, 396 F.3d at 114. Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 166 (S.D.N.Y. 2007).

Both the substance of the Notice and its method of dissemination to potential members of the Settlement Class satisfied these standards. The Court-approved Notice includes all of the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims asserted against EY; (ii) a definition of the Settlement Class; (iii) the amount of the Settlement; (iv) the proposed Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and expenses that will be sought; (vii) a description of the right to request exclusion from the Settlement Class or object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; (viii) a description of the right of the Individual Action Plaintiffs to request removal from the excluded list and participate in the Settlement; and (ix) notice of the binding effect of a judgment on members of the Settlement Class. The Notice also provides information on how to submit a Claim Form in order to be potentially eligible to receive a distribution from the Settlement and advised those Settlement Class Members who submitted a valid Claim Form in connection with the D&O Settlement or UW Settlements that they did not

need to submit another Claim Form as their previously submitted claim would be processed in connection with this Settlement.

As noted above, in accordance with the Court's Notice Order, since December 18, 2013, GCG has mailed over 916,000 copies of the Notice Packet by first-class mail to potential members of the Settlement Class and their nominees.[11] For those Settlement Class Members who submitted valid Claim Forms in connection with the D&O Settlement or UW Settlements, GCG included a cover letter, and in the case of electronic filers, an email, that informed the recipient that they would automatically be deemed an eligible claimant with respect to their transaction(s) in the Lehman Securities covered by this Settlement for which their Claim Form was previously approved, so long as the approved transaction(s) calculate to an Overall Recognized Claim under the Plan of Allocation for this Settlement. *Id.* ¶5.

Also in accordance with the Court's Notice Order, GCG caused the Summary Notice to be published in *Investor's Business Daily* and the national edition of *The Wall Street Journal* on January 2, 2014. *Id.* ¶9. In addition, the website dedicated to this matter, www.LehmanSecuritiesSettlementLitigation.com, was updated to address the Settlement with EY, and downloadable copies of the Notice and Claim Form, along with other documents, were posted to the settlement website as well as on Lead Counsel's websites. *Id.* ¶11.

This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by publication of a summary notice in two widely-circulated publications and an informative website, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., In re Citigroup Inc. Bond Litig.*, 08 Civ. 9522 (SHS), 2013 U.S. Dist. LEXIS 117838, at *18-19 (S.D.N.Y.

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[11] Fraga Aff. ¶8. To conduct the mailing, GCG used the names and addresses of potential Settlement Class Members that GCG previously obtained in connection with the D&O Settlement and UW Settlements as well as additional names and addresses obtained from banks, brokers and other nominees in connection with this Settlement. *Id.* ¶¶5-7.

Aug. 20, 2013); *FLAG Telecom*, 2010 WL 4537550, at *13; *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008).

Substantially similar notice programs were utilized for the D&O Settlement and UW Settlements. In connection with the Court's approval of these prior settlements, the Court found the notice programs to have satisfied the requirements of the PSLRA, Rule 23 and Due Process. *See* ECF Nos. 396 and 464.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement with EY as fair, reasonable and adequate; approve the Plan of Allocation as fair and reasonable; and certify the Settlement Class for purposes of effectuating the Settlement.

DATED: March 11, 2014

Respectfully submitted,

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Addendum Of Unpublished Authorities

In re Adelphia Commc'ns Corp. Sec. and Derivative Litig.,
No. 03 MDL 1529 LMM, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006)

In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,
No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236 (S:D.N.Y. Apr. 6, 2006).

In re Bisys Sec. Litig.,
No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007)

In re Blech Sec. Litig.,
Nos. 94 CIV 7696 (RWS), 95 CIV 6422 (RWS), 2000 WL 661680 (S.D.N.Y. May 19, 2000)

In re China Sunergy Sec. Litig.,
No. 07 Civ. 7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011)

In re Citigroup Inc. Bond Litig.,
08 Civ. 9522 (SHS), 2013 U.S. Dist. LEXIS 117838 (S.D.N.Y. Aug. 20, 2013)

In re Comverse Tech., Inc. Sec. Litig.,
No. 06-cv-1825, 2010 WL 2653354 (E.D.N.Y. June 24, 2010)

Cornwell v. Credit Suisse Grp.,
No. 08 Civ. 03758 (VM), Order Awarding Attorneys' Fees And Expenses [EFC No. 117] (S.D.N.Y. July 20, 2011)

In re EVCI Career Colls. Holding Corp. Sec. Litig.,
No. 05 Civ. 10240 (CM), 2007 WL 2230177 (S.D.N.Y. July 27, 2007)

In re Excess Value Ins. Coverage Litig.,
No. M-21-84RMB, 2004 WL 1724980 (S.D.N.Y. July 30, 2004)

In re FLAG Telecom Holdings, Ltd. Sec. Litig.,
No. 02 Civ. 3400, 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010)

Fogarazzo v. Lehman Bros., Inc.,
No. 03 Civ. 5194 (SAS), 2011 WL 671745 (S.D.N.Y. Feb. 23, 2011)

In re Gilat Satellite Networks, Ltd.,
No. CV-02-1510, 2007 WL 1191048 (E.D.N.Y. Apr. 19, 2007)

Halliburton Co. v. Erica P. John Fund, Inc.,
No. 13-317, 134 S. Ct. 636, 187 L. Ed. 415 (Mem) (Nov. 15, 2013)

Hicks v. Morgan Stanley,
No. 01 Civ. 10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005)

In re Marsh & McLennan Cos., Inc. Sec. Litig.,
No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009)

In re Priceline.com, Inc. Sec. Litig.,
No. 00CV1884 (AVC), 2007 U.S. Dist. LEXIS 52538 (D. Conn. July 20, 2007)

In re Sadia S.A. Sec. Litig.,
No. 08 Civ. 9528 (SAS), 2011 WL 6825235 (S.D.N.Y. Dec. 28, 2011)

In re Sony SXRD Rear Projection Television Class Action Litig.,
No. 06 Civ. 5173 (RPP), 2008 WL 1956267 (S.D.N.Y. May 1, 2008)

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-CV-11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004)

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 01695 (CM), 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007)

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 01695 (CM), 2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007)

In re Warner Chilcott Ltd. Sec. Litig.,
No. 06 Civ. 11515 (WHP), 2008 WL 5110904 (S.D.N.Y. Nov. 20, 2008)

White v. First Am. Registry, Inc.,
2007 WL 703926 (S.D.N.Y. Mar. 7, 2007)

United States District Court,
S.D. New York.
In re ADELPHIA COMMUNICATIONS CORPORATION SECURITIES AND DERIVATIVE LITIGATION

No. 03 MDL 1529 LMM, 03 Civ.5755, 03 Civ.5758, 03 Civ.5761, 03 Civ .5764, 03 Civ.5768, 03 Civ.5771, 03 Civ.5776, 03 Civ.5781, 03 Civ.5785, 03 Civ.5790, 03 Civ.5756, 03 Civ.5759, 03 Civ.5762, 03 Civ .5765, 03 Civ.5769, 03 Civ.5774, 03 Civ.5778, 03 Civ.5783, 03 Civ.5786, 03 Civ.5791, 03 Civ.5757, 03 Civ.5760, 03 Civ.5763, 03 Civ .5766, 03 Civ.5770, 03 Civ.5775, 03 Civ.5780, 03 Civ.5784, 03 Civ.5787, 03 Civ.5792.
Nov. 16, 2006.

MEMORANDUM AND ORDER

MCKENNA, J.

*1 THIS MEMORANDUM AND ORDER APPLIES TO 03 Civ. 5755, 03 Civ. 5756, 03 Civ. 5757, 03 Civ. 5758, 03 Civ. 5759, 03 Civ. 5760, 03 Civ. 5761, 03 Civ. 5762, 03 Civ. 5763, 03 Civ. 5764, 03 Civ. 5765, 03 Civ. 5766, 03 Civ. 5768, 03 Civ. 5769, 03 Civ. 5770, 03 Civ. 5771, 03 Civ. 5774, 03 Civ. 5775, 03 Civ. 5776, 03 Civ. 5778, 03 Civ. 5780, 03 Civ. 5781, 03 Civ. 5783, 03 Civ. 5784, 03 Civ. 5785, 03 Civ. 5786, 03 Civ. 5787, 03 Civ. 5790, 03 Civ. 5791, 03 Civ. 5792.

On November 10, 2006, the Court approved class settlements, in this consolidated class action brought on behalf of persons and entities who purchased or otherwise acquired securities of Adelphia Communications Corporation ("Adelphia") in the period August 16, 1999 through June 10, 2002, between plaintiffs and (i) defendant Deloitte & Touche LLP ("Deloitte") and (ii) a number of defendant banks (identified in, *e.g.,* Plaintiffs' Memorandum in Support of Proposed Settlements, at 1-2, n. 2) ("the Banks"), for, respectively, (i) $210 million and (ii) $244,953,437. Counsel for lead plaintiffs now move for an award of legal fees and expenses (with respect to both settlements) in the amount of 21.4% of the total of the settlements plus expenses of $1,455,130.81.[FN1] The fee is to be taken from the settlements proportionately.

FN1. In the notice to the members of the class describing both the proposed settlements and the expected application for fees and expenses, the members of the class were advised that counsel would apply for fees not exceeding 25% of the settlement funds and expenses not to exceed $3.3 million.

> The fee sought will encompass work on "responses to the potential appeals of objectors ... and continuing implementation and the monitoring of the Settlements and the settlement administration process to ensure that the Settlement Funds are appropriately distributed." Plaintiffs' Memorandum in Support of Proposed Settlements, at 68.

Objections to the fees sought, as excessive, have been filed by (i) Leonard and Claire Tow and related entities; (ii) the Commonwealth of Pennsylvania Public School Employees' Retirement System; and (iii) the New York State Teachers' Retirement System ("NYSTRS").

The fee application will be "assessed based on scrutiny of the unique circumstances of [this] case, and 'a jealous regard to the rights of those who are interested in the fund." ' *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 53 (2d Cir.2000) (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 469 (2d Cir.1974)).

The Court will consider a fee based upon a percentage of the common fund achieved, subject to consideration of the lodestar as a "cross check." *See*

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id. at 50.[FN2] The fee application is considered in light of the *Goldberger* factors: (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 Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121-22 (2d Cir.2005) (citing *Goldberger,* 209 F.3d at 50).

> FN2. The Court concurs with the observation that the pure lodestar calculation of fees can be a "disincentive to early settlements." *Goldberger* at 48 (citing *Savoie v. Merchants Bank,* 166 F.3d 456, 461 (2d Cir.1999)).

The Court has had the benefit of considering the helpful declarations of law professors John C. Coffee, Jr. (of Columbia University Law School, submitted by plaintiffs) and Michael A. Perino (of St. John's University School of Law, submitted by NYSTRS), which give a very thorough overview of what federal courts have been doing in recent years on fee applications in class actions. Ultimately, of course, each case must be evaluated individually. An average of percentages in (more or less) similar cases should not be used as a "benchmark." *See Goldberger,* 209 F.3d at 51-52.

*2 The first *Goldberger* factor ascertains the time and labor expended by counsel. Plaintiffs' counsel-*i.e.,* lead counsel and others working under their direction-have (to the date of the application) expended 83,038.33 hours on this litigation. (Joint Declaration of Arthur N. Abbey and Jeffrey H. Squire ("Joint Declaration"), ¶ 263.) [FN3] Those hours, at the hourly rates of the various participants, represent $33,686,468 in billable time. *Id.*

> FN3. Paralegal time is included. *See id.,* Appendix Ex. 2, p. 2. It represents less than 5% of the total time. *Id.*

As is set forth in detail in the Joint Declaration, lead counsel were required to perform services in the interest of the class in connection with other related proceedings: the bankruptcy of Adelphia and its subsidiaries, the civil action brought by the Securities and Exchange Commission ("SEC"), and the United States Attorney's prosecution of a number of Adelphia's principal shareholders and officers. (Joint Decl. ¶¶ 82-138.)

In addition, of course, lead counsel participated in the present case, drafting the consolidated class action complaint and participating substantially in responding to defendants' motions, and, most significantly, studying the discovery available (notwithstanding the discovery stay provisions of the Private Securities Litigation Reform Act) and consulting with accounting and damages experts, and, so prepared, engaging in the lengthy and difficult negotiations with Deloitte and the Banks, under mediator Daniel Weinstein, that resulted in the settlements.[FN4]

> FN4. Counsel obtained very substantial discovery by participating in the Adelphia bankruptcy proceedings, through review of the SEC and criminal proceedings, and as a result of voluntary disclosure made by Deloitte and the Banks for settlement purposes. (Joint Decl. ¶ 139.)
>
> Mr. Weinstein, a former Judge of the California Superior Court and an experienced mediator, has described the mediation as contentious, extensive, difficult and hard-fought. (Weinstein Decl. ¶¶ 5, 9, 11), and as resulting in "an excellent result for the class." (*Id.* ¶ 11.)

The second *Goldberger* factor focuses on the magnitude and complexities of the litigation.

The magnitude and complexity of the litigation is plain: these are over 60 cases in the MDL docket, many, but by no means all, subsumed in the consolidated class action complaint; counsel estimate approximately $5.5 billion in market

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losses; [FN5] furthermore, the bankrupt issuer, Adelphia, and the allegedly principal wrongdoers, members of the Rigas family whose assets have been forfeited to the government, are not promising sources of any major recovery, so that plaintiffs have had to direct their principal efforts at the present defendants, who have arguable defenses, *e.g.,* under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994), and its progeny, and that their proportionate Rule 10b-5 fault is relatively small.

FN5. *See* Joint Declaration, ¶ 18. Counsel there make clear that that estimate is not the result of "a strict loss causation analysis," and does not evaluate the strength of plaintiffs' claims.

> Professor Perino calculates investor loss at $7.9 billion (Perino Decl. ¶ 23), "as the dollar value increase in the defendant firm's market capitalization from the trading day on which its market capitalization peaked during the class period to the first trading day immediately following the end of the class period." (*Id.* n. 13 (citation omitted).) That figure does not appear to include any causation analysis, no less an evaluation of the strengths and weaknesses of plaintiffs' claims.
>
> NYSTRS argues that this case was not extremely risky.
>
> The existence of wrongdoing was made clear early on through SEC investigations of Adelphia, its executives, and Deloitte, through the creditors' adversary proceeding against the banks, from the indictments of several key Adelphia executives, from Adelphia's civil lawsuit against Deloitte, and from public disclosures made by Adelphia itself.
>
> (N.Y.STRS Opposition at 17.) Being aware that there had been massive fraud at Adelphia, however, is only the first step in bringing claims to a successful conclusion against parties in the positions of the settling defendants. "[T]he valuation of damages in securities class actions is not a 'hard science." ' *Goldberger,* 209 F.3d at 56 (citation omitted).

The facts relating to the third *Goldberger* factor-the risk of the litigation-are suggested in the discussion above of the second factor. Success, at least of the magnitude of the settlements at issue, was very far from assured. Some of the bank defendants might have escaped or reduced their exposure through releases in the Adelphia bankruptcy proceedings. *Central Bank* represented a serious barrier to overcome; the settling defendants' proportionate liability on the Rule 10b-5 claims might have been significantly reduced; there remained at the time of settlement serious limitations issues (*see Adelphia Comm. Corp. Sec. & Deriv. Lit .,* No 03 MDL 1529, 2005 WL 1278544 (S.D.N.Y. May 31, 2005)); and causation had to be established. The case had to be litigated, moreover, against large and extremely capable law firms deeply experienced in securities litigation.

***3** The fourth *Goldberger* factor looks at the quality of the representation. Here, lead counsel are two law firms well known and experienced in class action litigation. The quality of their work is, of course, best shown in the results they have achieved here: an all cash settlement of just under $455 million. The Court believes that Judge Cote's description of the achievement of counsel in the WorldCom litigation applies here as well: "If the Lead Plaintiff[s] had been represented by less tenacious and competent counsel, it is by no means clear that [they] would have achieved the success [they] did here on behalf of the Class." *In re WorldCom, Inc. Sec. Litig .,* 388 F.Supp.2d 319,

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359 (S.D.N.Y.2005). The fact that the settlements were obtained from defendants represented by "formidable opposing counsel from some of the best defense firms in the country" also evidences the high quality of lead counsels' work. *Id.* at 358.

The fifth *Goldberg* factor looks at the requested fee in relation to the settlement.

The aggregate amount of the settlement here, almost $455 million, "represents a recovery of 27.5% of the $1.65 billion in realistically provable damages, according to the analysis of plaintiffs' experts." (Joint Decl. ¶¶ 201, 254.) That, in the Court's view, based upon all of the foregoing factors-and adding that the settlements are all cash and will be distributed in the relatively near future, not after (probably) several years of litigation and trial-is an excellent settlement.

Goldberger also includes as a relevant factor public policy considerations. Aside from the considerations mentioned under this head by Judge Cote in *WorldCom,* 388 F.Supp.2d at 359, which may also be applied here, the Court simply adds that, in addition to the size of the settlements, the fact that the funds will be distributed now rather than later is also a benefit to the class.

The Court concludes that the percentage proposed by Lead Counsel, 21.4%, is reasonable on the facts of this case and should be awarded. The lodestar multiplier (2.89) confirms the Court's conclusion. Larger lodestar multipliers have been awarded in (more or less) comparable cases. In *WorldCom* the lodestar multiplier was 4. 388 F.Supp.2d at 354.

The Court has considered the arguments of the objectors and does not find them persuasive.[FN6]

FN6. NYSTRS seeks additional time to respond to lead counsels' fee application "if the record is unclear or incomplete in any way material to the Court's decision." (N.Y.STRS Opposition at 24.) The Court does not find that any supplementation is necessary.

The requested fee is granted as set forth in the orders (one as to each settlement) of even date herewith.

Copies of this Memorandum and Order and the orders referred to above are being made available to the Abbey firm, which is directed to forthwith transmit copies by fax to counsel for the objectors and the settling defendants.

SO ORDERED.

S.D.N.Y.,2006.
In re Adelphia Communications Corp. Securities and Derivative Litigation
Not Reported in F.Supp.2d, 2006 WL 3378705 (S.D.N.Y.), Fed. Sec. L. Rep. P 94,128

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re AOL TIME WARNER, INC. Securities and "ERISA" Litigation

No. MDL 1500, 02 Civ. 5575(SWK).
April 6, 2006.

OPINION & ORDER

KRAM, J.

***1** This Opinion considers the fairness of a $2.65 billon class action settlement (the "Settlement") reached in the securities litigation arising from America Online, Inc. ("AOL") and AOL Time Warner, Inc.'s ("AOLTW") allegedly fraudulent accounting of advertising revenue during, and in the years immediately preceding, AOL's merger with Time Warner, Inc. ("Time Warner"). [FN1] Coming on the heels of AOLTW's $150 million settlement with the Department of Justice ("DOJ") [FN2] and its $300 million settlement with the Securities and Exchange Commission ("SEC"), this Settlement marks the conclusion of the primary shareholder lawsuit against the Company.

FN1. Although Defendant AOLTW has changed its name to Time Warner, Inc., for clarity, the Court will continue to refer to the merged entity as AOLTW, or the Company.

FN2. The DOJ directed that the $150 million fund established by its settlement with the Company be used for AOLTW's settlement of securities litigation. AOLTW allocated that entire sum to the instant Settlement, in addition to the $2.4 billion provided by AOLTW and the $100 million provided by AOLTW's auditor, Ernst & Young LLP ("Ernst & Young"), under the terms of the Settlement. The Settlement's inclusion of the entire $150 million from the DOJ settlement is the basis of one of the objections discussed below. *See infra* Part II.E.1.

Although Lead Plaintiff's Counsel distributed approximately 4.7 million Settlement notifications to putative Class Members, the Court has received only six objections to various facets of the Settlement, one of which was withdrawn prior to the fairness hearing .[FN3] Of the remaining objections, two contest the reasonableness of the Settlement amount, and there are individual objections to the adequacy of the Class representative, the Settlement Notice, and the Plan of Allocation. After briefly commenting on the Court's earlier certification of the Settlement Class, reviewing the standards for the approval of class action settlements, and addressing the aforementioned objections, the Court grants Lead Plaintiff's petition for approval of the Settlement.

FN3. As explained in greater detail below, two of the six objections were filed by parties acknowledging that they are not members of the Class, including the party that withdrew its objection. *See infra* Parts I.C & II.E. Plaintiffs allege that two of the other objectors also lack standing to object to the Settlement.

I. Background

This Settlement is the culmination of over three years of litigation and seven months of mediation with a Court-appointed special master. The relevant history of the litigation through May 5, 2004 is described in the Court's Opinion considering Defendants' motions to dismiss. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 381 F.Supp.2d 192 (S.D.N.Y.2004). The Court presumes familiarity with that Opinion.

A. The Fraudulent Accounting Allegations

In brief, Plaintiffs allege that AOL and

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AOLTW improperly accounted for dozens of advertising transactions, inflating revenue for fifteen quarters between 1998 and 2002. These transactions were allegedly designed to create the appearance that they were generating revenue, despite providing completely illusory benefits to the Company.

Plaintiffs describe myriad sham transactions between AOLTW and over a dozen separate companies. For example, Plaintiffs allege that AOLTW engaged in a number of three-legged "round-trip" transactions with the internet vendor Homestore. In the first "leg" of such transactions, Homestore would pay a third party for services and products that it did not need. In the second leg, the third party would purchase advertising from AOLTW with the money it received from Homestore. Finally, AOLTW would purchase advertising from Homestore in substantially the same amount as the third-party's purchase of advertising from AOLTW. While capital flowed to each of the parties and appeared to increase AOLTW's advertising revenue, the parties received no real benefits apart from their inflated earnings statements. *See In re AOL Time Warner,* 381 F.Supp.2d at 226. These round-trip transactions are representative, but hardly exhaustive, of Plaintiffs' allegations.[FN4]

> FN4. AOLTW is also alleged to have employed such techniques as "jackpotting" (repetitive display of an advertising partner's advertisements immediately before a reporting period), the conversion of non-advertising proceeds into advertising revenues, and the impermissible double-booking of valid advertising revenue. (Second Am. Compl. ¶ 15.)

*2 Ultimately, Plaintiffs allege that these fraudulent schemes resulted in AOLTW's overstatement of revenue by at least $1.7 billion, inflating the value of AOLTW stock and causing billions of dollars in damage to investors, in violation of the federal securities laws.

B. Motion Practice

The Court evaluated Defendants' motions to dismiss the Complaint, and, on May 5, 2004, issued an opinion denying the motions in large part and preserving a wide variety of claims against AOLTW, Ernst & Young, and a half dozen individual defendants. Shortly thereafter, the Court granted Plaintiffs leave to amend their Complaint. Plaintiffs filed a Second Amended Complaint on August 23, 2004.

Subsequent to the Court's denial of Defendants' motions to dismiss, Plaintiffs initiated formal discovery and began reviewing over 15.5 million documents turned over by AOLTW. (Heins Decl. ¶ 7, Dec. 2, 2005.) In addition, Plaintiffs responded to Defendants' substantial document requests and interrogatories, battled over various aspects of their and Defendants' discovery requests, and engaged in extensive negotiations to address Defendants' claims to privileged documents. (Heins Decl. ¶¶ 65-69.) On the basis of relevant discovered materials, Plaintiffs not only supplemented their existing claims, but eventually drafted a Third Amended Complaint and petitioned the Court for leave to amend. Plaintiffs later indicated that they had identified "over 100 separate transactions which [they] thought were material to their allegations ." (Final Approval Hr'g Tr. 4-5, Feb. 22, 2006.) By the time they entered into the Settlement, Plaintiffs had laid "the groundwork to prepare for hundreds of merits and expert depositions to occur in the fall and spring of 2005-2006." (Heins Decl. ¶ 37.)

Meanwhile, Defendants drafted a motion for summary judgment, alleging that Plaintiffs failed to establish loss causation as a matter of law. The standard for loss causation has been the subject of substantial litigation over the past several years. In the interval between the filing of the motion to dismiss and the instant Settlement, the Second Circuit and Supreme Court have weighed in with a number of influential opinions, altering the relevant

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legal standards for active securities lawsuits. The most recent Supreme Court precedent addressing loss causation, *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336 (2005), was argued and decided in the months immediately following the final briefing of Defendants' motion for summary judgment. With a decision on that motion pending, the parties entered a phase of intense and protracted settlement discussions.

C. The Settlement

In late 2004, the Court appointed Paul D. Wachter as special master for discovery in this litigation. Special Master Wachter proceeded to play a prominent role mediating settlement negotiations between the parties. During the mediation sessions before Special Master Wachter, the parties discussed the viability of their respective claims and defenses, the role of emerging securities law precedent, and their widely divergent views of potential outcomes.

*3 Plaintiffs relied on their Complaint, a variety of economic experts, and the results of their massive discovery operation to buttress their claims that the Class sustained extensive damages. On the other hand, Defendants insisted, and continue to insist, that their accounting statements were not fraudulent and that, even if such allegations could be proved, such fraud did not cause the declining price of AOLTW stock. After nearly seven months of involved settlement negotiations overseen by Special Master Wachter, the parties entered into a Memorandum of Understanding on July 29, 2005, and began preparing a Stipulation of Settlement.

The Stipulation of Settlement resulted from a second round of negotiations between Lead Plaintiff's Counsel and representatives of the nine firms representing Defendants. The parties negotiated a number of complex issues essential to the Settlement, including the Defendants' right to termination of the Settlement, the scope of releases, and the specific language of the Stipulation. At the same time, Lead Plaintiff's Counsel drafted supplemental documents, including the Notice to the Class, the Proof of Claim and Release, and the Plan of Allocation. After finalizing the drafts of all relevant documents, the parties petitioned the Court for preliminary approval of the Settlement.

On September 28, 2005, the Court held a preliminary approval hearing to address the Settlement materials provided by the parties. After reviewing those materials (including the Stipulation of Settlement, draft notice material, the Plan of Allocation, and supporting memoranda) and considering the issues raised at the preliminary approval hearing, the Court provided the parties an opportunity to modify the notice procedures and opt-out requirements. On September 30, 2005, the Court issued Orders certifying the Class for settlement purposes and preliminarily approving the Settlement. Upon receiving preliminary approval of the Settlement, Plaintiffs commenced the mailing and publication of the Settlement Notice.[FN5]

> FN5. A short time later, in compliance with the terms of the Stipulation of Settlement, Defendants deposited the $2.65 billion Settlement Fund into an escrow account. The Fund has earned approximately $303,000 a day for the benefit of the Settlement Class since its deposit. (Pls.' Br. In Support of Final Approval 1, Jan. 30, 2006.)

Lead Plaintiff's Counsel retained Gilardi & Co., LLC (the "Settlement Administrator" or "Gilardi") to administer the Settlement. The Settlement Administrator initially mailed 115,080 "Notice Packages" to the names and addresses provided by AOLTW's transfer agent.[FN6] The Settlement Administrator also contacted the brokerage houses that hold securities in "street name" for beneficial owners, giving those institutions the option to mail Notice Packages directly to the beneficial owners or to provide Gilardi with a list of those owners' addresses. (Forrest Decl. ¶ 5, Jan. 1, 2006.) In addition, summary notices were published over the course of two weeks on separate weekdays in the New York Times, Wall Street Journal, Financial

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Times, and USA Today. (Forrest Decl. ¶ 7.) The Settlement Administrator has mailed more than four and a half million more Notice Packages in response to requests from putative Class Members. (Forrest Decl. ¶ 6.)

FN6. Each Notice Package included a "true and correct copy of the Notice, including the Proof of Claim and Release, the Plan of Allocation, and the Request for Exclusion from Securities Class." (Forrest Decl. ¶ 2, Jan. 1, 2006.) These materials were also available at the website maintained throughout the course of this Settlement. *See* AOL Time Warner Securities Litigation Settlement, http://www.aoltimewarnersettlement.com (last visited March 20, 2006).

*4 The Settlement Administrator initiated its mailing in early October, shortly after the Court's preliminary approval of the Settlement. The Notice set two important deadlines for responses to the Settlement: (1) objections to the Settlement and requests to opt out of the Settlement were to be filed by January 9, 2006, while (2) Settlement claims were to be submitted by February 21, 2006. By the January 9 objection deadline, the Court had received four objections from putative Class Members, and two motions to intervene and object to the Settlement, one of which was withdrawn shortly thereafter.[FN7]

FN7. Plaintiffs in the ERISA action stemming from the same operative facts as the instant lawsuit initially submitted a motion to intervene and object to the Settlement on January 7, 2006, but voluntarily withdrew their motion on January 27, 2006. Accordingly, the Court declines to address their objection.

On February 22, 2006, the Court conducted the final approval hearing. At the hearing, both Lead Plaintiff's Counsel and defense counsel for AOLTW were given the opportunity to make final remarks supporting the fairness of the Settlement. At that time, Lead Plaintiff's Counsel reported that almost all significant holders of affected stock had filed claims to the Settlement and noted the lack of significant opposition or adverse comment by institutional investors with Settlement claims. Not one of the formal objectors attended or spoke at the hearing, each of them resting on her papers. Further, nobody attending the hearing contested the fairness of the Settlement. The Court reserved judgment, pending this written Opinion.

II. Discussion

A. Certification of the Settlement Class

On September 30, 2005, the Court certified the Class for settlement purposes. This section briefly supplements that Order with the facts supporting class certification under Federal Rule of Civil Procedure 23.

1. Numerosity

To qualify for certification, a class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Here, more than 4.7 million Settlement Notices have been mailed to putative Class Members and the Settlement Administrator has received approximately 600,000 claims. Hence, the numerosity requirement is clearly satisfied.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "[W]here putative class members have been injured by similar misrepresentations and omissions, the commonality requirement is satisfied." *Fogarazzo v.. Lehman Bros., Inc.,* 232 F.R.D. 176, 180 (S.D.N.Y.2005) (citations omitted). Plaintiffs allege that the Class suffered damages as a result of three and a half years of AOLTW's misrepresentations about the Company's financial condition and its fraudulent accounting practices. Due to the public nature of Defendants' financial statements and the breadth of the alleged

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fraud, the issues of law and fact underlying this litigation are common to the Class.

3. Typicality

Under Rule 23(a)(3), the interests of the class representatives must be "typical of the claims ... of the class." Fed.R.Civ.P. 23(a)(3). This requirement is satisfied if "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." *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 155 (2d Cir.2001) (citation omitted). Further, a class representative's claims "are not typical if that representative is subject to unique defenses." *Fogarazzo,* 232 F.R.D. at 180 (citation omitted).

*5 Here, Lead Plaintiff, like all Class members, claims damages allegedly caused by Defendants' misrepresentation of AOL's financial health, including the overstatement of advertising revenues to artificially inflate the stock of AOL and AOLTW. The legal theories pleaded by Lead Plaintiff, numerous violations of the federal securities laws, are shared by all Class Members. Furthermore, no unique defenses may be asserted against Lead Plaintiff that would make its claims atypical. As such, the typicality requirement is satisfied.

4. Adequacy

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). In considering a class representative's adequacy, the court asks whether the representative (1) has any interests that conflict with the rest of the class, and (2) is represented by qualified and capable legal counsel. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000) (citation omitted).

On several occasions throughout the course of this litigation the Court has commented favorably on Lead Plaintiffs representation of the Class. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. MDL 1500, 2003 WL 102806, at *2 (S.D.N.Y. Jan. 10, 2003); *In re AOL Time Warner,* 381 F.Supp.2d at 208 n. 8. Lead Plaintiffs conduct during the Settlement has not altered the Court's earlier findings. All Class Members, including Lead Plaintiff, seek to obtain the largest possible recovery for losses resulting from Defendants' alleged misconduct. Lead Plaintiff has successfully prosecuted the claims it shares with the rest of the Class, resulting in the $2.65 billion Settlement at issue. There is no evidence that Lead Plaintiffs interests conflict with the rest of the Class. Similarly, the Court continues to be impressed with the quality of representation provided by Lead Plaintiffs Counsel, its prosecution of the lawsuit, and its negotiation of the Settlement. *See also In re AOL Time Warner,* 2003 WL 102806, at *2; *infra* Part II.C. Both Lead Plaintiff and its choice of counsel satisfy the adequacy requirement of Rule 23(a)(4).

5. Maintainability

In addition to finding that a class meets the requirements of Rule 23(a), courts must ascertain whether the class is maintainable under one of the Rule 23(b) criteria. One commonly applied criterion requires "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." Fed.R.Civ.P. 23(b)(3).

With respect to the first Rule 23(b)(3) prong, the Supreme Court has noted that predominance is "readily met in certain cases alleging ... securities fraud...." *Amchem Prods. v. Windsor,* 521 U.S. 591, 625 (1997). This case readily illustrates that principle. Allegations of Defendants' misrepresentations and the improper inflation of AOL's accounting revenues underlie the factual and legal claims of every Class Member. *See supra* Part II.A.2. The Court is satisfied that common questions of law and fact are predominant.

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*6 With respect to the second Rule 23(b)(3) prong-the superiority of the class action to other methods of adjudicating the controversy-securities cases like this one "easily satisfy" that requirement. *In re Blech Sec. Litig.,* 187 F.R.D. 97, 107 (S.D.N.Y.1999). The Settlement provides a vehicle of recovery for individuals that would find the cost of individual litigation prohibitive, yet allows anyone wishing to initiate her own lawsuit to opt out of the Settlement. The Court's previous decision to consolidate this litigation is also consistent with the Settlement. The Settlement offers a single forum to resolve the common claims of millions of potential Class Members and prevents the initiation of countless claims in state and federal courts throughout the nation. Finally, at this stage, the risk of encountering any serious difficulty in managing the Class is negligible. Maintainability is satisfied here.

B. Standard for Final Approval of Class Action Settlements

Federal Rule of Civil Procedure 23(e) governs the settlement of class action litigation. Courts may approve class action settlements after proponents of the settlement have distributed adequate notice of the proposed settlement and the settlement has been the subject of a fairness hearing. Fed.R.Civ.P. 23(e)(1). The touchstone for court approval is that the settlement be "fair, reasonable, and adequate," Fed.R.Civ.P. 23(e)(1)(C), and "not a product of collusion." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (citing *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000)); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005), *cert denied,* 125 S.Ct. 2277 (2005).

Courts analyze a settlement's fairness, reasonableness and adequacy with reference to both "the negotiating process leading up to settlement as well as the settlement's substantive terms." *D'Amato,* 236 F.3d at 85. The court may not engage in mere "rubber stamp approval" of the settlement, yet it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v.. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974).

Further, courts should be "mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context." ' *Wal-Mart,* at 116 (quoting *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998)). As the Second Circuit has long recognized, "[t]here are weighty justifications, such as the reduction of litigation and related expenses, for the general public policy favoring the settlement of litigation." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). This concern is reinforced by the Court's analysis of both the procedural and substantive fairness of the Settlement.

C. Procedural Fairness: The Negotiation Process

"A court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that the settlement resulted from 'arms-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." ' *D'Amato,* 236 F.3d at 85 (quoting *Weinberger,* 698 F.2d at 74). This inquiry into a settlement's procedural fairness helps to ensure that the settlement is not the product of collusion. Evidence of arms-length negotiation between experienced counsel that have engaged in meaningful discovery may give rise to a presumption of fairness. *Wal-Mart,* 396 F.3d at 117 (citation omitted).

*7 In evaluating a settlement's procedural fairness, the Second Circuit has noted that that "a court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." *D'Amato,* 236 F.3d at 85 (citing *County of Suffolk v. Long Island Lighting,* 907 F.2d 1295, 1323 (2d Cir.1990)). Courts in this District have also commented on the procedural safeguards inherent in cases subject to the PSLRA, wherein the lawyers are not "mere entrepreneurs acting on behalf of purely nominal plaintiffs," but are

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"selected by court-appointed Lead Plaintiffs who are substantial and sophisticated institutional investors with access to independent legal and financial specialists and a huge stake in the litigation." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y.2004).

This Settlement is the product of seven months of intense arms-length negotiations, overseen and assisted by a court-appointed special master, between major financial entities, both of whom are represented by experienced, highly regarded counsel. Lead Plaintiff, the Minnesota State Board of Investment ("MSBI"), "manages the investment of retirement fund assets of the Minnesota State Retirement System, Teachers Retirement Association, and the Public Employees Retirement Association, as well as idle cash of other state agencies," with total assets exceeding $50 billion. Minnesota Office of the Legislative Auditor, Report Summary: Minnesota State Board of Investment, http:// www.auditor.leg.state.mn.us/FAD/2006/f0604.htm (released Feb. 15, 2006). Upon assigning MSBI lead plaintiff status, this Court noted that MSBI had sustained an estimated loss of $249 million, thus had the largest financial stake in the litigation. *See In re AOL Time Warner*, 2003 WL 102806, at *2. [FN8] Lead Plaintiff's public mission, financial experience, and vested interest in obtaining the best terms for the Settlement Class reflect favorably on its selection of counsel here.

FN8. MSBI's loss was calculated on the basis of a class period nearly two years shorter than the Class Period ultimately defined in the Settlement. Accordingly, its loss is presumably greater than $249 million.

Indeed, Lead Plaintiff's Counsel, Heins, Mills & Olson, PLC, is a respected class action litigator, with considerable experience in major securities and antitrust class action lawsuits. *See, e.g., In re Monosodium Glutamate Antitrust Litigation,* MDL 00-1328 (D.Minn.); *In re Broadcom Corp. Sec. Litig.*, SA CV 01-0275 (C.D.Cal.). Lead Plaintiff's Counsel has garnered judicial praise for its representation in previous actions, and has continued to show its client commitment and exceptional lawyering in this case. On the other side of the table, AOLTW's counsel, Cravath, Swaine & Moore LLP ("Cravath") is generally regarded as one of the country's premier law firms. Cravath has extensive experience in the defense of major class action lawsuits and has vigorously defended Plaintiffs' allegations throughout this litigation. At the fairness hearing, counsel for both parties noted their continuing disagreement about Plaintiffs' allegations. With the mediation of Special Master Wachter, however, both parties concluded that the Settlement was the best and most efficient outcome for their clients in light of the costs of litigation and mutability of applicable legal standards.

*8 Special Master Wachter assumed his role during the early stages of discovery, overseeing the terms of the discovery process before playing a vital role in the settlement negotiations between the parties. Special Master Wachter fulfilled his assignment with considerable skill and diligence, remaining in close contact with both parties and mediating dozens of face-to-face and remote meetings between them over the course of seven months. Special Master Wachter's oversight of the process lends considerable support to the Court's finding of procedural fairness.

In light of the substantial evidence that settlement negotiations were conducted at arms-length without the slightest hint of collusion, the Court credits the Settlement with a presumption of fairness. This presumption is supported by the fairness of the Settlement terms.

D. Substantive Fairness: The Settlement Terms

In evaluating the fairness, reasonableness, and adequacy of a settlement, the court is primarily concerned with the "substantive terms of the settlement compared to the likely result of a trial." *Malchman v. Davis,* 706 F.2d 426, 433 (2d

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Cir.1983) (citations omitted). In order to make this evaluation, courts in this Circuit have consistently employed the *Grinnell* factors:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery;

(9) the range of reasonableness of the settlement fund to a possible recovery 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)).

1. Complexity, Expense and Likely Duration of the Litigation

Due to its notorious complexity, securities class action litigation is often resolved by settlement, which circumvents the difficulty and uncertainty inherent in long, costly trials. *See, e .g., Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005); *In re American Bank Note Holographics, Inc.,* 127 F.Supp.2d 418, 424 (S.D.N.Y.2001); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999). This notoriety is amply illustrated by the instant case, which is particularly conducive to settlement.

Plaintiffs allege wrongdoing by one of the largest companies in the world, during the largest corporate merger in history. Plaintiffs' allegations span more than three and a half years and implicate financial statements filed over fifteen consecutive quarters. Plaintiffs point to hundreds of fraudulent transactions carried out over multiple years, employing diverse accounting techniques, and often including multiple, interrelated revenue components. These sophisticated and complex transactions shared just one common characteristic: their allegedly inappropriate inflation of revenue. There is no question that the presentation of these transactions, and the conflicting interpretations which they would be subject to, would stretch the patience, attention, and understanding of even the most exemplary jury.

***9** Since the denial of Defendants' motions to dismiss and the commencement of formal discovery, Plaintiffs have pored over millions of documents, employed nine experts, added six defendants, and laid the groundwork for dozens of depositions. (Heins Decl. ¶¶ 4, 7, 70, 77.) The breadth of resources dedicated to the prosecution of this lawsuit reflects the complexity of the issues involved and the expenses that lie ahead. Shortly after the denial of their motions to dismiss, Defendants initiated an extensive round of deposition and document requests and negotiated with Plaintiffs over the scope of discovery. Defendants continue to deny liability and have been subject to only limited criminal prosecution for their alleged wrongdoing. Defense counsel's vigorous defense of this lawsuit indicates Defendants' continued willingness to defend the allegations in the absence of the Settlement.

In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages. These challenges are exacerbated here, where a number of controlling decisions have recently shed new light on the standard for loss causation. *See, e*

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.g., *Dura Pharms.,* 544 U.S. at 336; *Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 173 (2d Cir.2005). If Defendants' pending motion for summary judgment on the issue of loss causation did not prove dispositive, it would continue to be the subject of profound dispute throughout the litigation.

In the absence of the Settlement, this litigation could very well last for several more years. The parties have not yet finished discovery. At a minimum, months of depositions would precede trial. A presumably lengthy trial would then be followed by years of inevitable appeals. Each step of the way, expenses would continue to accumulate, further decreasing the funds available to Class Members. Conversely, the $2.65 billion Settlement under consideration here "results in a substantial and tangible present recovery, without the attendant risk and delay of trial." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 362 (S.D.N.Y.2002).

After careful consideration of the circumstances of this litigation, the Court finds that a trial would be long, complex, and costly. This factor strongly favors the Settlement.

2. Reaction of the Class to the Settlement

The reaction of the class is generally gauged by reference to the extent of objection to the settlement. Courts in this Circuit have noted that "the lack of objections may well evidence the fairness of the Settlement." *In re American Bank Note Holographics,* 127 F.Supp.2d at 425. Courts have also commented favorably on settlements that are not contested by institutional investors and class representatives. *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 479 (S.D.N.Y.1998).

***10** Here, the Settlement Administrator mailed over 4.7 million Notice Packages to putative Class Members and has received an estimated 600,000 proofs of claim. Only four such individuals filed an objection to any aspect of the Settlement, and just two dispute the reasonableness of the Settlement Fund. [FN9] Further, not a single institutional Class Member objected to the Settlement.[FN10] The relative lack of dissent here compares favorably with settlements previously approved in this District. *See, e.g., D'Amato,* 236 F.3d at 86-87 (eighteen objectors out of 27,883 notices); *Hicks,* 2005 WL 2757792, at *6 (three objectors out of approximately 100,000 potential members of the class); *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 337-338 (S.D.N.Y.2005) (seven objectors out of 4,000,000 potential class members and 830,000 claimants).

FN9. Moreover, Plaintiffs argue that two of the four objectors lack standing to object to the Settlement. The Court addresses all objections in considerably more detail below. *See infra* Part II.E.

FN10. One institutional investor seeks to intervene in order to file an objection, *see infra* Part II.E.1, but by exercising its right to opt out of the Class, that entity is protected from the binding legal effect of this Settlement.

The Settlement Administrator also noted that 10,082 persons and entities filed valid requests for exclusion from the Class. (Forrest Decl. ¶ 3, Feb. 21, 2006.) Although a large number at first glance, these opt-outs amount to less than 0.2% of the 4.7 million putative Class Members.[FN11] Comparably small percentages of opt-outs have favored settlement in the past. *See In re Sumitomo,* 189 F.R.D. at 281 (finding that fewer than 1% of class members requesting exclusion "strongly favor[ed] approval of the proposed settlement [ ]"). The small number of objections and low percentage of opt-outs here strongly favor the Settlement.

FN11. Additionally, as opt-outs were not required to submit transactional information in order to file a valid request for exclusion, it is impossible to ascertain what percentage of the opt-outs would have had valid claims to the Settlement.

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3. Stage of Proceedings and Amount of Discovery Completed

Courts have approved settlements at all stages of the proceedings. The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement. The parties need not "have engaged in extensive discovery" as long as "they have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make ... an appraisal' of the settlement." *In re Austrian & German Holocaust Litig.,* 80 F.Supp.2d 164, 176 (S.D.N.Y.2000) (quoting *Plummer v. Chemical Bank,* 668 F.2d 654, 660 (2d Cir.1982)); *see also Maley,* 186 F.Supp.2d at 363; *In re American Bank Note Holographics,* 127 F.Supp.2d at 425-26.

At the time of the Stipulation of Settlement, this litigation had reached an advanced stage of discovery. Even prior to formal discovery, Plaintiffs reviewed the relevant public facts pertaining to this litigation, with their review culminating in the 300 page Amended Complaint. Upon commencing formal discovery, Plaintiffs reviewed over 15 million documents, consulted with nine different economic and accounting experts, briefed numerous motions, and laid the foundation for hundreds of depositions. Although the final stages of discovery, including depositions, were not yet complete, it is not certain that Plaintiffs would have been able to maintain this action long enough to reach that stage of discovery. Defendants' motion for summary judgment was pending before the Court, and presented a difficult question that, if decided in favor of Defendants, may have resulted in dismissal of the lawsuit. The thorough briefing of this and other motions prior to settlement supplemented Plaintiffs' consideration of the strengths of their claims and the defenses they were likely to face at trial.

***11** Although discovery had not been completed prior to the Settlement, Plaintiffs had conducted meaningful pre-trial discovery and had engaged in sufficient trial preparation to appraise their likelihood of success. Accordingly, the third *Grinnell* factor also weighs in favor of the Settlement.

4. Risks of Class Prevailing (Establishing Liability and Damages, and of Maintaining the Class through Trial)

One of the Court's central inquiries when appraising a settlement is the likelihood that the class would prevail at trial in the face of the risks presented by further litigation. *Grinnell* specifically advises courts to consider the risks of establishing liability and damages, and of maintaining the class through trial. 495 F.2d at 463. This inquiry requires courts to consider legal theories and factual situations without the benefit of a fully developed record, thus courts must heed the Supreme Court's admonition not to "decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14 (1981). Rather, "the Court 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 (citing *In re Holocaust Litig.,* 80 F.Supp.2d at 177).

The difficulty of establishing liability is a common risk of securities litigation. *Maley,* 186 F.Supp.2d at 364. In this case, Plaintiffs were not only challenged to establish a valid theory of loss causation, *see supra* Parts I.B & II.D.1, they also faced the risk of being unable to establish scienter for a number of the defendants. In its consideration of Defendants' motions to dismiss, the Court closely reviewed Plaintiffs' allegations of scienter, dismissing claims against several individual defendants while finding other allegations adequate to avoid dismissal. *See In re AOL Time Warner,* 381 F.Supp.2d at 219-31. Of course, avoiding dismissal at the pleading stage does not guarantee that scienter will be adequately proven at trial.

The risk of establishing damages here was equally daunting. The decline in AOL and AOLTW stock prices spanned several years. Defendants

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argue that this decline was the result of a number of factors-including the general decline in Internet stock values-unrelated to the allegations of fraud. Plaintiffs hired a team of experts to estimate damages and would likely face a conflicting panel of experts retained by Defendants for trial. The risk of establishing damages would be further exacerbated by the difficulty of educating the jury on abstruse economic concepts necessary to the calculation of damages.

Further, Plaintiffs would have faced a considerable challenge explaining the transactions underlying the alleged fraud. The complexity and opacity of these transactions would likely hinder Plaintiffs' ability to present the jury with a coherent explanation of Defendants' misconduct. As their expert, Professor John C. Coffee, Jr., noted, Plaintiffs faced a serious issue "as to whether a jury could understand the convoluted 'round robin' advertising games that had been played" by Defendants. (Coffee Decl. ¶ 30, Dec. 2, 2005.)

***12** The Court certified this Class for settlement purposes only. Plaintiffs report that they had drafted a motion for class certification prior to the Settlement and had fully anticipated that Defendants would oppose class certification as vigorously as it had contested Plaintiffs' allegations and discovery requests. As such, even the process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement.

In summary, the *Grinnell* "risk factors" also favor the Settlement.

5. Ability of Defendants to Withstand a Greater Judgment

This factor typically weighs in favor of settlement where a greater judgment would put the defendant at risk of bankruptcy or other severe economic hardship. *See, e.g., In re Warner Comms. Sec. Litig.,* 618 F.Supp. 735, 746 (S.D.N.Y.1985). Here, AOLTW remains a solvent, highly capitalized company, with assets greatly exceeding its $2.4 billion contribution to the Settlement. Neither party contends that Defendants are incapable of withstanding a greater judgment. However, the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair. *See, e.g., D'Amato,* 236 F.3d at 86; *In re NASDAQ Market-Makers,* 187 F.R.D. at 477-78. This factor must be weighed in conjunction with all of the *Grinnell* factors; most notably the risk of the class prevailing and the reasonableness of the settlement fund.

6. Range of Reasonableness of the Settlement Fund

The final two *Grinnell* factors constitute an inquiry into the settlement fund's range of reasonableness (1) in light of the best possible recovery and (2) to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. Though courts are encouraged to consider the best possible recovery, the range of reasonableness inquiry is tightly bound to the risks of litigation, which have been developed in greater detail above. *See supra* Part II.D.4. As such, the following discussion must be tempered by the Court's earlier finding that continued litigation would proceed with a high degree of risk.

Plaintiffs have not provided a specific estimate of the total damages sustained by the Class, in large part, no doubt, due to the difficulty of distinguishing the decline in share price attributable to fraud from the decline attributable to general market forces. In light of the steep decline during the Class Period and the Settlement's estimated recovery per share, however, it seems clear that Class Members will not recover their entire loss. This consideration alone does not undermine my finding that the $2.65 billion Settlement Fund is reasonable in light of the difficulty of establishing damages here. "[T]he settlement amount's ratio to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement's fairness." *In re Global Crossing,* 225 F.R.D. at 460-61. Indeed, damages

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are of such a speculative and contested nature here that the ratio of the settlement amount to a hypothetical maximum recovery would not be dispositive of the Settlement's fairness.

***13** Not only do the parties dispute the amount of damages sustained by the Class, they continue to dispute the very existence of damages. In light of this fundamental disagreement, the $2.65 billion Settlement secured by Plaintiffs is all the more impressive. Plaintiffs have secured a substantial, immediate recovery for the Plaintiff Class that ranks among the five largest securities settlements in history (Coffee Decl. ¶ 2), and is the second largest settlement ever reached with an issuer of securities. (Heins Decl. ¶ 83.) [FN12] In addition, the Settlement Fund is currently in escrow, earning approximately $303,000 a day for the Class. In this sense, the benefit of the Settlement will not only be realized far earlier than a hypothetical post-trial recovery, but dates back to October 7, 2005, when the funds were deposited in the escrow account. The concrete benefits of this Settlement outweigh the possibility of a higher recovery after trial. Under the circumstances of this case, the Settlement Fund is within the range of reasonableness.

FN12. In the early stages of this litigation, legal experts estimated "a payout of $1 billion" in the event of a settlement. (Heins Decl. Ex. 40.) Though this figure represents an estimated settlement amount rather than a full recovery, it provides some indication of the legal community's expectations. The Settlement reached here far exceeds those prognostications.

After carefully considering the *Grinnell* factors, most of which weigh in favor of the Settlement, I find the substantive terms of the Settlement fair, reasonable, and adequate.

E. Objections

The Court received a handful of objections to the Settlement prior to the deadline.[FN13] I will address each objection in the context of the aspect of the Settlement that is disputed.

FN13. Several of the persons objecting to the Settlement also object to Class Counsel's application for attorney's fees. The Court reserves judgment on the issue of attorney's fees at this time and will address the objections to fees in a separate ruling.

1. Stichting's Objection to the Settlement's Handling of the DOJ and SEC Funds

Stichting Pensioenfonds ABP ("Stichting") filed a motion to intervene, objecting to the Settlement's handling of funds set aside by AOLTW subsequent to the Company's settlements with the DOJ and SEC.[FN14] Stichting's objection to the Settlement's inclusion of the DOJ funds and AOLTW's decision to use its "best efforts" to include the SEC funds are without merit. Because the right of intervention is inessential to my disposition of Stichting's objection, the validity of its intervention is assumed for the purpose of this Opinion.[FN15]

FN14. Stichting is a putative Class Member but has chosen to opt out of the instant Settlement, hence the necessity of its motion to intervene. Stichting has filed a separate lawsuit, which is pending in this Court.

FN15. Stichting's right of intervention is by no means assured under the circumstances of this case. I am particularly troubled by the objector's argument that its intervention in this dispute is timely. Though Stichting filed its motion on the January 9, 2006 deadline for objections, it made no attempt to alert the Court to its objection at the preliminary fairness hearing on September 28, 2004, or at any time prior to January 9, 2006. By the time Stichting objected, the Settlement Administrator had mailed millions of

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> Notice Packages and hundreds of thousands of putative Class Members had filed claims. If Stichting's requested relief were granted, these costs would be duplicated by a second round of Notice.

> Although Stichting waited until the last possible minute to bring their objection to the Court's attention, the exhibits to its motion indicate that Stichting was aware of the content of its objection well before the preliminary fairness hearing. (Kairis Decl. Ex. L; Letter from John C. Kairis to Samuel D. Heins and Peter T. Barbur (Aug. 17, 2005).) At that hearing, the Court heard argument from individuals objecting to certain conditions of the Notice, and, where appropriate, suggested that the Plaintiffs modify their proposal. Stichting's grievance is precisely the type of objection that would have been beneficially brought to the Court's attention at the preliminary fairness hearing. *See* Manual for Complex Litigation (Third) § 30.41, at 265 (2000) ("The court may want to hear not only from counsel but also from named plaintiffs, from other parties, and from attorneys who did not participate in the negotiations.").

Stichting requests that the Court strike the terms of the Settlement that refer to the DOJ and SEC funds, order that those funds be distributed pro rata to all aggrieved shareholders regardless of their participation in the instant Settlement, and order that a modified Notice and Plan of Allocation be published and distributed. Because the DOJ and SEC funds were established under different conditions and the Settlement handles the funds dissimilarly, each fund will be considered in turn.

i. The DOJ Funds

Prior to the instant Settlement, AOLTW entered into a Deferred Prosecution Agreement with the DOJ (the "DPA"). In accordance with the DPA, AOLTW agreed to pay $150 million into a "fund to be established under *its direction and control* to be used for either the settlement of shareholder securities law litigation or for purposes of any compensation fund" related to the transactions underlying the DPA. (Karis Decl. Ex. C; *United States v. America Online, Inc.,* No. 1:04 M 1133, at ¶ 9 (E.D.Va. Dec. 14, 2004) (emphasis added).) Stichting argues that the inclusion of the DOJ funds in the Settlement will preclude them from obtaining their pro rata share of the money provided by the DPA, thus unfairly benefiting the Settlement claimants to the detriment of shareholders who have opted out of the Settlement. (Stichting Obj. 23.)

***14** Stichting's objection to the Settlement's inclusion of the DOJ funds is undermined by the DOJ's directions for the distribution of those funds. Under the DPA, the DOJ funds are put under AOLTW's "direction and control" for "the settlement of shareholder securities law litigation." In its discretion, AOLTW has chosen to distribute those funds by means of the primary class action Settlement, benefiting hundreds of thousands of aggrieved shareholders and eliminating the costs associated with a separate distribution mechanism. Stichting's protestations notwithstanding, the DPA does not expressly indicate that the funds must be distributed pro rata to all harmed investors. Prior to filing their objection, Stichting wrote a letter to the DOJ, submitting their concern to that agency. (Kairis Decl. Ex. M; Letter from John C. Kairis to Paul J. McNulty, Esq., U.S. Dep't of Justice (Dec. 16, 2005).) There is no record of a reply. Without some indication that AOLTW's distribution of the funds is contrary to the Company's agreement with the DOJ, the Court will not disturb an agreement within the jurisdiction of another federal district court by reading conditions absent from the DPA into that agreement.

Stichting has not demonstrated that the Settlement's inclusion of the DOJ funds was

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improper. Consequently, the Settlement terms including those funds need not be stricken, nor must Plaintiffs distribute a modified Notice and Plan of Allocation on that basis.

ii. The SEC Funds

Following an SEC investigation into AOL's allegedly fraudulent accounting and Time Warner's alleged violation of a cease-and-desist order, AOLTW entered into an agreement with the SEC. Under the terms of a consensual judgment, AOLTW agreed to pay "$300 million in civil penalties, which the Commission will request be distributed to harmed investors." (Kairis Decl. Ex. F; SEC Litigation Release No. 2215 (March 21, 2005).)

In all of the materials announcing and describing the Settlement, the parties have referred to a $2.65 billion Settlement Fund. The $2 .65 billion figure does not include the SEC funds. The first mention of the SEC funds is on page six of the sixteen-page Notice. The Notice states that the SEC has not determined how those funds will be distributed, but that AOLTW has requested that the SEC make those funds, or a portion thereof, available for distribution with the Settlement. The settling parties have twice updated the Settlement website to indicate that the SEC has not made a final decision regarding those funds. In short, the Settlement does *not* include the SEC funds. Consequently, the Court will not require the parties to remove wholly aspirational language regarding the mechanism by which those funds may be distributed.

Furthermore, intermittent references to the SEC funds make neither the Notice nor the Plan of Allocation defective. Each of the Notice's references to the SEC funds is accompanied by a disclosure that those funds are not a part of the Settlement, but that AOLTW will make its best efforts to distribute those funds, or a portion thereof, through the class action mechanism. All estimates of per share recovery clearly indicate that the recovery is based on the $2 .65 billion figure, which does not include the SEC funds. Providing a second set of figures including the SEC funds in the estimated per share recovery would not only be misleading, but potentially inaccurate, because there is no indication of whether the SEC will elect to distribute none of the SEC funds, all of the SEC funds, or a portion thereof, through the Settlement. It cannot be said that the Notice fails to fairly apprise the putative Class Members of the terms of the Settlement.[FN16] To the contrary, the Notice explains the status of the SEC funds as clearly and simply as possible in light of the SEC's indecision with respect to how those funds will be distributed.

FN16. *See infra* Part II.E.4 for an elaboration on the relevant standards for settlement notice.

***15** Along these lines, the Plan of Allocation never mentions the amount of money that will be distributed. It merely states that the "Settlement monies will be distributed on a pro rata basis" under the terms of the Plan. (Plan of Allocation 1.) Stichting fails to explain how the Plan of Allocation would need to be altered to incorporate the greater amount of Settlement monies. If the SEC consented to distributing the $300 million via the Settlement, that money would simply be added to the $2.65 billion Settlement Fund already being distributed. Each claimant's pro rata share would net a greater per share recovery, but the Plan of Allocation itself would not require modification.

In short, references to SEC funds that are not included in the Settlement amount, but that AOLTW will make its "best efforts" to distribute through the class action mechanism do not make the Stipulation of Settlement, Notice, or Plan of Allocation defective. Stichting's objection is overruled.

2. Objections to the Reasonableness of the Settlement

Two individuals filed formal objections to the reasonableness of the Settlement. Margaret M. Keffer ("Keffer") argues that the Settlement

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provides inadequate compensation for her loss, suggesting instead that a settlement leading to the recovery of one-third of her losses might be adequate. Paul Heyburn ("Heyburn") argues that, considering the serious allegations against Defendants, the estimated recovery per share simply does not provide a substantial benefit.[FN17]

> FN17. Plaintiffs argue that Heyburn does not have standing to object to the Settlement. Indeed, the transaction records attached to Heyburn's objection indicate that he profited from his AOL investment. (Heyburn Obj. Ex 1.) Consequently, he does not have a claim under the Plan of Allocation, which limits recovery to those shareholders that suffered a loss. Without an injury, Heyburn does not have standing to object. *New York v. Reebok Int'l Ltd.,* 96 F .3d 44, 47 (2d Cir.1996). Nevertheless, in order to dispel any perceived unreasonableness of the Settlement, I will briefly address Heyburn's concerns regarding the reasonableness of the Settlement and adequacy of representation. *See infra* Part II.E.3.

Courts routinely approve settlements over conclusory objections. *See, e.g., In re Prudential Sec. Inc., Ltd. P'Ships Litig.,* MDL No. 1005, 1995 WL 798907, at *13 (S.D.N.Y. Nov. 20, 1995); *Saylor v. Bastedo,* 594 F.Supp. 371, 373-74 (S.D.N.Y.1984). Neither Heyburn's nor Keffer's objection provides a legal or factual basis for the alleged insufficiency of the Settlement, nor do they consider the legal or factual context in which the Settlement was reached. Consequently, the objectors' unsupported allegations of unreasonableness do not alter my appraisal of the Settlement's fairness.

3. Objection to Lead Plaintiff's Adequacy of Representation

Heyburn also questions the adequacy of representation. He argues that Lead Plaintiff has failed to adequately protect the interests of Class Members by neglecting to analyze whether "certain class members in certain states would fare better than in others" on the basis of state securities laws. (Heyburn Obj. ¶ 3.) This objection is without merit.

Heyburn overlooks the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA amended the federal securities laws to preempt state securities laws in certain class actions.[FN18] In relevant part, SLUSA directs that:

> FN18. As the Supreme Court recently noted, SLUSA amends the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") "in substantially similar ways." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, __ S.Ct. __, No. 04-1371, 2006 WL 694137, at *7 n. 6 (March 21, 2006). Plaintiffs claims are almost evenly divided between the 1933 Act and the 1934 Act. For ease of reference to the Supreme Court's analysis in *Dabit,* I will quote the amendments to the 1934 Act.

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging-

***16** (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1).[FN19]

> FN19. The analogous provision in the 1933 Act is found at 15 U.S.C. § 77p(b).

Because the instant action is a "covered class action," [FN20] alleging materially false and

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misleading statements or omissions of material fact (Second Am. Compl. ¶¶ 240-432) in connection with the purchase or sale of "covered securit[ies]," [FN21] claims under state securities laws are preempted. Consequently, Lead Plaintiff had no duty to consider, and in fact was prohibited from considering, state securities laws in the context of this class action. *See Dabit,* 2006 WL 694137, at *9; *see also Lander v. Hartford Life & Annuity Ins. Co.,* 251 F.3d 101, 108-10 (2d Cir.2001) (reaching the same conclusion in the context of the 1933 Act). As such, Heyburn's objection to the adequacy of Lead Plaintiff's representation is overruled.

> FN20. SLUSA defines a "covered class action" as:
>
> > any single lawsuit in which ... damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class ... predominate over any questions affecting only individual persons or members....
>
> 15 U.S.C. § 78bb(f)(5)(B). The instant class action clearly falls within this definition.

> FN21. "A 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit,* 2006 WL 694137, at *7 & n. 9 (citing 15 U.S.C. §§ 78bb(f)(5)(E) & 77r(b)). Both AOL (prior to the merger) and AOLTW stock traded on the New York Stock Exchange during the Class Period.

4. Objection to the Notice

"[T]he adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart,* 396 F.3d at 113-14 (citations omitted). Reasonableness refers to the understanding of the average class member; "the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options which are open to them in connection with the proceedings." ' *Id.* at 114 (quoting *Weinberger,* 698 F.2d at 70).

Cynthia R. Levin Moulton ("Moulton") objects to the Class Definition contained in the Notice, arguing that it "is defective and fails to satisfy the minimal requirements of due process" because the definition "only includes those security owners 'who were injured thereby," ' and the "class notice provides nothing by way of guidance concerning what it means to be injured thereby." (Moulton Obj. 2.) Moulton proceeds to describe a number of hypothetical situations in which the "injured thereby" definition may be unclear, as when a putative Class Member realizes gains offsetting her losses or has divergent results stemming from the ownership of distinct investment vehicles.

Moulton made an almost identical objection to the *WorldCom* settlement approved in this District just six months ago. In that case, Moulton argued that the class definition, which contained a similar "injured thereby" clause, "might be confusing to a person who had isolated losses but net gains from securities purchased during the Class Period, or who faced divergent results from purchases of different types of securities." *In re WorldCom,* 388 F.Supp.2d at 340. Judge Cote's well-reasoned analysis of Moulton's objection in that case applies equally here:

> A purchaser of [AOLTW] securities who believed that she had a legally cognizable injury attributable to those purchases would have been on notice that she was included in the Class. It is sufficient that the Class Definition gave putative Class Members who believed they had colorable claims arising from purchases of [AOLTW] securities enough information to alert them that they needed to opt out of the Class if they wished to pursue their claims separately.

*17 *In re WorldCom,* 388 F.Supp.2d at 340-41.

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Furthermore, the Plan of Allocation provides instructions for the calculation of recovery in many of the allegedly problematic scenarios proposed by Moulton. As in *WorldCom,* Moulton's objection is overruled.

5. Objection to the Plan of Allocation

A plan of allocation is evaluated by the same standards applied to the settlement as a whole: fairness, reasonableness, and adequacy. *See Maley,* 186 F.Supp.2d at 367 (citations omitted). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Id.* (citations omitted). Despite the existence of one objection here, the Plan of Allocation readily satisfies these standards.

I have already commented on Lead Plaintiff's Counsel's experience and competency. *See supra* Part II.C. Lead Plaintiff's Counsel prepared the Plan of Allocation in consultation with Scott D. Hakala, Ph.D., CPA ("Hakala"), an economics expert who has prepared court-approved plans of allocation in over a dozen securities settlements across the nation. (Hakala Decl. ¶ 1, Jan. 25, 2006.) Hakala designed the Plan of Allocation to provide recovery to damaged investors on a pro rata basis according to their recognized claims of damages. The Plan of Allocation presents clearly defined formulas for calculating claims by reference to a schedule with measures of artificial inflation for all relevant time periods and types of securities. Plans of allocation similarly calculating claims according to inflationary loss have recently been approved as a reasonable approach to the calculation of damages. *See Maley,* 186 F.Supp.2d at 367; *In re Lucent Techs., Inc., Sec. Litig.,* 307 F.Supp.2d 633, 649 (D.N.J.2004).

In his declaration, Hakala explains the methodology used to prepare the Plan of Allocation and asserts that the Plan is "fair and reasonable from an economic perspective." (Hakala Decl. ¶ 28.) While the estimates of damages and methodologies used to produce the Plan are necessarily complex due to the various types of securities involved in the AOLTW merger, the Court agrees with Hakala's assessment.

Pat L. Canada ("Canada") objects to the Plan of Allocation to the extent that it provides for the calculation of damages by the first-in/first-out accounting method ("FIFO"), rather than the last-in/first-out method ("LIFO"). Canada argues that courts prefer LIFO and only reluctantly permit the use of FIFO, thus the Plan of Allocation should be modified to calculate damages using LIFO. FN22

FN22. In addition to their substantive disagreement with Canada's objection, Plaintiffs attack the objection on two procedural grounds. First, they argue that Canada does not have standing, because he did not submit adequate proof of his membership in the Class. Indeed, Canada's non-notarized certification that he purchased 200 shares of AOL stock is not a valid proof of purchase. Second, they argue that Canada's lawyer, Nicholas M. Fausto, Esq. ("Fausto"), is in the practice of submitting "canned objections," thus the Court should be wary of his objection. On this latter point too, Plaintiffs may be correct.

> Much of the language in Fausto's brief attacking the use of FIFO is taken directly from Judge Schiendlin's opinion in *In re eSpeed, Inc. Sec. Litig.,* 232 F.R.D. 95 (S.D.N.Y.2005). Despite the fact that it is the most comprehensive authority from this District supporting his argument, Fausto fails to cite the case, choosing instead to lift whole sentences from that opinion without attribution. *Compare* Canada Obj. 7-8, *with In re eSpeed,* 232 F.R.D. at 101-02 & nn. 35-36. None of his arguments are original, nor are they made in the context of the specific factual circumstances of this case. Although I am wary of the

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Canada objection, I will briefly address the thrust of its argument.

In the context of a securities class action, FIFO and LIFO refer to methods used for matching purchases and sales of stock during the class period in order to measure a class member's damages. Under FIFO, a class member's damages are calculated by matching her first purchases during the class period with her first sales during the class period. Under LIFO, a class member's damages are calculated by matching the class member's last purchases during the class period with the first sales made during the period. Calculating recovery by means of these different methods can affect the measure of a class members' injury. Depending on the trajectory of a stock's percentage of artificial inflation and the sale of shares during the class period, use of FIFO may result in damages where LIFO would not, and vice versa.

***18** The method used to match purchases and sales when calculating damages in a securities action has only recently been the subject of judicial scrutiny and has more commonly arisen in the context of a court's assignment of lead plaintiff status. In this District, both FIFO and LIFO have been used to calculate the financial stake of movants for lead plaintiff status in securities class actions. *Compare In re Veeco Instruments Inc. Sec. Litig.,* 233 F.R.D. 330, 333 (S.D.N.Y.2005) (concluding that FIFO is "the appropriate methodology ... for the purpose of considering the financial stake of the movant for lead plaintiff status"), *with In re eSpeed, Inc. Sec. Litig.,* 232 F.R.D. 95, 100-02 (S.D.N.Y.2005) (concluding that lead plaintiff movant's "loss as calculated by the [movant] demonstrates why FIFO (as applied by the [movant]) is inferior to LIFO"). Determining the method of analysis is especially important in the context of lead plaintiff selection because prospective lead plaintiffs may manipulate their analysis in order to inflate their measure of damages, giving them an advantage over movants that calculate damages according to a different methodology.[FN23]

FN23. The method of analysis was not contested during the selection of lead plaintiff in this case. Without any objection, FIFO was used to calculate the damages in movants' applications for lead plaintiff. (Crawford Aff. Ex. B, Oct. 15, 2002.) Furthermore, the more than half million claimants to this Settlement have submitted their claims on the basis of the Plan of Allocation as presented here.

The LIFO/FIFO debate has not arisen in the context of a plan of allocation anywhere in this Circuit,[FN24] and Canada's conclusory objection fails to raise the slightest inference of how the Plan of Allocation's use of FIFO is unfair here. *Cf. In re eSpeed,* 232 F.R.D. at 101 (finding FIFO unfair in movant's application for lead plaintiff status in light of the movant's specific, manipulative application of FIFO in that case). Nor can Canada explain how the method of analysis would affect his recovery, as he claims to have made only a single purchase of stock and LIFO/FIFO is necessarily concerned with the matching of multiple stock purchases. Here, the Plan of Allocation is careful to limit a claimant's recovery to shares sold at a loss. Moreover, Plaintiff's economic expert affirms that "the overall effect of using the LIFO method instead of FIFO is not significant in this case." (Hakala Decl. ¶ 27.) Ultimately, there is no evidence that the method of analysis used in this case would result in an unfair distribution of the Settlement Fund.[FN25]

FN24. One court in this District recently approved a Plan of Allocation using LIFO, but did not elaborate on the choice of methodology, nor is their any evidence that the method of analysis was contested in that case. *See SEC v. Bear, Stearns & Co. Inc .,* No. 03 Civ. 2937, 2005 WL 217018, at *7 (S.D.N.Y. Jan. 31, 2005). The unelaborated use of LIFO in one case does not compel the use of that method of analysis in all cases. Both Hakala and the

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Settlement Administrator affirm that FIFO has been used in the great majority of the plans of allocation that they have prepared and administrated in the past. (Hakala Decl. ¶ 22; Forrest Decl. ¶ 12.)

FN25. This Opinion should not be read as an unconditional endorsement of FIFO as the method for matching purchases and sales for the calculation of damages in securities fraud litigation. Rather, the insignificance of the methodology applied in this case makes it counter-productive to require Plaintiffs to revise the Plan of Allocation and reinitiate the Notice period in order to calculate damages according to LIFO.

In light of overwhelming support for the Plan of Allocation by nearly all of the estimated 600,000 claimants to the Settlement, and the insignificance of the method of matching sales with purchases in the context of this case, I find the Plan of Allocation fair, reasonable, and adequate.

III. Conclusion

For the foregoing reasons, Lead Plaintiff's petition for approval of the Settlement and Plan of Allocation is granted. A separate opinion establishing attorney's fees and expenses will follow.

SO ORDERED.

S.D.N.Y.,2006.
In re AOL Time Warner, Inc.
Not Reported in F.Supp.2d, 2006 WL 903236 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re BISYS SECURITIES LITIGATION.

No. 04 Civ. 3840(JSR).
July 16, 2007.

MEMORANDUM ORDER
JED S. RAKOFF, U.S.D.J.

***1** At a hearing held on January 18, 2007, the parties in the above-captioned consolidated action moved for final certification of a class for settlement purposes and final approval of the class settlement and plan of allocation. In advance of the same hearing, the two law firms who served as co-counsel for the lead plaintiffs jointly applied to the Court for attorneys' fees in the amount of 30% of the $65,870,000 settlement (amounting to a request for $19,762.500 plus interest) and for a reimbursement of litigation expenses in the amount of $798,880.33, a figure subsequently reduced to $516,686.69 in a letter dated January 19, 2007.

No objection whatsoever has been made, orally or in writing, to the class certification or to the term of the settlement. Moreover, after careful review, and for the reasons stated from the bench, *see* transcript, 1/18/07, the Court finds the class arrangement, class, and plan of allocation, to be fair, reasonable, and adequate in all respects and fully consistent with the strictures of due process and Fed R. Civ. P. 23(a)(3) and 23(b)(3). Accordingly, they are all approved.

Regarding attorneys' fees, an objection was submitted by William Zorn, Esq., which raises several issues that warrant discussion.

First, Zorn contends that the Notice of Class Action Settlement ("Notice") did not provide the class with notice of attorneys' fees sufficient to comply with Rule 23(h), which requires that notice of a motion for fees be "directed to class members in a reasonable manner." Fed.R.Civ.P. 23(h). Specifically, the Notice did not specify the precise amount of attorneys' fees that lead counsel sought, but stated instead that counsel intended to "apply to the Court to award attorneys fees ... in an amount not greater than one-third (33%) of the settlement fund and for reimbursement of their expenses." The actual application for fees was not filed until after the deadline for objections had elapsed. As a result, no class member was on notice of the actual attorneys' fees requested at the time objections were due.

Nonetheless, members of the class were plainly on notice that the attorneys' fees might be as much as one-third of the fund and so had every reason to raise an objection if they thought this was excessive. While it might have been a better practice to provide them with more information relevant to evaluation of this request, not a single class member other than Zorn raised any objection-even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the one-third maximum fee was excessive, or short of that, if they thought the information given them as to the fees was inadequate. This in itself is a strong indication that the information about attorneys' fees was presented in a "reasonable manner." Nor is such a manner of notification unusual in this context. *See, e.g., In Re Elec. Carbon Prods. Antitrust Litig.,* 447 F.Supp.2d 389, 411 (D.N.J.2006); *Allapattah Servs. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1194 (S.D.Fla.2006); *Hicks v. Morgan Stanley & Co.,* 2005 U.S. Dist. LEXIS 24890, at *10; (S.D.N.Y.2005). Overall, in the context of this case, the Court finds that there has been adequate compliance with Rule 23(h).

***2** Zorn also objects to the amount of the fee itself, calling it "excessive," and, in any event, the Court has an independent obligation to examine the fee to see if it is reasonable. *See Goldberger v.*

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Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir.2000) ("[A]ttorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund.") The question of whether a particular fee is reasonable must be guided by consideration of such factors 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." *See Goldberger,* 209 F.3d at 50(citation omitted). Moreover, a "key consideration required by the PSLRA [FN1] 'is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.' " *See Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007) (quoting Advisory Comm. Notes to Fed.R.Civ.P. 23, 2003 Amendments).

FN1. Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995) (codified in pertinent part at 15 U.S.C. § 78u-4(a)(6)).

Consistent with these guidelines, a reasonable attorneys' fee may be calculated using either the percentage method or the lodestar method, though the recent trend in this Circuit has been to use the percentage method. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 122 (2d Cir.2005). The percentage method, "though not without flaws, is often preferable to the lodestar method to determine attorneys' fees in class actions because it reduces the incentive for counsel to drag the case out [and] fewer judicial resources will be spent in evaluating the fairness of the fee petition." *Hicks v. Morgan Stanley & Co.,* 2005 U.S. Dist. LEXIS 24890, at *23 (S.D.N.Y. October 24, 2005). The lodestar method remains highly useful, however, as a "cross-check" to further ensure reasonableness. *See Goldberger,* 209 F.3d at 50 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen.").

As already noted, class counsel here requested a fee 30% of the fund, *i.e.* $19,762.500 plus interest. As a general matter, "[a] 30% fee [would be] consistent with fees awarded in ... class action settlements in the Second Circuit." *See Hicks,* 2005 U.S. Dist. LEXIS 24890, at *24-25 (collecting cases).

It is true that most such case have involved smaller settlement funds and therefore have not bestowed so large a sum, in absolute terms, on class counsel. "Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." *Goldberger,* 209 F.3d at 52 (quotation marks omitted). Consequently, in many cases "with recoveries of between $ 50 [million] and $ 75 million, courts have traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%." *Id.* (citing William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation,* 23 J. Legal Stud. 185, 202 (1994)).

*3 Nonetheless, in this Court's experience, relatively few cases have involved as high level of risk, as extensive discovery, and, most importantly, as positive a final result for the class members as that obtained in this case. "The quality of representation is best measured by results ... calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement,' " *see Goldberger,* 209 F.3d at 55 (quoting *Lindy Bros. Builders, Inc. of Philadelphia v. Am. Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 118 (3d Cir.1976)), and an all-cash settlement of over $65 million, plus interest, is a very significant amount for the class members here, who can expect to recover roughly one-third of their damages in the settlement. By contrast, the more typical recovery rate in class actions is between 5% and 6%. *See In re Rite Aid Corp. Secs. Litig,* 146 F.Supp.2d 706, 715 (E.D.Pa.2001).

The reasonableness of the 30% figure is also confirmed by the resultant lodestar multiplier of

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2.99 (calculated by comparing the percentage fee to what the work would have cost if billed at a standard hourly rate FN2), which accurately reflects "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y.2004). Such a multiplier falls well within the parameters set in this district and elsewhere. *See Wal-Mart Stores,* 396 F.3d at 123 ("[T]he lodestar yields a multiplier of 3 .5, which has been deemed reasonable under analogous circumstances."); *see also Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.),* 243 F.3d 722, 742 (3d Cir.2001).

FN2. Lead Counsel expended a total of 16,632 hours on this case (including the time of attorneys, paralegals, and law clerks), resulting in a lodestar of $6,599,020 (if the time had been billed at rates well within the norm in such cases). *See* Joint Declaration of Gene Cauley and Jeffrey H. Squire, Exhibit 4.

Counsel's request for a fee reimbursement in the amount of $516,686.69 for out-of-pocket expenses incurred in connection with this action, as modified, is also approved. *See In re Independent Energy Holdings PLC Securities Litigation,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.") (internal quotation marks omitted).

In summary, the settlement and plan of allocation are hereby approved. Counsel is awarded attorneys' fees in the amount of 30% of the settlement amount, *i.e.,* $19,762,500 plus a corresponding share of interest accrued, and litigation expenses in the amount of $516,686.69.

SO ORDERED.

S.D.N.Y.,2007.

In re Bisys Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 2049726 (S.D.N.Y.)

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United States District Court, S.D. New York.
In re BLECH SECURITIES LITIGATION.
Bernard WEISS, et al., Plaintiffs,
v.
David BLECH, Texas Biotechnology Corporation, John M. Pietruski, David B. McWilliams, Richard A.F. Dixon, Stephen L. Mueller, John R. Plachetka, Joseph M. Welch, James T. Willerson, D. Blech & Co., Incorporated and Isaac Blech, Defendants.

No. 94 CIV. 7696(RWS), 95 CIV. 6422(RWS).
May 19, 2000.

Kaplan, Kilsheimer & Fox, New York, By Richard Kilsheimer, Esq., Of Counsel, Burt & Pucillo, West Palm Beach, FL, By Michael J. Pucillo, Esq., Wendy H. Zoberman, Esq., Of Counsel, Williams Bailey, Houston, TX, By Herbert T. Schwartz, Esq., Of Counsel, Kipnis, Tescher, Lippman & Valinsky, Ft. Lauderdale, FL, By Howard A. Tescher, Esq., Of Counsel, for Plaintiff.

Porter & Hedges, Houston, TX, By Mark G. Glasser, Esq., David L. Burgert, Esq., Jeffrey R. Elkin, Esq., Of Counsel, Miller & Wrubel, New York, By Martin D. Edel, Esq., Of Counsel, for Defendants.

OPINION

SWEET, D.J.

*1 Defendants Texas Biotechnology Corporation ("TBC"), John M. Pietruski, David B. McWilliams, Richard A.F. Dixon, Stephen L. Mueller, John R. Plachetka, Joseph M. Welch, and James T. Willerson (collectively, the "TBC Defendants") have moved, pursuant to Rule 54(b), Fed.R.Civ.P., for entry of final judgment severing and dismissing with prejudice the fraud claims against the TBC Defendants. Plaintiffs have moved for approval of a proposed settlement in this action as to the claims against the TBC Defendants, and for an award of attorneys' fees and reimbursement of litigation expenses. For the reasons set forth below, the motion to dismiss the fraud claims against the TBC Defendants and approval of the settlement will be granted, and attorneys' fees will be set at 30% of the settlement. In addition, expenses of $45,302.88 will be awarded.

Background and Prior Proceedings

The background and prior proceedings in these actions have been set forth in several opinions of this Court, familiarity with which is assumed. *See, e.g., In re Blech Sec. Litig.,* 928 F.Supp. 1279 (S.D.N.Y.1996); *In re Blech Sec. Litig.,* Nos. 95 Civ. 4204, 4298, 4299, 6422, & 7215(RWS), 1997 WL 20832 (S.D.N.Y. Jan. 21, 1997); *Weiss v. Blech,* No. 95 Civ. 6422, 1997 WL 458678 (S.D.N.Y. Aug. 11, 1997); *In re Blech Sec. Litig.,* 961 F.Supp. 569 (S.D.N.Y.1997); *In re Blech Sec. Litig.,* 187 F.R.D. 97 (S.D.N.Y.1999). Background and proceedings relevant to the instant motions is set forth below.

The *Weiss* action was originally filed on November 21, 1994, in the United States District Court for the Southern District of Texas, by named plaintiffs Bernard Weiss and Richard Hunt. The action was brought as a class action asserting violations of Sections 11, 12(2), and 15 of the Securities Act of 1933. The action was brought on behalf of purchasers of TBC units (each unit consisting of one share of common stock and one warrant to purchase a share of common stock) in TBC's initial public offering dated December 15, 1993. The defendants named in the Complaint were David Blech, a founder of TBC, a director at the time of the offering, and the principal of D. Blech & Co.; D. Blech & Co., the sole underwriter of TBC's initial public offering; David B. McWilliams, President & CEO and a director of TBC at the time of the offering; Richard A.F. Dixon, Vice President of Research and a director of TBC at the time of the offering; Stephen L. Mueller, Director of Finance, Treasurer and Assistant Secretary for TBC at the time of the offering; R. Plachetka, Vice President of Clinical

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Development at the time of the offering; Joseph M. Welch, Vice President of Business Development at the time of the offering; James T. Willerson, Chairman of the Scientific Advisory Board and a director at the time of the offering; and John M. Pietruski, Chairman of the Board of Directors of TBC at the time of the offering. Also named, but never served, was Isaac Blech, the brother of David Blech.

*2 On January 23, 1995, TBC Defendants moved to dismiss the Complaint. The matter was fully briefed in the United States District Court for the Southern District of Texas and on June 26, 1995, Magistrate Calvin Botley recommended that the motions be denied. By Order dated August 2, 1995, the Honorable Kenneth M. Hoyt adopted the Magistrate's Report and Recommendation. On August 21, 1995, by Order of the Judicial Panel on Multidistrict Litigation, this matter was transferred to this Court and consolidated with *In re Blech Securities Litigation,* Master File No. 94 Civ. 7696(RWS).

On November 20, 1995, the TBC Defendants moved in this Court for reconsideration of Judge Hoyt's order denying the motions to dismiss. The matter was again briefed and argued. By Order dated June 6, 1996, this Court permitted reconsideration but denied the motions on the same grounds as set forth by the Texas Court.

Originally, the complaint in *In re Blech Securities Litigation* did not involve any claims against TBC. On June 7, 1995, however, an action was filed in this District entitled *Kozloski v. Texas Biotechnology Corp.,* which was consolidated with the *In re Blech Securities Litigation* cases. A Notice of Voluntary Dismissal Without Prejudice was subsequently filed in the *Kozloski* action.

While this Court's Order of June 6, 1996 denied the Motions to Dismiss in their entirety as to the TBC claims, the Court granted the Motion to Dismiss for failure to plead fraud with particularity as to certain other claims in the consolidated complaint in *In re Texas Biotechnology Corp.* The Motion was granted with leave to replead. However, as to TBC, no fraud claims under Section 10(b) were asserted in any amended pleading. On July 26, 1996, the TBC Defendants answered the Complaint. Thereafter, a motion was filed seeking an interlocutory appeal of the denial of the Motion to Dismiss pursuant to 28 U.S.C. § 1292(b). That motion was denied.

On March 31, 1997, Plaintiff Weiss moved for class certification. Plaintiff Hunt had passed away, and Weiss remained the only plaintiff asserting claims against TBC and members of management of that company. Documents were produced by TBC throughout the fall of 1996 and early 1997. The depositions of defendants McWilliams and Mueller were noticed, and McWilliams' deposition was taken. Weiss's deposition was taken in September 1998, after which TBC Defendants agreed to certification of the class, which was granted by Order of this Court dated February 3, 1999.

In early 1999, Weiss also focused third party discovery on Citibank, the lender for D. Blech & Co. and David Blech. Documents were produced by Citibank pursuant to subpoena and in the Bankruptcy Court. On March 15, 1999, plaintiff took the deposition of Rosemary Vrablic, the loan officer responsible for the Blech account.

After the Vrablic deposition, settlement discussions were pursued in earnest and a settlement in principle was reached in May 1999. Through the summer of 1999, the parties worked on settlement papers which were signed in September 1999. A further issue arose with regard to insurance matters which delayed the filing of the settlement papers until December 17, 1999.

*3 On January 5, 2000, the Court preliminarily approved the settlement and directed that Notice be sent. Since the entry of the Order, more than 1,545 Notices have been sent to Class Members or brokers advising them of the pendency of this

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action and the proposed settlement and settlement hearing which was scheduled for April 5, 2000. The deadline for objections and requests for exclusion was March 20, 2000. As of April 5, 2000, no objections or requests for exclusion had been received; and no objections were raised at the April 5, 2000 settlement hearing.

Discussion

I. *An Order Directing Entry of Final Judgment Will Issue with Respect to the Claims Against the TBC Defendants*

The TBC Defendants' motion seeking an order directing the entry of a final judgment severing and dismissing with prejudice the fraud claims against the TBC Defendants in *In re Blech Securities Litigation* is unopposed by the plaintiffs in that action and will be granted.

II. *The Settlement Will Be Approved*

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 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. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982); *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).

It is well-established that courts' principal responsibility in approving class action settlements is to ensure that such settlements are fair, adequate, and reasonable. *See, e.g., Weinberger*, 698 F.2d at 73; *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y.1997).

This determination "involves consideration of two types of evidence." *Weinberger*, 698 F.2d at 73. The Court's primary concern is with "the substantive terms of the settlement compared to the likely result of a trial," *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983), and to that end "the trial judge must appraise 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. (internal citations omitted).

The Second Circuit has indicated nine factors to consider in determining the fairness of a proposed settlement:

(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.

*4 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974).

The Court's second concern is with the "negotiating process by which the settlement was reached," *Weinberger*, 698 F.2d at 74, 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. *See In re Warner Communications Sec. Litig.*, 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, *see Chatelain*, 805 F.Supp. at

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212, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See id.*

A. *The Grinnell Factors Have Been Satisfied*

As set forth below, analysis of the nine *Grinnell* factors establishes that the settlement is fair.

First, continued litigation in this action would be complex, costly, and of substantial duration. The action has already been pending for over five years. Significant discovery, trial preparation, and the trial itself still lie ahead. A judgment favorable to plaintiffs would likely be subject to post-trial motions and appeal, delaying any payment to the Class.

Second, no objections to the settlement have been raised.

Third, plaintiffs have engaged in sufficient discovery to evaluate fully the merits of their claims and obstacles to success. An analysis was done early in the case to set forth potential damages. Certain favorable facts were revealed in the course of discovery, as were certain defenses. Plaintiff's counsel is of the opinion that further discovery is not likely to provide plaintiffs with additional leverage to obtain a larger recovery.

Fourth, there were substantial risks of establishing liability in this action. While plaintiffs' counsel believes there is a strong case as to liability against TBC, the individual defendants had potential statutory defenses.

Fifth, plaintiffs faced substantial risks in proving damages. Plaintiffs' damage analysis estimated Section 12(2) damages at approximately $3.2 million, while the estimate for Section 11 damages ranged from $1,450,000 to $12,500,000. Defendants' numbers ranged from $300,000 to $3.7 million. The damage number was further complicated by the fact that David Blech, individually, was a purchaser of a substantial number of units in the period from December 1993 through April 1994, raising issues with respect to the number of open market purchases unaffiliated with David Blech.

The sixth factor tilts against approval: there were no serious risks of maintaining the Class through trial.

Seventh, it is questionable whether the defendants possess the ability to withstand a greater judgment. TBC is a start up company which has never had a profitable year. Sales for 1998 and 1999 barely exceeded $2 million. It is unclear whether the company could sustain a judgment at the level of damages in this case, absent a significant positive development in the company's business. The company is contributing $187,500 to the proposed settlement; the $612,500 balance is being paid by the directors' and officers' insurer. The aggregate limits of the insurance policy are $2 million, some of which has been spent on litigation costs. Since the policy is a wasting policy, continued litigation would deplete the resources available through the policy.

*5 Eighth and ninth, the settlement is within the range of reasonableness. While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery.

On the whole, the *Grinnell* factors weigh in favor of approval of the settlement, a strong indication that the settlement is fair.

B. *The Settlements Were Achieved in Good Faith and at Arm's Length*

A fair settlement should be the result of good faith, arm's length bargaining undertaken by experienced counsel. *See Weinberger,* 698 F.2d at 74; *Grinnell,* 495 F.2d at 463–66.

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As demonstrated by the previous motions to dismiss described above, the parties strenuously litigated the issue of the adequacy of the complaint.

The process by which the parties reached the proposed settlement was arms-length and hard fought by skilled advocates and negotiators, and has been presented to the Court after the completion of significant discovery.

For the reasons set forth above, the settlement merits the approval of the Court.

III. *Attorney's Fees of 30% Will Be Awarded*
Plaintiffs seek an award of attorney's fees of 30% of the settlement.

This Court has previously approved a percentage of the fund method for calculation of attorney's fees. *See Adair v. Bristol Technology Sys.,* No. 97 Civ. 5874, 1999 WL 1037878 (S.D.N.Y. Nov.16, 1999); *In re NASDAQ Market–Makers Antitrust Litig.,* No. 94 Civ. 3996, 1998 WL 782020, at *15 (S.D.N.Y. Nov.9, 1999). The *NASDAQ* opinion noted that while the Second Circuit had previously given its express approval to the lodestar method of determining fees, but not to the percentage of the fund method, the "judicial tide" was changing, and many district courts in the circuit had utilized the percentage method. *See id.* Since the *NASDAQ* opinion, the Circuit has acknowledged more explicitly the trend towards utilizing the percentage of the fund method. *See Savoie v. Merchants Bank,* 166 F.3d 456, 460–61 (2d Cir.1999); *see also Polar Int'l Brokerage Corp. v. Reeve,* 187 F.R.D. 108, 120 (S.D.N.Y.1999). This Court, for all the reasons previously given in the *NASDAQ* opinion, continues to find that the percentage of the fund method is more appropriate than the lodestar method for determining attorney's fees in common fund cases. *See Adair,* 1999 WL 1037878, at *3.

Plaintiffs' counsel has requested a fee of 30% of the Settlement Fund. Courts in this District have previously awarded fees exceeding this level on numerous occasions. *See, e.g., Adair,* 1999 WL 1037878, at *4 (33%); *Berchin v. General Dynamics Corp.,* 1996 WL 465752, at *2 (S.D.N.Y. Aug.14, 1996) (33% of first $3,000,000); *Vladimir v. Deloitte & Touche, LLP,* 95 Civ. 10319 (S.D.N.Y. Aug 14, 1996) (33%).

As the previous discussion regarding the fairness of the settlement indicates, this Court has carefully considered the efforts of Plaintiffs' counsel in this action. For the reasons aforementioned, Plaintiffs' request for fees of 30% is reasonable and fair. This conclusion is reinforced by evidence that the percentage fee would represent a *negative* multiplier of the lodestar, had that approach been used; under a lodestar calculation, Plaintiffs counsel would receive at least another $150,000 in fees.

***6** Costs of $45,302.88 are reasonable given the length of this litigation to date, and will be awarded as well.

Finally, an award of $5,000 to Mr. Weiss is appropriate, given his involvement in the case, including production of documents and submitting to a deposition.

Conclusion
For the reasons set forth above, the settlement of $800,000 is approved. Plaintiffs' counsel will be awarded 30% of the settlement fund, in addition to $45,302.88 in costs. Plaintiff Weiss will be awarded $5,000.

An order will issue dismissing the fraud claims in *In re Blech Securities Litigation* as against the TBC Defendants.

It is so ordered.

S.D.N.Y.,2000.
In re Blech Securities Litigation
Not Reported in F.Supp.2d, 2000 WL 661680 (S.D.N.Y.), Fed. Sec. L. Rep. P 90,978

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re CHINA SUNERGY SEC. LITIG.

No. 07 Civ. 7895(DAB).
May 13, 2011.

Memorandum & Order
DEBORAH A. BATTS, District Judge.

I. INTRODUCTION AND BACKGROUND

*1 On May 12, 2011, a Class Certification and Settlement Hearing was held in Courtroom 24B. The Court made findings in open court and hereby includes and incorporates those findings in this Memorandum and Order.

Named Plaintiff Thomas Brown, later a member of the Court-appointed Lead Plaintiff the Tonyaz Group, filed this class action on September 7, 2007, against China Sunergy Co. Ltd., various individual defendants, and underwriters Merrill Lynch, Pierce, Fenner & Smith Inc.; Cowen and Company, LLC; and Jefferies & Company, Inc. The Complaint alleged violations of Sections 11 and 15 of the Securities Act of 1933.

The action arises from material misstatements and omissions allegedly made by Defendants in China Sunergy's Prospectus and Registration Statement issued in connection with China Sunergy's May 17, 2007 IPO. Plaintiffs claimed that China Sunergy's Prospectus and Registration Statement failed to disclose that the company was having supply difficulties at the time of its IPO, that the Company's contracts involved the "spot market," that the Company did not have the necessary agreements in place to meet planned production of solar sale, that at the time of the IPO, the Company did not have sufficient quantities of silicon to meet production requirements, the Company did not have adequate control procedures, and that the Underwriters did not conduct sufficient due diligence.

Plaintiffs allege further that when the Company announced sales and production volume figures that implied an annual production range far below what was stated in the Prospectus and Registration Statement, the Company's shares declined from a high of $14.90 on July 2, 2007, to approximately $5.00 per share in late August of 2007.

Defendants moved to dismiss the Complaint in January of 2009. At the end of July, 2009, the Parties notified the Court that a settlement had been reached and Defendants withdrew their Motions to Dismiss. Both Parties recognized the significant risk involved if the litigation continued.

In an Order dated September 29, 2010, this Court preliminarily approved the Settlement between the Court-appointed Lead Plaintiff and the Defendants in this action. The Preliminary Approval Order preliminarily certified a class for the purposes of settlement only. Now before the Court is Lead Plaintiff's Motion for Final Approval of the Settlement and Plan of Allocation, and Lead Plaintiff's Motion for Attorney's Fees and Expenses.

For purposes of this Settlement, the class of Plaintiffs consists of all persons or entities that purchased the American Depository Shares of China Sunergy Co., Ltd. From May 17, 2007, through August 23, 2007, inclusive, on the open market or pursuant or traceable to the Company's May 17, 2007, Initial Public Offering Prospectus and Registration Statement. Excluded from the Class are the Defendants, the officers and directors of the Defendants from May 17, 2007, through August 23, 2007, inclusive, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which the Defendants have or had a majority interest. Also excluded from the Class are those persons who timely and validly requested exclusion

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from the Class pursuant to the Notice of Pendency and Proposed Settlement of Class Action.

*2 The Settlement followed vigorous, arm's length negotiations, principally involving Lead Counsel and counsel for the Company and certain individuals, which continued over a period of many weeks during the pendency of Defendants' Motion to Dismiss. (Mem. of Law, p. 7.)

Pursuant to this Court's Order of September 29, 2009, Claims Administrator Rosenthal & Company LLC mailed a total of 15,979 Notice Packets to potential Class members. (Joni Brown Decl., ¶ 12.) Class Members were notified of the pendency and terms of the Settlement, received instructions for participation in the Settlement and a Claim Form, were informed of important dates and deadlines, and were apprised of the proposed fees and maximum expenses that would be requested by Lead Counsel. Potential Class Members were also afforded an opportunity to exclude themselves from or object to the Settlement, the Plan of Allocation, or the proposed fees and expenses. (Mem. of Law, p. 8.)

The response to the Settlement has been extremely positive. 3,825 Proof of Claim forms were received. No objections were received, and only one request for exclusion was received. (Status Report, p. 1.)

The terms and administration of the Settlement Agreement, approved by the Court, are summarized as follows:

The Settlement calls for the creation of a $1,050,000.00 Settlement Fund paid by Defendants. The cash settlement amount and the interest earned thereon, less all taxes, approved costs, fees, and expenses (the "Net Settlement Fund"), shall be distributed to members of the Class who submitted accepted Proofs of Claim and Releases ("Authorized Claimants"). The Claims Administrator shall determine each Authorized Claimant's pro rata share of the Net Settlement Fund based upon each Authorized Claimant's "Recognized Claim." For those who purchased American Depository Shares of China Sunergy pursuant to the initial public offering on May 17, 2007 or on the open market between May 17, 2007 and August 23, 2007, and held such shares on August 24, 2007, damages per ADS are the lesser of: $1.54; the price paid less $7.08; the price paid less the price received if sold before final judgment is rendered; or $11.00 less the price received if sold before final judgment.

This Order, the Fairness Hearing of May 12, 2011, and the Final Judgment, Order of Dismissal with Prejudice, and Order Approving Award of Attorneys' Fees and Expenses and Plan of Allocation, set forth the Court's findings and rulings in this matter.

II. DISCUSSION

A. Class Certification

In order to certify finally the Class as defined by the Court's September 29, 2010 Order, the Court will consider the criteria of Federal Rule of Civil Procedure 23(a) and (b). The four prerequisites of Rule 23(a) are that: (1) the class be so numerous that joinder of all members is impracticable; (2) there be questions of law or fact common to the class; (3) the claims or defenses of the representative parties be typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

*3 The Court finds that the class is so numerous that joinder of all members is impracticable. Millions of China Sunergy shares were purchased during the Class Period (Prelim. App. Mem. of Law, p. 15), and 3,825 Proof of Claim forms were submitted (Status Report, p. 1).

The Court finds that there are questions of law or fact common to the class. The Court also finds that under Rule 23(b)(3), these questions of law or fact common to the class members predominate over any questions affecting only individual

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members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The central questions of whether China Sunergy's Registration Statement and Prospectus contained false or misleading statements, and whether the market prices of China Sunergy securities were artificially inflated due to the alleged nondisclosures or misrepresentations, are the same for each class member. (Prelim. App. Mem. of Law, p. 16.)

The Court finds that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Lead Plaintiff, like all Class Members, alleges that it purchased and/or acquired China Sunergy shares at prices that were artificially inflated because Defendants issued materially misleading statements and/or omitted information necessary to make statements made not misleading in violation of the federal securities laws. The evidence required to prove Lead Plaintiff's claims would establish the same violations by Defendants for every Class Member. (Final App. Mem. of Law, p. 21.)

The Court finds that the representative parties will fairly and adequately protect the interests of the class. Kahn Swick & Foti LLC, Lead Counsel for Lead Plaintiff, is a highly experienced law firm representing plaintiffs in securities class actions and other complex litigations throughout the nation. The firm and its attorneys have extensive experience in successfully prosecuting such actions and have achieved significant results for their clients and for certified investor classes. (Prelim. App. Mem. of Law, p. 18; Miller Decl., Ex. A.) Furthermore, there is no evidence of antagonism or conflict between Lead Plaintiff and the remainder of the Class Members. (Prelim. App. Mem. of Law, p. 18.)

Finding all of the criteria set forth in Rule 23 satisfied, this Court finally certifies the Class. Lead Plaintiff the Tonyaz Group is appointed as Class Representative, and Lead Counsel Kahn Swick & Foti LLC is appointed Class Counsel.

B. Fairness of the Settlement

Under Rule 23(e), to grant final approval of a settlement, the Court must determine whether the proposed settlement is fair, reasonable and adequate. In making this determination, the Court must review both the procedural and substantive fairness of a proposed settlement. To find a settlement procedurally fair, the Court must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations, and that Plaintiff's Counsel possessed the experience and ability, and engaged in the discovery necessary for effective representation of the class's interests. To find a settlement substantively fair, the Court reviews the nine *Grinnell* Factors. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974).

*4 *Procedural Fairness:* The Court finds that the Settlement resulted from "arm's length negotiations." Class Counsel possessed the requisite amount of experience and ability, and the parties engaged in the discovery necessary for effective representation of the Class's interests. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001), citing *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir.1982). At the time of settlement, Lead Plaintiff had opposed a Motion to Dismiss from the Company, the Underwriter Defendants, and Individual Defendants. While the Motion to Dismiss was pending, the Parties commenced and engaged in vigorous, arms-length settlement negotiations in an effort to resolve this Action fairly and efficiently. These negotiations, principally involving Lead Counsel and counsel for the Company and certain individuals, continued over a period of many weeks and involved a series of telephonic and email communications. On July 14, 2009, the Parties reached an agreement in principle to settle the Action, and Defendants withdrew their Motion to Dismiss without prejudice to refiling should the settlement not be consummated. (Final App. Mem. of Law, p. 7.)

Grinnell Factor 1: The Court finds that the

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Litigation is complex, and would likely be costly and lengthy in duration. This matter has been vigorously prosecuted and defended. Litigation began in September 2007 with the filing of the initial Complaint. Lead Counsel conducted an extensive investigation both in preparation for the initial filing and in the formation of Lead Plaintiff's operative Complaint. Lead Counsel worked with industry experts, investigators, and a damages consultant to garner a thorough understanding of the issues and complexities of the case. At the time of settlement, the Parties had fully briefed a Motion to Dismiss. Had the Parties not reached a settlement, discovery would likely have been protracted and expensive. Had the case proceeded through summary judgment and to Lead Plaintiff's verdict, Defendants would have almost certainly appealed issue such as loss causation, which could prolong resolution of the litigation for years. (Pinal App. Mem. of Law, p. 13.)

Grinnell Factor 2: The Court finds that the reaction of the class to the settlement has been positive. Over 15,900 Notice and Proof of Claim packets were mailed to the Class Members. (Brown Decl., ¶ 12.) A total of 3,825 Proof of Claim forms were received. No objections were filed, and only one request for exclusion was received. (Status Report, p. 1.)

Grinnell Factor 3: The Court finds that proceedings have progressed and sufficient discovery has been completed to understand Plaintiffs' claims and negotiate settlement terms. Although formal discovery has not taken place, Lead Plaintiff's Counsel conducted an extensive investigation into the factual background and legal underpinnings of the case, including: (i) utilizing the services of a private investigator; (ii) engaging in extensive analysis of damages scenarios; (iii) researching applicable law with respect to claims, defenses, service on foreign individuals, and enforcement of the judgment in foreign jurisdictions; and (iv) reviewing China Sunergy's SEC filings and public disclosures, including an analysis of the Company's financials during the relevant period. (Final App. Mem. of Law, p. 15; Miller Decl, ¶ 71.)

*5 *Grinnell Factors 4 and 5:* The Court finds that the risks of establishing liability and damages are significant. There was a significant risk that Lead Plaintiff would not have been able to prove: (i) the materiality of the false and misleading statements and omissions; (ii) causation; and (iii) damages. Furthermore, the Company's location in China would have posed a barrier that would have increased the difficulty and expense of discovery, and might have made it impossible to collect some of the evidence or take depositions necessary to prove Plaintiffs' claims. (Final App. Mem. of Law, p. 16–17.)

Grinnell Factor 6: The Court finds that the risk of maintaining the class action through the trial was significant. Had this matter proceeded to summary judgment and trial, Defendants would likely have vigorously opposed class certification. (Final App. Mem. of Law, p. 17.)

Grinnell Factor 7: The Court finds that Defendants' ability to withstand a judgment greater than the Settlement weighs in favor of approval. The Company was under tremendous financial pressure, and there was a likelihood not only that the Company would not withstand a greater judgment at trial, but that the Company would not remain a going concern, so that the potential for any recovery would be completely eroded. (Final App. Mem. of Law, p. 18.)

Grinnell Factors 8 and 9: The Court finds that the Settlement is reasonable in light of: (a) Plaintiffs' best possible recovery, and (b) the attendant risks of litigation. Lead Plaintiff estimates the Class's damages to be not more than $5.7 million. The Settlement, therefore, represents, at minimum, an 18.4% recovery for the Class. This far surpasses the "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade [which] have

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ranged from 3% to 7% of the class members' estimated losses." *LMPERS v. Sealed Air Corp.,* 03 Civ. 4372, 2009 WL 4730185, at *7 (D.N.J. Dec.4, 2009). The Settlement is therefore reasonable in light of the best possible recovery and the attendant risks of litigation.

Having considered the procedural and substantive factors, the Court find the proposed Settlement to be fair, reasonable and adequate under Rule 23 and THE SETTLEMENT IS HEREBY APPROVED.

C. Attorney's Fees and Expenses

To ensure the appropriateness of attorneys' fees and costs, the Court will now review the six *Goldberqer* criteria. *Goldberqer v. Int. Resources,* 209 F.3d 43, 50 (2d Cir.2000).

Goldberqer Factors 1 and 2: As discussed in the "Procedural Fairness" section above, the Court finds that Counsel has expended considerable time and labor on behalf of Plaintiffs and the litigation is complex and of large magnitude.

Goldberqer Factor 3: As discussed in *Grinnell* factors 4, 5, and 6 above, the Court finds that the risks of litigation for Plaintiffs are substantial.

Goldberqer Factor 4: The Court finds that the representation of Class Counsel is of high quality. Lead Counsel have extensive experience in complex litigation and are nationally known leaders in the field of securities class actions. (Miller Decl., ¶ 80; Ex. A .) This Settlement represents a favorable result for the Class, one that is attributable to the diligence, determination, hard work, and reputation of Lead Counsel. (Final App. Mem. of Law, p. 21.)

***6** *Goldberqer Factor 5:* The Court finds that in relation to the Parties' Settlement, the requested attorneys' fees of 33 and 1/3% are reasonable. The compensation requested was negotiated with the Lead Plaintiff and is within the range of percentage fees awarded in the Second Circuit. *See, e.g., In re Initial Public Offering Sec. Litiq.,* 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding 33 and 1/3% on a settlement of $586 million); *In re Blech Sec. Litiq.,* 94 Civ. 7696, 2002 U.S. Dist. LEXIS 23170, at *5, 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) (awarding 33 and 1/3% of settlement fund, plus expenses). The fee award represents a lodestar multiplier of 1.41, which is on the low end of multipliers found reasonable in the Second Circuit. *See In re Interpublic Sec. Litiq.,* 03 Civ. 1194, 2004 U.S. Dist. LEXIS 21429, at *36 (S.D.N.Y. Oct. 27, 2004) (noting that multipliers of between 3 and 4.5 have been common in securities class actions) (citing In *re Sumitomo Copper Litig.,* 74 F.Supp.2d 393, 399 (S.D.N.Y.1999)).

Goldberqer Factor 6: The Court finds that public policy supports granting attorneys' fees "that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers Squibb Sec. Litiq.,* 361 F.Supp.2d 229, 236 (S.D.N.Y.2005). This Court finds that an award of 33 and 1/3% of the Settlement Fund promotes the valuable public policy interests at stake.

Expenses: "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients." *In re Independent Energy Holdings PLC Sec. Litiq.,* 302 F.Supp.2d 180, 183 (S.D.N.Y.2003). This Court finds that expenses in the amount of $19,107.51 were reasonable and necessary to the prosecution of this Action. The categories of expenses for which Counsel seek reimbursement are the type of expenses routinely charged to hourly paying clients including, *inter alia,* fees for experts and consultants, filing fees, and legal research. (Miller Decl., ¶ 68.) Having conducted the *Goldberger* analysis, the Court finds attorneys' fees of 33 and 1/3% of the Settlement Fund to be reasonable and those attorneys' fees are HEREBY APPROVED. Likewise, the Court finds attorneys' expenses of

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$19,107.51 reasonable and those expenses are HEREBY APPROVED.

III. CONCLUSION

For the foregoing reasons, Lead Plaintiff's Motion for Final Approval of the settlement is granted. Lead Plaintiff's Motion for Attorneys' Fees and Expenses is granted. The Clerk of Court is directed to CLOSE the docket in this case.

SO ORDERED.

S.D.N.Y.,2011.
In re China Sunergy Sec. Litig.
Not Reported in F.Supp.2d, 2011 WL 1899715 (S.D.N.Y.)

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IN RE CITIGROUP INC. BOND LITIGATION

08 Civ. 9522 (SHS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 117838; Fed. Sec. L. Rep. (CCH) P97,611

August 20, 2013, Decided
August 20, 2013, Filed

PRIOR HISTORY: *In re Citigroup Bond Litig., 723 F. Supp. 2d 568, 2010 U.S. Dist. LEXIS 69257 (S.D.N.Y., 2010)*

COUNSEL: [*1] For Louisiana Sheriffs' Pension and Relief Fund, On behalf of itself and all others similarly situated, Plaintiff: Andrew L Zivitz, PRO HAC VICE, Benjamin J. Sweet, LEAD ATTORNEYS, Kessler Topaz Meltzer & Check, LLP, Radnor, PA; Jennifer L. Keeney, Richard A Russo, Jr, PRO HAC VICE, David Kessler, LEAD ATTORNEYS, Kessler Topaz Meltzer & Check, LLP (PA), Radnor, PA; John Christopher Browne, John Patrick Coffey, Steven B. Singer, LEAD ATTORNEYS, David Lloyd Wales, Gerald H. Silk, John James Rizio-Hamilton, Kurt Michael Hunciker, Mark Lebovitch, Bernstein Litowitz Berger & Grossmann LLP, New York, NY; Elizabeth P. Lin, PRO HAC VICE, Bernstein Litowitz Berger & Grossmann LLP (San Diego), San Diego, CA; Kristin Ann Meister, Alston & Bird, LLP(NYC), New York, NY; Stefanie Jill Sundel, Bernstein, Litowitz, Berger & Grossman, New York, NY.

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Lionel Asher, Consolidated Plaintiff, Pro se.

Mary J. Asher, Consolidated Plaintiff, [*4] Pro se.

For CitiGroup, Inc., Charles Prince, Sallie L. Krawcheck, John C. Gerspach, C. Michael Armstrong, Alain J.P. Belda, George David, Kenneth T. Derr, John M. Deutch, Roberto Hernandez Ramirez, Ann Dibble Jordan, Klaus Kleinfeld, Andrew N. Liveris, Dudley C. Mecum, Ann M. Mulcahy, Richard D. Parsons, Judith Rodin, Robert E. Rubin, Franklin A. Thomas, Defendants: Brad Scott Karp, Richard A. Rosen, LEAD ATTORNEYS, Jane Baek O'Brien, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY; Kevan Daniel Choset, Sharon L. Schneier, Davis Wright Tremaine LLP (NYC), New York, NY.

For Sanford I. Weill, Defendant: Brad Scott Karp, Richard A. Rosen, LEAD ATTORNEYS, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY.

For Citigroup Global Markets Inc., JPMorgan Chase & Co., Goldman Sachs & Co., UBS Securities LLC, Banc of America Securities LLC, Barclays Capital Inc., Deutsche Bank Securities Inc., Credit Suisse Securities (USA) LLC, Greenwich Capital Markets Inc., Citigroup Global Markets Limited, Merrill Lynch, Pierce, Fenner & Smith Inc., Morgan Stanley & Co. Inc., Wachovia Capital Securities, LLC, Defendants: George Abraham Zimmerman, Jay B. Kasner, LEAD ATTORNEY, Gary John Hacker, [*5] Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY.

For Citigroup Capital XIV, Citigroup Capital XV, Citigroup Capital XVI, Citigroup Capital XVII, Citigroup Capital XVIII, Citigroup Capital XIX, Citigroup Capital XX, Citigroup Capital XXI, Sir Winfried Bischoff, Gary Crittenden, Vikram Pandit, Saul Rosen, Robert L. Ryan, Defendants: Richard A. Rosen, LEAD ATTORNEY, Jane Baek O'Brien, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY; Kevan Daniel Choset, Sharon L. Schneier, Davis Wright Tremaine LLP (NYC), New York, NY.

For Office of the Comptroller of the Currency, ADR Provider: Ernest Clifford Barrett, U.S. Office of The Comptroller of The Currency, Washington, DC.

For The Clearing House Association L.L.C., Amicus: Sharon L. Nelles, Sullivan & Cromwell, LLP(NYC), New York, NY.

For Board of Governors of the Federal Reserve System, Intervenor: Yvonne Facchina Mizusawa, LEAD ATTORNEY, Board of Governors of The Federal Reserve System, Washington, DC.

For Federal Deposit Insurance Corporation, Intervenor: Thomas M. Clark, LEAD ATTORNEY, Federal Deposit Insurance Company (NYC), New York, NY; Thomas L Holzman, PRO HAC VICE, Federal Deposit Insurance Corporation-Legal [*6] Division, Arlington, VA.

JUDGES: SIDNEY H. STEIN, U.S. District Judge.

OPINION BY: SIDNEY H. STEIN

OPINION

OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge.

Plaintiffs bring this action on behalf of a class of purchasers of bonds issued by or on behalf of Citigroup, Inc., raising claims pursuant to the Securities Act of 1933. They allege that Citigroup made material misstatements or omissions--primarily concerning the extent and impact of its exposure to subprime mortgage assets--in public offerings associated with forty-eight

bond issuances that occurred between May 2006 and November 2008. Plaintiffs have now agreed to settle all claims asserted in this action in exchange for a payment of $730 million, and they seek the Court's approval. Defendants do not oppose that motion. Having reviewed the proposed class action settlement and plan of allocation, the Court has determined that both are fair, reasonable, and adequate and hereby approves the settlement and plan of allocation pursuant to *Federal Rule of Civil Procedure 23*.

I. BACKGROUND

A. The Alleged Fraud Summarized

The allegations in this case concern the same basic Citigroup conduct involved in the other litigations in this multidistrict litigation--notably *In* [*7] *re Citigroup Inc. Securities Litigation*, No. 07 Civ. 9901 (SHS) (the "Securities Action"). The Court recently approved a proposed securities class action settlement and attorneys' fee award in the Securities Action. *See generally In re Citigroup Inc. Sec. Litig., 09 MD 2070 (SHS), 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951 (S.D.N.Y. Aug. 1, 2013)*. As in that consolidated class action, plaintiffs' injuries here allegedly stem from "Citigroup's investment in, and exposure to, risks associated with a now-infamous species of complex financial instruments: collateralized debt obligations ('CDOs') that have as some or all of their collateral residential mortgage backed securities ('RMBS')." *2013 U.S. Dist. LEXIS 108115, [WL] at *2.*

The specific allegations here are that "Citigroup made materially untrue or misleading statements or omissions in public offering materials associated with forty-eight different bond issuances between May 2006 and August 2008." *In re Citigroup Inc. Bond Litig., 723 F. Supp. 2d 568, 572 (S.D.N.Y. 2010)*. These misstatements or omissions allegedly concerned Citigroup's exposure to $66 billion of CDOs backed by subprime mortgage assets, its exposure to $100 billion in structured investment vehicles ("SIVs") backed by similar [*8] assets, the extent of reserve capital Citigroup held to offset potential losses from residential mortgage loans, its acquisition of $11 billion in auction-rate securities ("ARS") whose market evaporated during the financial crisis, its misstatement of its capital ratio, and the compliance of its Securities and Exchange Commission filings with Generally Accepted Accounting Principles ("GAAP"). *Id. at 574-75*. Plaintiffs allege that the price of Citigroup bonds "plummeted in value" when the truth about Citigroup's extensive exposure to subprime mortgage assets was disclosed and these misstatements or omissions became apparent. *Id. at 574*. As explained below, the Court found that certain of these allegations stated plausible grounds for relief. *See id. at 595-96*.

B. Pre-Settlement Procedural History

Two putative class actions raising Securities Act claims based on this alleged fraud were filed in New York State Supreme Court, New York County on September 30 and October 28, 2008. *In re Citigroup Inc. Bond Litig., 723 F. Supp. 2d at 581*. In addition to Citigroup, the defendants are a number of statutory trusts whose sole assets are securities issued by Citigroup, a number of individuals who [*9] are or were either members of the Citigroup Board of Directors or officers of Citigroup, and a plethora of underwriter defendants.[1] (Stipulation and Agreement of Settlement dated March 18, 2013 ("Stipulation"), Ex. 1 to Notice of Motion for Preliminary Approval of Settlement ("Preliminary Approval Motion"), Dkt. No. 153.)

1 Plaintiffs' claims against the majority of the underwriter defendants were dismissed without prejudice in 2009 pursuant to a stipulation. *In re Citigroup Inc. Bond Litig., 723 F. Supp. 2d at 574 n.1.*

Defendants timely removed both actions, and they were consolidated and accepted by this Court as part of the Citigroup multidistrict litigation in December 2008. *In re Citigroup Bond Litig., 723 F. Supp. 2d at 581*. The law firm of Bernstein Litowitz Berger & Grossman LLP was appointed to represent plaintiffs in the consolidated action and directed to coordinate with lead plaintiffs and their counsel in the Securities Action. (Order dated Dec. 10, 2008, Dkt. No. 10.) Lead plaintiffs here are a number of pension plans, an insurance company, and two individuals, all of which purchased debt securities issued by Citigroup during the relevant period.[2] Plaintiffs filed a consolidated [*10] amended class action complaint on January 15, 2009, raising seven different causes of action pursuant to Sections 11, *12*, and *15* of the Securities Act, *15 U.S.C. § 77k, l, o*. *In re Citigroup Inc. Bond Litig., 723 F. Supp. 2d at 581*.

2 The current class representatives are Louisiana Sheriffs' Pension & Relief Fund, the City of Tallahassee Retirement System, the City of

Philadelphia Board of Pensions and Retirements, the Miami Beach Employees' Retirement Plan, Southeastern Pennsylvania Transit Authority, American European Insurance Company, Arkansas Teacher Retirement System, Phillip G. Ruffin, and James M. Brown. (Stipulation at 1.)

The Citigroup defendants and the underwriter defendants filed separate motions to dismiss the consolidated amended complaint in March 2009. Defendants claimed that plaintiffs lacked standing to bring certain claims; that the heightened pleading standard of *Rule 9(b)* applied and that plaintiffs' pleadings failed to meet it; and that, even if *Rule 9(b)* did not apply, plaintiffs' complaint failed to allege actionable misstatements or omissions. *Id. at 572*. In a July 2010 opinion and order, this Court granted in part and denied in part the motions. It found that [*11] plaintiffs had standing to bring claims pursuant to Sections 11 and *15* of the Securities Act and that plaintiffs had adequately plead a number of actionable misstatements or omissions. *Id.* Specifically, claims survive alleging that the registration statements accompanying the forty-eight Citigroup bond issuances that took place between May 2006 and August 2008--from which Citigroup raised over $71 billion--contained either material misstatements of fact or omissions regarding Citigroup's holdings of CDOs, the credit quality of Citigroup's SIV holdings, Citigroup's "well-capitalized" status, and Citigroup's compliance with GAAP, in violation of Sections 11 and *15*. *Id. at 595-96*. The Court dismissed Section 11 claims alleging misstatements respecting Citigroup's pre-December 2007 SIV holdings and Citigroup's ARS exposure. *Id. at 591, 593*. The Court also dismissed all claims brought pursuant to *Section 12*, finding that plaintiffs did not have standing to bring such claims because they had not claimed to have purchased bond securities directly from defendants. *Id. at 585*.

Defendants moved for reconsideration of the opinion and order, arguing that controlling precedent dictated that plaintiffs [*12] lacked statutory standing to bring certain Section 11 claims; they filed an answer to the amended complaint in October 2010, asserting thirty-eight affirmative defenses. Following full briefing, the Court denied the motion for reconsideration in March 2011. (Order dated March 29, 2011, Dkt. No. 82.)

Active discovery began in August 2010, soon after the resolution of the motions to dismiss. The scope of plaintiffs' requests for production was broad, and the parties engaged in extensive negotiations and numerous conferences regarding which documents would be produced. Plaintiffs also sought third-party discovery from thirteen nonparties, including Citigroup's auditor--KPMG--and a number of former Citigroup employees. All said, the production resulted in plaintiffs obtaining over 42.5 million pages of documents--approximately 38 million from Citigroup and an additional 4.5 million from nonparties. (Decl. of Steven B. Singer, Esq. dated June 7, 2013 ¶¶ 35-42.) Plaintiffs' counsel also took and defended a total of seventy-six depositions. (*Id.* at ¶¶ 64, 87.) Thirty-three of these depositions were performed on a coordinated basis with plaintiffs in the Securities Action, but fourteen additional [*13] depositions took place after the Court issued a stay in the Securities Action. (*Id.* at ¶¶ 90-91.) Finally, plaintiffs vetted and retained six experts to prove their claims and rebut defenses in the areas of damages; the adequacy of Citigroup's loan-loss reserves; GAAP compliance; the composition, risk, credit quality, and valuation of CDOs and SIVs; due diligence in connection with public offerings; and federal banking regulations. (*Id.* at ¶ 94.)

During this period, the Court received briefing in support of and in opposition to a number of motions. Specifically, in March 2011, plaintiffs moved for class certification. (Mot. for Class Certification dated March 11, 2011, Dkt. No. 78.) In May 2011, plaintiffs served a motion to compel on three federal banking agencies, which had refused to produce certain requested documents based upon the bank examination privilege. (Mot. to Compel dated May 13, 2011, Dkt. No. 86.) In October 2011, defendants filed a Rule 12(c) motion, arguing that the recent decision of the U.S. Court of Appeals for the Second Circuit, *Fait v. Regions Financial Corp., 655 F.3d 105 (2d Cir. 2011)*, required dismissal of plaintiffs' claims. (Mot. for J. on the Pleadings [*14] dated October 27, 2011, Dkt. No. 139.) Following extensive communications among the parties and a detailed review of the allegedly privileged documents, the Court granted in part and denied in part the motion to compel. (Order dated Dec. 5, 2011, Dkt. No. 142.) The Court construed the Rule 12(c) motion as a motion for summary judgment and denied it with leave to renew. (Order dated Nov. 23, 2011, Dkt. No. 141.) And although the Court reviewed the memoranda and exhibits submitted in connection with the motion for class certification, the parties reached a settlement prior to the

resolution of that motion.

C. Settlement Negotiation and the Approval Process

1. Negotiations and Preliminary Approval

The parties broached the possibility of resolving this action in early 2012, while fact and expert discovery was proceeding at full force. By September 6, 2012, discussions had progressed to the point that the parties sought, and the Court agreed to, a ninety-day stay of all proceedings--subsequently extended to the end of January 2013. Around this time, the parties jointly engaged Layn R. Phillips, a retired federal judge, to mediate settlement negotiations. The mediator was familiar with the underlying [*15] facts because of his previous experience mediating the settlement in the Securities Action. (Singer Decl. ¶¶ 103-04.)

Plaintiffs and defendants provided Judge Phillips with numerous submissions regarding liability and damages during the last few months of 2012 and early 2013, resulting in a recommendation by him that the action be settled for a payment of $730 million by Citigroup. On January 25, the parties accepted this recommendation. (Singer Decl. ¶¶ 105-07.)

The parties then negotiated the remaining terms of the settlement, and on March 25 the Court preliminarily approved the settlement; certified a class consisting of all persons or entities that purchased or otherwise acquired Citigroup bonds during the relevant period for the purposes of settlement;[3] appointed Bernstein Litowitz as class counsel; and appointed the above-described plaintiffs as class representatives. (Singer Decl. ¶¶ 09-10; Order Preliminarily Approving Settlement and Providing for Notice dated Mar. 25, 2013 ("Preliminary Approval Order"), Dkt. No. 155.) Preliminary Approval Order ¶¶ 1-4.) The Court had the benefit of the parties' extensive briefing on the class certification issue to inform its decision to certify [*16] the class. The order also approved the form, content, and manner of notice to be distributed to class members--which explained the procedures for submitting a proof of claim, requesting exclusion from the class, and objecting to any aspect of the proposed settlement--and set a fairness hearing for July 23. (Preliminary Approval Order ¶¶ 5, 7, 8.)

3 The class consists of:

> "[A]ll persons and entities who purchased or otherwise acquired, from May 11, 2006 through and including November 28, 2008 (the "Settlement Class Period"), the debt securities (including medium term notes), series of preferred stock and certain series of depository shares representing interests in preferred stock, in or traceable to offerings of the Bond Class Securities, and were damaged thereby (the "Bond Class").

(Preliminary Approval Order 2-3.)

2. Objections and the Fairness Hearing

Following the issuance of the preliminary approval order, the claims administrator sent notice of the settlement to nearly 500,000 potential class members. Plaintiffs' counsel received only thirty-one requests for exclusion by the date provided in the notice--eighteen of which are from individuals who are not members of the class, did not suffer [*17] losses, or did not provide sufficient information to allow plaintiffs' counsel to determine whether they are class members. (Aff. of Jason Zuena dated July 15, 2013 ¶ 5, Ex. 1 to Supp. Decl. of Steven Singer, Esq. ("Supp. Singer Decl.") dated July 15, 2013, Dkt. No. 171; Pls.' Reply Mem. of Law in Support of Mot. for Final Approval of Class Action Settlement and Plan of Allocation ("Pls. Reply") 2, Dkt. No. 170.) Further, plaintiffs' counsel received only five objections to the settlement--one of which included no content. (Pls. Reply 1.) No institutional investor--many of which had large financial stakes in this litigation--has objected to any aspect of the settlement. (*Id.*) And none of the objections challenge the fairness of the proposed settlement figure or the plan of allocation.

After reviewing all written objections, the Court held a fairness hearing as scheduled. At the hearing, the Court heard presentations from plaintiffs' counsel regarding the fairness of the settlement and the reasonableness of the fee request. No objector appeared in person.

II. FINAL APPROVAL OF CLASS ACTION SETTLEMENT

A. Proper Notice of Class Certification and the Settlement

"*Rule 23* requires notice to the [*18] class both when the class is certified pursuant to *Rule 23(b)(3)* and when a class action settlement has been proposed for court approval." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *7*. As this Court recently noted, the notice requirements of *Rule 23(e)* are less specific than those of *Rule 23(c)*; the Court therefore focuses its analysis on the *Rule 23(c)* requirements. *Id.* That provision requires that the notice inform the class of:

> (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). Individual notice must be provided "to all members who can be identified through reasonable effort." *Id.* Compliance with these requirements satisfies due process. *In re IMAX Secs. Litig., 283 F.R.D. 178, 185 (S.D.N.Y. 2012)*. Additionally, because this class action settlement involves securities claims, [*19] the Private Securities Litigation Reform Act of 1995 (the "PSLRA") requires that certain additional information be included in the notice. *See id.*; *15 U.S.C. § 78u-4(a)(7)*.

The Court has reviewed the notice and finds that it complies with the requirements of *Rule 23*, the PSLRA, and due process. Specifically, the claims administrator mailed copies of the notice packet to almost 500,000 potential class members and informed the recipients of the date by which requests for exclusion were to be received. (Zuena Aff. ¶¶ 2, 4.) The notice also adequately informed the potential class members of the information required by *Rule 23* and the PSLRA. (*See* Notice of Pendency of Class Action and Proposed Settlement; Settlement Fairness Hearing; and Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Notice"), Ex. A to Aff. of Stephen J. Cirami dated June 7, 2013, Ex. 1 to Singer Decl.) As such, the Court finds that notice to the class was proper.

B. Fairness of the Settlement

Pursuant to *Rule 23(e)*, the Court must review a proposed class action settlement to determine whether it is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. The fairness of a settlement is [*20] determined by looking at both the negotiating process by which it was achieved and the settlement's terms--that is, procedural and substantive fairness. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005)*. Courts evaluate class action settlements with the "general policy favoring the settlement of litigation" in mind. *Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982)*. Nonetheless, reviewing courts must exercise careful scrutiny to ensure that the requirements of *Rule 23* have been met and that the settlement is not a product of collusion. *D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001)*. Because this settlement was negotiated prior to class certification, it is "subject to a higher degree of scrutiny in assessing its fairness." *Id.*

Applying the required heightened level of scrutiny, the Court finds the proposed class action settlement is fair, reasonable, and adequate for the following reasons.

1. Procedural Fairness

Courts may apply a presumption of fairness when a class settlement is the product of "arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, 396 F.3d at 116* (quoting *Manual for Complex* [*21] *Litigation* (*Third*) § 30.42 (1995)). This presumption arises because if the negotiation process is fair "the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *8* (quoting *In re PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 132 (S.D.N.Y. 1997))*. The Court finds that is the case here.

Both plaintiffs' and defendants' attorneys are experienced practitioners whose skill and knowledge of the case has been demonstrated to the Court's satisfaction. As explained, the parties engaged in extensive and contested discovery for over two years prior to the stay imposed by this Court, at which point settlement became the parties' primary focus. Settlement negotiations were overseen by an experienced, neutral third-party mediator over a period of months, and the parties eventually agreed to the settlement terms recommended by this impartial

mediator. For these reasons, the Court finds that settlement negotiations were fair and free from collusion, and the presumption of fairness, adequacy, and reasonableness applies. *See Wal-Mart Stores, 396 F.3d at 116.*

2. Substantive Fairness

"The [*22] Court must next consider whether the substantive terms of the settlement support or rebut the presumption of fairness arising from the arm's-length negotiations." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *9.* The following nine factors, set forth in *City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)*, guide the Court's analysis of the substantive fairness of the terms of the settlement:

> (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 [compared] to a possible recovery in light of all the attendant risks of litigation. *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *9* (quoting *Wal-Mart Stores, 396 F.3d at 117*). The Court scrutinizes each of the *Grinnell* factors [*23] carefully, but stop[s] short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell, 495 F.2d at 462.*

a. The complexity, expense, and likely duration of the litigation

As this Court noted in the Securities Action settlement, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *9* (quoting *McBean v. City of N.Y., 233 F.R.D. 377, 385 (S.D.N.Y. 2006)*). Other courts in this district "have long recognized" that securities class action litigation, in particular, "is notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig., No. 02 Civ. 3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010)* (quoting *In re Sumitomo Copper Litig., 189 F.R.D. 274, 281 (S.D.N.Y. 1999)*). This case was no exception.

Although this action has already proven complex, expensive, and time consuming during its four-and-one-half year duration, the Court has no doubt that the future litigation would have been equally or more so. Extensive summary judgment [*24] motions are to be expected. If the litigation were to proceed past summary judgment, preparation for and conduct of a trial would have consumed substantial resources. Either way, the result would have been ripe for appeal, requiring additional time and expense. This factor therefore weighs in favor of approval.

b. *The reaction of the class to the settlement*

Minimal objections and few requests for exclusion from class members are evidence that a settlement is fair and adequate. *See Wal-Mart Stores, 396 F.3d at 118*; *D'Amato, 236 F.3d at 86-87.* This factor carries particular weight here where only five parties submitted objections, none of which challenge the fairness of the terms of the settlement. Also noteworthy is that only thirty-one requests for exclusion were received from a distribution pool of nearly 500,000---and only thirteen of these requests for exclusion were from class members who suffered losses. Moreover, not one of the objections or requests for exclusion was submitted by an institutional investor. Therefore, as in the Securities Action, "the class's reaction weighs heavily in favor of approval." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *9.*

c. *The stage of the* [*25] *proceedings and the amount of discovery completed*

This factor is "intended to assure the Court that counsel for plaintiffs have weighed their position based

on a full consideration of the possibilities facing them." *In re Global Crossing Sec. and ERISA Litig., 225 F.R.D. 436, 458 (S.D.N.Y. 2004)* (quoting *Klein ex rel. Ira v. PDG Remediation, Inc., No. 95 Civ. 4954 (DAB), 1999 U.S. Dist. LEXIS 650, 1999 WL 38179, at * (S.D.N.Y. Jan. 28, 1999)*) (quotation marks omitted). Here, litigation has been ongoing for years, and the plaintiffs had a thorough understanding of the strengths and weaknesses of their case. In addition to having the benefit of the Court's opinion and order resolving the motion to dismiss, the Court had decided defendants' motion for reconsideration and their motion for judgment on the pleadings. And both parties had submitted arguments and evidence in favor of or in opposition to the motion for class certification.

Moreover, discovery had been extensive and was nearly complete. As explained, plaintiffs had gathered approximately 42.5 million pages of documents, had taken or defended seventy-six depositions, and had engaged six experts. The plaintiffs had also fought a battle---including a hotly [*26] contested motion to compel--over certain documents in the possession of federal banking agencies and claimed to be protected by the bank examination privilege. The upshot of these facts is that "[p]laintiff ... had more than enough information to make an informed and intelligent decision." *See In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *10*. This factor also weighs in favor of approval.

d. The risks of continued litigation associated with maintaining the class through trial and establishing liability and damages

Uncertainty abounded with regard to plaintiffs' ability to maintain the class through trial and to establish liability and damages--*Grinnell* factors four, five, and six. The Court will not exhaustively detail all the difficulties plaintiffs would have faced had the litigation continued, but highlights a few representative examples.

First and most obviously, the Court had not yet resolved the motion for class certification. Plaintiffs therefore not only faced the risk of maintaining the class through trial, but also of the class potentially not being certified. *See In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *10* ("It is no coincidence that the parties' settlement [*27] talks ramped up specifically to avoid the first of these uncertainties: that the Court might deny class certification.").

The highest hurdle for plaintiffs to overcome, however, was establishing liability. In addition to having to counter Citigroup's primary defense--that its offering materials contained no material misstatements or omissions and that the market was well aware of any allegedly misstated or omitted information-plaintiffs would have had to contend with case law that, since the resolution of defendants' motion to dismiss, has raised the bar for establishing Section 11 liability based on certain types of statements. Following the Second Circuit's decision in *Fait*, plaintiffs would have had to demonstrate that any of defendants' alleged statements that could be categorized as statements of opinion-such as those involving loan-loss reserves-were not only untrue, but "misstated their truly held belief." *655 F.3d at 108*. Other courts in this district have interpreted *Fait's* definition of statements of opinion broadly, applying it to, for example, estimates of the fair market value of assets. *See In re Gen. Elec. Co. Secs. Litig., 856 F. Supp. 2d 645, 653 (S.D.N.Y. 2012)*. *Fait* [*28] might have sounded the death-knell to plaintiffs' hope of establishing liability based on the majority of the claims that survived the motion to dismiss.

Finally, in order to be awarded damages, plaintiffs would have had to contend with Citigroup's defense that the historic events occurring in the financial world between May 2006 and November 2008---in particular the market collapse in the latter months of 2008--caused their losses, rather than the misstatements or omissions allegedly made in connection with the public offerings at issue here.

The purpose of this brief exploration of ways in which plaintiffs' efforts might have fallen short is to demonstrate that the fourth, fifth, and sixth *Grinnell* factors all weigh in favor of approval of the settlement. The Court finds particularly compelling the increased risk plaintiffs faced in establishing liability post-*Fait*.

e. The ability of defendants to withstand a greater judgment

Plaintiffs concede that Citigroup could likely withstand a greater judgment. This factor, therefore, does not weigh in favor of approval. This Court and numerous others have recognized, however, that "standing alone," a defendant's ability to withstand a greater judgment [*29] "does not suggest that the settlement is unfair." *See In re*

*Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *11* (quoting *D'Amato, 236 F.3d at 86*).

f. The range of reasonableness of the settlement fund in light of the best possible recovery and all attendant risks of litigation

Finally, the Court considers the range of reasonableness with respect to the settlement, which involves a comparison of "the terms of the compromise with the likely rewards of litigation." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *11* (quoting *Weinberger, 698 F.2d at 73*). Certainly, the settlement does not represent the best possible recovery for plaintiffs; their damages experts estimate that to be approximately $3 billion. (Singer Decl. ¶ 138.) Nevertheless, a recovery of $730 million represents a substantial sum, "and the risk that the class would recover nothing or would recover a fraction of the maximum possible recovery must factor into the decisionmaking calculus." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *11*. Moreover, plaintiffs' counsel represents that this $730 million figure is the second-largest recovery in a securities class action brought on behalf of purchasers of debt securities. [*30] (Singer Decl. ¶ 3.) Also worthy of note is that, although this litigation and the Securities Action differ in meaningful ways reflected in the settlement figures--most notably insofar as the elements of the violations alleged in that case are arguably more difficult to prove than the elements of the Securities Act violations alleged here-the recovery here is larger than that achieved in the Securities Action, both in terms of the total amount and the percentage of the best possible recovery the settlement figure represents. *See 2013 U.S. Dist. LEXIS 108115, [WL] at *11-12*. And the Court found that the Securities Act recovery "stands out in the crowd." *2013 U.S. Dist. LEXIS 108115, [WL] at *12*. In short, the final two *Grinnell* factors weigh heavily in favor of approval, as the settlement figure represents a noteworthy recovery for the class, and it falls well within the range of reasonableness.

As in the Securities Action, here, "nearly every traditional indicator of a settlement's fairness points in favor of approval of this settlement." *2013 U.S. Dist. LEXIS 108115, [WL]. at *13*. The Court therefore finds that the settlement is fair, reasonable, and adequate and grants plaintiffs' motion for final approval.

III. FINAL APPROVAL OF THE PLAN OF ALLOCATION

The plan of allocation is [*31] subject to the same test of fairness, reasonableness, and adequacy as the settlement itself. *See In re IMAX Secs. Litig., 283 F.R.D. at 192*; *In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005.)* "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." *In re Citigroup Inc. Sec. Litig., 2013 U.S. Dist. LEXIS 108115, 2013 WL 3942951, at *13* (quoting *In re PaineWebber Ltd. P'ships Litig., 171 F.R.D. at 133*). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re IMAX Secs. Litig., 283 F.R.D. at 192* (quoting *In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008))* (quotation marks omitted).

Here, the proposed plan of allocation provides for calculation of damages based on the formula set forth in Section 11(e) of the Securities Act, *15 U.S.C. § 77k(e)*[4]; it essentially allocates damages on a pro rata basis according to the net loss sustained for each qualifying bond security. Specifically, recognized loss amounts are [*32] calculated based on the difference between the purchase price and the closing price of each bond on the last day of the settlement class period. This amount is then offset by recognized gain amounts calculated for shares of the same bond sold, converted, or held for a gain. The resulting figure is the net recognized loss for that security. A claimant's award is the sum of his or her net recognized losses, and the award is allocated on a pro rata basis based on the relative size of each claim. This general rule applies except to class members still holding bond class securities as of March 18, 2013. The calculation of those class members' net recognized loss will differ insofar as the recognized loss amount will be discounted by 90 percent to account for a substantial recovery, subsequent to the class period, in price of a majority of the bond class securities. (Singer Decl. ¶¶ 151-52.)

4 The statute provides for the following calculation of damages: "the difference between the amount paid for the security . . . and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3)

> the price [*33] at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security ... and the value thereof as of the time such suit was brought." *15 U.S.C. § 77k(e)*.

The Court finds the plan of allocation has a rational basis grounded in a federal statute and that it was formulated by competent, experienced counsel. Thus, the plan is fair, reasonable, and adequate, and the Court hereby grants plaintiffs' motion for final approval of the plan of allocation.

IV. CONCLUSION

For the reasons set forth above, the $730 million settlement and the plan of allocation are fair, reasonable, and adequate. In addition, the Court finds that the class was provided with adequate notice of class certification and of the settlement. Accordingly, plaintiffs' motion for final approval of the settlement and the plan of allocation is granted. (Dkt. No. 156.)

Dated: New York, New York

August 20, 2013

SO ORDERED:

/s/ Sidney H. Stein

Sidney H. Stein, U.S.D.J.

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

United States District Court,
E.D. New York.
In re COMVERSE TECHNOLOGY, INC. SECURITIES LITIGATION.

No. 06-CV-1825 (NGG)(RER).
June 24, 2010.

Christopher Joseph Keller, Labaton Sucharow & Rudoff LLP, Nancy Kaboolian, Abbey Spanier Rodd & Abrams, LLP, New York, NY, for Plaintiffs.

Joseph S. Allerhand, Weil, Gotshal & Manges, LLP, Donald A. Corbett, Dickstein Shapiro Morin & Oshinsky LLP, Edward M. Spiro, Jeremy Hugh Temkin, Morville, Abramowitz, Grand, Iason, David S. Hoffner, Guy Petrillo, Robert W. Topp, Donald Scott Smedley, Dechert LLP, Joel M. Cohen, Clifford Chance U.S. LLP, Solomon N. Klein, Thomas Philip Puccio, Law Office of Solomon N. Klein, Seth T. Taube, Baker Botts, LLP, Yehudis Shalva Lewis, Kramer Levin Naftalis & Frankel LLP, Alex Jason Kaplan, Saima S. Ahmed, Steven Bierman, Sidley Austin LLP, New York, NY, for Defendants.

MEMORANDUM

NICHOLAS G. GARAUFIS, District Judge.

*1 The court issues this Memorandum to explain its award of fees in the Judgment and Order of Dismissal entered in this case on June 23, 2010.

I. BACKGROUND

The court assumes the parties' familiarity with the background of this case, and only recites the facts necessary to address Lead Counsel's motion for an award of attorneys' fees (Docket Entry # 331).

This case arises out of allegedly unlawful stock option awards made to officers of Comverse Technology, Inc. ("Comverse"). Beginning on April 16, 2006, Comverse stockholders filed five putative class actions against Comverse and certain Comverse officers (collectively, "Defendants"), alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t, and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder. On March 2, 2007, the court consolidated these actions and appointed Menora Mitvachim Pension Funds, Ltd. and Menora Mitvachim Insurance Co. (the "Menora Group") as Lead Plaintiff, in accordance with the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(I). (Docket Entry # 65.) The Menora Group is represented by Pomerantz Haudek Grossman & Gross LLP ("Lead Counsel").

On December 16, 2009, the Menora Group entered into a Stipulation of Settlement with Defendants. (Docket Entry # 323 ("Stipulation").) Under the Stipulation, Comverse agreed to pay a total of $165 million to a class consisting of all purchasers of Comverse common stock during the period April 30, 2001 through January 29, 2008, in exchange for the release and discharge of all claims based upon Comverse's acts during the class period. (*See* Stipulation ¶¶ 1.8, 2.2, 5.2; Declaration of Patrick V. Dahlstrom in Support of Final Approval of Settlement (Docket Entry # 333) ("Dahlstrom Decl.") ¶ 97.) Defendant Kobi Alexander, a former Comverse officer, agreed to pay $60 million to the class, resulting in a total recovery of $225 million (the "Settlement Amount"). (Stipulation ¶ 2.3.)

On April 2, 2010, the court entered an order preliminarily approving the settlement, certifying a class for settlement purposes, and scheduling a fairness hearing. (Docket Entry # 329 ("Preliminary Approval Order").) The Preliminary Approval Order directed Lead Counsel to provide notice of the settlement and the fairness hearing to potential

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class members. (Preliminary Approval Order ¶ 9.) Through a claims administrator, Lead Counsel mailed a Notice of Pendency and Settlement of Class Action to more than 204,000 potential class members, and also posted summary notice in the *Wall Street Journal* and in the Israeli financial paper *Globes.* (*See* Pls. Reply Mem. in Opposition to Objections (Docket Entry # 342) ("Pls. Reply Mem.") 1); Affidavit of Michael Rosenbaum (Docket Entry # 336 ("Rosenbaum Aff.").)

The retainer agreement between Lead Counsel and the Menora Group permitted Lead Counsel to request attorneys fees up to 30% of any eventual recovery. (Pls. Mem. in Support of Attorneys' Fees Award (Docket Entry # 334) ("Pls. Fee Mem.") 7.) After the parties reached settlement, the Menora Group and Lead Counsel began "vigorous negations" over the fee award. (Decl. of Assaf David–Margalit (Docket Entry # 335) ¶ 8.) The Menora Group also consulted with independent counsel regarding an appropriate fee award for Lead Counsel. (*Id.*) The Notice of Pendency informed potential class members that Lead Counsel would apply for attorneys' fees not in excess of 27% of the Settlement Amount. (Rosenbaum Aff. Ex. A.) On May 10, 2010, Lead Counsel filed a motion requesting, *inter alia,* an award of attorneys' fees in the amount of 25% of the Settlement Amount. (Docket Entry # 331.)

*2 The court received three objections to the settlement. One of these was withdrawn. Another objection, filed by a repeat pro se litigant, was patently frivolous. (*See* Docket Entry # 330.) The only cognizable objection was filed by the Pennsylvania State Employees' Retirement System ("SERS"). (Docket Entry # 344 ("SERS Ltr.").) SERS argued that Lead Counsel's fee request was too large, and suggested instead that the court "award no more than is absolutely required to provide reasonable compensation to counsel." [FN1] (SERS Ltr. 7.)

FN1. SERS does not object to the proposed settlement of the class action, to the proposed Plan of Allocation, to Lead Counsel's request for an award of unreimbursed expenses, or to Lead Counsel's request for a compensatory award to Lead Plaintiff.

This court held the fairness hearing on June 21, 2010. No parties objected at the hearing.

II. DISCUSSION

A. Calculating Appropriate Fees in Common Fund Cases

Attorneys who recover a common fund for the benefit of a class of injured plaintiffs "are entitled to a reasonable fee—set by the court—to be taken from the fund." *Goldberger v. Integrated Res.,* 209 F.3d 43, 47 (2d Cir.2000). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." *Id.* (internal citation omitted). In exercising this discretion,

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

Id. at 50 (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)).

Courts use two methods to calculate appropriate fees: the "percentage method" and the "lodestar method." Under the percentage method, the court simply awards counsel a reasonable percentage of the recovery as a fee. The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably

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billed, then multiply that figure by an appropriate hourly rate. *Id.* at 47. "The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal–Mart Stores. Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir.2005) (internal citations omitted). The lodestar method, by contrast, "creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement." *McDaniel v. County of Schenectady*, 595 F.3d 411, 418 (2d Cir.2010). The Second Circuit therefore encourages district courts to use the lodestar method primarily as a "cross-check" for the percentage method. *Goldberger*, 209 F.3d at 50. Any percentage award, however, must still be assessed for reasonableness using the *Goldberger* criteria.

*3 An additional consideration obtains when the lead counsel and lead plaintiff in a PSLRA class action enter into a fee agreement. In such circumstances, the Second Circuit directs district courts to:

> [G]ive 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. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133–134 (2d Cir.2008); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir.2001) ("[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.").

B. Application of the *Goldberger* Factors to Lead Counsel's Fee Application

1. *The Requested Fee in Relation to the Settlement*

When determining whether a fee request is reasonable in relation to a settlement amount, "the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (McMahon, J.), 2009 U.S. Dist. LEXIS 120953, at *56 (S.D.N.Y.Decl.23, 2009); *see also re Nortel Networks*, 539 F.3d at 134. Lead Counsel's request for 25% of the Settlement Amount is consistent with, or lower than, the fee awards in other "megafund" securities fraud actions in this Circuit. *See In re Initial Pub. Offering Sec. Litig.*, 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding lead counsel 33.3% of $586 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL Dkt. No. 1222 (Brieant, J.), 2003 U.S. Dist. LEXIS 26795, at *13–14 (S.D.N.Y. June 12, 2003) (28% of $300 million); *Kurzweil v. Philip Morris Cos.*, Nos. 94 Civ. 2373, 94 Civ. 2546 (Mukasey, J.), 1999 U.S. Dist. LEXIS 18378, at *2 (S.D.N.Y. Nov. 30, 1999) (30% of $124 million); *In re Prudential*, 912 F.Supp. 97, 104 (S.D.N.Y.1996) (27% of $ 110 million); *In re Priceline.com*, No. 00 Civ. 1884 (Covello, J.), 2007 U.S. Dist. LEXIS 52538, at *12–13 (D.Conn. July 20, 2007) (30% of $80 million). This suggests, at the very least, that Lead Counsel's request is not unreasonable.

This court is aware that other courts have adopted a "sliding-scale" approach to fee awards in megafund cases in order to prevent "unwarranted windfalls" to class counsel. *See, e.g., In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689 (Scheindlin, J.), 2003 U.S. Dist. LEXIS 17090, at *20 (S.D.N.Y. Sept. 29, 2003) ("The 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

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be over-compensated to the detriment of the class members they represent."). The logic of this approach is appealing, if not altogether airtight: for example, it ignores the possibility that a sliding scale may actually harm class members by reducing attorneys' incentive to accept greater risk in pursuit of above-average recoveries.

*4 But whatever the merits of the sliding-scale method, its underlying rationale—to avoid awarding unearned or unanticipated benefits to class counsel—is inapplicable in this case. It was clear when Comverse's financial troubles were first announced that the potential recovery in any successful lawsuit against Comverse would be substantial. (*See, e.g.,* Amended Compl. (Docket Entry # 74) ¶¶ 152–60.) Nonetheless, the Menora Group and Lead Counsel contracted at the outset of this litigation for a fee award as high as 30% of the eventual recovery. After the settlement amount had been determined, the Menora Group negotiated a 25% fee request. The fact that this fee request is the product of arm's-length negotiation between Lead Counsel and the lead plaintiff is significant. Whether a court uses the percentage or lodestar method, its primary goal when awarding fees is to approximate the prevailing market rate for counsel's services. *See Goldberger,* 209 F.3d at 52 ("[M]arket rates, where available, are the ideal proxy for [class counsel's] compensation'); *In re Nortel Networks,* 539 F.3d at 133–134; *McDaniel,* 595 F.3d at 420; *cf. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 184 (2d Cir.2008) (awards in fee-shifting cases should approximate market rates). Because attorneys and clients ordinarily strike their bargain prior to litigation (*i.e.,* when the risk of loss still exists), an ex ante fee agreement is the best indication of the actual market value of counsel's services. *See In re Synthroid Mktg. Litig.,* 264 F.3d 712, 719 (7th Cir.2001) (opinion of Easterbrook, J.); *In re Nortel Networks,* 539 F.3d at 133–134 ("In many cases, the agreed-upon fee will offer the best indication of a market rate"). Presumably, the Menora Group's decision not to negotiate for a sliding-scale fee award was based on its assessment of the risks of the litigation, Lead Counsel's competence, the rates of settlement in comparable securities actions, and all the other considerations that clients ordinarily take into account when contracting for attorney services on an open market. The court sees no need to impose its own ex post assessment of Lead Counsel's value when the retainer and fee agreements speak for themselves.

Using the lodestar as a cross-check confirms the reasonableness of Lead Counsel's request. Lead Counsel expended 43,573 hours of attorney and support time valued at rates ranging from $125 to $880 per hour, generating a $20,245,585 lodestar figure. (Dahlstrom Decl. Ex. B.) Although high, these rates are not extraordinary for top New York law firms. *See In re Gilat Satellite Networks, Ltd.,* No. 02 Civ. 1510 (Sifton, J.), 2007 U.S. Dist. LEXIS 68964, at *54 (E.D.N.Y. Sept. 18, 2007) (citing cases).[FN2] The hours Lead Counsel expended on this action are reasonable given the magnitude and complexity of the case. (*See* Dahlstrom Decl. ¶ 137); *see also Goldberger v. Integrated Res.,* 209 F.3d at 50 (where lodestar method is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.").

FN2. *See also* Nathan Koppel, *Lawyers Gear Up Grand New Fees,* Wall St. J., Aug. 22, 2007, *available at* http://online.wsj.com/article/SB118775188828405048.html (last visited June 23, 2010).

*5 Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar. *Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir.1974). The requested fee in this case represents a lodestar multiplier of 2.78. This multiplier is well within the range awarded in comparable settlements. *See Welch & Forbes, Inc. v. Cendant Corp.,* 243 F.3d 722, 742 (3d Cir.2001) (surveying cases with recoveries over $100 million and finding lodestar multiplier of 1.35 to 2.99 common);

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Kurzweil, 1999 U.S. Dist. LEXIS 18378, at *8 (noting that multipliers between 3 and 4.5 are common in federal securities cases, and awarding 25% attorneys' fee); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998) ("multipliers of between 3 and 4.5 have become common").

2. *The Risk of the Litigation*

The risk of the litigation is often cited as one of the most important *Goldberger* factors. *See, e.g., In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 233 (S.D.N.Y.2005). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation. In particular, securities actions have become more difficult from a plaintiff's perspective in the wake of the [Private Securities Litigation Reform Act]." *In re Metlife Demutualization Litig.,* 689 F.Supp.2d 297, 361 (E.D.N.Y.2010) (quotations and citations omitted).

Lead Counsel invested tens of thousands of hours of attorney time and over $1.6 million of its own money to litigate this case. (Dahlstrom Decl. Ex. C.) It did so despite the fact that the Menora Group faced serious challenges with respect to establishing liability and damages. Had the litigation proceeded, the Menora Group would have faced conflicting evidence concerning the materiality of the alleged misstatements regarding backdated options, the *scienter* claims against the Compensation/Audit Committee defendants, and loss causation for the interim partial disclosures. (*See* Dahlstrom Decl. ¶¶ 99–117.) Even if liability was established, there was also a substantial risk that the jury would award damages lower than those calculated by the Menora Group's expert. There was also a risk that Comverse's deteriorating cash condition would make it unable to pay a substantial settlement. (*Id.* ¶¶ 120–25.) In short, a positive outcome was by no means guaranteed.

3. *The Time and Labor Expended By Counsel and the Magnitude and Complexities of the Litigation*

This case, while perhaps not as enormous as some other recent securities class actions, was large, protracted, and bitterly contested. Lead Counsel expended 43,573 hours on the litigation. Among other things, Lead Counsel: reviewed seven million pages of documents, as well as SEC filings, analyst reports, and public filings in nine other securities cases; filed multiple complex pleadings; briefed oppositions to protective-order motions, a motion for class certification, papers in support of the settlement, and six motions to dismiss; successfully appealed a Report and Recommendation; deposed 10 Comverse employees, defended three depositions, and interviewed 30 former Comverse employees throughout the United States and Israel; and prepared and reviewed highly complex accounting and damages analyses with the aid of experts. (Dahlstrom Decl. ¶ 137.) These efforts were hardly makework, given the uncertainty of key issues relating to liability and damages. Lead Counsel also engaged in lengthy, contentious settlement and mediation sessions over the course of a eighteen months. (*Id.* ¶¶ 74–98.) The results of this labor speak for themselves: as of May 2010, this settlement is the second largest securities class action settlement involving options backdating claims. (Pls. Fee Mem. 5.)

4. *The Quality of Lead Counsel's Representation*

***6** To evaluate the quality of representation in common-fund litigations, courts in this Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 141 (S.D.N.Y.1998). As outlined above, the recovery in this case is one of the highest ever achieved in this type of securities action. Lead Counsel has extensive experience in complex federal civil litigation, including securities fraud class actions. (Dahlstrom Decl. Ex. A.) The court also notes that, throughout this litigation, it has been impressed by Lead Counsel's acumen and diligence. The briefing has been thorough, clear, and convincing, and as far as the court can tell, Lead Counsel has not taken short cuts or relaxed its

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efforts at any stage of the litigation.

5. *Public Policy Considerations*

Private securities class actions are "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action." *Eichler v. Berner,* 472 U.S. 299, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (internal quotation marks and citation omitted). For these reasons, "public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *Bristol–Myers Squibb,* 361 F.Supp.2d at 236; *see also In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").

A 25% fee award in a $225 million settlement is certainly sufficient incentive to pursue securities cases of this magnitude. And while it may be that a lower percentage would also be sufficient, this court will not pretend that it has the expertise necessary to divine the ideal percentage or construct an accurate sliding fee scale. This court is particularly unwilling to undertake such an endeavor in a case where the fee award was set on the open market, and where an improperly calibrated fee would provide a disincentive to future counsel to take risks and pursue large class settlements that the SEC cannot.

III. CONCLUSION

For the foregoing reasons, this court finds that Lead Counsel's request for a fees award in the amount of 25% of the Settlement Amount is fair and reasonable under *Goldberger* and the prevailing law in this Circuit.

E.D.N.Y.,2010.

In re Comverse Technology, Inc. Securities Litigation

Not Reported in F.Supp.2d, 2010 WL 2653354 (E.D.N.Y.), Fed. Sec. L. Rep. P 95,781

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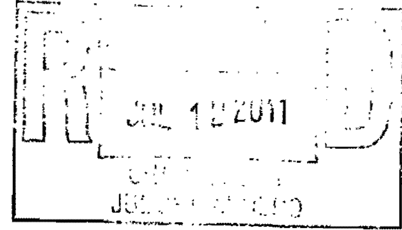
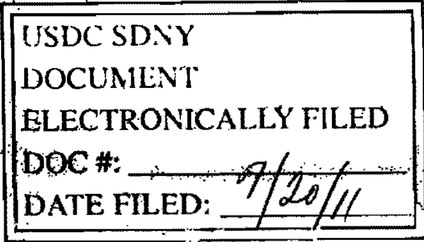


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN CORNWELL, Individually and On Behalf of All Others Similarly Situated,	:	Civil Action No. 08-cv-03758(VM) **(Consolidated)**
Plaintiff,	:	CLASS ACTION
vs.	:	ORDER AWARDING ATTORNEYS' FEES AND EXPENSES
CREDIT SUISSE GROUP, et al.,	:	
Defendants.	:	



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THIS MATTER having come before the Court on July 18, 2011, on the motion of Lead Plaintiffs' counsel for an award of attorneys' fees and expenses incurred in the Action; the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of the Action to be fair, reasonable, and adequate and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement dated March 7, 2011.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all members of the Settlement Class who have not timely and validly requested exclusion.

3. Counsel for the Lead Plaintiffs are entitled to a fee paid out of the common fund created for the benefit of the Settlement Class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). In class action suits where a fund is recovered and fees are awarded therefrom by the court, the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is the proper approach. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Second Circuit recognizes the propriety of the percentage-of-the-fund method when awarding fees. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

4. Lead Plaintiffs' counsel have moved for an award of attorneys' fees of 27.5% of the Settlement Fund, plus interest.

5. This Court adopts the percentage-of-recovery method of awarding fees in this case, and concludes that the percentage of the benefit is the proper method for awarding attorneys' fees in this case.

6. The Court hereby awards attorneys' fees of 27.5% of the Settlement Fund, plus interest at the same rate as earned on the Settlement Fund. The Court finds the fee award to be fair and reasonable. The Court further finds that a fee award of 27.5% of the Settlement Fund is consistent with awards made in similar cases.

7. Said fees shall be allocated among plaintiffs' counsel by Co-Lead Counsel in manner which, in their good faith judgment, reflects each counsel's contribution to the institution, prosecution and resolution of the Action.

8. The Court hereby awards expenses in an aggregate amount of $285,072.62, plus interest.

9. In making this award of attorneys' fees and expenses to be paid from the Settlement Fund, the Court has considered each of the applicable factors set fort in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). In evaluating the *Goldberger* factors, the Court finds that:

(a) Counsel for Lead Plaintiffs expended considerable effort and resources over the course of the Action researching, investigating and prosecuting Lead Plaintiffs' claims. Lead Plaintiffs' counsel have represented that they have reviewed tens of thousands of pages of documents, interviewed witnesses and opposed legally and factually complex motions to dismiss. The parties also engaged in settlement negotiations that lasted several months. The services provided by Lead Plaintiffs' counsel were efficient and highly successful, resulting in an outstanding recovery for the Settlement Class without the substantial expense, risk and delay of continued litigation. Such efficiency and effectiveness supports the requested fee percentage.

(b) Cases brought under the federal securities laws are notably difficult and notoriously uncertain. *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 U.S. Dist. LEXIS 17588, at *31 (S.D.N.Y. Apr. 6, 2006). "[S]ecurities actions have become more

difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Despite the novelty and difficulty of the issues raised, and the procedural posture of the case, Lead Plaintiffs' counsel secured an excellent result for the Settlement Class.

(c) The recovery obtained and the backgrounds of the lawyers involved in the lawsuit are the best evidence that the quality of Lead Plaintiffs' counsel's representation of the Settlement Class supports the requested fee. Lead Plaintiffs' counsel demonstrated that notwithstanding the barriers erected by the PSLRA, they would develop evidence to support a convincing case. Based upon Lead Plaintiffs' counsel's diligent efforts on behalf of the Settlement Class, as well as their skill and reputations, Lead Plaintiffs' counsel were able to negotiate a very favorable result for the Settlement Class. Lead Plaintiffs' counsel are among the most experienced and skilled practitioners in the securities litigation field, and have unparalleled experience and capabilities as preeminent class action specialists. Their efforts in efficiently bringing the Action to a successful conclusion against the Defendants are the best indicator of the experience and ability of the attorneys involved. In addition, Defendants were represented by highly experienced lawyers from a prominent firm. The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys. The ability of Lead Plaintiffs' counsel to obtain such a favorable settlement for the Settlement Class in the face of such formidable opposition confirms the superior quality of their representation and the reasonableness of the fee request.

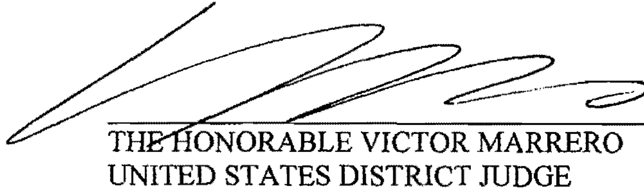
(d) The requested fee of 27.5% of the settlement is within the range normally awarded in cases of this nature.

(e) Public policy supports the requested fee, because the private attorney general role is "'vital to the continued enforcement and effectiveness of the Securities Acts.'" *Taft v. Ackermans*, No. 02 Civ. 7951(PKL), 2007 U.S. Dist. LEXIS 9144, at *33 (S.D.N.Y. Jan. 31, 2007) (citation omitted).

(f) Lead Plaintiffs' counsel's total lodestar is $4,049,631.50. A 27.5% fee represents a multiplier of 4.7. Given the public policy and judicial economy interests that support the expeditious settlement of cases, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002), the requested fee is reasonable.

10. The awarded attorneys' fees and expenses, and interest earned thereon, shall be paid to Co-Lead Counsel from the Settlement Fund immediately after the date this Order is executed subject to the terms, conditions, and obligations of the Settlement Agreement and in particular ¶6.2 thereof, which terms, conditions, and obligations are incorporated herein.

IT IS SO ORDERED.



Dated: New York, NY

18 July, 2011

THE HONORABLE VICTOR MARRERO
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011, I submitted the foregoing to orders and judgments@nysd.uscourts.gov and e-mailed to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 11, 2011.

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re EVCI CAREER COLLEGES HOLDING CORP. SECURITIES LITIGATION.

Master File Nos. 05 Civ. 10240(CM), 05 CV 10287, 05 CV 10515, 05 CV 10610, 06 CV 00304, 06 CV 00347, 06 CV 01684.
July 27, 2007.

DECISION AND ORDER APPROVING SETTLEMENT OF CLASS ACTIONS AND AWARDING FEES AND DISBURSEMENTS TO LEAD COUNSEL

McMAHON, J.

I. *PRELIMINARY STATEMENT*

*1 After more than fourteen months of litigation. Lead Counsel, with the active participation, oversight and consent of ATRS, have reached a Settlement with Defendants to resolve the Class's claims against them for a cash payment of $7,725,000. The Settlement constitutes 35% of the $22 million of damages estimated by Lead Plaintiffs damages expert. *See* Declaration of Jane D. Nettesheim ("Nettesheim Decl."), Exhibit 2 to the Stewart Declaration ("Stewart Decl."), ¶ 12. It includes substantially all of the EVCI's available insurance. And it ensures recovery' for the class that might otherwise not be possible, given EVCI's precarious financial condition: there was significant risk that, even if ATRS succeeded at trial, the resulting damage award could be wiped out by a bankruptcy filing.

That risk of non-recovery in the face of success was in addition to the usual risks faced by plaintiffs' counsel in litigation brought under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Even assuming ATRS was successful in establishing Defendants' scienter, the issues of causation and damages would have been hotly contested at trial. Defendants intended to argue that the Class did not suffer any compensable damages, or that those damages were a fraction of what ATRS estimated.

The Settlement was achieved only after Lead Counsel conducted extensive legal and factual investigations into the events and circumstances underlying the claims asserted in the Action; thoroughly researched the law pertinent to the claims against Defendants and potential defenses thereto; consulted with experts on the Class's damages; and interviewed numerous witnesses. Stewart Decl. ¶ 5. Thus, the Settlement was reached only after Lead Counsel and ATRS had attained-through Lead Counsel's aggressive prosecution efforts-a thorough understanding of the strengths and weaknesses of the claims against Defendants. Counsel were in an optimal position to negotiate and judge the terms of the proposed Settlement.

The Settlement is the product of adversarial arm's-length negotiations that took place over a several week period with the involvement of ATRS and consultation with its damages expert. Stewart Decl. ¶¶ 33-37. Al the same time, Lead Counsel continued to pursue the Class's claims through the discovery process. *Id.* ¶ 32.

Lead Plaintiff actively participated both in the prosecution of this Action and the settlement negotiations. ATRS regularly consulted with Lead Counsel on all substantive matters, reviewed all pleadings, and consulted in and monitored the negotiation process. *See* Clark Decl. ¶¶ 3.9-11. The PSLRA was enacted in part to ensure that sophisticated institutional investors such as ATRS would participate in and control securities litigation. Legal Counsel of ATRS, who was involved in all aspects of the prosecution and settlement of this Action, has approved the Settlement as fair, adequate and reasonable, *see id.* ¶ 12. Lead Plaintiff believes that the Settlement is a superior result and strongly urges the Court to grant

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its approval.

*2 Pursuant to the Preliminary Approval Order, the Notice was mailed to 9,548 potential Class members or their nominees. *See* Affidavit of Steven Mueller, attached to Stewart Deck as Exhibit 2, ¶ 7. The Notice (attached as Exhibit A to the Mueller Affidavit) advised Class members of the proposed Settlement, the proposed Plan of Allocation and the request for an award of attorneys' fees and reimbursement of expenses. The Notice further advised Class members of their right to object or seek exclusion from the Class. Additionally, the Summary-Notice of Proposed Settlement, Settlement fairness Hearing and Petition for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Summary Notice") was published in the national edition of *The Wall Street Journal* and over the *PR Newswire* on May 21, 2007. *Id.* ¶ 10. Information regarding the Settlement, including downloadable copies of the Notice and Claim Form, was posted on www.evciseeuritiessettlement.com, the website dedicated to the Settlement, *id.* ¶ 8, and was available through the Claims Administrator's website, www.analytics-inc.com. and Lead Counsel's website, www.blbg.law.com, Stewart Decl. ¶ 42. Not a single Class member has tiled an objection to the proposed Settlement, the Plan of Allocation, or the fee application, or sent in a valid exclusion request. *See* Stewart Decl. ¶ 43.

The proposed settlement meets all the factors set forth by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974). It is, therefore, approved.

II. *BACKGROUND*

This Action was brought against EVCI and certain of its senior executives for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5 promulgated thereunder. Stewart Decl. ¶ 30. The filing of this Action was precipitated by a disclosure by EVCI on October 19, 2005 that a compliance review conducted by the New York State Education Department (the "NYSED") recommended that one of EVCI's career colleges, Interboro Institute ("Interboro"), increase "the number and percent of full-lime faculty, hav[e] contracts with full-time faculty, improv[e] Interboro's libraries, improv[e] other facilities and equipment resources and assess[ ] and improv[e] the quality of student learning," and by a further disclosure by the Company on December 6, 2005 that it had received the NYSED's final report of its compliance review of Interboro, which set forth a litany of deficiencies at Interboro's instructional locations and detailed fraudulent practices in admissions and financial aid. *Id* . ¶¶ 8-18, 21. In response to those disclosures, the market price of EVCI common stock dropped from $5.53 on October 18, 2005 to $1.80 on December 6, 2005. *Id.* ¶ 21.

By Order dated May 9, 2006, this Court consolidated the six class actions that had been filed, and appointed ATRS as Lead Plaintiff and approved ATRS's selection of BLB & G as Lead Counsel. Stewart Decl. ¶ 25. Thereafter, Lead Counsel launched an extensive investigation that included interviews with numerous witnesses, review of thousands of pages of documents obtained through FOIL requests, and a review of EVCI's public statements and SEC filings. *Id.* at ¶¶ 27-29. That investigation resulted in the filing on July 21, 2006 of Lead Plaintiffs Consolidated Amended Class Action Complaint (the "Complaint"). *Id.* at ¶ 30.

*3 Defendants moved to dismiss the Complaint. Relying on their own public filings and the results of an investigation commissioned by EVCI's Audit Committee after the NYSED had uncovered fraudulent admissions and financial aid practices at Interboro, Defendants argued, among other things, that (i) ATRS did not adequately plead that there was a fraud at EVCI, (ii) the market was aware of the regulatory risk at EVCI such that there were no actionable false statements or omissions: (iii) Defendants did not act with the requisite

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scienter required to plead liability for securities fraud: and (iv) EVCI's "forward-looking" statements were shielded by the Safe Harbor provisions of the PSLRA. *Id.* ¶ 31.

By Order dated December 13, 2006, the Court denied Defendants' motion in its entirety, stating, "If ever a complaint was well-pleaded under the PSLRA, this one is." *See* Decision and Order Denying Motion to Dismiss Consolidated Amended Class Action Complaint (the "December 13, 2006 Order") at 1. The Court, citing to Lead Counsel's comprehensive investigation (which "involved interviewing persons who are or were formerly associated with Interboro" and which concluded that the results of that investigation "contradict in substantial part the Audit Committee's conclusions that the fraudulent admissions practices were confined to a few rogue employees and were unknown to management,") *id.* at 6, complimented the Complaint as "one of the best supported securities fraud complaints this court has seen." December 13, 2006 Order at 9.

After the motion to dismiss was denied. Lead Counsel immediately served discovery requests and embarked on discovery. Settlement negotiations ensued shortly thereafter.

III. *THE PROPOSED SETTLEMENT*

A. The Proposed Settlement Is Fair, Reasonable And Adequate And Should Be Approved

1. *Standards for Approval of a Class Action Settlement*

"Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.' " *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y.1999) (citation omitted: *accord Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 361 (S.D.N.Y.2002) (McMahon, J); *In re American Bank Note Holographies, Inc. Sec. Litig.*, 127 F.Supp.2d 418, 423 (S.D.N.Y.2001) (McMahon, J.). In evaluating a proposed settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir.1995); *see also In re WorldCom Sec. Litig.*, No. 02 Civ. 3288(DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004). As noted by courts generally, "[t]he arm's-length compromise of a disputed claim has long been favored by the courts." *E.g., Sumitomo,* 189 F.R.D. at 280 (and cases cited therein); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). This is particularly true of class actions. *Sumitomo,* 189 F.R.D. at 280; *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 718 F.Supp. 1099, 1103 (S.D.N.Y.1989). As the court in *WorldCom* summarized:

> *4 In brief, the district court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not the product of collusion. A district court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.

2004 WL 2591402 at *10 (quotations and citations omitted): *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (3d Cir.2005), *cert. denied sub nom, Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005).

A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws. *See, e.g., Sumitomo,* 189 F.R.D. at 280; *New York & Maryland v. Nintendo of Am., Inc.*, 775 F.Supp. 676, 680-81 (S.D.N.Y.1991). Moreover, under the PSLRA, a settlement reached under the supervision of appropriately selected lead plaintiffs is entitled to an even greater presumption of reasonableness.

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As stated in the Senate Committee Report issued in support of the PSLRA, cited in *Greebel v. FTP Software, Inc.*, 939 F. Supp, 57, 63-64 (D.Mass.1996): "Institutions with large stakes in class action share much the same interests as the plaintiff class generally: thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable.' " Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.

The standards governing approval of class action settlements are well-established in this Circuit. In *City of Detroit v. Grinned Corp.*, the Court of Appeals held that the following were factors to be considered in evaluating a class action settlement:

> (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.

495 F.2d 448, 463 (2d Cir.1974) (citations omitted); *see also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir.1990); *Sumitomo*, 189 F.R.D. at 281; *WorldCom*, 2004 WL 2591402, at *10. In applying these factors, a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir.1982); *In re Michael Milken & Assocs. Sec. Ling.*, 150 F.R.D. 46, 53 (S.D.N.Y.1993). As the Second Circuit stated in *Newman v. Stein:*

> *5 [T]he role of a court in passing upon the propriety of the settlement of a ... class action is a delicate one .... [W]e [recognize] that since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal for the trial.

464 F.2d 689, 691-92 (2d Cir.1972) (internal citations and quotation marks omitted); *accord Maley*, 186 F.Supp.2d at 360-61.

The Court is now asked to determine whether the Settlement is within a range that reasonable and experienced attorneys, and a sophisticated institutional Lead Plaintiff, could accept, considering all relevant risks, facts and circumstances. *See Weinberger*, 698 F.2d at 74; *Grinnell*, 495 F.2d at 455. The range, as defined by Judge Friendly, "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." *Newman*, 464 F.2d at 693.

2. *Application of the Grinnell Factors Supports Approval of the Settlement*

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

The "complexity, expense and likely duration of the litigation" are factors that the Court should consider in evaluating a proposed settlement for approval. *Grinnell*, 495 F.2d at 463; *In re Drexel Bumham Lambert Group Inc.*, 130 B.R. 910, 927 (S.D.N.Y.1991). "In evaluating the settlement of a *securities* class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citations omitted; emphasis added). That statement is certainly true here.

As reflected in the Stewart Declaration, this prosecution involved complex legal and factual issues, and, but for the Settlement, would have

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involved substantial document discovery. Stewart Decl. at ¶ 61. Indeed, Lead Counsel had already undertaken a comprehensive investigation prior to reaching agreement on the terms of the Settlement, and would have had tens of thousands of additional documents to review if no settlement had been reached. *Id.* at ¶¶ 27-29. And notwithstanding Lead Counsel's interviews of many witnesses in connection with its investigation, continued prosecution and trial of this case would have required Lead Counsel to take the depositions of dozens of witnesses. In addition, all parties would have relied on a number of experts to produce reports and testify on complex issues including regulatory and damages calculations; the successful prosecution of this Action would have depended upon extensive discovery of those experts.

Absent the Settlement, there would have been significant additional resources and costs expended to prosecute the claims through trial and the inevitable appeals. *See In re Prudential Ins. Co. Am. Sales Practice Litig.,* 148 F.3d 283, 318 (3d Cir.1998) (settlement favored where "trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). Given the complex issues at the heart of ATRS's allegations, this was a challenging case to present lo a jury and, even if Defendants' liability had been established, there were significant issues relating to the damages that a jury might have awarded, and the Defendants' ability to pay a judgment. In contrast, the Settlement provides a definite and substantial recompense to the Class now, rather than await the uncertain outcome prompted by the effort and time devoted to trial and likely appeals. As this Court held in *Maley:*

> *6 Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial. These factors weigh in favor of the proposed Settlement. As the court in *Slomovics v. All for a Dollar, Inc.,* 906 F.Supp. 146, 149 (E.D.N.Y.1995), concluded: "The potential for this litigation to result in great expense and lo continue for a long time suggest that settlement is in the best interests of the Class." *Id.* (citation omitted). The same reasoning applies here. Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value.

186 F.Supp.2d at 361-62 (citing, *inter alia, American Bank Note,* 127 F.Supp.2d at 424-25).

b) *The Response of the Class*

As the cases report, a positive reaction of the Class to the proposed Settlement is a further factor favoring its approval by the Court. *See Grinnell,* 495 F.2d at 462 (approving settlement where only twenty objectors appeared from group of 14,156 claimants); *Maley,* 186 F.Supp.2d at 362-63 ("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."); *American Bank Note,* 127 F.Supp.2d at 425). No Class Members have objected lo the Settlement, and none have opted out. Stewart Deck ¶ 43. [FN1] The reaction of the Class to dale supports approval of the Settlement.

> FN1. Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173-75 (1974). The Court-approved Notice was sent to all identifiable potential Class Members, and the Summary Notice appeared in the national edition of *The Wall Street Journal* and over *PR Newswire. See* Mueller Aff. ¶¶ 3-8, 10. The Notice contained all information required by § 21D(vi)(7) of the PSLRA, and is more than adequate to meet the requirements of due process and Rule 23(c)(2) and (e).

c) *The Stage of the Proceedings and Amount of*

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Discovery Completed

"[T]he stage of the proceedings and the amount of discovery completed" are other *Grinnell* factors to be considered in determining the fairness, reasonableness and adequacy of a settlement. *Grinnell,* 495 F.2d at 463. These criteria are met here. While the Settlement was reached at a relatively early stage in this litigation, when formal discovery had just commenced, "Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims." *In re Global Crossing Sec. and ERISA Litig.,* 225 F.R.D. 436, 458 (S.D.N.Y.2004) ("Plaintiffs' counsel appear to have scrutinized the facts of the Actions from the earliest stages of the litigation and developed an informed basis from which to negotiate a reasonable compromise."); *Maley,* 186 F.Supp.2d at 363-64 ("To approve a settlement, however, "the Court need not find that the parties have engaged in extensive discovery.") (citing, *inter alia, American Bank Note,* 127 F.Supp.2d at 425-26). Well before the Settlement was reached here, Lead Counsel had extensively analyzed and investigated the events and transactions alleged in the Complaints, having reviewed and analyzed Defendants' public statements and SEC filings, interviewed numerous fact witnesses, reviewed thousands of pages of documents obtained from NYSED through FOIL requests, and retained and consulted with a damages expert. *See* Stewart Decl. ¶¶ 27-29. In short. ATRS and Lead Counsel engaged in sufficient investigation and discussions about the merits of the Action to evaluate fully the merits of the claims and the obstacles to success. *See Maley,* 186 F.Supp.2d at 364 (Even though discovery had not begun by the time settlement was reached, "Plaintiffs' Counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement."); *In re Medical X-Ray Film Antitrust Litig.,* No. CV-93-5904, 1998 WL 661515, at *4 (E.D.N.Y. Aug. 7, 1998). Thus, in this case, it may be said that the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Comm. Sec. Litig.,* 618 F.Supp. 735, 745 (S.D.N.Y.1985) *aff'd,* 798 F.2d 35 (2d Cir.1986).

d) *Risks Involved in Establishing Liability and Damages, and in Maintaining the Class Action Through Trial*

*7 *Grinnell* holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). These factors also support approval of the Settlement.

There are certain unassailable facts and risks that had to be considered by ATRS in assessing the sufficiency of the Settlement. As in any securities class action under the PSLRA, ATRS faced a high burden in demonstrating that Defendants acted with scienter. While Lead Plaintiff believed that it could meet that standard. Defendants, in their motion to dismiss, vigorously argued that ATRS's allegations were insufficient. Stewart Decl. ¶ 31. At trial, Lead Plaintiff expected Defendants to argue that the Class could not establish scienter because the individual officers had no knowledge of, and did not participate in, the alleged fraud. *Id.* ¶ 61. If the allegations of the Complaint were proven. ATRS should have been able to meet its burden, but it could not dismiss the possibility that a reasonable jury would conclude otherwise.

In addition, while Defendants have stipulated to the certification of the Class for purposes of the Settlement, there would have been no such stipulation had ATRS prosecuted the Action to trial. Defendants would have vigorously challenged Lead Plaintiffs motion for class certification based on, among other grounds, that the Class Period, which begins on August 14, 2003 as pleaded, should not have started before the August 26, 2004 disclosure by EVCI of the New York State Comptroller's issuance of an audit report that

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concluded that Interboro had wrongfully obtained nearly $1 million in TAP funds during the 2000-01 and 2002-03 school years. Any reduction in the size of the Class would have affected the claims and damages at issue in the Action. Defendants also could have challenged the inclusion in the Class of investors who sold EVCI common stock after partial disclosures before the end of the Class Period. *See, generally, e.g., In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at k12 (S.D.N.Y. Apr. 6, 2006) (risk of succeeding in certifying class supported approval of settlement); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 460 (same). Indeed, the success of any of these arguments would have splintered the Class.

> [N]ot only does the aggregation of the claims enlarge the value of the suit but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 817 (3d Cir.1995): *see also In re Lucent Techs., Inc., Sec. Litig.*, 307 F.Supp.2d 633, 646 (D.N.J.2004) ("Class certification influences the value of a class action.").

***8** Even if the Class were certified. Defendants' scienter proven and liability established, ATRS faced the burden of proving both the extent of the Class's damages and that those damages were caused by Defendants' conduct. Specifically. Lead Plaintiff would need to establish that the alleged misrepresentations and omissions resulted in actual damages, and quantify the damages suffered by the Class. ATRS would have to establish that the price that each Class member paid for shares of EVCI stock was artificially inflated on the date of purchase and, pursuant to *Dura Pharma, Inc. v. Brando*, 544 U.S. 336, 344-45 (2005), that such inflation was confirmed by post-purchase stock movements tied lo disclosures related to the fraud. To do so, Lead Plaintiff retained a damages expert, who would opine on what the "true value" of EVCI shares would have been during the Class Period had there been no fraud and who, at trial, would have explained how stock movements in response to subsequent disclosures confirmed, per *Dura*, the extent of the fraud-induced price inflation. ATRS's expert concluded that the Class's damages were approximately $22 million. *See* Nettesheim Decl., ¶ 12. While the theories behind and validity of Lead Plaintiff's expert's conclusions are supported by-economic and legal theory and could withstand scrutiny. Defendants would have presented their own damages experts, with conflicting conclusions and theories. *See* Nettesheim Decl. ¶¶ 13-14 (setting forth the types of challenges anticipated, and estimating damages under a typical "defendant style" analysis at between $11 and $15 million). Ultimately, proving damages would come down to "a battle of the experts," and it is impossible to predict which expert and theory of damages the jury would accept. *See American Bank Note*, 127 F.Supp.2d at 426-27 ("In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y.1997) ("damages are a matter for the jury, whose determinations can never be predicted with certainty"), *aff'd*, 117 F.3d 721 (2d Cir.1997).

e) *Collectibility and Defendants' Ability to Withstand a Greater Judgment*

EVCI's uncertain financial condition and the consequent threat of non-collectibility posed the most significant risk to Lead Plaintiffs continued prosecution of this Action. Stewart Decl. ¶¶ 34-37. This risk existed from the outset, and events since Settlement was submitted to the Court confirm that the risk was substantial. In a Form 8-K EVCI filed on June 19, 2007,[FN2] the Company disclosed that it had received a notice from the NASDAQ that EVCI's stock was subject to delisting, and that the

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Company had unsuccessfully sought a "financial viability" exception to NASDAQ's shareholder vote requirement for the private placement of securities with Com Vest Investment Partners III L.P. (the "ComVest Financing"). Although NASDAQ rules required shareholder approval for the ComVest Financing prior to its closing, "in order to ensure EVCI's financial viability, EVCI management and the board of directors determined that it was necessary to complete the ComVest Financing prior to the receipt of stockholder approval." Given the extent of the damages calculated by Lead Plaintiffs expert, any judgment for a substantial portion of the Class's damages would likely have resulted in the Company's bankruptcy. The risk that a successful prosecution will result in the bankruptcy of the defendant strongly weighs in favor of approval of a settlement. *See Grinnell,* 356 F.Supp. at 1389 (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 Commc'ns Sec. Litig.,* 618 F.Supp. 735, 746 (S.D.N.Y.1985) (where defendant cited to risk of bankruptcy, "certainty of payment of the settlement is advantageous to the class"); *see also In re Global Crossing,* 225 F.R.D. 436, at 460 (S.D.N.Y.2004) ("without the proposed settlement, class members might well receive far less than the settlement would provide to them, even if they could prevail on their claims"); *Maley,* 186 F.Supp.2d at 365 (In view of defendant's "dire financial condition," and noting wasting nature of insurance, "obtaining a greater recovery than provided by the Settlement would have been difficult." (citing *American Dank Note,* 127 F.Supp.2d at 427).

FN2. http://www.sec.gov/Arch ives/ edgar/ data/ 065591/00011J4420407032623/v078819.htm.

*9 As noted above, Lead Plaintiff understood from the outset that EVCI's inability to fund a significant cash settlement posed the greatest hurdle to the resolution of the Action. Stewart Decl. ¶ 2. The Company's public filings reflected significant and growing operating losses and delisting of the Company's stock had been threatened as early as June 13, 2006. *Id* at ¶ 35. ATRS and Lead Counsel therefore devoted efforts to understanding EVCI's present and projected financial condition, as well as the amount of available insurance, and to working to maximize the recovery that could be obtained for the Class. *Id.* ¶¶ 35-36. On the basis of publicly available information and Lead Counsel's analysis. ATRS and Lead Counsel evaluated EVCI's settlement offers in order to ensure that the Settlement offered the maximum value for the Class. *Id.* Lead Plaintiff and Lead Counsel believe, based on their understanding of EVCI's financial wherewithal, that the Company could not satisfy a judgment substantially in excess of the recovery obtained through the Settlement. Clark Decl. ¶ 12; Stewart Decl. ¶ 37.

f) *The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and in Light of All Risks of Litigation*

In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a single mathematical equation yielding a particularized sum." *In re PaineWebber,* 171 F.R.D. at 130 (citation omitted); *In re Union Carbide,* 718 F.Supp. at 1103. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein* 464 F.2d at 693; *Zerkle v. Cleveland-Cliffs Iron Co.,* 52 F.R.D. 151, 159 (S.D.N.Y.1971). As the Second Circuit has stated "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no reason, at least in theory, why a

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satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery ." *Id.* at 455 n.2.

Despite the obstacles facing ATRS on the issues of liability and damages, ATRS believes that it would be able to prove its claims and obtain a verdict for substantial damages. However, that verdict would likely be a pyrrhic victory. ATRS and Lead Counsel concluded that EVCI simply could not satisfy such a judgment, and that continued litigation likely would have wasted the limited available insurance. Lead Plaintiff was only able to secure a recovery from the insurance policies through negotiation and settlement. When the benefits of the guaranteed recoveries from Defendants are weighed against the risks of continued litigation, approval of the Settlement is warranted. *See In re "Agent Orange" Prod. Liab. Litig.,* 611 F.Supp. 1396, 1405 (E.D.N.Y.1985) ("much of the value of a settlement lies in the ability to make funds available promptly"), *modified on other grounds,* 818 F.2d 179 (2d Cir.1987).

***10** Given the obstacles and uncertainties attendant to this complex litigation, ATRS submits that the Settlement is well within the range of reasonableness, and better for the Class than the other possibilities, which could have been little or no recovery at all. Indeed, the Settlement yields a significant recovery for the Class, particularly as a percentage of the amounts that ATRS estimated to be the damages in the case. Specifically, Lead Plaintiff's expert estimated that, assuming the jury agreed with all of her data and assumptions, the maximum aggregate damages were approximately $22 million. *See* Nettesheim Decl. ¶ 12. Thus, the recovery from the proposed Settlement represents 35% of the maximum damages that ATRS could have recovered had the jury accepted its expert's view of damages. Lead Plaintiff's expert also concluded that Defendants' experts would tell the jury that the Class did not suffer any compensable damages at all or, even if the Class did, those damages amounted lo between $11 and $15 million. *Id.* at ¶¶ 13-14. The proposed Settlement thus represents a recovery of between 51.5 and 70.2% of the damages that Defendants would likely have argued were incurred by the Class.

Accordingly, each of the *Grinnell* factors discussed above supports approval of the Settlement by this Court.

3. *The Proposed Settlement Is the Product of Informed Arm's-Length Negotiations and Is Presumptively Fair*

"In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is 'entitled to great weight' ... There is thus a strong initial presumption that the compromise as negotiated herein under the [c]ourt's supervision is fair and reasonable." *In re Michael Milken,* 150 F.R.D. at 54; *see also In re Union Carbide,* 718 F.Supp. at 1103. As the court noted in approving the settlement in *In re Sumitomo Copper Litig.:*

> 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,* 171 F.R.D. at 125. As likewise staled by the *Manual for Complex Litigation,* 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).

189 F.R.D. at 280-81 (emphasis in original). As in *Sumitomo,* the parties to the Settlement negotiated it at arm's-length. Thus, the presumption of fairness "clearly attaches here." As discussed above and as set forth in the Stewart Declaration, the Settlement was negotiated at arm's-length over several weeks among Lead Counsel, in consultation with ATRS, and counsel for Defendants. *See generally* Stewart Decl. ¶ 33. Accordingly, ATRS

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and Lead Counsel recommend that the Court approve the Settlement.

B. The Plan Of Allocation Is Fair And Reasonable

***11** "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." *WorldCom,* 388 F.Supp.2d at 344 (quoting *Maley,* 186 F.Supp.2d at 367). As numerous courts have held, a plan of allocation need not be perfect. *RMED Int'l., Inc. v. Sloan's Supermarkets, Inc.,* No. 94 Civ. 5587 (PKL RLE), 2000 WL 420548, at *2 (S.D.N.Y. Apr. 18, 2000) ("aggregate damages in securities fraud cases are generally incapable of mathematical precision") (citing *In re Oracle Sec. Litig.,* 829 F.Supp. 1176, 1182 (N.D.Cal.1993)); *see also In re Computron Software, Inc. Sec. Litig.,* 6 F.Supp.2d at 320; *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1284-85 (9th Cir.1992). Indeed, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *WorldCom,* 388 F.Supp.2d at 344 (quoting *Maley,* 186 F.Supp.2d at 367); *accord In re NASDAQ,* 2000 WL 37992 at *2.

In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. *See Paine Webber,* 171 F.R.D. at 133 ("[T]he 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 also In re Lloyd's American Trust Fund Litig.,* No. 96 cv 1262(RWS), 2002 WL 31663577, *18 (S.D.N.Y. Nov. 26,2002); *White v. NFL,* 822 F.Supp. 1389, 1420 (D.Minn.1993) (slating that "[t]he court ... affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds). Here, the Plan of Allocation fully complies with these standards.

Working with their damages expert. Lead Counsel has developed a Plan of Allocation that reflects in a simple and straightforward manner their damages theory of the case based upon their extensive investigation. *See* Nettesheim Decl. ¶¶ 4-12, 15. The Plan of Allocation accounts for the degree of inflation of EVCI common stock caused by Defendants' alleged misconduct during the Class Period, and accounts for the extent to which that inflation was relieved by the corrective disclosures of the Company's true condition made prior to and at the end of the Class Period. As a result, the Plan of Allocation establishes a basis for calculating the "Recognized Claim" of each Class Member whose overall transactions in EVCI common stock during the Class Period resulted in a loss.

Courts also consider the reaction of a class to a plan of allocation. *See Maley,* 186 F.Supp.2d at 367; *Paine Webber,* 171 F.R.D. at 126. The Notice described the proposed Plan of Allocation in detail, and indicated that the deadline for objecting to the Plan of Allocation was July 13, 2007. No objections to the Plan of Allocation have yet been received. Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

C. Certification of the Class for Settlement Purposes Is Proper and Necessary

***12** For settlement purposes only, ATRS requests that the Court certify the Class, which, with the exceptions set forth in ¶ 1.4 of the Stipulation, consists of all persons who purchased or otherwise acquired EVCI common stock from August 14, 2003 through December 6, 2005. In the settlement context, class certification criteria are easily met because the class is unified by a common interest in a reasonable recovery. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997). Although class action requirements must be met when certifying a settlement class, the settlement must be taken into account. *Id.* Indeed, the Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick,* 698 F .2d 61.73 (2d Cir.1982); *see also In re Baldwin*

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United Corp., 105 F.R.D. 475, 478 (S.D.N.Y.1984).

Classes certified for settlement purposes, like all other classes, must meet each of the requirements set forth in Rule 23(a) and at least one of three requirements set forth in Rule 23(b). *In re Prudential Sec. Inc. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y.1995). In analyzing the class certification requirements, the Second Circuit "has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation and has explicitly noted its preference for class certification in securities cases." *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855(RMB). 2003 WL 22077464, at *2 (S.D.N.Y. Sept. 8, 2003) (citations omitted). In determining whether to certify a class, courts must refrain from examining the underlying merits of the case unless they are relevant to the class certification requirements. *See, e.g., In re Livent, Inc. Noteholders Sec. Litig.*, 211 F.R.D. 219, 221 (S.D.N.Y.2002) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met") (quoting *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178 (1974)). As relevant here, while the "some showing" standard is no longer appropriate, a district court must continue to refrain from making "a merits inquiry *unrelated* to a specific Rule 23 requirement" in evaluating whether to certify a class, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 35 (2d Cir.2006) (emphasis in original); *see also Hnot v. Willis Group Holdings Ltd.*, No. 01 Civ. 6558(GEL), 2007 WL 749675, at *4 (S.D.N.Y. Mar. 8, 2007) (Lynch.J.) ("[the court] was *not* required 'to make a preliminary inquiry into the merits of a case in order to determine whether it may be maintained as a class action[.]") (emphasis in original). Under these standards, the proposed Settlement Class meets the requirements of Rule 23 and should be certified for purposes of the Settlement.

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. In this Circuit, "Numerosity is presumed when a class consists of forty or more members." *In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279 (S.D.N.Y.2003). And "[i]n securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Teachers Ret. Sys. of Louisiana v. ACLN Ltd.*, No. 01-CV-11814 (LAP), 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004) (internal quotation marks omitted). Here, EVCI's shares traded on NASDAQ, and, as of December 6, 2005, 12,596.000 such shares were outstanding. EVCI had hundreds of thousands of shares traded during the Class Period, and, accordingly, the Class contains many thousands of persons.

***13** Rule 23(a)(2) requires that there be "questions of law or fact common to the class." In securities fraud litigation, the commonality requirement is applied permissively. *See ACLN,* 2004 WL 2997957, at *4; *In re Vivendi Sec. Litig,* No. 02 Civ 5571(RJH), 2007 WL 861147, at *6 (S.D.N.Y. March 22, 2007) (quoting *Nortel.* 2003 WL 22077464, at *3). Not every question of law or fact must be common to every class member. *See, e.g., ACLN,* 2004 WL 2997957, at *4. Where plaintiffs allege that class members have been injured by the same fraudulent scheme, the commonality requirement is satisfied. *See. e.g., Berwecky v. Bear, Stearns & Co.,* 197 F.R.D. 65, 68 (S.D.N.Y.2000) (commonality requirement met where plaintiffs alleged that "the defendants ... entered into a scheme to defraud investors of the securities of the promoted companies by engaging in 'parking' of securities, unauthorized purchases, and other fraudulent practices"). As set forth in paragraph 27 of the Complaint, this case presents several common issues of law and fact. "Where, as here, Lead Plaintiff has alleged a common course of fraudulent conduct, which has allegedly caused all

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members of the Class to suffer damages, commonality is satisfied." *ACLN,* 2004 WL 2997957, at *4; *accord In re Oxford Health Plans,* 191 F.R.D. 369, 374 (S.D.N.Y.2000).

Rule 23(a)(3) requires that plaintiffs' claims be typical of the class' claims. Courts have emphasized that the typicality requirement is not demanding, and that "[t]ypicality 'does not require that the factual background of each named plaintiffs claim be identical to that of all class members.' " *ACLN,* 2004 WL 2997957, at *4 (quotation omitted). Here, the claims asserted by the ATRS are typical, if not identical, to the claims of the other Class members. ATRS alleges that Defendants violated the Exchange Act by issuing public statements and documents that misrepresented or omitted material facts. ATRS also alleges that it and the Class paid artificially inflated prices for EVCI stock as a result of Defendants' material misrepresentations and omissions. Those claims are thus based upon precisely the same theories and will be proven by precisely the same evidence. Accordingly, ATRS satisfies typicality under Rule 23(a)(3).

Rule 23(a)(4) requires that plaintiffs fairly and adequately protect the interests of the class. This requirement is comprised of two factors: (1) that the class representatives' attorneys are qualified, experienced and generally able to conduct the litigation; and (2) that the suit is not collusive, and plaintiffs' interests are not antagonistic to those of the other members of the class. *See, e.g., ACLN,* 2004 WL 2997957, at *4. BLB & G was previously approved as Lead Counsel by the Court. Lead Counsel is qualified and able to conduct the litigation, based on its extensive experience in securities class action litigation and successful prosecution of many of the most significant class actions under the PSLRA. In addition, there is no antagonism between ATRS and the Class. Lead Plaintiff and all Class Members have suffered losses as a result of their transactions in EVCI common stock during the Class Period.

***14** A class action also must satisfy one of the subdivisions of Rule 23(b). The Class satisfies the requirements of Rule 23(b)(3), which provides that a class action may be maintained "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." Where, as here, ATRS alleges that Defendants engaged in misrepresentations causing inflation in the price of stock, which is alleged to violate the federal securities laws, the issues of law and fact that flow from these activities predominate over any individual issue in a class action. *See Amchem,* 521 U.S. at 625 ("[p]redominance is a test readily met ... [in] cases alleging ... securities fraud"); *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 127 (S.D.N.Y.2003) (same).

A class action also is superior to other methods of adjudication, and is particularly appropriate for addressing claims of violations of the securities laws. Most violations of the federal securities laws, such as those alleged here, inflict economic injury on large numbers of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against well-financed, multiple adversaries is not feasible. *See ACLN,* 2004 WL 2997957, at *9 (" '[S]ecurities suits such as this easily satisfy the superiority requirement of Rule 23 ... Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be 'fair' nor an adjudication of their claims.' ") (quoting *Blech Sec. Litig.,* 187 F.R.D. at 107)).

The four factors specified in Rule 23(b)(3) favor class certification. *First,* there is no indication that members of the Class would prefer to individually control the prosecution of their claims; any who do have the opportunity to opt out or be represented by counsel of their own choice. *Second,*

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the court is unaware of any other class action litigation concerning the false statements and omissions alleged here against Defendants. *Third,* it is clearly desirable to concentrate the litigation in one forum in order to avoid inconsistent adjudications and thus promote fairness and efficient use of the judicial system. *Fourth,* this case presents no unusual difficulties in management of the Class action or notice to the Class. Lead Counsel and the courts have handled numerous similar actions; in fact, settlement sets up a very efficient and workable means of administering claims to resolve this action.

For all the foregoing reasons, the Settlement is approved.

IV. *COUNSEL, FEES AND DISBURSEMENTS*
A. The Requested Fee is Fair and Reasonable

1. *The Percentage-Based Fee Application Comports with the Legal Standards Governing Awards of Attorneys' Fees in this Circuit*

***15** It is well-settled that attorneys who represent a class and achieve a benefit for class members are entitled to be compensated for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than ... 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): *Savoie v. Merchants Bank,* 84 F.3d 52, 56 (2d Cir.1996). The Supreme Court has further emphasized that private securities actions, such as the instant action, provide " 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.' " *Bateman Eichler, Hill Richards. Inc. v. Berner.,* 472 U.S. 299, 310(1985) (quoting, *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)); *accord Tellabs, Inc. v. Makor Issues & Rights, Lid.,* No. 06-484, ---S.Ct. ----, 2007 WL 1773208, at *4 (June 21, 2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission ."); *see id.* at *8 n.4 ("Nothing in the Act, we have previously noted, casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'-a matter crucial to the integrity of domestic capital markets.") (citation omitted).

The Second Circuit has recently confirmed that counsel who creates a substantial benefit for a class is entitled to a commensurate award of fees. In *Wal-Mart Stores Inc. v. Visa U.S.A.,* 396 F.3d 96. 122 (2d Cir.2005), *cert. denied sub nom. Leonardo's Pizza by the Slice Inc. v. Wal-Mart Stores Inc.,* 544 U .S. 1044 (2005), the Court of Appeals noted that fees may be awarded under either the lodestar or percentage of the fund methods, but that "the trend in this Circuit is toward the percentage method." This is consistent with the line of cases in which the Supreme Court held that in the case of a common fund, the fee awarded should be determined on a percentage-of-recovery basis. *See Trustees v. Greenough,* 105 U.S. 527, 532 (1882): *Central R.R & Banking Co. v.. Pettus,* 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 165-70 (1939). In *Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984), the Supreme Court slated that "under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class." This also is consistent with the trend of district courts within this Circuit to utilize the percentage of recovery approach when calculating attorneys' fees in common fund cases. *See, e.g., Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 370 (S.D.N.Y.2002) ("the trend within this Circuit is to use the percentage of recovery method to calculate fee awards to class counsel" in common fund cases) (McMahon, J.); *In re Am. Bank Note Holographies, Inc. Sec Litig.,* 127 F.Supp.2d 418, 431 (S.D.N.Y.2001) (same).

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***16** In his opinion in *In re Lloyd's American Trust Fund Litigation,* 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002), Judge Sweet, who awarded class counsel 28% of the settlement fund using the percentage method, noted:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process-to both counsel and the courts-of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

Id. at *25 (quoting "Court Awarded Attorney Fees," Report of the Third Circuit Task Force (Arthur F. Miller, Reporter) *reprinted in* 108 F.R.D. 237, 258 (3d Cir.1985)).[FN3] In addition, the PSLRA implicitly supports the use of the percentage of the fund method. *See* 15 U.S.C. § 78u-4(a)(6) ("[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 of any damages and prejudgment interest actually paid to the class").

> FN3. For many years, courts within this Circuit recognized that "Support for the lodestar/multiplier approach in common fund cases has eroded, and there has been a 'groundswell of support for *mandating* a percentage-of-the-fund approach' in the common fund cases." *In re Sumitomo Copper Litig.,* 74 F.Supp.2d 393, 397 (S.D.N.Y.1999) (citation omitted, emphasis in original); *accord In re NASDAQ,* 187 F.R.D. at 465, 489 (S.D.N.Y.1998) (chronicling and discussing strong support for percentage of recovery method). The trend among circuit courts is to utilize the percentage of recovery method, which has been expressly adopted in the vast majority of circuits (the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and District of Columbia Circuits) as an appropriate method for determining an award of attorneys' fees. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 305 (1st Cir.1995) (permitting use of percentage method; "Contrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent-"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods, Liab. Litig,* 55 F.3d 768, 821-22 (3d Cir.1995); *Gottlieb v. Barry,* 43 F.3d 474, 487 (10th Cir.1994) (authorizing percentage and holding that use of lodestar/multiplier method was abuse of discretion); *Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 564-65 (7th Cir.1994) (percentage approach is appropriate in common fund case); *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376-77 (9th Cir.1993) (percentage approach appropriate); *Rawlings v. Prudential-Bache Props., Inc.,* 9 F.3d 513, 515-16 (6th Cir.1993); *Swedish Hosp. Corp., v. Shalala,* 1 F.3d 1261, 1271 (D.C.Cir.1993) ("a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condo. Ass'n. v. Dunkle,* 946 F.2d 768, 774 (11th Cir.1991) (percentage approach applicable).

From a public policy perspective, the percentage method is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result. *In re Agent Orange Prod. Liab. Litig.,* 611 F.Supp. 1296, 1306 (E.D.N.Y.1985) (criticizing lodestar approach as one that "lends to

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encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation"), *aff'd in pari, rev'd in part on other grounds,* 818 F.2d 226 (2d Cir.1987); *accord Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 49 (2d Cir.2000) (comparing lodestar analysis to "resurrect[ing] the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits"). In addition, a percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients. *See Am. Bank Note,* 127 F.Supp.2d at 432 (citing *In re Sumitomo,* 74 F.Supp.2d at 397).

The fee request here is based on the percentage method because that is what Lead Plaintiff chose as the method for determining the fees that Lead Counsel could seek. Since passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable. *In re Cendant Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001): *accord In re Lucent,* 327 F. Supp, 2d at 433-34; *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 466 (S.D.N.Y.2004) (Lynch, J.) (citing *Cendant* for the proposition that "in class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable"). The Third Circuit stated in *Cendant* that passage of the PSLRA "shift[ed] the underpinnings of our class action attorneys' fees jurisprudence in the securities area." 264 F.3d at 276, 282.[FN4] And recently in *WorldCom,* Judge Cote found. "When class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight." *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 353 (S.D.N.Y.2005). Indeed, in an earlier opinion concerning the first of the two fee requests in that case, Judge Cole noted that public policy considerations supported the award, as the lead plaintiff, a large public pension fund, had "conscientiously" supervised the work of lead counsel, and had given its endorsement to the fee request. *In re WorldCom. Inc. Sec. Litig.,* No. 02 Civ. 3288(DLC), 2004 WL 2591402, at *20 (S.D.N.Y. Nov. 12.2004). Here an experienced public pension fund was involved in all significant aspects of the prosecution and settlement of the Action, and negotiated a below-"benchmark" fee agreement after evaluating the actual efforts put forth, and the results obtained, by Lead Counsel.

FN4. *See also id.* at 276 (in enacting the PSLRA. Congress expressed its strong belief that an institutional lead plaintiff would be in a better position than the court to protect the interests of the class by monitoring lead counsel throughout the litigation and by negotiating a reasonable fee for counsel's representation). As the Third Circuit in *Cendant* stated: "[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel ... This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers." 264 F.3d at 282; *accord Global Crossing,* 225 F.R.D. at 468 & n.16 (quoting Professors Geoffrey Miller of NYU Law School and Arthur Miller of Harvard Law School, "both of whom have significant expertise in securities class action settlements and attorney fee awards," for the proposition that such fee agreements are "prima facie evidence of the reasonableness of a fee calculated according to its terms," and that such

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negotiations are "precisely the type of bargaining that the PSLRA anticipated and to which a court reasonably may give substantial deference"); *see also In re AT & T Corp. Sec. Litig.,* 455 F.3d 160, 169 (3d Cir.2006) (affirming reasonableness of fees awarded by district court, and emphasizing that the presumption of reasonableness afforded to retainer agreements between properly selected lead plaintiffs and properly selected lead counsel does not diminish court's responsibility to closely scrutinize fee arrangements).

*17 Significantly, the percentage-based fees requested here also are fair and reasonable when measured against fees awarded in other cases. Indeed, in some cases that have resulted in settlements in the hundreds of millions of dollars, courts have awarded fees in the range of 25% of the recovery.[FN5] And, as this Court observed in approving the 33 1/3 % fee requested in *Moley,* which settled for $11.5 million (in cash, a promissory note and equity) while motions to dismiss were pending, "Courts in this and nearby Districts have recently awarded 33 1/3 % in securities class actions where there has been a significant monetary recovery early on in the litigation." 186 F.Supp.2d at 368 (citing cases). When judged against these awards, the actual fee request of 18%, negotiated after the results obtained were evaluated, is fair and reasonable.

FN5. *See. e.g., In re Lucent Techs., Inc Sec. Litig.,* 327 F.Supp.2d 426 (D.N.J.2004) (17% fee awarded on recovery of $517 million); *In re DaimlerChrysler AC Sec. Litig.,* No. 00-0993(KAJ) (D.Del. Feb. 5.2004) (22.5% fee awarded on recovery of $300 million); *In re Oxford Health Plans. Inc. Sec Litig.,* MDL 1222, 2003 U.S. Dist. Lexis 26795 (S.D.N.Y. June 12, 2003) (28% fee awarded on recovery of $300 million); *see also Lucent,* 327 F.Supp.2d at 439-41 (compiling cases).

2. *The Requested Fees Are Reasonable as Measured by the Grinnell Factors*

In determining a reasonable fee, the Second Circuit has advised courts to be guided by the traditional factors set forth in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974). As shown above, every one of those factors supports the fee request.

3. *The Lodestar Cross-Check*

The Second Circuit encourages the practice of performing a lodestar "cross-check" on the reasonableness of a fee award based on the percentage approach, The lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The lodestar multiplier enhances the lodestar figure "by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 466 (S.D.N.Y.2004).[FN6] The lodestar here, through June 30, 2007, was $569,203.75. Stewart Decl. ¶ 56. This represents 1,334.75 hours expended by attorneys and paraprofessionals during the fourteen months of litigation in this case. *Id.* The requested fee would represent a multiplier of 2.43. *Id.*

FN6. The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.,* the "market rate." *See Blum,* 465 U.S. at 895; *Hensley v. Eckerhart,* 461 U.S. 424, 447 (1983) (Brcnnan, J., concurring in part, dissenting in part) ("market standards should prevail"); *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

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comparable skill, experience, and reputation' " (citing *Blum,* 465 U.S. at 896 n.11)). In addition, the Supreme Court and other courts have held that the use of current rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins,* 491 U.S. 274, 283-284 (1989); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1153 (2d Cir.1983) (use of current rates appropriate where services were provided within two to three years of fee application).

Lead Counsel's approach resulted in an outstanding recovery for the Class now, rather than obtaining the same, or a lesser, or perhaps no recovery after incurring substantial amounts of time and resources and jeopardizing EVCI's survival. Given the Company's limited financial wherewithal and the wasting nature of its insurance policies, Lead Counsel maximized the Class's recovery. Accordingly, a lodestar multiplier of 2.48 is justified here, and is within the range found to be reasonable by courts that have used lodestar cross checks in complex class actions with outstanding results in the face of substantial risks. *See, e.g., Charier Comms.,* 2005 WL 4045741 at *18 (finding that a multiplier of 5.61 "falls within the range of multipliers found reasonable for cross-check purposes by courts in other similar actions, and is fully justified here given the effort required, the hurdles faced and overcome, and the results achieved"); *In re Rite Aid Corp. Sec Litig.,* MDL No. 1360, 2005 WL 697461 at *2-3 (E.D.Pa. Mar. 24, 2005) (multiplier of 6.96); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig,* 364 F.Supp.2d 980 (D.Minn.2005) (multiplier of 4.7); *In re Cendant Corp. Prides Litig.,* 51 F.Supp.2d 537 (D.N.J.1999), *vacated and remanded,* 243 F.3d 722 (3d Cir.2001), *on remand,* No. 98-2819 (D.N.J. June 11, 2002) (multiplier of 5.28); *Di Giacomo v. Plains All Am. Pipeline,* Nos. H-99-4137, H-99-4212, 2001 WL 3463337 at *10 (S.D.Tex. Dec. 18, 2001) (multiplier of 5.3); *Roberts v. Texaco. Inc.,* 979 F.Supp. 185, 197 (S.D.N.Y.1997) (multiplier of 5.5). FN7 Thus, the "cross-check" confirms the reasonableness of the percentage sought here. *See Maley,* 186 F.Supp.2d at 371.

FN7. Lodestar multipliers of nearly 5 have been deemed "common" by courts in this District. *See In re NASDAQ,* 187 F.R.D. at 489 (Judge Sweet approving fee representing 14% of $1.027 billion settlement representing a multiplier of 3.97, and noting that lodestar multiples of between 3 and 4.5 are common); *In re Sumintomo Copper Litig.,* 74 F.Supp.2d 393, 399 (S.D.N.Y.1999) (awarding a 27.5% fee and finding multipliers of 3 to 4.5 to be common).

B. Plaintiffs' Counsel Should Be Reimbursed For Expenses Reasonably Incurred In Connection With This Action

***18** Reimbursement of expenses to counsel to create a common fund is appropriate. *See In re Arakis Energy Corp., Sec. Litig,* No. 95 CV 3431, 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 McDonnell Douglas Equip. Leasing Sec. Litig.,* 842 F.Supp. 733, 746 (S.D.N.Y.1994); *Miltland Raleigh-Durham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients") (citation omitted). The Stewart Declaration (¶¶ 66-70) summarizes that Lead Counsel incurred $51,268.27 in "reimbursable" expenses on behalf of the Class in the prosecution of the Action. Of those expenses, 80% were incurred for Lead Plaintiffs damages expert ($28,225) and for online legal and factual research ($12,658.12). The expenses incurred were essential lo the successful prosecution and resolution of this

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Action. The expenses are reasonable and are approved.

V. *CONCLUSION*

Lead Counsel should submit a form of judgment for entry by the Clerk of the Court, whereupon this matter can be closed.

S.D.N.Y.,2007.
In re EVCI Career Colleges Holding Corp. Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 2230177 (S.D.N.Y.)

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United States District Court,
S.D. New York.
In re EXCESS VALUE INSURANCE COVERAGE LITIGATION

No. M–21–84RMB, MDL–1339.
July 30, 2004.

DECISION AND ORDER APPROVING MDL SETTLEMENT

BERMAN, J.

***1** THIS DOCUMENT RELATES TO: ALL ACTIONS

I. Introduction

This consolidated multidistrict litigation ("MDL") involves some 27 separate class actions brought against United Parcel Service, Inc. ("UPS") and related defendants (together, "Defendants") in state and federal courts throughout the United States by purchasers of "excess value" shipping insurance ("EVIC") offered by UPS ("Plaintiffs" or the "Class" or "Class Members").[FN1]

FN1. The Court assumes familiarity with the factual and procedural history of this case, as set forth in its prior decisions. *See In re EVIC Class Action Litig.,* No. M–21–84, 02 Civ. 2703, MDL–1339, 00 Civ. 3811, 2002 WL 1766554 (S.D.N.Y. July 31, 2002) (granting in part and denying in part Defendants' motion to dismiss); *Stein Jewelry Co. v. United Parcel Service, Inc.,* 228 F.Supp.2d 304 (S.D.N.Y.2002) (granting in part and denying in part Defendants' motion to dismiss related actions) (together, the "July 30, 2002 Decisions and Orders").

On April 20, 2004, Plaintiffs moved (1) pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") for final approval of settlement of this action as (originally) proposed on December 31, 2003 ("Settlement"); (2) pursuant to Fed R. Civ. P. 23(h) and 54(d)(2) for an award of attorneys' fees and expenses to Plaintiffs' counsel ("Class Counsel") in the amount of $19,340,000 .00 ("Class Counsel's Fee Application"); and (3) for an award of $160,000 as incentive compensation ("Incentive Compensation") to the Class representatives ("Class Representatives").[FN2] (*See* Plaintiffs' Memorandum in Support of the Final Approval of the Proposed Settlement, dated April 20, 2004 ("Pl.Settle.Mem."); Plaintiffs' Memorandum in Support of the Joint Application of Plaintiffs' Counsel for an Award of Attorneys' Fees, Reimbursement of Expenses and an Award of Incentive Compensation to the Class Representatives, dated April 20, 2004 ("Pl. Fee Mem."); Defendants' Memorandum in Support of Final Approval of Settlement, dated April 21, 2004 ("Def.Mem.").)

FN2. Fee Applications have also been submitted by counsel to certain Class Members ("Objectors") who had filed objections ("Objections") to the Settlement and Class Counsel's Fee Application, including counsel for Stainless Systems Corp. ("Stainless Systems"), who seeks an award of $183,100 in attorneys' fees and $2,084.27 in costs (Memorandum in Support of Motion for Award of Attorneys' Fees and Costs to Counsel for Stainless Systems Corp., dated July 5, 2004 ("Stainless Fee Mem.")), and counsel for Objectors Reller, Inc., Meredith Whittington, Jeanine M. Schweinberg, Ann Reid Warrington, William McGrath, Paul Redd, John P. Hale, Jr., Sound Deals, Inc., Digital Playroom, Inc., Kearney D. Hutsler, P.C., Joel Shapiro, and Transnational News Co., Inc. (the "Coordinated Objectors"), who seek an award of attorneys' fees and expenses in the amount of $500,000 (Petition For An Award of Attorney's Fees and Expenses By

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Coordinated Objectors' Counsel, dated July 9, 2004 ("Coord. Obj. Fee Mem."), at 8) (together, the "Objectors' Counsel's Fee Applications").

For the reasons set forth below, the motion for final approval of the Settlement is granted; the motions to withdraw Objections to the Settlement are granted; and the Court defers consideration of Class Counsel's Fee Application, the motion for an award of Incentive Compensation to the Class Representatives, and Objectors' Counsel's Fee Applications.

II. Background

On April 13, 2000, the Judicial Panel on Multidistrict Litigation ("MDL Panel") consolidated before this Court purported class actions filed as early as 1998 asserting claims relating to the UPS program of selling EVIC.[FN3] Many of the actions were prompted in part at least by an August 1999 United States Tax Court ruling which found that UPS improperly had established a Bermuda insurance company in connection with its EVIC program to avoid income taxes (the "Tax Court Ruling"). *See UPS of America, Inc. v. Commissioner,* No. 15993–95, 1999 WL 592696 (U.S. Tax Ct. Aug. 9, 1999) ("With respect to the restructuring of the excess value income, we have found that petitioner engaged in ongoing sham transactions devoid of economic substance during the year at issue."). Following the Tax Court Ruling, class action lawsuits were initiated against UPS alleging, among other things, fraud, breach of contract, insurance regulatory deficiencies, excessive rates, RICO violations, and that UPS "violated federal antitrust laws .... in the package transportation insurance market by steering shippers to purchase excess value insurance from UPS at supracompetitive rates." (Affidavit of Stanley M. Chesley, dated April 20, 2004 ("Chesley Aff."), ¶¶ 3–4.) Plaintiffs asserted claims under, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c) & (d); federal antitrust laws, 15 U.S.C. §§ 2, 18; state consumer protection and insurance statutes; and state common law. *See In re EVIC,* 2002 WL 1766554, at *1–2.

FN3. On July 7, 2000, the Court entered a Case Management Order which established, among other things, the procedure for handling "newly filed or transferred actions," "an organizational structure for plaintiffs' counsel," the schedule for filing a consolidated amended complaint and motions to dismiss, and the procedure for filing and docketing pleadings and other papers. ("Case Management Order," dated July 7, 2000.)

***2** As noted in the Court's July 30, 2002 Decisions and Orders, on June 20, 2001 the United States Court of Appeals for the Eleventh Circuit reversed the Tax Court Ruling, impacting Plaintiffs' claims in this case: "We therefore conclude that UPS's restructuring of its excess-value business had both real economic effects and a business purpose, and it therefore under our precedent had sufficient economic substance to merit respect in taxation. It follows that the tax court improperly imposed penalties and enhanced interest on UPS for engaging in a sham transaction." *UPS of Am., Inc. v. Commissioner,* 254 F.3d 1014, 1020 (11th Cir.2001), *cited in In re EVIC,* 2002 WL 1766554, at *3 n. 11 (emphasis added).

The Court's July 30, 2002 Decisions and Orders further impacted several of Plaintiffs' claims. *See In re EVIC,* 2002 WL 1766554; *Stein Jewelry,* 228 F.Supp.2d at 307–08. That is, the Court (1) dismissed on federal preemption grounds all claims from January 1, 1984 through August 25, 1994, *see In re EVIC,* 2002 WL 1766554, at *7 ("The Court finds that the filed tariff doctrine bars all claims asserted ... for the period January 1, 1984 to August 26, 1994"); and (2) dismissed all claims for violations of state consumer protection statutes and for civil conspiracy, unfair competition, fraud, misrepresentation, conversion/restitution/moneys had and received, and unjust enrichment, *see id.* at

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*8 & nn. 24–25 (Holding that the Federal Aviation Administration Authorization Act's shipping regulations preempted "Plaintiffs' state causes of action sounding in fraud and misrepresentation," including "alleged violations of state unfair competition laws and consumer protection statutes, civil conspiracy, conversion/restitution/ moneys had and received, fraud, misrepresentation, and unjust enrichment," as well as "deceptive acts and unlawful trade practices and unjust enrichment."). Following the July 30, 2002 Decisions and Orders, Plaintiffs were left with claims of breach of contract, RICO, and federal antitrust violations. *Id.* at *16 n. 44; *Stein Jewelry,* 228 F.Supp.2d at 307–08.[FN4]

> FN4. These remaining claims were subject to future pre-trial challenges. (*See* Transcript of Hearing, dated May 21, 2004, at 86 (Court: "[T]he record should be clear [that the merits of the RICO and breach of contract claims were] not ruled on [in the Court's July 30, 2002 Decisions and Orders]. And what I said at the time ... was certainly we will hear [Defendants] on the RICO claim and on the breach of contract claim, but I preferred to do it at a later time rather than the time [Defendants] were proposing.").)

On November 12, 2002, the Court entered an order upon stipulation and consent of all parties certifying a nationwide class alleging RICO, breach of contract, and intentional interference with contract claims, and also certifying subclasses of Plaintiffs from Texas, Kentucky, South Carolina, and Kansas asserting claims under the insurance statutes of their respective states. (EVIC Class Cert. Stip. and Order, dated November 12, 2002.)

Discovery

Prior to the commencement of formal discovery in this action, Class Counsel obtained and reviewed voluminous relevant documents from the Tax Court proceedings. (Chesley Aff. ¶¶ 21–22.) Beginning in 2001, the parties also engaged in extensive formal discovery, including, among other things, UPS's production of substantial additional material which had also been produced in connection with the Tax Court proceedings. (Chesley Aff. ¶¶ 23–26; *see also* Case Management Order at 17.)

Settlement

***3** In keeping with Fed.R.Civ.P. 1, settlement has been a consistent objective of the Court in this case. The Case Management Order provided that "[t]he parties, through Lead Counsel, shall regularly meet and confer in an effort to resolve all ... substantive issues between and among themselves, including ... resolution of all claims." (Case Management Order, dated July 7, 2000, at 16.) In addition, from and after the Court's July 30, 2002 Decisions and Orders, the parties engaged in extensive, serious, hard-fought settlement negotiations between November 2002 and extending throughout 2003. (Chesley Aff. ¶¶ 53–63.) The Court hosted settlement conferences (in person or by conference call) on October 17, 2002, November 8, 2002, December 20, 2002, January 16, 2003, February 5, 2003, February 28, 2003, March 14, 2003, April 4, 2003, July 25, 2003, September 19, 2003, October 10, 2003, and January 7, 2004. (Def. Mem. at 5.) The parties reached an agreement in principle for a global settlement on October 10, 2003, and they filed a Stipulation of Settlement with the Court on December 31, 2003 (the "Stipulation"). On January 16, 2004, the Court entered an order certifying a "Settlement Class" and preliminarily approving the Settlement. (*See* "Preliminary Approval Order," dated January 16, 2004, at 9 ("The Court preliminarily approves the Settlement, including the releases and other terms, set forth in the Stipulation and accompanying Exhibits as being fair, reasonable, and adequate to the Parties....").)

Features of the proposed Settlement include the following:

- A Settlement Class comprised of "all Persons and Entities in the United States and its

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Commonwealths and Territories, who shipped packages via UPS within the United States or from the United States to a location outside of the United States from January 1, 1984 to the Effective Date and either (1) from whom UPS directly collected EV Premiums for those packages or (2) who (a) paid a Shipping Outlet for shipment via UPS of a package with a declared value in excess of $100 where the package was ultimately tendered by the Shipping Outlet to UPS, and (b) paid EV Premiums through the Shipping Outlet for loss of, or damage to, the package." (Settlement § IV(D).) The certification of this Settlement Class supplements and amends the EVIC Class Certification Stipulation and Order, dated November 12, 2002. (Settlement § IV(C)(2).)

• Distribution to Class Members of vouchers ("Vouchers") that may be used toward the purchase of various UPS services. (Settlement § V(B)(3).) The four Voucher categories include: (1) Class Members who currently hold UPS accounts and who paid up to $1,000 in EV premiums after January 1, 1994 will be sent—*automatically* and with no claim form required—a Voucher having a face value of $5 to $50; (2) in addition to receiving automatic Vouchers, Class Members who now hold or held a UPS account and spent over $300 in EV premiums from August 26, 1994 through September 30, 1999 will be eligible for "additional" Vouchers having a face value of up to $8,000 upon the submission of a claim form and documentary proof; (3) Class Members who now hold or held a UPS account and spent over $300 in-EV premiums from 1984 through August 25, 1994 will be eligible for "alternative" Vouchers having a face value of up to $1,000 upon the submission of a claim form and documentary proof; and (4) non-account holders who paid EV premiums on or after August 26, 1994 will be eligible to receive $10 Vouchers upon the submission of an affidavit of purchase of EV Insurance, and will be eligible to receive a Voucher having a face value up to $2,000 upon the submission of a claim form with documentary proof of purchase. (Settlement § V(A).)

*4 • Vouchers may be redeemed for UPS services within 180 days of issue date. (Settlement § V(B)(2).) Class Members may transfer their eligibility to receive Vouchers one time by designating a substitute recipient on the Voucher claim form. (Settlement § V(B)(5).) Once issued, Vouchers "shall be non-assignable, nontransferable, and shall not be redeemable for cash," and "[t]here shall be no credit for the unused portion of any [v]oucher." (*Id.*)

• UPS will implement certain structural changes and disclosures relating to the EV Insurance program (the "Structural Changes"), including: (1) using licensed insurance brokers and independent claims adjusters to adjust claims; (2) reorganizing UPS's reinsurance program so that Overseas Partners Ltd. (which allegedly is a subsidiary of UPS) "no longer reinsures the EV Insurance policies"; (3) notifications about the exclusion from coverage of articles of unusual value; (4) notice that the price of EV Insurance is surcharged by Mail Boxes Etc., Inc. franchisees; and (5) notice that the purchase of EV Insurance is optional. (Settlement § V(C).)

• Class Counsel will apply to the Court for attorneys' fees (including costs) not to exceed $19,340,000 ("Class Counsel's Fees"), and Defendants would "not oppose" such an award. (Settlement § V(D)(1).) The Court may approve the Settlement while, at the same time, denying Class Counsel's Fees in whole or in part. (*See* Settlement § V(D)(1).)

• Defendants will create a $160,000 fund from which $5,000 in Incentive Compensation may be awarded to each of the 32 Class Representatives. (Settlement §§ I(UU), V(D)(2).)

• Class Members will be notified of the rights to request exclusion from the Class, to file

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Objections to the Settlement, and to appear at a hearing (held by the Court on May 21, 2004) to determine whether the Settlement was "fair, reasonable, and adequate" ("Fairness Hearing"). (Settlement §§ V(G) & (L).)

• Release of the Settlement Class Members' claims related to the EV program and the dismissal with prejudice of this litigation.

• Defendants will retain the Garden City Group, Inc. as "Settlement Administrator" to effect notice of the Settlement to Class Members ("Settlement Notice"). (Settlement §§ V(I) & (J).) The Settlement Notice described, among other things, the claims that were being settled, the terms of the Voucher program and the structural changes to be instituted by UPS, the proposal to award Class Counsel's Fees of $19,340,000, the date, time and place of the Fairness Hearing, and the procedures for submitting Objections and requests for exclusion. (Settlement § V(H) & Exs. 3–4.)

• The Settlement Administrator will mail a detailed "Long Form Notice" to all Settlement Class Members whose shipping addresses were readily available; publish a "Short Form Notice" in a variety of periodicals, including *Barron's, The New York Times, TV Guide, Inc.*, and *The Wall Street Journal;* display in-store "point of sale" announcements in UPS stores and Mail Boxes, Etc. locations; and establish a website and toll-free telephone number to handle inquiries from Class Members. (*Id.*)

*5 Plaintiffs' expert, Harvey S. Rosen, estimates that the aggregate "face value" of the entire Voucher program is $265 million, and that the Vouchers' fair market value to the Class is $205 million. (Affidavit of Harvey S. Rosen, dated April 20, 2004 ("Rosen Aff."), ¶ 5 & n. 2.) [FN5] UPS has stated that it cannot "reliably estimate the aggregate dollar value of the Settlement." (Defendants' Supplemental Filing Regarding Valuation Issues, dated May 14, 2004 ("Def.Supp.Mem."), at 3–6.)

FN5. Dr. Rosen (Ph.D., Case Western Reserve University) is described as "an economist with extensive experience in reviewing and evaluating businesses and economic and financial data." (Rosen Aff. ¶ 1.)

Class Notice and Objections

Pursuant to the Preliminary Approval Order, the Settlement Administrator effected the Settlement Notice from February 13, 2004 through April 19, 2004 by, among other things, mailing Long Form Notices to approximately 2.6 million individual Class Members. (Second Declaration of Wayne L. Pines, dated April 19, 2004, ¶ 10; Def. Mem. at 8; Pl. Settle. Mem. at 7–8.) [FN6]

FN6. Certain Objectors have argued that the Settlement Notice was deficient. (*See, e.g.,* Objection of James W. Wilson, dated April 20, 2004, at 3 (the Notice contains "no reliable evidence" regarding "the potential damages and results which could be achieved through full litigation of this matter").) "Although no rigid standards govern the contents of notice to class members, the 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) (citations omitted). "The notice need not include the entire text of the proposed settlement but may describe it in general terms." *Handschu v. Special Services Div.,* 787 F.2d 828, 833 (2d Cir.1986). "Neither Rule 23 nor due process ... requires that the notice report the estimated value of damages." *Thompson v. Metropolitan Life Ins. Co.,* 216 F.R.D. 55, 67 (S.D.N.Y.2003). The Settlement Notice described, among other things, the terms and procedures of the Settlement, the Settlement's benefits to the Class, the

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nature of the releases, the date, time and place of the Fairness Hearing, and the procedures for submitting objections and requests for exclusion. (Settlement Notice.) The Notice also identified Class Counsel and described how Class Members could obtain more information via website or toll-free telephone number. (*Id.*) The Court reaffirms that the Settlement Notice was more than adequate to apprise the Class of the Settlement terms and of the options open to Class Members. (*See* also Preliminary Approval Order ¶ 10 (approving proposed Settlement Notice).) *See Thompson,* 216 F.R.D. at 67 ("The appearance and argument by counsel on behalf of these objectors at the fairness hearing belies their claim that the notice denied them the opportunity [to] object....").

On April 20, 2004, Plaintiffs moved for final approval of the Settlement and for approval of Class Counsel's Fee Application in the amount of $19,340,000 and the Class Representatives' Incentive Compensation in the amount of $160,000. (*See* Pl. Settle. Mem.; Pl. Fee Mem.) Defendants filed a memorandum supporting final approval of the Settlement (Def.Mem.), and did not oppose Class Counsel's Fee Application or the Class Representatives' Incentive Compensation. (*See* Settlement § V(D)(1) ("Defendants will not oppose an award of total Attorneys' Fees equal to or less than" $19,340,000).)

Twenty-six Objectors filed (a total of eighteen separate written) Objections to the Settlement and/ or award of Class Counsel's Fees between February 23, 2004 and April 21, 2004. Fourteen Objectors were represented by counsel. Twenty-five Objectors objected to Class Counsel's Fee Application and eighteen Objectors objected to various terms of the Settlement. On May 7, 2004, Plaintiffs and Defendants filed responses to the Objections. (Defendants' Responses to Objections to Proposed Settlement, dated May 7, 2004 ("Def.Opp.Mem."); Plaintiffs' Response to Objections to Proposed Settlement, dated May 7, 2004 ("Pl.Opp.Mem.").) All but one Objector complained about Class Counsel's proposed fees or the Class Representatives' proposed Incentive Compensation. (*See, e.g.,* Objection of Revelation Records, dated March 11, 2004 ("Revelation does not object to the distribution of vouchers to the Settlement Class, we object only to the ... Attorneys' Fees.").) Certain Objectors suggested that "Attorneys fees ... should not be approved until after results of coupon redemption, if approved, are tabulated and known." (Objection of Transnational News Co., dated April 20, 2004, at 1; *accord* Transcript of May 21, 2004 Fairness Hearing ("Tr.") at 32–33 (Objector John Brodbeck: suggesting that fees be "based on a percentage of the dollar value of the vouchers actually redeemed by the class members").) Several Objectors argued that Class Counsel's Fee request, Defendants' agreement not to oppose the request, and the Settlement in Vouchers, together suggested that Class Counsel may have chosen higher attorneys' fees at the expense of more favorable Settlement terms. [FN7] Several Objectors criticized specific aspects of the Voucher program. (*See* Section IV(A)(3), *infra.*)

FN7. *See, e.g.,* Objection of James W. Wilson, dated April 20, 2004, at 6–8 (" 'the very existence of a 'clear sailing' provision increases the likelihood that the class counsel has bargained away something of value to the class ... making heightened judicial scrutiny ... highly desirable" '; Class Counsel's Fee component is "for all practical purposes, a constructive common fund") (citations omitted); Memorandum in Support of Objections of Stainless Systems, dated April 20, 2004, at 3 (the "Court must examine the negotiating process for evidence of collusion," especially where, as here, the parties entered into a " 'clear

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sailing' agreement"); *accord* Tr. at 19 (Objector Stainless Systems); Tr. at 42–43 (Objectors Sound Deals, Inc., Digital Playroom, Inc., and Kearney D. Hutsler, P.C.: the questions of the settlement and the attorneys' fees are "so intertwined you can hardly discuss one without the other"); Tr. at 54 (Objector Joel Shapiro: "if the fees had been set lower, the relief to the class would have been higher").

Supplemental Submissions

***6** On May 5, 2004, the Court ordered: (1) Class Counsel "jointly to submit documentary evidence of attorneys' fees and costs incurred and projected to occur through May 21, 2004 based upon the 'lodestar' methodology, including the hourly rates of each professional, the number of hours each professional worked, and copies of contemporaneous time records"; (2) Plaintiffs to submit "evidence describing in detail the assistance provided by each class representative"; and (3) Defendants "to submit further evidence of their 'valuation' of the Settlement...." (Order, dated May 5, 2004.) Plaintiffs filed supplemental papers containing detailed documentary evidence of Class Counsel's fees and costs ("Fee Application Documentation") as well as a description of the assistance provided by the Class Representatives (*see, e.g.,* Plaintiffs' Submission of Time and Expense Summaries and Declarations, dated May 13, 2004; Plaintiffs' Description of Work Performed By Class Representatives, dated May 13, 2004), and Defendants filed supplemental papers relating to the estimated value of the Settlement (Def. Supp. Mem. at 3–6). In their supplemental papers, Defendants stated that the Settlement "confers significant value on Settlement Class Members," adding that Defendants could not "reliably estimate the aggregate dollar value of the Settlement" because Defendants had not "retained a valuation expert" and "too many currently unknown variables prevent" an accurate valuation estimate. (Def. Supp. Mem. at 2–3.)

May 21, 2004 Fairness Hearing

At the May 21, 2004 Fairness Hearing, the Court (first) heard from all Objectors in attendance, namely, Stainless Systems; Transnational News Co., Inc.; Sound Deals, Inc.; Digital Playroom, Inc.; Kearney D. Hutsler, P.C.; John Brodbeck (of Mississippi Safety Services, appearing *pro se*); and Joel Shapiro.[FN8] The Objectors raised a variety of arguments regarding both Class Counsel's Fee Application and the Settlement terms. (Tr. at 15–56.) Notably, nearly every Objector who discussed the merits of the case was of the view that Plaintiffs' claims were relatively weak. (*See* Tr. at 18 (Objector Stainless Systems: "the claims in this case are weak"), *id.* at 26–27, 30 (Objector Mississippi Safety Services: "this has always been a case in search of both a theory and a harm.... And I understand that's why with a weak case the plaintiffs would agree to settlement"), *id.* at 35 (Transnational News Co.: "this is a very high risk case, ... pretty difficult case to win").)

FN8. Class Counsel Stanley M. Chesley observed that "in all [his] years ..., [he] never had a court be so deferential as to say 'I want the objectors to go first" ' at a fairness hearing. (Tr. at 70.)

The Court then heard from Class Counsel in support of the Settlement and Class Counsel's Fee Application and from Defendants' counsel in support of the Settlement. Class Counsel Stanley M. Chesley asserted, among other things, that the less than 7,000 opt-outs from a Class of over 2.6 million represented "one of the smallest opt-out cases [he had] ever seen." (Tr. at 68.) Class Counsel also compared the Settlement favorably to the June 2001 settlement of a similar class action against UPS in Illinois state court in *Triad Industries, Inc. v. United Parcel Service,* No. 00–L–600 (Madison Co. Illinois). (Tr. at 73; *see* Chesley Aff. ¶ 27.) [FN9] According to Class Counsel, under the *Triad* settlement, *Triad* class members who submitted documented claims received vouchers having a total face value of

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approximately $38.5 million, redeemable for most UPS services within sixty days. (Chesley Aff. ¶¶ 29, 68.) [FN10] Class Counsel argued that, employing the percentage method of calculating attorneys' fee, Class Counsel's $19,340,000 fee was reasonable in light of the Settlement's "undisputed" $205 million value. (Tr. at 59–60.) Moreover, Class Counsel maintained that if the Court employed the "fair multiplier" of 2.8, Class Counsel's approximate lodestar of $7 million would result in a $20 million fee. (Tr. at 59–61.)

FN9. After the *Triad* action was filed in state court, UPS removed the case to the United States District Court for the Southern District of Illinois, *Triad Industries, Inc. v. United Parcel Service,* Case No. 00–619–MJR (S.D.Ill.), and on August 29, 2000, the MDL Panel conditionally transferred the *Triad* action to this Court (*see* Order of the MDL Panel, dated November 21, 2000 (referencing August 29, 2000 Order)). However, on November 17, 2000 the Honorable Michael J. Reagan of the United States District Court for the Southern District of Illinois remanded the *Triad* action to Illinois state court (the "Remand Order"). (*Id.*) Based upon the Remand Order, on November 21, 2000 the MDL Panel vacated its August 29, 2000 conditional transfer order. (*Id.*) On November 21, 2000, UPS filed with the United States Court of Appeals for the Seventh Circuit a petition for a writ of mandamus regarding the Remand Order, which petition was dismissed on December 13, 2000.

FN10. According to Class Counsel, the *Triad* vouchers carried a maximum face value of $1,000, compared to $8,000 here, and the settlement did not provide for "automatic" vouchers or for UPS to implement any Structural Changes, such as those reflected in the Settlement. (Chesley Aff. ¶¶ 29, 68.) Class Counsel also advise that the Illinois court approved $9,625,000 in attorneys' fees for the *Triad* class counsel, representing "25% of the maximum value of the *Triad* vouchers." (Chesley Aff. ¶ 68.)

*7 Defendants asserted at the Fairness Hearing that the merits of Plaintiffs' case had been undermined by the Eleventh Circuit's reversal of the Tax Court Ruling. (Tr. at 83–85 (Defendants: "65, 70 percent of the language in the complaint was directly lifted from ... the tax court's ruling").) Moreover, Defendants argued that the Court's July 30, 2002 Decisions and Orders limited Plaintiffs to only three claims; and that the United States Supreme Court's reversal of the Second Circuit's *Trinko* decision diminished one of the three claims, namely Plaintiffs' antitrust claim. (Tr. at 84–85.) Defendants also argued that the settlement negotiations had been extremely hard fought with give and take on both sides. "In the end, a settlement is consensual, and this was the most the defendants would do, given [their] view of the merits of the case. It was the most that the plaintiffs could get, given [defendants'] view of the merits of the case." (*Id.* at 88–89; *see also id.* at 80 ("the most important factor [in evaluating a settlement] is the strength of the case for the plaintiffs on the merits").) Defendants noted that the number of opt-outs was "very low, both as a percentage and based on [counsel's] experience." (Tr. at 77.) According to Defendants, a not insubstantial cross-section of UPS customers stated that "they didn't see any reason for the case because they've been absolutely satisfied with their relationship with ... UPS." (*Id.* at 77–78, *see id.* at 87–88 (quoting from customer letters admitted as hearing exhibits).) Defendants also argued that the six-month Voucher expiration period was more than adequate, as "most of the class members ... do business with UPS every single day," and the Vouchers "are good for virtually every service that UPS offers." (Tr. at 78–79.)

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Supplemental Notice and Hearing

On May 18, 2004, Defendants informed the Court that the Settlement Administrator had inadvertently failed to mail the Long Form Settlement Notice to approximately 58,000 identified Class Members. (Defendants' Letter, dated May 18, 2004.) On May 19, 2004, the Court approved, and on May 20, 2004 the Settlement Administrator effected, a supplemental notice ("Supplemental Notice") to those Class Members notifying them that, among other things, the deadlines for opting out of the Class and/or objecting to the Settlement had been extended (for them) and that a further hearing regarding the Settlement and any objections they may have had was scheduled for July 1, 2004. (Transcript of Hearing, dated May 19, 2004; *see* May 21, 2004 Hearing Tr. at 98 ("The next hearing on July 1 is limited to hearing objections from those persons to whom a new notice is being sent.").)

At the July 1, 2004 hearing, Defendants informed the Court that no new Objections had been filed in response to the Supplemental Notice. (Defendants' Notice Regarding Objections and Requests For Exclusion, dated June 29, 2004.) Defendants also informed the Court that a total of more than 2.6 million individual notices had been mailed to the Class (including the Supplemental Notice) and that only 6,683 Class Members or approximately .25% had requested exclusion. (*Id.*)

***8** The parties also informed the Court that thirteen of the original twenty-six Objectors (including all but one of the fourteen Objectors who were represented by counsel and all but one of the seven Objectors who appeared at the May 21, 2004 Fairness Hearing, the "Settling Objectors") had agreed to move to withdraw their Objections in return for several modifications to the Settlement that benefitted the Class. (*See* Confidential Term Sheet, Executed July 1, 2004 ("Objector Settlement") ¶ 3; Fourth Joint Addendum to the Stipulation of Settlement, dated July 14, 2004 (the "Fourth Addendum to the Settlement"); July 1, 2004 Hearing Tr. at 7–10, 18–19 (Coordinated Objectors Counsel: "at this time, after considerable effort among various of the attorneys, this group of objectors ... [has] been satisfied by the changes in the fourth amendment [to the Stipulation of Settlement], the enhancements to the value of the settlement, and are prepared to withdraw their objections ....").)[FN11] As part of the Objector Settlement, the parties to the case agreed to the following modifications to the Settlement: (1) where a Class Member "would receive a larger Voucher if [he] claimed a smaller amount of Excess Value Premiums," "the Settlement Administrator will treat the eligible Settlement Class Member as having paid a lower amount of Excess Value Premiums so that a higher rate and amount of recovery will apply"; (2) an "Automatic Voucher issued to a UPS Account that is no longer open and active may be redeemed through a new or existing open and active UPS account issued to the same person"; (3) if a Class Member's claim is denied by the Settlement Administrator, the Class Member may contact Class Counsel who "will assist the Settlement Class Member if the denial ... should be reconsidered"; (4) Class Counsel agreed to reduce their application for expenses by $204,975.39; and (5) the parties agreed that they "will not oppose Settling Objectors['] request for reasonable fees and expenses, not to exceed $600,000," which amount would be drawn from Class Counsel's Fees. (Objector Settlement ¶¶ 1, 2, 4; Fourth Addendum to the Settlement.)[FN12]

FN11. The Settling Objectors include Stainless Systems, Reller, Inc., Meredith Whittington, Jeanine M. Schweinberg, Ann Reid Warrington, William McGrath, Paul Redd, John P. Hale, Jr., Sound Deals, Inc., Digital Playroom, Inc., Kearney D. Hutsler, P.C., Joel Shapiro, and Transnational News Co., Inc.

FN12. Fed.R.Civ.P. 23(e)(4) provides that "[a]ny class member may object to a proposed settlement ... that requires court

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approval," and that "[a]n objection made under [this Rule] may be withdrawn only with the court's approval." Fed.R.Civ.P. 23(e)(4).

The Objector Settlement (and related Fourth Addendum to the Settlement) which the parties presented to the Court on July 1, 2004 also provided, among other things, a limited appeal to United States Magistrate Judge Kevin N. Fox in the event a Class Member is dissatisfied with the decision of the Settlement Administrator. (Objector Settlement ¶ 1(c); *see* Fourth Addendum to the Settlement § II(H).) At the July 1, 2004 hearing, the Court informed the parties that, in its view, the proposed Magistrate appeal provision imposed inappropriate duties and restrictions. (*See* July 1, 2004 Hearing Tr. at 14, 17–18.) With the parties' agreement, on July 14, 2004 the Court entered the Fourth Addendum to the Settlement, deleting the Magistrate appeal. (Fourth Addendum to the Settlement § II(H).) *See* 28 U.S.C. § 636 (defining duties and powers of a United States Magistrate Judge).[FN13] In place of the Magistrate appeal, on July 29, 2004 the Court affirmed and approved the parties' understanding that Class Members would have the right to seek review by the Court of the Settlement Administrator's denial of a timely filed claim. (Class Counsel's Letter to the Court, dated July 29, 2004, at 2.) See also Section VII(O) of the Settlement which provides that this "Court shall retain exclusive and continuing jurisdiction and exclusive venue with respect to the consummation, implementation, enforcement, construction, interpretation, performance, and administration of the Stipulation" of Settlement. (Settlement § VII(O); *accord* Final Judgment and Order of Dismissal with Prejudice, dated July 30, 2004, ¶ 11.) Thereafter, on July 29, 2004, Stainless Systems (again) moved pursuant to Fed.R.Civ.P. 23(e)(4) to withdraw its Objections. (Renewed Application to Withdraw Objections, dated July 29, 2004 ("In light of the Court's approval of the proposal of the parties to modify the Fourth Addendum, as presented in the July 27[sic], 2004, letter of [Class Counsel], ... Stainless Systems Incorporated renews its application to withdraw its objections....").)

FN13. On July 5, 2004, Objector Stainless Systems sought, pursuant to Fed.R.Civ.P. 23(e)(4)(B), to withdraw its Objections to the Settlement in light of the beneficial "changes to the Settlement" contemplated by the Objector Settlement and the Fourth Addendum to the Settlement. (Application of Objector Stainless Systems to Withdraw Objections, dated July 5, 2004.) However, on July 26, 2004 Stainless Systems purported to "withdraw[ ] its withdrawal of objections." (Stainless Systems Letter to the Court, dated July 26, 2004 (enclosing "Withdrawal by Objector Stainless Systems of Its Application to Withdraw Objections").) Stainless Systems asserted that its "agreement to withdraw all its objections" had been contingent upon implementation of the original Objector Settlement and the Fourth Addendum to the Settlement, including the Magistrate appeal. (*Id.; but see* page 17, *infra.*)

Class Counsel's Lodestar

*9 By order, dated May 27, 2004, the Court referred Class Counsel's Fee Application to Magistrate Judge Fox for an inquest and Report and Recommendation to "(1) determine Plaintiffs' attorneys' actual and reasonable 'lodestar' ... and (2) determine the actual and reasonable expenses incurred by Plaintiffs' attorneys." (Order, dated May 27, 2004.) The Court stated that Judge Fox "need not, at this time, be concerned with determining whether a 'multiplier' should be applied to the lodestar." (*Id.*) The Court also directed that the "Fee Application Documents ... be made available for public inspection through June 24, 2004 at the offices of the Southern District of New York under the supervision of Magistrate Judge Fox" (*id.*), and, in fact, Judge Fox so opened to public inspection the Fee Application Documentation. Judge Fox is considering written

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submissions from Plaintiffs and Objectors and is also developing a Report and Recommendation.

Objector Counsel's Fee Applications

Pursuant to the Objector Settlement, counsel for Objector Stainless Systems filed an application on July 5, 2004 for an award of $183,100 in attorneys' fees and $2,084.27 in costs (Stainless Fee Mem. at 1 ("Counsel for Stainless Systems has benefitted the Class by obtaining significant and beneficial changes to the Settlement.... Under established authority he is entitled to an award of his reasonable fees and costs.")), and counsel for the Coordinated Objectors filed an application on July 9, 2004 for an award of attorneys' fees and expenses in the amount of $500,000, from which the Coordinated Objectors seek to be paid an "incentive award" of $1,000 (Coord. Obj. Fee Mem., at 3, 8 (the Coordinated Objectors "flagged a serious defect in the calculation of relief to class members with different levels of damages that the parties had entirely overlooked")). The Objectors' Fee Applications are unopposed, aside from the Coordinated Objectors' argument, on July 9, 2004, that Stainless Systems' counsel's fee should be limited to $100,000.

III. Legal Standard

Rule 23(e) requires that "the court must approve any settlement" or dismissal of a class action. Fed.R.Civ.P. 23(e). In determining whether to approve a class action settlement, the district court must determine whether it is "fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000). "The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001). Judicial discretion should be exercised in light of "the general policy favoring the settlement of litigation." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982).

District courts must first review the negotiating process that produced the settlement to ensure: (1) that the settlement was the product of arm's length negotiations; and (2) that class counsel " 'possessed the experience and ability, and ... engaged in the discovery, necessary to effective[ly] represent [ ] ... the class's interests." ' *D'Amato,* 236 F.3d at 85 (quoting *Weinberger,* 698 F.2d at 74). Once the court determines that the settlement is procedurally fair, adequate and reasonable, it must determine whether the settlement is substantively fair, adequate and reasonable by considering the following nine factors enumerated initially in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir.2000):

> ***10** (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[.]

D'Amato, 236 F.3d at 86 (citations omitted).

The party seeking attorneys' fees bears the "burden of 'establishing entitlement to an award...." ' *Savoie v. Merchants Bank,* 166 F.3d 456, 463 (2d Cir.1999) (citation omitted).

IV. Analysis

A. *Final Approval of Settlement*

1. *Settlement Procedures*

The Court was an observant supporter of the extensive settlement process and has no basis to question that the Settlement was the product of

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"intense arm's length negotiations," appropriately conducted and lasting over one year (Chesley Aff. ¶¶ 53–63, 65; Tr. at 77 (Plaintiffs: the parties had "at least 25 or 26 individual negotiating sessions" and "at least 12 or 14 different sets of [settlement] term sheets"); Tr. at 88–89 (Defendants: there were "dozens" of settlement conferences and telephone calls; "[e]very point was fought," and the negotiations were "prolonged" and "protracted").) *See States of N.Y. and Md. v. Nintendo of America, Inc.,* 775 F.Supp. 676, 680–81 (S.D.N.Y.1991) (deeming settlement fair because it was reached "only after spirited arms-length negotiations by the parties").[FN14]

FN14. On May 5, 2004, Objector Stainless Systems moved to disqualify this Court, arguing that because the Court was "substantially involved in achieving the proposed settlement" and has "stated he was very much in favor of resolving the case by settlement," the Court could not evaluate the Settlement "with an open mind." (Memorandum of Points and Authorities in Support of Motion to Disqualify, dated May 5, 2004, at 1.) The motion was opposed by Plaintiffs, Defendants, and Objector Transnational News Co. (*See* Plaintiffs' Opposition to Motion to Disqualify Judge Richard M. Berman, dated May 13, 2004; Defendants' Response to Motion to Disqualify, dated May 14, 2004; Objector Transnational News Co.'s Letter to the Court, dated May 12, 2004 ("the limited involvement of this Court in settlement matters was well within the parameters long-established as proper for judges of this District").) The Court denied the motion at the May 21, 2004 Fairness Hearing, holding that "the allegations of any bias on my part are, at best, speculative"; the Settlement was the result of "arm's length negotiation and bargaining between the [parties], and not with the court"; and " 'the Federal Rules of Civil Procedure expressly contemplate the act [ive] participation of the trial judge in the settlement process." ' (Tr. at 4–5 (quoting 3 A. Conte & H. Newberg, Class Actions § 9:11 (4th ed.2002)). As noted above, Stainless Systems also sought the Court's active settlement intervention on July 26, 2004.

Class Counsel have extensive experience in handling complex plaintiffs' class actions, and they conducted sufficient investigation, discovery, and motion practice to make an informed decision regarding the merits of the Settlement. (*See* Chesley Aff. ¶ 67.) [FN15] And, as Class Counsel acknowledge, Defendants' counsel are nationally recognized and presented a "formidable legal opposition" in this case. (Chesley Aff. ¶ 65; Pl. Fee Mem. at 10.) Where "the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness." *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d 164, 173–74 (S.D.N.Y.2000), *aff'd sub nom. D'Amato v. Deutsche Bank,* 236 F.3d 78 (2d Cir.2001).

FN15. The Case Management Order provided that Class Counsel "shall coordinate the prosecution of these cases so to avoid unnecessary fees and expenses, strain upon judicial and the parties' resources and duplication of effort...." (Case Management Order § IV(H).)

Under the Case Management Order, the Court named as lead counsel for the "EVIC Class Actions" Steven W. Berman (no relation to the Court) of Hagens Berman LLP and Stanley M. Chesley of Waite, Schneider, Bayless & Chesley Co., L.P.A., and named as lead counsel for the "Antitrust Action" the firm of Milberg Weiss Bershad Hynes & Lerach LLP. (Case Management Order

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at §§ IV(B) & (F); *see* Chesley Aff. ¶ 12.).) The Court also acknowledged that the following attorneys were to serve as members of the "Plaintiffs' EVIC Steering Committee": Phillip Bohrer, David Ewing, Calvin C. Fayard, Jr., Douglas H. Morris, Kip B. Shuman, and Jeffrey H. Squire. (*Id.* § IV(D); *see* Chesley Aff. ¶ 64; Pl. Fee Mem. at 2 n. 4.) In the November 12, 2002 Class Certification Stipulation and Order, the Court appointed (1) David Zoll to Plaintiffs' EVIC Steering Committee, (2) Ben Barnow of Barnow & Associates P.C. as Counsel for certain statewide subclasses, and (3) Brian Herrington of Herrington & White, PLLC, as Special Counsel for the Stein Jewelry subclass of Plaintiffs. (Class Cert. Stip. and Order, dated November 12, 2002, at 7, 15; Pl. Fee Mem. at 2 n. 4.) The Case Management Order also named Paul T. Friedman of Morrison & Foerster LLP as "Defendants' Lead Counsel in both the EVIC Class Action and the Antitrust" Action. (*Id.* § VI(A).) Other Defendants' counsel included, among others, Thomas L. Long of Baker & Hostetler LLP, Edward P. Krugman of Cahill Gordon & Rendel, and Scott A. Edelman of Milbank, Tweed, Hadley & McCloy, LLP. (*Id.* § VI(B).)

Nor does the so-called "clear sailing agreement" by Defendants not to oppose Class Counsel's Fee Application bar approval of the Settlement, where, as here, the Court has strictly scrutinized both the process and substance of the Settlement. *See Malchman v. Davis,* 761 F.2d 893 (2d Cir.1985), *abrogated on other grounds, Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997); *see also Evans v. Jeff D.,* 475 U.S. 717, 738 n. 30 (1986) (Parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees.").FN16

FN16. The Court recognizes that other courts have stated that "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *Weinberger v. Great N. Nekoosa Corp.,* 925 F.2d 518, 525 (1st Cir.1991); *accord In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liability Litig.,* 55 F.3d 768, 803 (3d Cir.1995); *Malchman,* 761 F.2d at 908 (Newman, C.J., concurring).

2. *The Grinnell Factors*

***11** * The first *Grinnell* factor relates to the complexity, expense and likely duration of the litigation. This four-year old action is legally and factually complex as it involves, among other things, contract, RICO, and antitrust claims filed in 27 different state and federal cases on behalf of over 2.6 million Plaintiffs against 27 named Defendants. (Tr. at 79–80.) Plaintiffs state that they have already incurred over $6,944,964.00 in legal fees, and significant additional fees and expenses would be incurred were the case to go forward, including the costs of depositions and other discovery, expert reports, summary judgment motions, and ultimately trials. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 34–35 (1998) (28 U.S.C. § 1407(a) "obligates the [Judicial] Panel [on Multidistrict Litigation] to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course."). The complexity of this case, as well as its probable (long) duration and substantial expense, strongly support approval of the proposed Settlement. *See, e.g., In re Visa Check/ Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 510 (E.D.N.Y.2003) ("The potential for this complex litigation to result in enormous expense, and to continue for a long time, was great. The complexity of federal antitrust law is well known....").

* Class reaction to the proposed Settlement has

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been overwhelmingly favorable and also weighs (strongly) in favor of approving the Settlement. The Court received only eighteen (separate) Objections from twenty-six Objectors in response to approximately 2.6 million separately mailed notices. *See D'Amato,* 236 F.3d at 86–87 ("The District Court properly concluded that this small number of objections [18 out of 27, 883 notices sent] weighed in favor of the settlement."); *Visa,* 297 F.Supp.2d at 511 ("The second factor—the reaction of the class—may be the most significant factor in this inquiry.... The extremely small number of objectors—a mere 18 out of approximately five million Class members—heavily favors approval."). Many of the Objectors did not oppose the benefits to be received by the Class but, rather, argued that the lawsuit would be difficult to win and that Class Counsel's Fees were high. (*See, e.g.,* Objection of William G. Hayes, dated April 27, 2004 ("I do not object to the settlement per se. However, I am strongly opposed to the award of large attorneys' fees to the plaintiffs' counsel and 'incentive compensation' to the class representatives."); Objection of Revelation Records, dated March 11, 2004.) Significantly, all but one of the fourteen Objectors represented by counsel, and all but one of the seven Objectors who attended and spoke at the May 21, 2004 Fairness Hearing, applied to withdraw their Objections after the parties agreed to make several modifications to the Settlement that benefitted the Class. (July 1, 2004 Hearing, at 7–10, 18–19; *see supra* at pages 15–16.) [FN17] "[N]one of the thousands of institutional Class members, who have the largest financial stake, have objected." *In re NASDAQ MarketMakers Antitrust Litig.,* 187 F.R.D. 465, 479 (S.D.N.Y.1998). And, only 6,683 of the over 2.6 million Class Members, or approximately .25% (one quarter of one percent) of the Class, opted out of the Settlement. *See id.* at 478, 482 n. 20 (describing as "minimal" 3,874 opt-outs from a class of over one million, or .39%); *In re Warner Communications Secs. Litig.,* 618 F.Supp. 735, 746 & n. 4 (S.D.N.Y.1985) (approving settlement having 222 opt-outs from a class of 104,000, or .21%), *aff'd,* 798 F.2d 35 (2d Cir.1986).

FN17. James W. Wilson was the only Objector represented by counsel who did not withdraw his Objections, and John Brodbeck was the only Objector who spoke at the Fairness Hearing and did not withdraw his Objections. As noted above, Objector Stainless Systems (1) applied pursuant to Fed.R.Civ.P. 23(e)(4)(B) to withdraw its Objections on July 5, 2004 (Application of Objector Stainless Systems to Withdraw Objections, dated July 5, 2004), (2) "withdr[ew] its withdrawal of objections" on July 26, 2004 (Stainless Systems Letter to the Court, dated July 26, 2004), and (3) again withdrew its Objections on July 29, 2004 (Application of Objector Stainless Systems to Withdraw Objections, dated July 29, 2004).

***12** * "[T]he stage of the proceedings and the amount of discovery completed," also weigh in favor of approving the Settlement. The investigation, discovery, and motion practice conducted to date provide Plaintiffs with "sufficient information to make an informed judgment on the reasonableness of the settlement proposal." *Diamond v. Fogelman,* No. CV–90–0900, 1992 WL 167271, at *4 (E.D.N.Y. June 26, 1992).

* The fourth and fifth *Grinnell* factors relate to the risks faced by the Class in establishing liability and damages—and these factors also favor settlement. *See Grinnell,* 495 F.2d at 455 (" 'The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ') (citation omitted). Plaintiffs recognize that they face very "substantial risks of litigation." (Chesley Aff. ¶¶ 65–67, 70.) As noted above, the Eleventh Circuit's reversal of the Tax Court Ruling took a considerable "bite" out of Plaintiffs' case. *See UPS of America, Inc. v. Commissioner,* No. 15993–95, 1999 WL 592696 (U.S. Tax Ct. Aug. 9, 1999), *rev'd,* 254 F.3d 1014, 1020 (11th Cir.2001). Plaintiffs concede that this

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reversal "strategically damaged the Plaintiffs' case and emboldened the resolve of Defendants." (Chesley Aff. ¶ 65; *see* Tr. at 84 (Defendants: "The most pivotal moment was when the Eleventh Circuit ... issued its decision reversing the tax court's ... decision.").)

Second, the Court's July 30, 2002 Decisions and Orders foreclosed several of Plaintiffs' claims. *In re EVIC,* 2002 WL 1766554 at *16 n. 44; *Stein Jewelry,* 228 F.Supp.2d at 307–08; *see* Tr. at 84–85 (Defendants: "The second pivotal moment, working chronologically, ... was the Court's [July 30, 2002 Decisions and Orders] because ... [a]ll of the claims between 1984 and 1994 were dismissed from the case, and all of the claims other than breach of contract and the federal RICO claim, were dismissed from the case. In other words, all the tort claims, all the fraud claims...."). And, although the Court deferred Defendants' challenge to Plaintiffs' RICO and breach of contract claims, Defendants fully intended to raise that challenge if settlement talks broke down. (*See* Tr. at 86 (Defendants "were ready to roll with motions to dismiss" the RICO and breach of contract claims).) FN18

FN18. In upholding Plaintiffs' antitrust claims in the July 30, 2002 Decisions and Orders, the Court followed Second Circuit precedent in *Law Office of Curtis Trinko, L.L.P v. Bell Atlantic Corp.,* 305 F .3d 89 (2d Cir.2002), regarding the "essential facilities doctrine." *See In re EVIC,* 2002 WL 1766554, at *12–13. The Court is aware that *Trinko* has now been reversed by the United States Supreme Court, *Verizon Communications Inc. v. Law Offices of Curtis,* 124 S.Ct. 872 (2004), "narrow[ing] the scope of the essential facilities doctrine" and, thereby, possibly weakening Plaintiffs' antitrust claims (Chesley Aff. ¶ 65 & n. 13).

In addition, Plaintiffs may have a difficult time proving damages as individual EVIC claims have, according to Defendants, been paid. *See UPS,* 254 F.3d at 1018 ("There was a real insurance policy between UPS and National Union...."). And, "Defendants, throughout the proceedings, provided compelling evidence that UPS charged less for insurance than other similarly situated shippers." (Chesley Aff. ¶ 66; *see* Tr. at 81 (Defendants: "UPS provides the lowest cost protection for packages shipped of any major carrier by a wide, wide margin").) *See, e.g., Thompson v. Metropolitan Life Ins. Co.,* 216 F.R.D. 55, 63 (S.D.N.Y.2003) ("plaintiffs would certainly face the prospect that no damages may be awarded"). FN19

FN19. (*See* Memorandum of Objector Stainless Systems, dated June 30, 2004, at 2 (after having "throughly reviewed the [case] file," Stainless Systems "now fully appreciates the defendants' contention that a modest settlement is all that is appropriate") (emphasis added).)

***13** * The eighth and ninth *Grinnell* factors relate to "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[.]" *Grinnell,* 495 F.2d at 455 (" 'The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ') (citation omitted). FN20 These factors favor approval of the Settlement.

FN20. No party claims that the sixth or seventh *Grinnell* factors are relevant to this Decision, namely, "the risks of maintaining the class action through the trial" or "the ability of the defendants to withstand a greater judgment."

The strengths and weaknesses of Plaintiffs' case must be "balanced against the amount offered in settlement." *Grinnell,* 495 F.2d at 455. Plaintiffs' expert estimates that the fair market value of the Vouchers is $205 million. (Rosen Aff. ¶ 5 & n. 2.) If that proves to be even close to accurate, the Class

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Members would succeed extraordinarily well. Stated in other terms, there is significant benefit to the Class even if the value of the Vouchers ultimately proves to be significantly less, in light of the obstacles to Plaintiffs' case. *See Henry v. Sears Roebuck & Co .,* No. 98–CV–4110, 1999 WL 33496080, at *10 (N.D.Ill. July 23, 1999) ("The fact that all Class members will automatically receive the benefits of the Settlement without any required action on their part substantially increases the value of the Settlement to the Class.").

At this time, without knowing the rate at which Class Members will redeem the UPS Vouchers, the Voucher program cannot, in fact, be valued with precision. (Def. Supp. Mem. at 3–6 (acknowledging that UPS cannot "reliably estimate the aggregate dollar value of the Settlement".) *See In re Mexico Money Transfer Litigation,* 267 F.3d 743, 748 (7th Cir.2001) (Although coupons to be distributed to settlement class had a "face value" of $400 million, "[e]xperts estimated that about half of the coupons would be claimed, and 20% to 30% of those claimed would be used, implying a net value of $40 million to $60 million."). At the same time, it is clear to the Court that the Settlement—including both the Voucher program and the consumer-oriented Structural Changes—"offers real and substantial value to Settlement Class Members." (Def. Supp. Mem. at 4; *see* Tr. at 62 (Court: "It's not as if the class members are offered ... a coupon to buy a car or a house or some item ... that is infrequently acquired. This is something ... used by the vast [majority of class] members on a far more regular and frequent basis").) Although the Court is not, at this time, "confident of the [Voucher] redemption rate ... and thus of the settlement's [actual] total value," the Court finds the Settlement to be fair, reasonable, and adequate to the Class because Plaintiffs' "odds of winning the lawsuit" are relatively difficult and the "settlement does provide value to the class members." *In re Compact Disc Minimum Advertised Price Antitrust,* 292 F.Supp.2d 184, 188, 190 (D.Me.2003); *accord Nintendo,* 775 F.Supp. at 682 (approving voucher settlement "in light of the questionable merits of the underlying case"); *see also Thompson,* 216 F.R .D. at 65.

***14** The proposed UPS Vouchers have several unequivocally positive features for Class Members. For one thing, they are relatively liquid: "Unlike coupons ... in other class actions—where class members only benefit if they use the coupon in connection with the purchase of an expensive durable good, the vouchers in this case are easily redeemable on relatively inexpensive consumable goods and services—UPS services. Although the subject matter of the litigation relates to insurance, the vouchers are redeemable for eleven different UPS" services. (Rosen Aff. ¶ 11.) Class Members may transfer their Vouchers by designating a substitute recipient on the Voucher claim form. And, Vouchers are valid for six months—a relatively long period given the frequency with which UPS services are used. *See In re Motorsports Merchandise Antitrust Litig.,* 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000). Also, under the Settlement, Vouchers worth between $5 and $50 are automatically provided to "the vast majority of account holding Settlement Class Members," or to almost 2.3 million of the approximately 2.6 million UPS account-holders who received Notice of Settlement. (Def. Supp. Mem. at 2.) [FN21] Another positive feature of the Settlement is that the Vouchers "often will cover the entire cost of a frequently purchased and needed product" (Def. Opp. Mem. at 10), rather than a small percentage of a "big ticket item."

FN21. Other courts have approved voucher-based settlements involving low-cost, frequently-purchased goods or services. *See, e.g., Nintendo,* 775 F.Supp. at 682 (distribution of $5 coupons approved as settlement of nationwide antitrust class action); *In re Cuisinart Food Processor Antitrust Litig.,* M.D.L. 447, 1983 WL 153, at *7–8 (D.Conn. Oct. 24, 1983) (Cabranes, D.J.) ("the fact that some

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objectors would have preferred cash [rather than coupons] cannot be determinative of the issue whether the settlement before the court is reasonable").

The Settlement also obligates UPS to implement important Structural Changes to its EVIC program which will benefit Class Members and others. For example, UPS has agreed to use licensed insurance brokers and independent claims adjusters to adjust claims; to make additional disclosures regarding the exclusion from coverage of articles of unusual value; to disclose that the price of EV Insurance is surcharged by Mail Boxes Etc., Inc. franchisees; and to disclose that the purchase of EV Insurance is optional. (*See* Settlement § V(C).) While no party has attempted to place a dollar value on the Structural Changes, *see, e.g., Staton v. Boeing Co.,* 327 F.3d 938, 974 (9th Cir.2003) ("the value of injunctive relief is difficult to quantify"), it is clear to the Court that these changes confer a substantial benefit upon the Class.

3. *Objections*

Several Objectors had argued, among other things, that the Vouchers "should have at least a three year expiration date and ... should be freely transferable" (Objection of Supranational Publishing Company, dated April 20, 2004), that "class members should not be required to produce '[d]ocumentary proof' of the EV premiums paid" (Objection of Sound Deals, Inc., dated April 20, 2004; *accord* Objection of Westmont College, dated March 9, 2004; Objection of Derma–Safe Company, dated March 22, 2004), and that the Voucher program is a "marketing scheme designed to induce new purchases of the defendant companies' services" (Objection of James W. Wilson, dated April 20, 2004, at 5). Certain Objectors have claimed that "large users of the insurance are penalized under the settlement," because the "formula for compensation results in the rate of compensation being reduced the more a class member used the insurance." (Objection of Stainless Systems, dated April 20, 2004; *accord* Objection of John Brodbeck, dated February 29, 2004, at 2 .) The few criticisms that have not already been analyzed in this Decision and Order should not stand in the way of the Settlement, for several reasons. First, the six-month Voucher expiration (and limited Voucher transferability) are reasonable features in light of the high frequency of use and the fact that Vouchers can be redeemed for virtually all UPS services. (*See* Def. Opp. Mem. at 10 ("The vast majority of Settlement Class Members use UPS services regularly, on a daily or weekly basis, and Settlement Class Members with UPS Accounts purchased the vast majority of EV Insurance during the class period."); Tr. at 79 (Defendants: Vouchers "are good for virtually every service that UPS offers").) *See In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 297, 331 (N.D.Ga.1993) (although "the certificates are not universally transferable at all times, the terms of transferability are reasonable...."). It is also reasonable to require documentary proof of claims especially in instances where Class Members have incurred large losses. *See, e.g. Domestic Air Transp.,* 148 F .R.D. at 309 (approving settlement that required greater documentation for larger claims). The automatic distribution of Vouchers under the Settlement is, as noted, an important feature; it would not be feasible with respect to *non*-account holders, as UPS "has no practical means to independently identify from its records every individual entitled to settlement benefits." *Thompson,* 216 F.R.D. at 66. As to Objectors' claim that large UPS customers are disadvantaged, " 'there is no rule that settlements benefit all class members equally,' as long as the settlement terms are 'rationally based on legitimate considerations." ' *In re PaineWebber Ltd. Partnerships Litig.,* 171 F.R.D. 104, 131 (S.D.N.Y.) (citations omitted); *aff'd,* 117 F .3d 721 (2d Cir.1997). (*See* Def. Opp. Mem. at 14 ("the use of differing rates of recovery for Settlement Class Members with higher EV purchases is entirely rational because the larger shippers were best able to protect themselves from any alleged injury

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claimed in the litigation").) "Here, the objectors present nothing to overcome the deference that should be given to the rational allocation of benefits that has been negotiated by counsel for the parties." *Thompson,* 216 F.R.D. at 65.

***15** The proposed Voucher program offers real value to Class Members and appears clearly to be the best result that Class Counsel could negotiate. For the reasons stated, the Court finds that the settlement process was vigorous and "arms length" and that Settlement benefits to the Class are fair, adequate, and reasonable under *Grinnell. See In re Compact Disc,* 292 F.Supp.2d at 188; *Nintendo,* 775 F.Supp. at 682.[FN22]

FN22. Contemporaneously with this Decision and Order, the Court is entering the Final Judgment and Order of Dismissal with Prejudice substantially in the form of Exhibit 2 to the Fourth Addendum to the Settlement.

B. *Class Counsel's Fee Application*

As noted, Class Counsel sought an award of fees and expenses of $19,340,000.00.[FN23] This amount is intended to be shared among 41 sets of Plaintiffs' counsel (and includes up to $600,000 in Objectors' Counsel's fees and expenses). (Pl. Fee Mem. at 1; Objector Settlement ¶ 4.) According to Class Counsel, the "requested fees represent less than 10% of the value of the Settlement," which Plaintiffs estimate to be $205 million. (Pl. Fee Mem. at 1.) Class Counsel argue that even if the Court determined attorneys' fees through the "lodestar" method (rather than the percentage method), Class Counsel's lodestar of approximately $7 million would result in a $20 million fee if the Court employed a multiplier of 2.8, which, according to Class Counsel, is "a fair multiplier ... in a case like this." (Tr. at 61.) According to Class Counsel, the requested "award is particularly justified under the circumstances of this Action, where the litigation has proceeded over several years and where the risks have been substantial." (Pl. Fee Mem. at 1.)

FN23. Pursuant to the Objector Settlement, dated July 1, 2004, Class Counsel agreed to reduce their application for expenses by $204,975.39. (Objector Settlement ¶ 2.)

On May 5, 2004, the Court ordered Class Counsel "jointly to submit documentary evidence of attorneys' fees and costs incurred and projected to occur through May 21, 2004 based upon the 'lodestar' methodology, including the hourly rates of each professional, the number of hours each professional worked, and copies of contemporaneous time records." (Order, dated May 5, 2004.) The May 5th Order was in keeping with this Circuit's practice. *See, e.g., Mikes v. Straus,* 274 F.3d 687, 706 (2d Cir.2001) (litigants applying for attorneys' fees must submit "contemporaneous time records"). Class Counsel documented $6,944,964.00 in attorneys' fees and $1,066,403.60 in expenses through May 21, 2004, for a total "lodestar and expenses" of $8,011,367.60. (Declaration of Stanley M. Chesley in Support of Plaintiffs' Response to Objections to Proposed Settlement and the Award of Attorneys' Fees, dated May 6, 2004.) At the Court's further direction, Magistrate Judge Fox opened Class Counsel's "Fee Application Documents ... for public inspection ... at the offices of the Southern District of New York." (Order, dated May 27, 2004.)

Plaintiffs also seek an award of Incentive Compensation in the amount of $5,000 to each of the 32 Class Representatives, for a total of $160,000. (Pl. Fee Mem. at 1.) In response to the Court's May 5, 2004 order that Plaintiffs "submit evidence describing in detail the assistance provided by each class representative" (Order, dated May 5, 2004, ¶ 2), Plaintiffs filed supplemental papers (Plaintiffs' Description of Work Performed By Class Representatives, dated May 13, 2004) and assert that Class Representatives "greatly assisted counsel" by, among other things, "collect[ing] documents—in many cases a voluminous amount of documents—review[ing] the complaints and

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verif[ying] that they believed that the settlement was fair" (Chesley Aff. ¶ 64).

***16** Pursuant to the Objector Settlement, counsel for Objector Stainless Systems filed an application on July 5, 2004 for an award of $183,100 in attorneys' fees and $2,084.27 in costs (Stainless Fee Mem.), and counsel for the Coordinated Objectors filed an application on July 9, 2004 for an award of attorneys' fees and expenses in the amount of $500,000, from which the Coordinated Objectors will each be paid an "incentive award" of $1,000 (Coord. Obj. Fee Mem., at 8).

For several reasons, Class Counsel's (and Objectors' Counsel's) Fee Applications are not being resolved at this time and are hereby severed from the motion for final approval of the Settlement.[FN24] For one thing, the Court has referred Class Counsel's Fee Application to Magistrate Judge Fox for a Report and Recommendation. (Order, dated May 27, 2004.) Magistrate Judge Fox's assessment is *sub judice* and his Report and Recommendation, once issued, will be subject to party objections under Fed.R.Civ.P. 72(b). (The Court will entertain applications for reimbursement of counsels' out of pocket expenses immediately upon issuance of Judge Fox's Report and Recommendation.)

FN24. In ordering a severance, the Court wishes to make clear that it is not ruling upon the merits of the Fee Applications of Class Counsel or Objectors' Counsel at this time. Nor is the Court criticizing the extensive efforts made in this case by Class Counsel and Objectors' Counsel. The Court is simply concluding that it is premature to assess and award counsel fees.

Second, the Court has not yet determined whether to calculate attorneys' fees based upon a percentage of the Settlement (and, if so, what percentage is appropriate), or based upon "counsel's 'lodestar' of hours actually and reasonably billed." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 44 (2d Cir.2000) ("the lodestar approach is an accepted but not exclusive methodology in common fund cases"); *see id.* at 50 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen."). [FN25] In any case, the Court cannot reasonably determine Class Counsel's Fees under either approach at this time. The lodestar cannot be resolved because, as noted, Judge Fox has not submitted his Report and Recommendation. And, the appropriate lodestar "multiplier" (if any) cannot reasonably be determined without first determining the Settlement's actual benefit to the Class. *See In re Lloyd's American Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *24 (S.D.N.Y. Nov. 26, 2002) (lodestar multiplier "reflect[s] such factors as the results obtained, the risks involved, the contingent nature of the fee, quality of the work performed, and public policy considerations").

FN25. "[D]istrict courts should ... be guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." ' *Goldberger,* 209 F.3d at 50 (citation omitted). "[I]t is appropriate to treat this case as a constructive common fund despite the fact that the fees in the instant action are to be paid by defendants and despite the existence in this Settlement Agreement of a clear sailing provision." *In re Vitamins Antitrust Litig.,* No. 99-197, MDL 1285, 2001 WL 34312839, at *9 (D.D.C. July 16, 2001).

The percentage of Settlement approach cannot be reasonably employed at this point because the

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Settlement's actual value to the Class is unclear and cannot accurately be assessed until the rate at which Class Members redeem UPS Vouchers is known. *See, e.g., In re Mexico Money Transfer Litigation,* 267 F.3d 743, 748 (7th Cir.2001) (estimating vouchers' value as a small fraction of face value). "Particularly where the common benefits are in the form of discounts, coupons, options, or declaratory or injunctive relief, estimates of the value or even the existence of a common fund may be unreliable, rendering application of any percentage-of-recovery approach inappropriate. Where there is no secondary market for coupon redemption, the judge can conclude that the stated value of the coupons ... does not provide a sufficiently firm foundation to support a fee award...." *Manual for Complex Litigation* § 14.121 (footnotes omitted). Because "fee awards should be based only on the benefits actually delivered ... [i]t is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete." *Id.* § 21.71; *accord id* § 14.121.[FN26]

> FN26. The Court is familiar with legislation pending in the United States Senate which provides that "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." The Class Action Fairness Act of 2004, 2004 S.2062, 108th Congress (2004).

*17 Nor can the Court determine Objectors' Counsel's Fee Applications at this time, as they are predicated (contingent), in part, upon a final determination of Class Counsel's Fees. (*See* Objector Settlement ¶¶ 2, 4 (the parties agreed that they "will not oppose Settling Objectors['] request for reasonable fees and expenses, not to exceed $600,000," which amount would be drawn from Class Counsel's Fees).) [FN27] For related reasons, the Court is also severing and deferring Plaintiffs' motion for Incentive Compensation to each of the Class Representatives.

> FN27. As in the case of Class Counsel, the Court is not ruling upon the merits of Objectors' Counsel's Fee Applications nor diminishing the work done by Objectors' Counsel.

The possibility of severance was raised at the July 1, 2004 hearing. (July 1, 2004 Hearing Tr. at 31–33 (Court: "I understand your point of view that you would like [approval of the Settlement and the Fee Applications] to stay ... together. I don't know if that's possible, and I don't want to hold up the settlement. And I have the feeling ... that it might be on different tracks ...."); *id.* at 34 (Defendants: "The stipulation of settlement does, however, provide and contemplate that there might be some separation. And if ... there is no precise time line as to when the fee issue would finally be resolved, ... we would ask the Court to ... resolve the merits [of the Settlement approval].").) *See Compact Disc,* 292 F.Supp.2d at 189–90 (Court deferred "award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is.... The exercise period expires after six months, so this is not an inordinately long extension.").

V. Conclusion and Order

For the foregoing reasons, Plaintiffs' motion [141] for final approval of the Settlement is granted, as are the pending applications to withdraw Objections. The Court defers, without prejudice, consideration of Class Counsel's Fee Application [142], the motion for an award of Incentive Compensation to the Class Representatives [142], and the Objectors' Counsel's Fee Applications [196 and 200].

S.D.N.Y.,2004.
In re Excess Value Insurance Coverage Litigation
Not Reported in F.Supp.2d, 2004 WL 1724980

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(S.D.N.Y.), 2004-2 Trade Cases P 74,521

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Only the Westlaw citation is currently available.

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

United States District Court,
S.D. New York.
In re FLAG TELECOM HOLDINGS, LTD. SECURITIES LITIGATION.
This Document Relates to: All Actions.

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

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

McMahon, District Judge.

***1** Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs and Class Representatives Peter T. Loftin and Joseph Coughlin (collectively, "Lead Plaintiffs" or the "Class Representatives") have moved for an order granting: (1) final approval of the proposed settlement of this action (the "Action") against Citigroup Global Markets, Inc. ("CGMI") and seven former officers and directors (the "Individual Defendants") [FN1] of FLAG Telecom Holdings, Limited ("FLAG") [FN2] (collectively, with CGMI, "Defendants") for $24.4 million in cash; (2) final approval of the proposed Plan of Allocation of the settlement proceeds; (3) an award of attorneys' fees and reimbursement of counsels' expenses incurred in connection with the prosecution and settlement of the Action; and (4) an award to Lead Plaintiffs for their services in prosecuting the Action. The motion is not opposed by defendants.

> FN1. The seven individual defendants are Andres Bande, Edward McCormack, Edward McQuaid, Philip Seskin, Daniel Petri, Dr. Lim Lek Suan and Larry Bautista.

> FN2. Former Defendant/non-party FLAG filed a Chapter 11 bankruptcy petition on April 12, 2002. FLAG emerged from its Chapter 11 proceeding on October 9, 2002, with FLAG Telecom Group Limited ("FTGL") becoming its successor. In late 2003, FTGL was purchased by Reliance Gateway Net Limited, a subsidiary of Reliance Communications Limited.

I. PRELIMINARY STATEMENT

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

Discovery and discovery-related disputes required massive time and effort: Plaintiffs reviewed more than 2.4 million pages of documents produced by Defendants; analyzed privilege logs with more than 9,000 entries; issued document

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requests by subpoena or Hague Request to over fifty (50) non-parties, including companies in France and England, and received nearly 300,000 pages of documents in response; and conducted sixteen (16) fact depositions, including seven taken in Europe pursuant to Hague Convention requests. Each of three proposed Class Representatives, as well as Plaintiffs' expert, were deposed by the Defendants. Frequent and protracted discovery disputes resulted in hundreds of letters and emails among the parties, and multiple written opinions from multiple jurisdictions in the U.S., and in London.

Settlement negotiations in this case were extraordinarily complicated due, among other reasons, to a Directors and Officers Insurance policy involving twenty-two insurance carriers on eight separate layers of coverage. Negotiations were further complicated by parallel litigation,[FN3] which also had to be settled for the Individual Defendants to achieve total peace. The Settlement eventually was achieved with the assistance of the Honorable Daniel Weinstein, a retired California Superior Court Judge, after three full-day mediation sessions that were preceded by extensive written submissions from the parties on both liability and damage issues. Along the way, Plaintiffs also mediated a division of any recovery with the *Rahl* plaintiffs, in a mediation overseen by the Honorable Nicholas H. Politan, a retired Judge from the U.S. District Court for the District of New Jersey. Ultimately, all parties, including the *Rahl* plaintiffs, agreed to Judge Weinstein's "Mediator's Proposal."

FN3. *Rahl v. Bande,* C.A. No. 04–CV–1019 (CM)(PED) (*"Rahl"*).

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

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

II. FACTUAL BACKGROUND%

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

FLAG stated in its IPO Prospectus, which was incorporated into the Registration Statement filed with the SEC, that its goal was to become "the leading global carriers' carrier by offering a wide range of cost-effective capacity use options and wholesale products and services across our global network." To further that goal, FLAG was constructing the FLAG Atlantic cable system (the "FA–1 system"), a 50/50 joint venture with GTS

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TransAtlantic Carrier Services Ltd. ("GTS"), which would connect London and Paris to New York and have a potential capacity of fifteen times the maximum of the most advanced cable system in service on the Atlantic at that time. FLAG'S IPO prospectus stated, among other things, that FLAG intended to finance the construction of the FA–1 system with $600 million in bank financing and presale capacity commitments in excess of $750 million.[FN4]

FN4. In telecom industry parlance, "presales" are capacity sales made on a system prior to the date the system is put into service.

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

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

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

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

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

III. HISTORY OF THE LITIGATION

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

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

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

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

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

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

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

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

In a forty-three page decision issued on February 25, 2004, the Court dismissed the 2CAC without prejudice.[FN5]

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FN5. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 308 F.Supp.2d 249 (S.D.N.Y.2004).

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

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

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

After extensive briefing, the Court issued a sixty-five page decision on January 12, 2005, denying in part and granting in part the motions to dismiss. FN6 The Court held that Plaintiffs had not pled facts demonstrating that the statements regarding demand in FLAG's prospectus were false as of the time of the IPO; however, the Court held that Plaintiffs *had* "alleged facts sufficient to demonstrate that the Prospectus contained a material misstatement or omission in connection with the Alcatel Sales Agreement," an agreement by which FLAG had (allegedly) fraudulently inflated the amount of its FA–1 presales.FN7 The Court also held that the 3CAC included allegations sufficient to sustain Plaintiffs' claims regarding: (1) improper accounting related to FLAG's swap transactions; (2) FLAG'S failure to write down the value of its assets in a timely manner; and (3) misstatements concerning demand and the optimistic outlook for FA–1 made by Bande and McCormack between April 1, 2001 and the end of the Class Period. The Court also held that the allegations in the 3CAC raised the requisite strong inference of *scienter* required for the '34 Act claims against Bande, McCormack and Bautista, but not Evans.

FN6. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 352 F.Supp.2d 429 (S.D.N.Y.2005).

FN7. *Id.* at 451.

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

*6 Plaintiffs' '33 Act claims against defendants Bautista and Evans were dismissed because they had not signed the Registration Statement and, despite "a host of new allegations" in the 3CAC regarding Verizon's alleged status as a control person of FLAG and use of FLAG as a corporate piggy bank, the Court again dismissed Plaintiffs' claims against Verizon.FN8 Plaintiffs' claims against FLAG and Evans were dismissed with prejudice and the claims against Verizon were dismissed without prejudice. The motions to dismiss by Bande, McCormack, Rubin, Petri, McQuaid, Seskin, Suan, and Salomon Smith

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Barney, Inc. n/k/a CGMI, were denied.

FN8. *Id.* at 457.

D. *Motion for Judgment on the Pleadings*

On June 23, 2005, CGMI moved to dismiss Plaintiffs' Securities Act claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, based on an affirmative defense of negative causation. CGMI also asserted that Plaintiffs' claims were barred by the statute of limitations. On January 23, 2006, the Court denied Defendants' motion in its entirety, holding that (1) Defendants had failed to establish "that the decline [in FLAG'S stock price] was not due, at least in part, to the alleged misrepresentations concerning pre-sales in Flag's Prospectus" and (2) that the new allegations in the 3CAC arose from the same conduct charged in the May 2002 complaint and were, therefore, not time-barred.[FN9]

FN9. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 411 F.Supp.2d 377 (S.D.N.Y.2006).

E. *Motion for Class Certification*

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

Defendants also challenged the adequacy of the named Plaintiffs to represent the class, claiming that the Plaintiffs were insufficiently engaged in the management of the case and, in particular, were not sufficiently concerned with the then-pending indictment of Lead Counsel and its potential consequences, although Defendants themselves said they did "not [challenge] the competence or adequacy" of Lead Counsel.[FN10]

FN10. Defendants' Joint Memorandum of Law In Opposition to Plaintiffs' Motion for Class Certification, at 22 n. 65.

Plaintiffs responded with a twenty-page reply brief refuting Defendants' contentions, accompanied by a sworn Declaration from one of Plaintiffs' previously confidential sources (FLAG's former Vice President of Sales for North America); a sworn Declaration from damages expert Dr. Scott Hakala (eighty-five pages with exhibits); and a sworn Declaration of Lead Counsel (491 pages with exhibits). Defendants submitted a 256–page sur-reply (including exhibits). Plaintiffs filed a twenty-five page response to Defendants' sur-reply. On September 4, 2007, the District Court issued a fifty-page decision granting Plaintiffs' motion for class certification. The Court included in-and-out traders in the class because, "in light of Hakala's affidavit ... it is conceivable" that the in-and-out purchasers may be able to prove loss causation based on events prior to the end of the Class Period.[FN11] The Court appointed Peter T. Loftin, Norman H. Hunter, and Joseph Coughlin as the Class Representatives, and appointed Milberg as Class Counsel.

FN11. *Id.* at 167.

F. *Discovery and Discovery Disputes*

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

Plaintiffs have, since 2005, obtained

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

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

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

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

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

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

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

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

On June 25, 2007, in response to the Individual Defendants' request for permission to file a motion for partial summary judgment dismissing Plaintiffs' '33 Act claims in their entirety, Plaintiffs moved for leave to amend the 3CAC to further detail their '33 Act claims. That motion was granted. Plaintiffs filed the Fourth Consolidated Amended Complaint on October 15, 2007. The final and operative complaint, the Corrected Fourth Consolidated Amended Complaint (the "Complaint"), was filed on January 10, 2008 .[FN12]

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FN12. The Correction removed vestigal references to Verizon as a defendant.

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

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

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

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

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

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

On March 23, 2009, the Court issued a twenty-three page opinion denying Defendants' motion in its entirety.[FN13]

FN13. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 618 F.Supp.2d 311 (S.D.N.Y.2009).

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

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

On July 22, 2009, the Second Circuit affirmed virtually all of the Court's class certification Order, rejecting all but one of the Defendants' arguments. However, the Second Circuit agreed with Defendants that "as a matter of law" there was insufficient evidence of loss causation prior to the last day of the Class Period for in-and-out traders to remain in the Class. The Court of Appeals therefore vacated the Court's class certification Order with respect to those Class Members who sold their FLAG common stock prior to February 13, 2002, and ruled that Norman H. Hunter, who sold all of his shares before the end of the Class Period, could not serve as a Class Representative. Unfortunately for Plaintiffs, this decision dramatically reduced the total potential recovery in this case, from more than $360 million to approximately $14.2 million.[FN14]

FN14. Prior to the Second Circuit's decision, Plaintiffs' damage expert, Dr. Scott Hakala, calculated that the potential damages in this case were in the range of $362.3 million to $465.5 million, depending on whether one used the economic loss method or the investment loss method of calculating damages, and whether the date of the first significant corrective disclosure is considered to be April 2, 2001 or June 18, 2001.

On August 5, 2009, Plaintiffs filed a petition pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure seeking rehearing of the appeal and/or rehearing *en banc.* By Order dated

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October 6, 2009, the Second Circuit Court of Appeals denied Plaintiffs' petition for rehearing and/or rehearing *en banc.*

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

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

IV. HISTORY OF THE SETTLEMENT NEGOTIATIONS

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

***10** The $250 million D & O policy is comprised of one primary and seven excess coverage layers, with multiple carriers sharing each layer. For example, the second excess layer includes five carriers. In all, there are 22 different carriers, with several appearing in more than one layer.[FN15] According to the terms of the policy, the carriers in any particular layer are not obligated to make any payment unless and until all the coverage layers below are exhausted. This coverage structure results in a situation where any carrier that would be required to pay into a possible settlement can effectively veto the settlement even though that veto may expose carriers on higher layers to greatly increased liability; and, unless the vetoing carrier itself appears on a higher layer, it has no incentive to accept the settlement. Further complicating the situation, certain carriers in the insurance tower, at various times, threatened to and/or did disclaim coverage of the '33 Act claims [FN16] and/or coverage of CGMI.

FN15. The first layer is $20 million (two carriers share 50/50); the second layer is $30 million after the first $20 million is exhausted (two carriers share 50/50); the third layer is $50 million after the prior $50 million is exhausted (five carriers have 20% each); the fourth layer is $50 million after the prior $100 million is exhausted (one carrier has 82.16%, plus two others); the fifth layer is $25 million after the prior $150 million is exhausted (one is 40% and three others are 20% each); and the sixth through eighth layers are $25 million each (each is a different single carrier).

FN16. Astoundingly, certain excess insurance policies in the tower did not "follow form."

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

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settlement negotiations, maintaining that damages were only a small fraction of those claimed by Plaintiffs.

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

On October 17, 2007, Plaintiffs' Lead Counsel (with the assistance of Mr. Loftin's personal in-house counsel), counsel for the Individual Defendants (with the assistance of defendant McCormack), and counsel for several of the insurance carriers, conducted a full-day mediation session before retired California Superior Court Judge Daniel Weinstein of JAMS.[FN17] Formal written mediation statements were submitted by both sides in advance of the mediation. At the Mediator's request, both sides also submitted a supplemental mediation statement on the issue of loss causation. At the beginning of the mediation counsel for both sides, as well as Mr. McCormack, made oral presentations. At the conclusion of the session Plaintiffs made a settlement demand to which the Individual Defendants did not respond, and the mediation ended without success.

FN17. CGMI and plaintiff's counsel in *Rahl* were not part of the initial mediation efforts.

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

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

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

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

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

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

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

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document production issues were also mediated and resolved as between the Trustee and the Class.

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

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

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

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

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

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

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

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

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

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ordered a fairness hearing to take place at 2 p.m. on October 29, 2010. The Court also approved the Claims Administrator in the Preliminary Approval Order.

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

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

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

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

VI. THE COURT GRANTS FINAL APPROVAL TO THE PROPOSED SETTLEMENT

A. *The Standard for Evaluating Class Action Settlements*

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

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132, 138 (2d Cir.1998)). Moreover, " 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 366 (S.D.N.Y.2002) (internal quotation and citation omitted).

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

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

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

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

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

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

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

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

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Resources

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

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

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

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

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

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

iii. Settlement Was Reached at an Advanced

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Stage of Litigation After Significant Discovery and Extensive Consultation with a Damages Expert

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

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

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

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

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

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

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

• all of FLAG's accounting for capacity sales during the Class Period was accurate and in

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accordance with GAAP;

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

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

- Plaintiffs could not prove causation and damages.

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

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

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

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

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

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

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

The most significant risk to Plaintiffs' claim for damages was actually realized in this case, when the Second Circuit held, as a matter of law, that there was insufficient evidence on which in-and-out traders could establish the element of loss causation. As previously noted, this decision probably caused a very significant reduction in Plaintiffs' recoverable damages, from over $360

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million to approximately $14.2 million. Although Plaintiffs initially considered a motion asking that the District Court reformulate the Class to include at least some of the individuals excluded by the Second Circuit's decision, the likelihood of success on such a motion was slim, and the Court so advised the parties during the September 17, 2009 status conference.

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

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

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

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

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

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

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> authority under Rule 23(d) to issue orders ensuring "the fair and efficient conduct of the action."

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

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

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

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

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

Under the proposed Settlement, the Class will receive $24.4 million, well in excess of the $14.2 million estimated by Plaintiffs' expert to be the potential damages in light of the Second Circuit ruling excluding in-and-out traders from the Class. More aggressive methods of calculation could result in damages ranging from approximately $25 million to approximately $120 million . [FN18] Even under the most favorable, $120 million scenario, the proposed settlement amounts to over 20% of the potential damages, well within the "range of reasonableness." *See In re Merrill Lynch Research Rep. Sec. Litig.,* Nos. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 02 Civ. 7854(JFK), 02 Civ. 10021(JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (settlement representing 6.25% of estimated damages found to be "at the higher end of the range of reasonableness of recovery in class action securities litigations"); *In re PaineWebber,* 171 F.R.D., at 132 (recovery between 7% and 20% is "well within the range of reasonableness"); *see also In re Telik,* 576 F.Supp.2d at 580 (settlement representing 25% of recoverable damages is "well above that in most securities class actions"); *Veeco I,* 2007 WL 4115809, at *11 (settlement representing 23.2% of possible recovery is "squarely within the range of reasonableness") (internal quotations omitted).

> FN18. To achieve these results, Class Members (those who held their shares throughout the Class Period) would have to

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

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

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

VII. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

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

The Plan of Allocation proposed herein has been prepared by Plaintiffs' Lead Counsel utilizing their Damages Expert's report and data concerning causation and damages. The Plan reflects the proposition that the price of FLAG common stock was artificially inflated from the beginning of the '33 Act Class Period on February 11, 2000, and at the beginning of the '34 Act Class Period on March 6, 2000, and through February 12, 2002, but that

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much of the artificial inflation was suddenly eliminated on February 13, 2002 when FLAG made disclosures that at least partially corrected its prior misstatements, and that any remaining artificial inflation was eliminated by April 11, 2002. The Plan reflects the requirements for establishing damages promulgated by *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), and complies with the requirements of the PSLRA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Courts traditionally have used two methods to calculate attorneys' fees in common fund cases: the percentage method, which awards attorneys' fees as a percentage of the common fund created for the benefit of the class; and the lodestar/multiplier or "presumptively reasonable fee" approach, which multiplies the number of hours expended by counsel by the hourly rate normally charged for similar work by attorneys of comparable skill and experience, and enhances the resulting lodestar figure by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999).

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The Second Circuit has held that both the percentage and lodestar/multiplier methods are available to district courts in awarding attorneys' fees in common fund cases. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir.2000). However, as has often and emphatically been noted, the percentage of recovery methodology is considered the "most efficient and logical means" for calculating attorneys' fees. *In re Telik,* 576 F.Supp.2d at 584.

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

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

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

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

Indeed, as this Court wrote in *In re Veeco Instruments* (*"Veeco II"*), there are numerous other common fund cases in this District alone where fees were awarded in the amount of 33 1/3% of the gross settlement fund. *Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115808, at *4 n. 5 (S.D.N.Y. Nov.7, 2007) (*"Veeco II"*) (collecting cases).[FN19]

> FN19. *See also In re Blech Sec. Litig.,* 2002 WL 31720381, at * 1 (S.D.N.Y. Dec.4, 2002) (33.3%); *In re APAC Teleservice, Inc. Sec. Litig.,* 1999 WL 1052004, at *1 (S.D.N.Y. Nov.19, 1999) (33 1/3% of $21 million settlement); *Becher v. Long Island Lighting Co.,* 64 F.Supp.2d 174, 182 (E.D.N.Y.1999) (one-third fee, plus expenses, is "well within the range accepted by courts in this circuit"); *In re Medical X–Ray Film Antitrust Litig.,* 1998 WL 661515, at *2 (E.D.N.Y. Aug.7, 1998) (awarding 33 1/3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

Likewise, courts in other circuits around the country commonly award attorneys' fees equal to or higher than the compensation requested here. "Awards of 30% or more of a settlement fund are not uncommon in § 10(b) common fund cases such as this." *Ressler v. Jacobson,* 149 F.R.D. 651, 655 (M.D.Fla.1992); *see also In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 735 (E.D.Pa.2001) (noting that in a study of 287 settlements ranging

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from less than $1 million to $50 million, "the median turns out to be one-third"). As this Court observed in *In re Telik* (awarding attorneys' fees of 25% of the settlement amount):

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

In re Telik, 576 F.Supp.2d at 587 (additional citations omitted). FN20

FN20. *See also In re Managed Care Litig.,* 2003 WL 22850070, at *2 (S.D.Fla. Oct.24, 2003) (awarding 35.5%).

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

A lodestar analysis begins with the calculation of the lodestar, which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential Sec. Inc. Ltd. Pshps, Litig.,* 985 F.Supp. 410, 414 (S.D.N.Y.1997), Here, Lead Counsel devoted over 45,500 hours to this matter and their lodestar was $20,955,697.50. (Milberg Decl., ¶ 6 and Exh. A.) FN21 Lead Counsel's efforts are described in detail *supra,* and in the accompanying Friedman Declaration. Lead Counsel is also overseeing all aspects of the settlement process, a responsibility that will continue into the coming months.

FN21. In addition, Finkelstein Thompson devoted 46.9 hours to this matter on a fully contingent basis, and their lodestar was $17,590.00, in connection with Lead Counsels' efforts to compel the production of documents from Gibson, Dunn & Crutcher. (Finkelstein Decl. ¶¶ 2, 5 and Exh. 1.) All other law firms that assisted Lead Counsel were foreign firms that may not legally be paid contingently, or, in one instance, an American bankruptcy firm that would not work contingently, and so these fees and expenses were advanced by Lead Counsel and are being treated by Lead Counsel as an expense to Lead Counsel. (Milberg Decl., Exhs. B and C.)

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

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

In a lodestar analysis, the appropriate hourly

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rates are " 'those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience and reputation.' " *Cruz v. Local Union No. 3 of the IBEW,* 34 F.3d 1148, 1159 (2d Cir.1994) (*quoting Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *see also Luciano v. Olsten Corp.,* 109 F.3d 111, 115–16 (2d Cir.1997); *Veeco II,* 2007 WL 4115808, at *9. In complex securities class actions in this Circuit and around the country, courts have repeatedly found rates similar to those charged by Lead Counsel here to be reasonable; indeed, the American Lawyer recently reported that the *median* billing rate for partners at many leading law firms exceeds $900/hour. FN22 The median rates for the firms representing defendants in this case were reported to be $950/hour for Shearman & Sterling and $900/hour for Milbank, Tweed, Hadley & McCloy. And, of course, we know that counsel for the Individual Defendants, Shearman & Sterling, who were paid currently and on a risk-free basis, long ago exhausted the entirety of a $20 million primary layer of insurance on defense costs.

FN22. *Bankruptcy Billing,* The American Lawyer, February 2010, at 44–45.

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

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

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

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

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effective prosecution of this Action.

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

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

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

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

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

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

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

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

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$14.2 million.

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

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

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

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

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

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

If this important public policy is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook. In this case, Lead Counsel

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seeks a fee that is significantly less than its accrued lodestar. As such, public policy considerations favor granting the fee request.

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

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

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

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

In the Milberg and Finkelstein Declarations, counsel have detailed and documented the $1,910,420.76 in expenses that they incurred in connection with this action.[FN23] These expenses are of the type that law firms typically bill to their clients, including photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for foreign counsel, on-line research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel, and other expenses directly related to the prosecution of this Action. All of these expenses are customary and necessary expenses for a complex securities action, and were necessary for Lead Counsel to successfully prosecute this case.

FN23. Of the total expenses set forth in text, only a relatively small amount—$1,165.83—were incurred by Finkelstein Thompson.

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

Finally, the expenses for which reimbursement is sought amount to less than the expense figure of

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$2 million referred to in the Notice, to which no objection was filed.

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

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

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

As Judge Conner wrote in his decision granting class certification, the Lead Plaintiffs "all received and reviewed the pleadings, consulted with [Lead Counsel] on various issues relevant to the lawsuit, produced documents and participated in depositions. Loftin, for example, is intimately familiar with the claims and was uniquely involved in the drafting of the Complaint, particularly with respect to the decision to initially name Verizon as a defendant.... And Coughlin, during his deposition, cogently explained the underlying basis for the litigation." [FN24]

FN24. *In re Flag Telecom,* 245 F.R.D. at 160–63.

*31 The Settlement Notice advised Class Members that application "will also be made for reimbursement to the Lead Plaintiffs for an amount not to exceed $100,000 for Lead Plaintiff Peter T. Loftin and for an amount not to exceed $5,000 for Lead Plaintiff Joseph Coughlin." [FN25]

FN25. Settlement Notice, at 2.

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

Mr. Loftin, who lost over $24 million in FLAG stock, has been actively involved in this litigation since its inception in 2002.[FN26] As set forth in the Loftin Declaration, he reviewed and authorized the various complaints, as well as countless other pleadings, and, incredibly, even assisted in researching and drafting significant parts of the complaint. He consulted regularly with counsel, and insisted on Lead Counsel visiting him at his home in Florida for a full-day in-person briefing. He also traveled from Miami to New York for his deposition, which lasted a full day, as well as a preparation session the day before. He also produced over 4,000 pages of documents from his and his business's files. And, of course, he also sent his in-house counsel to attend several of the mediation sessions in person. In total, Mr. Loftin estimates that he has spent more than four hundred hours on this litigation over the eight years it has been pending. (Loftin Decl., ¶ 17.)

FN26. Mr. Loftin founded and was, for many years, the Chairman and CEO of a domestic long distance phone company named BTI. Today he owns Casa Casuarina, an upscale South Beach, Florida hotel and event location in the former Versace Mansion. Over the course of the Class Period, especially the summer of 2000, he purchased a total of 1,700,000 FLAG shares at various prices, primarily in the range of $15.50 per share. He sold 297,300 of these shares in early April 2001, at prices ranging from approximately $2.72 to $4.02 per share, and held the remainder until FLAG filed for bankruptcy.

Mr. Coughlin responded to Lead Counsel's statutory lead plaintiff notice at the beginning of the case, but because his loss was much smaller than Mr. Loftin's, he did not seek to intervene as an additional Lead Plaintiff and Class Representative until February 2005, in response to threats from the Defendants that they would challenge Mr. Loftin as

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a Class Representative in light of his prior work for BTI.[FN27] Because he became involved significantly later in the case, Mr. Coughlin spent much less time on this matter than did Mr. Loftin, but he still spent a meaningful amount of time.

> FN27. Mr. Coughlin served in the Air Force from 1958 to 1962, and then spent six years with the CIA in cryptographic communications, at times posted overseas in classified locations; both positions required a security clearance. He then spent six years as a facilities analyst at IBM. Prior to retiring he spent 20 years as a court reporter. Mr. Coughlin purchased 250 shares traceable to the IPO at prices just under $31.25 per share on February 23, 2000, and purchased an additional 100 shares on July 3, 2001 for $5.17 per share. He held these shares until FLAG filed for bankruptcy.

In addition to reviewing the complaint and other pleadings and communicating with Lead Counsel, Mr. Coughlin collected his documents for production to the Defendants, and travelled from Florida to New York to sit for a half-day deposition, and also spent time preparing for his deposition the night before. In total, Mr. Coughlin estimates that he has spent approximately twenty hours on this litigation, including travel time. Coughlin Decl., ¶ 9.

XI. CONCLUSION

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

S.D.N.Y.,2010.
In re Flag Telecom Holdings, Ltd. Securities Litigation
Not Reported in F.Supp.2d, 2010 WL 4537550 (S.D.N.Y.)

END OF DOCUMENT

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Westlaw

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Lawrence FOGARAZZO and Carolyn Fogarazzo, Joint Tenants With Rights of Survivorship, Stephen L. Hopkins, and Don Engel on behalf of themselves, and all others similarly situated, Plaintiffs,
v.
LEHMAN BROTHERS, INC., Goldman Sachs & Co., and Morgan Stanley & Co., Inc., Defendants.

No. 03 Civ. 5194(SAS).
Feb. 23, 2011.

Curtis V. Trinko, Esq., Wai K. Chan, Esq., Law Offices of Curtis V. Trinko, LLP, New York, NY, for Plaintiffs.

Gandolfo V. DiBlasi, Esq., Stephanie G. Wheeler, Esq., David E. Swarts, Esq., Sullivan and Cromwell LLP, New York, NY, for Defendant Goldman Sachs.

Peter D. Doyle, Esq., Peter A. Bellacosa, Esq., Lisa V. LeCointe, Esq., Kirkland & Ellis LLP, New York, NY, for Defendant Morgan Stanley.

Sarah L. Cave, Esq., Hughes Hubbard & Reed LLP, New York, NY, for Defendant Lehman Brothers.

MEMORANDUM OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

*1 Lead Plaintiffs brought this securities class action on behalf of a class consisting of all persons who purchased or otherwise acquired RSL Communications, Inc. ("RSL") common stock between April 30, 1999 and December 29, 2000 (the "Class"). Lead Plaintiffs and defendants Morgan Stanley & Co., Inc. ("Morgan Stanley") and Goldman Sachs & Co. ("Goldman Sachs") have agreed to a cash settlement (the "Settlement") in the amount of $6,750,000.00 (the "Settlement Fund"), half of which will be paid by Morgan Stanley and half of which will be paid by Goldman Sachs (the "Settling Defendants" or "Defendants"). Lead Plaintiffs are represented by the Law Offices of Curtis V. Trinko, LLP ("Class Counsel" or "Plaintiffs' Counsel"). Class Counsel now moves, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), for an award of attorneys' fees of $2,250,000.00, which is one-third of the $6.75 million Settlement Fund, plus reimbursement of litigation related expenses of $211,596.69, for a total award of $2,461,596.69. For the following reasons, Class Counsel's motion for attorneys' fees and costs is granted.

I. BACKGROUND

Class Counsel diligently litigated plaintiffs' claims against defendants Morgan Stanley and Goldman Sachs throughout the seven and one-half years of active litigation. Plaintiffs prevailed on defendants' motion to dismiss the amended complaint and on both motions for class certification. Class Counsel conducted substantial merits discovery and obtained expert opinions with regard to the issues of loss causation and damages. In addition, Class Counsel defended the four Lead Plaintiffs at their depositions as well as plaintiffs' loss causation expert, Dr. Paul J. Irvine, at two separate depositions.

During this entire litigation, Class Counsel accrued $4,362,899.50 in legal fees, exclusive of costs.[FN1] This lodestar figure represents 64.64% of the Settlement Fund. Plaintiffs' counsel have acknowledged that there is always a balancing of the interests of Class Counsel in obtaining compensation versus the interests of the Class in realizing a significant return from the settlement of securities class actions. However, even if Plaintiffs' Counsel receives a fee award of one-third of the Settlement Fund, it will only recover 51.6% of the accumulated lodestar expended on this litigation ($2,250,000.00/ $4,362,899.50). Class Counsel's

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request for a fee award of one-third of the Settlement Fund was disclosed in the Notice of Pendency of Settlement sent to prospective Class members. No objections to the requested fees was received from any members of the Class.

FN1. *See* Summary Lodestar Chart, Ex. A to the 1/21/11 Amended Affidavit of Curtis V. Trinko in Support of Lead Plaintiffs' Application for an Award of Attorneys' Fees and Reimbursement of Expenses. The hourly rates set out in the Summary Lodestar Chart are the same rates Class Counsel charges for its services in other complex litigation.

As for requested litigation expenses, $136,690.97 in out-of-pocket expenses were accumulated by Plaintiffs' Counsel, as well as additional contractual obligations owed to others in the amount of $74,905.72, for a total of $211,596.69, which is less than the $300,000 disclosed in the Notice of Pendency of Settlement. No objections to the amount of expenses being sought was received from any members of the Class.

*2 Plaintiffs' Counsel are also seeking awards for the four named Lead Plaintiffs in the aggregate amount of $32,000, to compensate them, in part, for the value of their efforts undertaken on behalf of the Class.[FN2] As set forth in the Declarations of the Four Lead Plaintiffs,[FN3] each Lead Plaintiff described in detail the services that they rendered on behalf of the Class and the hourly rates utilized in the valuation of their services. Based upon these Declarations, counsel seeks Lead Plaintiffs' awards in the following amounts: $10,000 to Don Engel; $10,000 to Stephen Hopkins; $8,000 to Lawrence Fogarazzo; and $ 4,000 to Carolyn Fogarazzo. The amount sought by the Lead Plaintiffs is less than the maximum amount of $40,000 disclosed in the Notice of Pendency of Settlement. No objections to these awards was received from any members of the Class.

FN2. Each Lead Plaintiff devoted services well in excess of the amounts sought.

FN3. Jointly annexed to the Declaration of Curtis V. Trinko in Support of Final Approval of Settlement, Plan of Allocation, Lead Counsels' Application for an Award of Attorneys['] and Expenses, and Lead Plaintiff's Application for Incentive Awards.

II. LEGAL STANDARD

The PSLRA expressly permits courts to award attorneys' fees and costs that represent a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to [a] class," [FN4] "[A] litigant or a lawyer who recovers a common fund 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." [FN5] "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." [FN6] In *Blum v. Stenson,* the Supreme Court recognized that under the "common fund doctrine," a reasonable fee may be based on a percentage of funds bestowed on the class.[FN7] Courts therefore have two methods in which to calculate fees: the "percentage method" and the "lodestar method." [FN8]

FN4. 15 U.S.C. § 78u–4(a)(6).

FN5. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980).

FN6. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000) (citation omitted).

FN7. 465 U.S. 886, 900 n.16 (1984).

FN8. *See Goldberger,* 209 F.3d at 50 ("[W]e hold that both the lodestar and the percentage of the fund methods are available to district judges in calculating

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attorneys' fees in common fund cases.").

Under the percentage method, the court simply awards counsel a reasonable percentage of the recovery as a fee. The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably billed, then multiply that figure by an appropriate hourly rate. The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation. The lodestar method, by contrast, creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement. The Second Circuit therefore encourages district courts to use the lodestar method primarily as a "cross-check" for the percentage method. Any percentage award, however, must still be assessed for reasonableness using the *Goldberger* criteria.[FN9]

FN9. *In re Converse Tech., Inc. Sec. Litig.,* No. 06–CV–1825, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (quotation marks and citations omitted).

"[D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." [FN10] The level of litigation risk and the complexity of the issues presented are important factors in a fee award.[FN11] In fact, courts in this Circuit have held that the level of litigation risk is often the "most important" factor. [FN12]

FN10. *Goldberger,* 209 F.3d at 50 (quotation marks, citation and ellipsis omitted).

FN11. *See, e.g., Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1048–49 (9th Cir.2002).

FN12. *See. e.g., In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 233 (S.D.N.Y.2005) ("The first, and most important, *Goldberger* factor is the risk in pursuing the case.").

*3 Admittedly, "the trend within this circuit after *Goldberger* has been to award attorneys' fees in amounts considerably, less than 30% of common funds in securities class actions, even where there is a substantial contingency risk." [FN13] However, even after *Goldberger,* courts in this Circuit have awarded fees based upon percentages which approximate the contingent fee model.[FN14] Finally, where the total award computed under the percentage method is significantly less than the lodestar figure, a higher percentage may be warranted.[FN15]

FN13. *In re Arakis Energy Corp. Sec. Litig.,* No. 95 CV 3431, 2001 WL 1590512, at *9 (E.D.N.Y. Oct. 31, 2001).

FN14. *See, e.g., Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 504 F.3d 229, 249 (2d Cir.2007) (affirming award equal to thirty percent of a $42.5 million settlement fund); *In re Telik, Inc. Sec. Litig.,* 576 F, Supp.2d 570, 587 n.8 (S.D.N.Y.2008) (citing cases where the awards have been between thirty percent and one-third of the total settlement funds); *Hens v. Clientlogic Operating Corp.,* No. 05–CV–381S, 2010 WL 5490833, at *2 (W.D.N.Y. Dec. 21, 2010) (same).

FN15. *See, e.g., In re Blech Sec. Litig.,* Nos. 94 Civ. 7696, 95 Civ. 6422, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (awarding thirty percent of twelve million

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dollar settlement fund where thirty percent represented a negative multiplier of the lodestar).

III. DISCUSSION

A. Application of the *Goldberger* Factors

Application of the *Goldberger* factors supports the amount of fees requested by Class Counsel. *First,* Class Counsel expended 10,989.60 hours in this litigation. This time was spent, in part, on the following tasks: (1) reviewing and analyzing voluminous publicly filed SEC reports, financial reports, analysts' reports, and press releases concerning Defendants' coverage of RSL; (2) researching the law applicable to the claims and defenses asserted; (3) filing a fact-specific amended complaint; (4) completing discovery for, and defending against, two motions to dismiss; (5) completing discovery for, and pursuing, two motions for class certification; (6) reviewing over six hundred thousand pages of documents produced by Defendants; and (7) conducting fifteen merits depositions and the depositions of two defense expert witnesses, defending Plaintiffs' loss causation expert on two separate occasions, and defending the Lead Plaintiffs at their depositions. *Second,* courts have recognized that, in general, securities actions are highly complex.[FN16] This case is no exception. Here, Plaintiffs alleged that during the specified Class Period, the price of RSL's common stock was artificially inflated as a result of untrue or materially misleading statements and omissions made by Defendants in their equity research reports concerning RSL. Thus, substantial and complex issues arose as to loss causation, Defendants' non-compliance with SEC rules and regulations, damages, and scienter. *Third,* Class Counsel undertook this representation on a contingent-fee basis and has not received, to date, any payment for the legal services provided or any reimbursement of litigation expenses incurred on behalf of the Class. At the outset of this litigation, it was apparent that Lead Plaintiffs faced formidable defenses as to proof of liability and damages. The risk of dismissal and, hence, non-recovery, was a very possible outcome under the PLSRA's heightened pleading standards. Under the circumstances, it was far from certain that any recovery, let alone $6.75 million, would ultimately be obtained. Thus, the litigation risk in this case supports a one-third fee award. *Fourth,* the quality of representation is beyond reproach given Class Counsel's thirty years of experience in prosecuting securities class actions. *Fifth,* the requested fee is reasonable in relation to the settlement. In view of the risks faced and overcome by Class Counsel, the recovery obtained for the Class, and the quality of representation, an award of one-third of the Settlement Fund is appropriate. Finally, with regard to the sixth *Goldberger* factor, "[p]rivate enforcement of the federal securities laws, as is the nature of the action here, is a necessary adjunct to government intervention because neither the SEC nor the Justice Department has sufficient assets to address all forms of securities fraud." [FN17] In sum, all six *Goldberger* factors support the requested fee.

FN16. *See, e.g., In re Metlife Demutualization Litig.,* 689 F.Supp.2d 297, 332 (E.D.N.Y.2010).

FN17. *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 1695, 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007).

B. The Lodestar Cross–Check

*4 "Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a 'cross-check' for a percentage of recovery analysis, counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk assumed by them, the quality of their work, and the result achieved for the class." [FN18] Here, the lodestar figure is $4,362,899.50, which is almost twice the amount of fees requested. Not only is Class Counsel not receiving a multiplier of their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar "cross-check"

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unquestionably supports a percentage fee award of one-third.

FN18. *Id.* at *9,

IV. CONCLUSION

Based upon the submissions of Class Counsel, as well as the argument presented at the Fairness Hearing, the Court hereby awards Class Counsel attorneys' fees equal to one-third of the Settlement Fund ($2,250,000.00). This award recognizes the extensive level of services devoted to the Class over the past seven and one-half years of litigation, balanced against the interests of the Class in realizing a fair, reasonable and adequate outcome from this matter. In addition, the Court finds that such an award is fair and reasonable to the Class and Class Counsel given the results achieved and the nearly $4.4 million lodestar figure. Lead Plaintiffs' Counsel are also entitled to $211,596.69 in unreimbursed litigation expenses, for an aggregate award of $2,461,596.69. Furthermore, the Court awards the Lead Plaintiffs the aggregate amount of $32,000.00 from the Settlement Fund, in recognition of the value of their services expended on behalf of the Class. These awards are to be allocated in the manner set forth above.[FN19]

FN19. For details regarding the terms of the Settlement and these awards, see Final Judgment and Order of Dismissal with Prejudice with Regard to Settling Defendants.

In sum, based upon materials submitted to the Court and the oral argument at the January 31, 2011 Fairness Hearing, I find that the proposed Settlement is fair, reasonable and adequate, as is the proposed Plan of Allocation. This Court hereby approves both the Settlement between the Class and the Settling Defendants as well as the Proposed Plan of Allocation. Also approved is Lead Plaintiffs' request for incentive awards totaling $32,000.00 and Class Counsel's request for attorneys' fees and costs in the amount of $2,461,596.69.

SO ORDERED:

S.D.N.Y.,2011.

Fogarazzo v. Lehman Bros., Inc.
Not Reported in F.Supp.2d, 2011 WL 671745 (S.D.N.Y.), Fed. Sec. L. Rep. P 96,207

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United States District Court,
E.D. New York.
In re GILAT SATELLITE NETWORKS, LTD.

No. CV-02-1510.
April 19, 2007.

Joseph P. Cyr, Andrew M. Behrman, Lovells, New York, NY, Thomas Bush, Lovells, Chicago, IL, for Gilat Satellite Networks, Ltd.

MEMORANDUM OPINION AND ORDER
SIFTON, Senior Judge.

***1** On January 17, 2003, eleven class actions alleging violations of federal securities laws by Defendants Gilat Satellite Networks, Ltd. ("Gilat"), Yoel Gat, and Yoav Leibovitch (collectively "Defendants") were consolidated in this Court and Leumi PIA Sector Fund, Leumi PIA World Fund, and Leumi PIA Export Fund were appointed Lead Plaintiffs.[FN1] On May 13, 2003, Lead Plaintiffs filed a Consolidated Class Action Complaint (the "Original Consolidated Complaint"), alleging against all Defendants violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated under the Exchange Act, 17 C.F.R. § 240j.10b-5. The complaint also alleges against Gat and Leibovitch a violation of Section 20(a) of the Exchange Act. Presently before the Court are the parties' joint motions for (1) certification of a settlement class; (2) preliminary approval of a proposed Settlement Agreement; (3) preliminary approval of a Plan of Allocation; (4) approval of the proposed manner and form of Notice to the settlement class and of the proposed Proof of Claim form; and (5) scheduling of a date for a Fairness Hearing to consider final approval of the settlement.[FN2] For the reasons set forth below, the motions are granted.

FN1. In 2005, while this case was pending, Leumi PIA, which owns and manages the three mutual funds referred to herein, was sold to Harel Insurance Investments Ltd. and is now known as "Harel-PIA Group." The names of the individual funds have also changed. To avoid confusion, the parties continue to refer to Lead Plaintiffs by their prior names, except where noted.

On February 12, 2003, Glancy Binkow & Goldberg LLP, Bernstein Liebhard & Lifshitz, LLP, and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. were appointed co-lead counsel for Lead Plaintiffs.

FN2. In December, 2006, the parties filed an identical set of motions on the basis of their original Settlement Agreement. On January 4, 2007, this Court granted the parties' previous motion for certification of the settlement class but denied without prejudice the motions for preliminary approval of the Settlement Agreement and the Plan of Allocation. The motions for approval of Notice and to schedule a date for the Fairness Hearing were denied as premature. As discussed in more detail below, the parties have filed the present motions on the basis of their Amended Settlement Agreement.

BACKGROUND

The following facts are taken from the parties' submissions in connection with this motion, as well as this Court's previous opinions in this case. For purposes of these motions, they are not disputed.

Gilat's Business

Gilat is a provider of products and services for satellite-based communications products and services, including Very Small Aperture Terminal ("VSAT") satellite dishes. During the relevant time periods, February 10, 2000 through May 31, 2002, Yoel Gat was Gilat's Chief Executive Officer and

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Yoav Leibovitch was Gilat's Chief Financial Officer.

In January 2000, Gilat formed a joint venture, StarBand, with Microsoft and EchoStar Communications, to provide internet access via satellite dishes. Customers would purchase a VSAT manufactured by Gilat and then pay a monthly fee to receive internet access. The StarBand service was made available to the public in November 2000.

During the relevant time periods, Gilat common stock was traded on the NASDAQ National Market System ("NASDAQ"). From 1997 to 2000, Gilat reported substantial growth in revenues and its stock rose significantly. On February 28, 2000, Gilat stock closed on the NASDAQ at $160.50 a share.

Litigation History and Plaintiff's Complaint

Defendants moved to dismiss the Original Consolidated Complaint on July 15, 2003, and subsequently withdrew that motion to dismiss so that the parties could engage in mediation. After mediation proved unsuccessful, Lead Plaintiffs filed an Amended Consolidated Class Action Complaint (the "Amended Consolidated Complaint") on August 25, 2004 which Defendants moved to dismiss on October 29, 2004. That motion to dismiss was granted in part and denied in part in a Memorandum Opinion and Order dated September 19, 2005.

*2 The portion of the Amended Consolidated Complaint which survived Defendants' motion to dismiss, again alleges that the Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and that defendants Gat and Leibovitch violated Section 20(a) of the Exchange Act. More specifically, Lead Plaintiffs allege that Defendants artificially inflated Gilat's financial results through deceptive financial statements which overstated Gilat's revenues. Although Defendants purported to follow Generally Accepted Accounting Principles ("GAAP"),[FN3] they allegedly inflated reported revenues in press statements and Securities and Exchange Commission ("SEC") filings through premature revenue recognition, recording revenue from sales in excess of actual purchases, recognizing revenue from sales prior to delivering the product to customers, recognizing revenue from sales to uncreditworthy customers, recording goods placed on consignment as sold, and engaged in related-party transactions. Lead Plaintiffs further allege that the defendants misrepresented the performance of StarBand and the market for its services, claiming significant success while there were allegedly serious problems with the service and in signing up new subscribers. The Amended Consolidated Complaint also alleges that Defendants failed to disclose that Echostar Communications had not marketed Starband as promised and that Starband's lenders had withdrawn a $37 million line of credit and that the Defendants falsely stated that Gilat's total financial exposure to Starband would not exceed $75 million. According to Lead Plaintiffs, as a result of these materially false and misleading statements, made between February 10, 2000 and May 31, 2002 (the "Class Period"),[FN4] they and other class members suffered damages because they purchased or otherwise acquired Gilat securities at prices which were artificially inflated.

FN3. According to the complaint, "GAAP are those principles recognized by the SEC and the accounting profession as the conventions, rules, and procedures necessary to define proper accounting practice at a particular time." Amended Consolidated Complaint, ¶ 192. 17 C.F.R. § 210.4-01 states that financial statements filed with the SEC that are not in accordance with GAAP are presumed to be misleading or inaccurate.

FN4. As discussed below, the initial alleged fraud is said to have occurred on February 9, 2000 after the close of the

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markets. Accordingly, the Class Period begins on February 10.

After this Court's ruling on the motion to dismiss, the parties engaged in additional mediation before retired California Superior Court Judge Daniel Weinstein on June 26 and June 27, 2006. As a result of that mediation, the parties reached an agreement on the terms of the settlement.

On December 1, 2006, the parties moved for (1) certification of a settlement class; (2) preliminary approval of a proposed Settlement Agreement; (3) approval of proposed Plan of Allocation; (4) approval of the proposed manner and form of Notice to the settlement class and of the proposed Proof of Claim form; and (5) scheduling of a date for a Fairness Hearing to consider final approval of the settlement. On January 4, 2007, this Court granted that motion in part and denied it in part. *See In re Gilat Satellite Networks, Ltd.,* 2005 WL 2277476 (E.D.N.Y.2005). Specifically, the motion to certify the settlement class was granted, but the motions to preliminarily approve the Settlement Agreement and the Plan of Allocation were denied without prejudice; the Settlement Agreement and Plan of Allocation failed to sufficiently set forth factual bases for presumptions about the timing of alleged disclosures, [FN5] contained internal inconsistencies regarding dates and recovery amounts, and provided no explanation for the parties' decision to include a $5 minimum claim amount. The motions for approval of the proposed Notice and for scheduling of a date for a Fairness Hearing were also denied as premature. [FN6]

FN5. The timing of the alleged disclosures factors into the amount of inflation remaining in the stock on a particular date, as described below.

FN6. In denying those motions, the Court also alerted the parties to minor typographical errors and aspects of the Notice which required clarification, which the parties have addressed in the Amended Notice. In oral arguments on March 15, 2007, the Court noted additional corrections which were required, which the parties have also addressed.

***3** The parties then revised the settlement in light of this Court's ruling [FN7] and now move for the same relief they sought earlier.[FN8]

FN7. Those aspects of the Amended Settlement Agreement which address the concerns expressed by this Court are noted below.

FN8. Although this Court previously granted the motion for certification of a settlement class, the parties revised the class definition slightly in amending the settlement and thus move again for certification.

Amended Settlement Agreement

I. Members of the Class & Identity of Lead Plaintiffs

According to the Amended Settlement Agreement, the Class consists of "all persons and entities who purchased or otherwise acquired Gilat common stock between February 10, 2000 and May 31, 2002, inclusive." [FN9] Amended Stipulation and Agreement of Settlement, ¶ 1(c) ("Amended Settlement").

FN9. In the Plan of Allocation, the parties note that:

> Common stock (and other securities) may be acquired by means other than purchase on the open market. Examples of other methods of acquisition include acquiring stock through by exercising warrants or stock options, or acquiring stock through an employer stock distribution.

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Amended Notice of Proposed Settlement, n. 1 ("Amended Notice").

> Excluded from the Class are Defendants, members of the immediate family of each of Defendants, any person, firm, trust, corporation, officer, director, or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party. "Related to or affiliated with" means all companies, subsidiaries, joint ventures, joint subsidiaries, or other entities controlled by any Defendant, or any entity that is or was under common corporate ownership or control with any Defendant.
> *Id.*

Lead Plaintiffs in this case are three mutual funds, managed by Harel-PIA Group, Israel's longest established mutual fund management company, representing more the $3 billion in assets. Harel-PIA Group is owned by Harel Insurance Investments Ltd., a publically traded Israeli insurance company. The three funds who serve as Lead Plaintiffs manage between $7 million and $17.5 million in assets each.

None of these three funds owned Gilat stock at the beginning of the Class Period and they each purchased and sold shares during several of the time periods described in the Plan of Allocation below.[FN10] Exhibit A annexed to the Declaration of Michael Civer (filed with the December 2006 motion) reflects that Leumi PIA World Fund purchased 87,950 shares of Gilat stock during periods 1, 3 and 4 and sold stock during periods 1, 3 and 4; the fund sold all its stock before the end of the Class Period. Civer Declaration, ¶ 6, Exhibit A. Leumi PIA Export Fund purchased 11,000 shares of Gilat stock during period 1, sold 4,000 shares during period 1 and held the remainder until after the end of period 5. *Id.* Leumi PIA Sector Fund purchased 6,000 shares during period 1 and sold all of its shares during period 3. *Id.*[FN11] Lead Plaintiffs will not receive any compensation or recovery under the settlement for acting as Lead Plaintiffs.

FN10. The time periods, detailed below, are (1) February 10, 2000 through March 9, 2001 at 2:40 P.M.; (2) March 9, 2001 after 2:40 P.M. through March 11, 2001; (3) March 12, 2001 through October 2, 2001; (4) October 3, 2001 through May 31, 2002; and (5) the 90 period after the end of the Class Period, beginning May 31, 2002 and ending August 28, 2002.

FN11. On the basis of the damages estimated in the Plan of Allocation filed with the December 2006 motion, Lead Plaintiffs estimated that the total combined recognized losses for the three funds would total $389,7000, though the actual recovery under the settlement will depend on the ratio of their recognized claims as compared to all other recognized claims, and is likely to be significantly lower. Lead Plaintiff's have not submitted a revised estimate with their current motion.

II. *Released Parties*

Under the terms of the Settlement Agreement, the "Released Parties" are:

> any and all of Defendants and their respective present and former affiliates, predecessors, successors, and assigns, and each of their respective family members, heirs, executors, and administrators, and any corporate entity affiliated with any of the Defendants, including, but not limited to, Gilat, and its presents and former officers, directors, employees, partners, principals, trustees, attorneys, auditors, accountants, investment bankers, consultants, agents, insurers and co-insurers and each of their respective heirs, executors, administrators, predecessors, successors (including, but not limited to, successors in bankruptcy) and assigns.

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*4 Amended Settlement, ¶ 1(q).

III. *Claims Administrator*

Lead Plaintiffs' counsel have proposed Garden City Group, Inc. ("GCG") as their Claims Administrator to provide notice and process claims. GCG has been in the business of administering class action settlements for twenty years and has administered hundreds of class action settlements, including several well-known securities settlements. First Affidavit of Shandarese Garr, ¶ 2-3 ("Garr First Affidavit") (attached to December 2006 motion).[FN12] The firm has experience handling international aspects of class action settlements, and it has in the past provided such services as toll-free numbers and websites which accommodate non-English speakers. *Id.,* ¶ 6. The firm strives to complete all work and provide final reports within six months of the claims-filing deadline and sees no reason why it could not adhere to that timeline in this case. *Id.,* ¶ 8.

FN12. The securities class action settlements administered by GCG include *Worldcom Securities Litigation* and *Nortel Networks Corp. Securities Litigation.*

Lead Plaintiffs' counsel selected GCG after reviewing the available options. All three firms have had favorable experiences with GCG in prior securities settlements and have found that "GCG provides professional and high quality work, at competitive rates." Declaration of Daniel Sommers, ¶ 8 ("Sommers Declaration") (attached to December 2006 motion).[FN13]

FN13. The parties note that while GCG's rates are "not necessarily the lowest among claims administrators," they are reasonable and justified by the quality of the work. GCG has also submitted a document listing "Standard Hourly Billing Rates," though no estimated total cost for their services in this matter has been provided. Garr First Affidavit, Exhibit A.

IV. *Settlement Fund*

Under the Settlement Agreement, Defendants have agreed to pay $20 million to the Class ("Gross Settlement Fund"), in exchange for release of all claims "arising out of, based upon or related to the purchase of Gilat common stock during the Class Period and that facts, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act that were alleged in Action ." Amended Settlement, ¶ 1(r), 5(a), 5(b). After accounting for (1) any taxes on the income from the Settlement Fund, (ii) the notice and administrative costs of settlement, (iii) attorneys' fees and expenses awarded by this Court, and (iv) additional administrative expenses, the "Net Settlement Fund" will be distributed according to the Plan of Allocation among Class members who do not opt-out of the settlement and who submit valid proofs of claim. *Id.,* ¶ 7, 13-16.

Under the Settlement Agreement, Lead Plaintiffs' counsel may expend, without further approval from the Court, up to $300,000 from the Gross Settlement Fund to pay the reasonable costs and expenses associated with identifying Class members, publishing, printing and mailing notice and the administrative fees charged by the Claims Administrator in connection with providing notice and processing submitted claims. *Id.,* ¶ 8. Lead Plaintiffs' counsel will also apply to the Court for an award of attorneys fees of up to 30% of the Gross Settlement Amount and reimbursement of expenses, also payable from the Gross Settlement Amount; these fees and expenses are to be allocated among counsel in proportion to their respective contributions to the prosecution and resolution of this suit. *Id.,* ¶ 9. According to Lead Plaintiffs, expenses of approximately $600,000 have been incurred to date. Amended Notice of Proposed Settlement, ¶ 8 ("Amended Notice").

V. Amended Plan of Allocation

*5 The Amended Plan of Allocation proposed by the Lead Plaintiffs is set out in the Amended Notice of Proposed Settlement and was prepared

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with the assistance of a damages consultant, Michael Marek, CFA. *See* Declaration of Michael Marek.[FN14] The Plan of Allocation "reflects the Lead Plaintiffs' allegations that the price of Gilat's common stock was inflated artificially during the Class Period." Amended Notice, ¶ 38. According to Lead Plaintiffs, the artificial inflation had begun by February 10, 2000 and Gilat's stock remained inflated throughout the Class Period, until May 31, 2002. *Id.* However, at certain times during the Class Period, Gilat made disclosures which partially revealed the alleged fraud and caused the stock price to fall, thereby reducing the amount of artificial inflation caused by the allegedly false and misleading statements. Accordingly, the Plan of Allocation identifies five different time periods and allocates damages on the basis of the amount of artificial inflation remaining in the stock price during each of these periods. "Each Authorized Claimant shall be allocated a pro rata share of the Net Settlement Fund based on his, her or its Recognized Claim as compared to the total Recognized Claims of all Authorized Claimants." *Id.,* ¶ 41.

FN14. The Plan of Allocation "is not a necessary term" of the Settlement Agreement and "[r]eversal of any plan of allocation approved by the Court shall not constitute grounds for terminating the Settlement and shall not act to terminate the Settlement." Amended Settlement, ¶ 14.

1) Time Period 1: February 10, 2000-March 9, 2001 at 2:40 PM

According to the Amended Consolidated Complaint, after the close of the markets on February 9, 2000, Bloomberg reported on comments made by Gat at a conference regarding StarBand's business prospects which were "materially false and misleading." Amended Consolidated Complaint, ¶¶ 66-67; see also Marek Declaration, ¶ 5. Accordingly, the relevant Class Period begins on February 10, the first trading day after the allegedly false statements.[FN15]

FN15. The parties revised this date from February 9 to February 10 in response to this Court's concerns about the relationship between the timing of the disclosure and the beginning of the Class Period.

"The first alleged partial disclosure of fraud occurred on March 9, 2001, when Defendants revealed that a previously announced initial public offering of StarBand stock would not proceed." Amended Notice, ¶ 38. According to the parties' damages consultant, the disclosure was made at 2:40 P.M. EST. Marek Declaration, ¶ 7. For stock purchased before 2:40 P.M. on March 9, 2001 the damages consultant concluded that the price of Gilat stock was inflated by $16.62 per share.[FN16] Therefore

FN16. The parties included this revised time and date and detail about the timing of the disclosure in response to this Court's concerns regarding a factual basis for the Plan's presumptions.

for common stock purchased prior to 2:40 p.m. EST on March 9, 2001 and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $16.62.[FN17] For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.[FN18]

FN17. The Recognized Loss is "a calculation of a particular Authorized Claimant's losses that are recognized as compensable in some measure under the Settlement." Notice, ¶ 37.

FN18. The calculation of loss is set forth in more detail below.

Amended Notice, ¶ 38. Since some Class Members will be unable to prove the time at which

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they purchased their Gilat stock on that day, the stock price of $32.875 will be used as a proxy under the Plan, since $32.875 was the price per share of the last trade prior to the 2:40 PM disclosure. Trades at or above $32.875 will be deemed to have occurred prior to 2:40 PM and trades below that amount will be deemed to have occurred after 2:40 PM. *Id.*, n. 6.[FN19]

FN19. According to the damages consultant, 99% of trades above $32.875 were made prior to 2:40 PM. Marek Declaration, ¶ 10.

2) Time Period 2: March 9, 2001 after 2:40 P.M.-March 11, 2001 [FN20]

FN20. There was no trading on March 10 or March 11.

***6** Gilat's stock price fell on March 9 after the disclosure at 2:40 P.M. and, according to the damages consultant, $1.19 of the decline was attributable to the StarBand announcement of March 9, leaving $15.43 of artificial inflation in the stock. Amended Notice, ¶ 38.

Accordingly, for purchases after 2:40 p.m. EST on March 9, 2001 but prior to March 12, 2001, and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $15.43. For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.

Id.

3) Time Period 3: March 12, 2001-October 2, 2001

According to Lead Plaintiffs, the alleged fraud was further partially revealed on March 12, 2001, prior to the opening of the market,[FN21] "when Defendants announced downwardly-revised earnings guidelines for Gilat," leading to a further decline in Gilat's stock price, $13.10 of which was attributable to that disclosure; as a result, Gilat's stock price after the disclosure was inflated by $2.33. *Id.*

FN21. The press release disclosing this information was at 8:57 A.M. EST. Marek Declaration, ¶ 12. The parties included this information in response to this Court's concerns regarding a factual basis for the Plan's presumptions.

Accordingly, for purchases on or after March 12, 2001 but before October 3, 2001 and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $2.33. For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.

Id.

4) Time Period 4: October 3, 2001-May 31, 2002

According to Lead Plaintiffs, Defendants made additional disclosures on October 2, 2001, after the close of the markets,[FN22] announcing that Gilat would take "tens of millions of dollars in charges and make an additional bad debt reserve of $10 million." *Id.* After this disclosure, the remaining $2.33 in inflation was removed from the stock. However, the disclosure allegedly contained an additional misstatement which caused a new inflation of $0.30. *Id.*

FN22. The press release disclosing this information was at 5:53 P.M. EST. Marek Declaration, ¶ 15. The parties included this information about the timing of the disclosure in response to this Court's concerns regarding a factual basis for the Plan's presumptions.

Accordingly, for common stock purchased on or after October 3, 2001 but on or before May 31, 2002, and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $0.30.[FN23] For

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stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.

FN23. In the original Plan of Allocation, the maximum Recognized Loss for this period was 25% of the purchase price. The parties have changed this to $0.30 based on the damages consultant's revised measurement. Marek Declaration, ¶ 19.

Id.

5) Time Period 5: May 31, 2002-August 28, 2002

According to Lead Plaintiffs, the final disclosure occurred on May 31, 2002, [FN24] when Defendants filed a Form 20F with the S.E.C. which announced "increased reserves for uncollectible accounts receivables." *Id.*[FN25] Accordingly, "no purchases after this date are recognized under the Plan of Allocation." *Id.* In addition, the Plan of Allocation reflects a limitation on damages in securities cases imposed under the Private Securities Litigation Reform Act ("PSLRA"), limiting recovery for Class Members who sold after the close of the Class Period, namely May 31, 2002.[FN26] See 15 U.S.C. § 78u-4. Under the Plan, recovery on stock sold between May 31, 2002 and August 28, 2002 may be no greater than the purchase price of the stock minus the average trading price of the stock between May 31, 2002 and the date of sale. Recovery for stock sold after August 28, 2002 may be not exceed the purchase price of the stock minus the 90-day mean trading price of $0.95. *Id.*, n. 8.

FN24. In the original Plan of Allocation, the parties listed May 29, 2002 as the date of final disclosure. They have corrected the date on the basis of the investigation of the damages expert. Marek Declaration, ¶ 18. In so doing, the parties have also corrected inconsistencies in the Plan dates identified by the Court.

FN25. The time of the filing is not available, but since such filings are normally submitted after the close of business and the price decline on Gilat stock did not occur until the next trading day, the damages consultant concluded that the disclosure occurred after the close of trading on May 31. *Id.*, ¶ 19.

FN26. Under the PSLRA, plaintiff's damages are limited in securities class actions by the mean stock trading price for the 90-day period (the 'lookback' period) subsequent to the corrective disclosure-recovery cannot be greater than the purchase price minus the mean trading price during the lookback period. Similarly, if a party sold the stock during that same 90-day period, the damages may not exceed the difference between the purchase price and the mean trading price of the security from the date of disclosure until the date of sale.

*7 The Plan of Allocation also provides that transactions resulting in recognized gains will be excluded from the calculation of the net Recognized Claim; the costs/proceeds associated with securities purchased or sold by reason of having exercised an option or warrant shall be incorporated into the price accordingly; shares originally sold short shall have a Recognized Claim of $0; and no payments will be made on a claim where the potential distribution is less than $5.00. Amended Notice, ¶ 40.

In summary, the Plan of Allocation establishes the following claim calculations. For authorized claimants who purchased stock between February 10, 2000 and March 9, 2001 at 2:40 P.M., inclusive, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $16.62 per share or (b) the difference between the purchase price per share and $0.95;

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(2) for stock sold between February 10, 2000 and 2:40 P.M. on March 9, 2001, inclusive, there shall be no Recognized Loss;

(3) for stock sold after March 9, 2001 at 2:40 P.M. but prior to March 12, 2001, the Recognized Loss shall be the lesser of (a) $1.19 per share or (b) the difference between the purchase price per share and the sales price per share;

(4) for stock sold between March 12, 2001 and October 2, 2001, inclusive, the Recognized Loss shall be the lesser of (a) $14.29 per share or (b) the difference between the purchase price per share and the sales price per share; FN27

FN27. The parties have corrected the original Plan which inconsistently calculated this amount as $14.29 in some places and $14.28 in others.

(5) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $16.32 per share or (b) the difference between the purchase price per share and the sales price per share;

(6) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $16.62 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(a).

For authorized claimants who purchased stock on after 2:40 P.M. on March 9, 2001 but before March 12, 2001, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $15.43 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold on March 9, 2001, there shall be no Recognized Loss;

(3) for stock sold between March 12, 2001 and October 2, 2001, inclusive, the Recognized Loss shall be the lesser of (a) $13.10 per share FN28 or (b) the difference between the purchase price per share and the sales price per share;

FN28. The parties have corrected the original Plan which inconsistently calculated this amount as $13.10 in some places and $13.09 in others.

(4) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $15.13 per share or (b) the difference between the purchase price per share and the sales price per share;

*8 (5) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $15.43 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(b).

For authorized claimants who purchased stock between March 12, 2001 and October 2, 2001, inclusive, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $2.33 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold between March 12, 2001 and October 2, 2001, inclusive, there shall be no Recognized Loss;

(3) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $2.03 per share or (b) the difference between the purchase price per share and

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the sales price per share;

(4) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $2.33 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(c).

For authorized claimants who purchased stock between October 3, 2001 and May 31, 2002, inclusive, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $0.30 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold between October 3, 2001 and May 31, 2002, inclusive, there shall be no Recognized Loss;

(3) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $0.30 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(d).

DISCUSSION

Certification of Amended Settlement Class

In accordance with Federal Rule of Civil Procedure 23, this Court previously approved the settlement class in the January 4, 2007 Memorandum Opinion and Order, holding that the class met the numerosity, commonality, typicality requirements, that the representation was adequate and that common questions of law and fact predominate over individual questions.[FN29] The parties now move for an order certifying the amended class. Since the only material changes to the class definition are the corrected dates of the Class Period (from February 10, 2000 until May 31, 2002), I certify the amended settlement class for the same reasons as set out in my prior Order.

FN29. Federal Rule of Civil Procedure 23(a) sets forth the requirements for class certification:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (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.
>
> In addition, for a class action to be maintainable, it must satisfy one of the subsections of Federal Rule of Civil Procedure 23(b). In the present action, Rule 23(b)(3) is applicable. Rule 23(b)(3) requires that a court find:
>
> 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.

Preliminary Approval of Settlement & Plan of Allocation

***9** Preliminary approval of a proposed settlement is appropriate where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies (such as unduly preferential treatment of class representatives or of

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segments of the class, or excessive compensation for attorneys), and where the settlement appears to fall within the range of possible approval. Manual for Complex Litig. § 30.41; *In re Med. X-Ray Film Antitrust Litig.*, at *6.

Addressing the Court's previously expressed concerns, the Amended Plan of Allocation sets forth factual bases for the times and dates of the alleged disclosures by Defendants and revises the beginning and ending dates of the five time periods accordingly. *See* Marek Declaration. Further, using the stock price as of 2:40 P.M. on March 9, 2001, as a proxy for the time of purchase and sale is a reasonable and workable solution to the problem of determining when the stock was traded on that date. *See In re American Bank Note Holographics, Inc.*, 127 F.Supp.2d 418, 429-30 (S.D.N.Y.2001) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel). In addition, the parties' have adequately responded to this Court's concern regarding the minimum claim amount. The Plan states that "no cash payments will be made on a Recognized Claim where the potential distribution amount is less than $5.00." Amended Notice, ¶ 40(e).[FN30] As noted by the parties, *de minimus* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds, often at $10. *See* Second Garr Affidavit (attached to the current motion); *In re Global Crossing Securities and ERISA Litigation,* 225 F.R.D. 436, 463 (S.D.N.Y.2004) (approving a $10 threshold and noting that "[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief"). In this case, the parties have agreed to a $5 threshold, which is reasonable to "preserve the settlement fund from excessive and unnecessary expenses in the overall interests of the class as a whole." *In re Global Crossing Securities and ERISA Litigation,* 225 F.R.D. at 463. Under the Amended Settlement, those class members with such *de minimus* claims may choose to opt out from the class as set forth in the Amended Notice.[FN31]

FN30. The Court's understanding of this clause is that claims which, under the optimal distribution scenario, are worth less than $5 will not be paid out. However, claims which are potentially worth more than $5 but, after the allocations have been determined are worth less in practice, will be paid out.

FN31. The parties have also corrected the typographical errors and confusing aspects of the Notice which I noted in my previous opinion and at oral arguments on March 15, 2007.

As I explained in my January 4, 2007 Opinion, with these changes, the Settlement Agreement meets the standards required for preliminary approval. The proposed settlement here does not appear to be collusive, given the lengthy negotiations surrounding it and the involvement of a third-party mediator with experience in similar types of actions in establishing the settlement framework. Weinstein Declaration, ¶ 1, 7; *see In re Indep. Energy Holdings PLC,* 2003 WL 22244676, at *4 (S.D.N.Y.2003) ("the fact that 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"). Judge Weinstein has stated that "each party was ably and aggressively represented in [the] negotiations." Weinstein Declaration, ¶ 6. He has further stated that the parties prepared detailed mediation briefs detailing the facts, law and damages as they saw them and that he "can attest to vigorous, thorough and reasonable negotiations, and to the arms-length nature of the mediation process," which led to a settlement that was "fair and reasonable." *Id.*, ¶ 8.

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While Lead Plaintiffs' counsel has indicated the fees it intends to request from the Court should the settlement be approved, the settlement explicitly provides that any order relating to the application for fees "shall not operate to terminate or cancel the Stipulation or the Settlement." Amended Settlement, ¶ 9. In addition, there is no unduly preferential treatment to class representatives, who will receive no additional compensation from the settlement for their role as Lead Plaintiffs.

***10** Further, in terms of the overall fairness, adequacy, and reasonableness of the settlement, a full fairness analysis is unnecessary at this stage; preliminary approval is appropriate where a proposed settlement is merely within the range of possible approval. I note, however, that the factors to be considered in such an analysis 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 to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974). Clearly, some of these factors, particularly the reaction of the class to the settlement, are impossible to weigh prior to notice and a hearing.

At this stage, brief consideration of these factors leads to the conclusion that the proposed relief awarded to Class Members under the Amended Settlement Agreement and Amended Plan of Allocation is within the range of possible approval. Securities class actions are generally complex and expensive to prosecute. *See In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 283 (S.D.N.Y.1999) (Proof of damages is "particularly risky ... in commodity price manipulation cases"). In this case, the costs of litigating are anticipated to be "extremely high," since both Gilat and the companies with which Gilat did business under the allegedly fraudulent scheme are located overseas, which will increase the cost and complexity of discovery. First Memorandum in Support, P.12; *see Schwartz v. Novo Industri A/S,* 119 F.R.D. 359, 363 (S.D.N.Y.1988) (weighing the complications of discovery with a foreign defendant in favor of settlement). In addition, the parties state that if the case were litigated and Plaintiffs' prevailed, "Defendants certainly would ... appeal[ ] the verdict," adding further delay and expense. First Memorandum in Support, P.12; *see In re Am. Bank Note Holographics, Inc.,* 127 F.Supp.2d 418, 425 (S.D.N.Y.2001) ("Add on time for a trial and appeals, and the class would have seen no recovery for years. Class counsel properly considered this factor as well"). The parties have also spent significant time investigating the legal and factual issues in this case and appear to be well informed as to the operative facts of this case, which is already four years old. Although little formal discovery has been completed, Lead Plaintiffs have interviewed several former employees of Gilat and obtained a number of internal documents, and both parties have conducted "extensive research" in connection with their briefings on the Defendants' motion to dismiss and in preparation for mediation. First Memorandum in Support, P.13; Amended Consolidated Complaint, ¶ ¶ 42-51; Weinstein Declaration, ¶¶ 3, 6. As for the risks of establishing liability and damages, they are considerable in this case. Lead Plaintiffs will have to establish that the Defendants acted with a culpable state of mind, "a difficult burden to meet," *Adair v. Bristol Tech. Sys., Inc.,* 1999 WL 1037878, at *2 (S.D.N.Y.1999), especially in this case where, apparently, neither the individual defendants nor any other Gilat executive profited from their Gilat investments, creating substantial difficulty in establishing a motive. In addition, while Lead Plaintiffs allege that the most significant stock decline, which occurred on March 12, 2001, was

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related to Gilat's financial announcement of that day, Defendants "vigorously dispute this" and claim instead that the stock decline was related to prior announcements and, moreover, that the announcement of March 12 did not reveal any fraud. First Memorandum in Support, P.14. Accordingly, it is highly uncertain whether Lead Plaintiffs will be able to demonstrate loss causation related to the March 12 announcement, which would impact the vast majority of the damages allegedly suffered by the Class. Additionally, at trial, Defendants would likely introduce their own expert to contest Lead Plaintiffs' allegations as to the causes of the stock price declines on the other dates as well. Accordingly, although Lead Plaintiff's counsel appears capable of litigating this case, there are obvious doubts as to the merits of the case that may make it difficult for them to do so. The relationship of the settlement fund to the best possible recovery or the potential recovery in light of all the risks of litigation also weighs in favor of approving the settlement. As stated above, Defendants have agreed to contribute $20 million to the Gross Settlement Fund; after attorney's fees and other costs associated with this action, the Net Settlement Fund will likely be in the range of $12 million to $13 million. Though the parties have not provided the Court with an estimate of the total potential recovery should the case go to trial, given the risks involved in proving liability and damages, were this case to proceed to trial there is a significant possibility that the Class would recover nothing. Finally, the parties have provided a sufficient factual basis for the time periods and damages amounts specified in the Amended Plan of Allocation and established a reasonable formula for allocating recovery to Class Members on the basis of each Class Member's injury.[FN32][FN33] Given the risks and costs involving in litigating this matter, and the reasonableness of the allocation formula, the relief awarded to Class members under the Amended Settlement Agreement and the Amended Plan of Allocation is within the range of possible approval required for preliminary approval. Accordingly, preliminary approval of the Amended Plan of Allocation and Amended Settlement Agreement is granted.

FN32. The parties have also submitted to the Court, under seal, the Supplemental Agreement referred to in § 30 of the Amended Settlement Agreement regarding the conditions under which Defendants may terminate the Settlement if Class Members who purchased in excess of a certain number of shares exclude themselves from the Class. The Court has reviewed the agreement and finds it reasonable.

FN33. The Plan applies the PSLRA's 90-day 'lookback' period for averaging the sales price only to sales made after the final disclosure. While this creates a somewhat inconsistent scheme, it does not appear unreasonable for the purposes of preliminary approval, especially considering the fact that the PSLRA does not apply to settlements. *See In re Veritas Software Corp. Securities Litigation,* 2005 WL 3096079, at *10 (N.D.Cal.2005). Similarly, the Plan may allow for some overcompensation of those Claimants who sold stock immediately after disclosure but before the entire amount of deflation had gone out of the stock. Given the complexity in determining the point after which deflation was fully accounted for, the Plan of Allocation reasonably caps recovery at Marek's estimated amount of deflation, even though that may allow for isolated cases of overcompensation. In addition, it is arguable that the 90-day lookback period for the PSLRA should begin on June 3, 2002, the first trading day after the final disclosure. However, since the PSLRA states that the 90-day period begins "on the date on which the information correcting the misstatement or omission that is the basis for the action is

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> disseminated to the market," the parties' interpretation that the period should begin on May 31, 2002 (the date of the final disclosure) is not unreasonable. 15 U.S.C. § 78u-4(e)(1).

Notice

***11** Under Rule 23(c)(2), this Court is to direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed R. Civ. P. 23(c)(2); *see also Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 173 (1974). The form of notice must fairly apprise the prospective members of the class of the pendency of the class action, the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the settlement. *See Weinberger v. Kendrick,* 698 F.2d 61, 70-71 (2d Cir.1982).

The proposed Amended Notice in this case contains all the necessary information, including a description of the Class, a summary of settlement terms, the Plan of Allocation and procedures for objections and opt-outs. The parties propose to provide notice by mailing the Amended Notice, along with the Proof of Claim form, to each Gilat shareholder of record (as provided by Gilat's transfer agent) and to a list of more than 2500 of the largest banks, brokerages, and other nominees which has been complied by GCG and used in previous class action settlements. These nominees are required to identify clients who are members of the Class and either mail notices to those Class Members or forward their contact information to GCG, which will then mail them the Amended Notice and Proof of Claim form. According to Lead Plaintiff's counsel and GCG, this manner of notice is standard and effective in securities class actions.

In addition, a Summary Notice will be published once in the *Wall Street Journal* and three Israeli Newspapers: *Ha'aretz,* the *Globe,* and the *Jerusalem Post.* The Summary Notice provides both a telephone number to contact and a web site where potential Class Members can obtain more information. It will also include a brief description of the Class, the date of the Fairness Hearing, and notice as to the binding nature of the settlement and how Class Members may either opt-out or file a claim. The Amended Notice and Proof of Claim form will also be available on GCG's web site and a toll-free number, staffed with both English and Hebrew speaking representatives, will also be made available. Moreover, the Tel-Aviv based law office of Jacob Sabo, Lead Plaintiff's counsel, will maintain a phone number for inquiries and will be prepared to mail or otherwise provide Amended Notice and Proof of Claim forms on an as-requested basis to Israeli Class Members.

Since the proposed detailed Amended Notice, containing all the relevant information about the settlement and Class Member rights, will be mailed to Class Members and supported by Summary Notice published in several newspapers, the method and form of the Amended Notice is sufficient and is hereby approved. The Proof of Claim form itself, to be filled out by participating Class Members, is also sufficient.[FN34]

> FN34. At oral argument on this motion, the Court noted that Part I of the Proof of Claim form needed to be corrected to state "For Claims Administrator's Use Only." The parties have made such a change although the change does not indicate which part is to be completed by the Claims Administrator as clearly as it might.

Fairness Hearing and Scheduling

***12** A Fairness Hearing will be conducted in accordance with the accompanying Order. That order also sets forth the dates for required submissions from parties and Class Members. If a timely application for attorney's fees and expenses is made by the date set forth in the Order, the Court will take up that issue at the Fairness Hearing as well.

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CONCLUSION

For the reasons set forth above, the motions are granted. The schedule for future submissions and the Fairness Hearing is included in the accompanying Order. The Clerk is directed to transmit a copy of the within to all parties.

SO ORDERED.

E.D.N.Y.,2007.
In re Gilat Satellite Networks, Ltd.
Not Reported in F.Supp.2d, 2007 WL 1191048 (E.D.N.Y.), Fed. Sec. L. Rep. P 94,309

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Supreme Court of the United States
HALLIBURTON CO., et al., petitioners,
v.
ERICA P. JOHN FUND, INC., fka Archdiocese of Milwaukee Supporting Fund, Inc.

No. 13–317.
Nov. 15, 2013.

Case below, 718 F.3d 423.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

U.S.,2013
Halliburton Co. v. Erica P. John Fund, Inc.
134 S.Ct. 636, 187 L.Ed.2d 415, 82 USLW 3119, 82 USLW 3295, 82 USLW 3298

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Westlaw.

United States District Court,
S.D. New York.
Harold HICKS, et al., Plaintiffs,
v.
Morgan STANLEY, et al., Defendants.

No. 01 Civ. 10071(RJH).
Oct. 24, 2005.

MEMORANDUM OPINION AND ORDER
HOLWELL, J.

*1 Plaintiffs petition for court approval of a settlement and plan of allocation, as well as an award of attorneys' fees and expenses in this securities class action brought on behalf of investors in Morgan Stanley Dean Witter Prime Income Trust (the "Trust"). The Settlement and Plan of Allocation are approved, and attorneys' fees and costs are awarded.

I. Background

Plaintiffs allege that between November 1, 1998 and April 26, 2001 (the "Class Period"), defendants disseminated a series of materially false and misleading Prospectuses/Registration Statements ("Prospectuses") and annual reports regarding the net asset value ("NAV") of the Trust. The Trust is a closed-end investment company that invests in floating-rate secured loans made to corporations and business entities. The NAV per share is the price at which shares are bought and sold by the public. The method by which NAV is to be computed is set forth in applicable SEC rules, including Rule 2a-4, promulgated pursuant to § 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. § 80a-1 *et seq*). *See Automatic Catering, Inc. v. First Multifund for Daily Income Inc.,* 1981 WL 1664, at *7 (S.D .N.Y.1981). Rule 2a-4 provides that the Trust compute the NAV of such loans based on market quotations when such quotations are "readily available," and based upon a "fair value" computation where market quotations are not "readily available." Where the "fair value" method is used, the SEC's rules require that the "fair value" of a loan must reflect what would be received on its current sale.

Issues raised by this case include whether market quotations were "readily available" during the class period, in which case such prices should have been used by the Trust, or whether the Trust was correct in using "fair value" prices. In addition, if the "fair value" method was the appropriate method by which to value these loans, then the issue raised is whether the defendants complied with SEC rules mandating how fair value must be calculated. The alleged failure to follow applicable SEC rules regarding valuation of Trust assets would have the effect of artificially inflating the NAV of the Trust, causing class members to pay higher prices than they would have paid had the assets of the Trust been valued properly. The Trust phased in its change in pricing methodology (from "fair value" to market pricing), allegedly to prevent class members from realizing the full impact upon NAV that would occur if defendants had used proper valuation methods.

As a result of such events, two class actions were filed against the Trust, Morgan Stanley & Co., Morgan Stanley Dean Witter Advisors Inc., and several trustees, executive officers and/or portfolio managers of the Trust alleging violations of federal securities laws.

By an order of January 30, 2002, the Court (the Hon. Harold Baer, Jr., United States District Judge) consolidated the actions pursuant to the provisions of the Private Litigation Reform Act of 1995 (the "PSLRA"). The Consolidated Amended Class Action Complaint, filed on March 14, 2002, alleges violations of Sections 11 and 12(a)(2) of the Securities Act of 1933 (the "Securities Act") and a breach of fiduciary duty under state law, on behalf of all persons who purchased or otherwise acquired shares of the Trust between November 1, 1998 and April 26, 2001.

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*2 The defendants' motion to dismiss the Securities Act claims was denied on November 13, 2002. On December 1, 2002, the Court issued an order dismissing with prejudice Lead Plaintiffs' claims regarding state law breach of fiduciary duty.

On March 31, 2003, the Court issued a written order formally appointing Nita Bradshaw and Lawrence Nicholson as Lead Plaintiffs (together "Lead Plaintiffs") and approving their selection of Goodkind Labaton Rudoff & Sucharow LLP ("Goodkind Labaton") and a predecessor-in-interest of Lerach Coughlin Stoia Geller Rudman & Bobbins LLP ("Lerach Coughlin") as Co-Lead Counsel.

On July 16, 2003, the Court issued an Opinion and Order granting the motion for class certification, appointing Nicholson to serve as class representative and appointing Goodkind Labaton and Lerach Coughlin to serve as class counsel. On October 14, 2003, pursuant to an order by Judge Baer, a Notice of Pendency of this action was mailed to all members of the class who could be identified through reasonable effort. A Summary Notice of Pendency of this action was published in *The New York Times* on October 23, 2003.

On April 19, 2004, following a status conference held on April 12, 2004, this Court issued an order on consent dismissing Lead Plaintiffs' claims under Section 12(a)(2) of the Securities Act with prejudice and without costs, and also issued a pretrial scheduling order, superseding certain scheduling orders previously issued by Judge Baer, and setting a deadline for the completion of expert discovery and a briefing schedule for motions for summary judgment.

Discovery consisted of review and analysis of over 100,000 pages of documents produced by defendants and third parties, review and analysis of electronic files contained on more than a dozen compact disks, review and analysis of prospectuses and other documents filed by the Trust with the SEC, consultations throughout the pendency of the litigation with liability and damages experts retained by Lead Plaintiffs, depositions of ten Morgan Stanley witnesses, including the portfolio managers and certain trustees of the Trust, and inclusion in the record of depositions of third-party witnesses who had testified in an unrelated securities class action with similar allegations.

In January 2004, after fact discovery was completed and expert reports were submitted, the parties agreed to participate in non-binding mediation before the Hon. Daniel Weinstein, retired Judge of the Superior Court of California, under the auspices of Judicial Arbitration and Mediation Services, Inc. ("JAMS"). In accordance with Judge Weinstein's procedures, plaintiffs and defendants exchanged comprehensive mediation statements, and the parties submitted a two-volume joint appendix of exhibits. The mediation was held on March 10 and 11, 2004, at JAMS's New York offices. Lead Plaintiffs and defendants each made presentations to Judge Weinstein in the presence of all parties and counsel for defendants' insurance carriers, and proceeded to engage in negotiations. Although the parties negotiated in good faith, no agreement was reached at that time.

*3 Following the mediation, the parties engaged in continued negotiations with the assistance of Judge Weinstein. Several demands, offers, and counter-offers were communicated. On June 21, 2004, the parties reached an oral agreement-in-principle to settle the action. The parties then negotiated a letter agreement to memorialize the agreement-in-principle, which was signed on June 29, 2004. On June 30, 2004, the parties advised the Court that they had reached an agreement-in-principle and would submit a Stipulation of Settlement to the Court for approval. On October 19, 2004, this Court received the Stipulation of Settlement.

Settlement Terms

The Stipulation of Settlement provides for a gross payment of $10,000,000 in cash (the "Settlement Fund"). In addition to paying claims to

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class members, the Settlement Fund will be used to pay taxes, administrative costs of the class action, including the costs of providing notice, and attorneys' fees and expenses. The resulting Net Settlement Fund will then be distributed to claimants according to the Plan of Allocation.

In addition to the financial provisions, the settlement also contains a release and waiver, barring participating class members from bringing any future claims, known or unknown, against any defendant in the action, for matters relating to the settlement, except such actions as may be necessary to enforce the terms of the settlement or the final judgment. This release specifically includes a waiver by the parties of the provisions of Section 152 of the Civil Code of the State of California and similar provisions available in other jurisdictions, which provide that a general release does not release unknown claims.

Plaintiffs moved for preliminary approval of the settlement on November 15, 2004. On December 9, 2004, following a hearing, this Court issued an Order Preliminarily Approving Proposed Settlement, Directing the Issuance of Notice to the Class, and Setting a Fairness Hearing (the "Preliminary Approval Order").

Notice to the Class

In the Preliminary Approval Order of December 9, 2004, the Court preliminarily approved the settlement on the terms set forth in the Stipulation, scheduled a hearing for May 26, 2005 to determine whether the settlement and plan of allocation were fair, reasonable, and adequate, whether a final judgment should be entered, and whether an application by co-Lead Counsel for attorneys' fees and reimbursement of expenses should be granted.

The Court approved the form and substance of the Notice of Proposed Settlement of Class Action and Fairness Hearing (the "Notice"), which was mailed to approximately 100,000 class members; the Summary Notice of Proposed Settlement of Class Action and Fairness Hearing (the "Summary Notice"), which was published in *The New York Times* on March 31, 2005, and on a widely-circulated national wire service; the Special Notice to Class Members Who Previously Requested to be Excluded from the Class and Form of Request for Revocation of Exclusion (the "Special Notice"); and the Claim Information Form.

*4 The Notice, sent pursuant to Fed.R.Civ.P. 23(e)(1)(B), provided descriptions of the action and the proposed settlement, detailed the circumstances of the settlement, and outlined the plan of allocation. In addition, the Notice furnished instructions for class members regarding the submission of claims, objections to the settlement, and attendance at the fairness hearing. The Notice further provides that Co-Lead Counsel will apply for attorneys' fees not to exceed thirty-three and one-third percent (33.3%) of the Settlement Fund, and reimbursement of expenses, exclusive of notice and administration costs, of no greater than $500,000, and provides that class members have the opportunity to contest counsels' request for attorneys' fees and reimbursement of expenses, in addition to contesting the terms of the settlement.

The Reaction of the Class to the Notice of Proposed Settlement

The overall response of the class to the settlement has been positive. In response to the original Notice of Pendency, 123 investors opted out of the class out of approximately 100,000 potential class members. The Special Notice gave such opt-outs an opportunity to rejoin the class, and, as a result, 19 of the 123 opt-outs elected to rejoin the class and reinstate their right to participate in the settlement. Furthermore, as of May 18, 2005, over 50,000 class members have submitted signed Claim Information Forms. The high level of participation in the proposed settlement and the speedy submission of Claim Information Forms signify a high level of approval by class members of the settlement.

In addition, as of May 5, 2005, the deadline for

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filing objections to the settlement, plan of allocation, or application for attorneys' fees and expenses, only three persons, Rudolph Wishner, Cecelia Villarreal, and Lawrence Smith, have objected to the settlement. For the reasons stated below, the Court overrules the individual objections and concludes that the settlement amount is fair and reasonable.

The Fairness Hearing

On May 26, 2005, the Court held a fairness hearing. Counsel spoke in favor of the settlement and no member of the class or shareholder attended and spoke against the settlement. Co-Lead Counsel addressed the Court in support of their applications for attorneys' fees and expenses as well.

II. Discussion

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any settlement of a certified class action. While public policy favors the settlement of class actions, *In re Interpublic Securities Litigation,* 2004 WL 2397190, at *7 (S.D.N.Y.), the district court must nevertheless "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (citation omitted). This determination is a matter addressed to the Court's discretion. *See Joel A. v. Giuliani,* 218 F.3d 132, 139 (2d Cir.2000) (great weight accorded to trial judge's views of fairness of settlement). In determining the settlement's fairness, the court must "eschew any rubber stamp approval" yet simultaneously "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974) (*abrogated on different grounds by Goldberger v. Integrated Reserves, Inc.,* 204 F.3d 43 (2d Cir.2000)). *See also In re Interpublic Securities,* 2004 WL 2397190, at *6-7.

*5 A district court must review both the procedural and substantive fairness of a proposed settlement. *D'Amato,* 236 F.3d at 85; *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005). Procedural fairness is established by examining the negotiating process "to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability necessary to effective representation of the class's interests." *D'Amato* 236 F.3d at 85 (citation omitted). "The experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves" shed light on the fairness of the negotiating process. *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983) (citation omitted).

The standards governing the substantive fairness of a settlement in this Circuit are the well-established "*Grinnell* factors," including:

(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.

D'Amato, 236 F.3d at 86 (originally enumerated in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974)). To find the settlement fair, the Court need not find that every factor weighs in favor of the settlement; the court "considers[s] the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y.2004) (citation omitted).

The record amply supports the procedural fairness of the settlement in this case. In January 2004, after plaintiffs completed document and

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deposition discovery, and the parties' expert witnesses submitted their reports, the parties agreed to participate in non-binding mediation before the Honorable Daniel Weinstein, a retired California judge and JAMS neutral. The participation of a respected and neutral mediator "gives [the court] confidence that [the negotiations] were conducted in an arms-length, non-collusive manner. *In re AMF Bowling Sec. Litig.,* 334 F.Supp.2d 462, 465 (S . D.N.Y.2004); *see also In re WorldCom, Inc. ERISA Litig.,* 2004 WL 2338151, at *6 (S.D.N.Y.2004). Counsel attended two days of mediation on March 10 and 11, 2004. Although offers and counter-offers were made, negotiations at that time broke down and mediation was unsuccessful. A breakdown in settlement negotiations can tend to display the negotiation's arms-length and non-collusive nature. *Denney v. Jenkens & Gilchrist,* 2005 WL 388562, at *14 (S . D.N.Y.2005). In June 2004, six months after the parties first agreed to discuss settlement, the parties reached an agreement-in-principle. Able and experienced counsel in class action and securities litigation represented both sides in reaching this settlement and further supports its fairness to the class. *Wal-Mart,* 396 F.3d at 116 (*citing Manual for Complex Litigation, Third,* § 30.42 (1995)) ("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." ').

***6** Based on a review of the relevant *Grinnel* factors, the Court also concludes that the substantive terms of the settlement are fair, adequate, and reasonable.

The complexity, expense, and duration of continued litigation likely would be considerable. Securities class actions are often "difficult and ... uncertain." *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) (citation omitted), and this case is no exception. The issues presented in the litigation, such as determining the correct value for senior bonds and whether or when market quotations for such bonds reliably indicated the correct value, are complex and highly disputed. 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.

The reaction of the class to the settlement strongly supports approval. Out of the approximately 100,000 members and potential members of the class, only 123 initially opted-out, of whom 19 rejoined the class after announcement of the preliminary settlement. Only three persons have objected to the settlement. The objectors, Mr. Wishner, Ms. Villarreal, and Mr. Smith, object to the amount of the settlement, arguing that it is too low. However, there are obstacles that the plaintiffs would face in continued litigation with defendants, and it is uncertain whether they could overcome these obstacles to prove both liability and damages. The settlement amount represents a fair payment to plaintiff class due to the risk that protracted litigation may be fruitless. Objector Wishner's request to allow class members to sue Morgan Stanley individually, seemingly a request to allow another opt-out period after the settlement has been proposed, is denied. It is not feasible for individual litigants to sue Morgan Stanley directly because few investors have suffered losses great enough to make it worthwhile for them to individually expend resources in a suit. Consequently, an additional opt-out opportunity is not appropriate under Fed.R.Civ .P. 23(e)(3).

Fairness is also indicated by the fact that the settlement was reached after thorough discovery, including substantial document review and the depositions of ten Morgan Stanley witnesses. Therefore, plaintiffs were able to make an informed judgment as to the likelihood of success at trial when entering into this settlement.

That judgment necessarily reflected the risk that plaintiffs would not prevail in establishing liability at trial. While counsel believed their claims

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had merit, defendants interposed substantial defenses. For example, defendants contended that market quotations for each of the several hundred loans in the Trust's portfolio were neither “reliable” nor “readily available” throughout the class period, and, therefore, that a “fair value” analysis was appropriate. Resolution of these issues will turn on a “battle of the experts” as to proper methods of valuation over an extended period of time and creates a significant obstacle to plaintiffs in establishing liability. *In re Global Crossing,* 225 F.R.D. at 459; *In re Interpublic Securities,* 2004 WL 2397190 at *7.

*7 In addition, plaintiffs face substantial risks in establishing the extent of any damages at trial. Plaintiffs' expert aggressively calculates damages of $265.8 million based on the total decline in the Trust's NAV. However, defendants' experts point out that this calculation fails to account for declines in NAV attributable to external market conditions, including increasing default and bankruptcy rates and widening spreads. Taking these adverse factors into account would, in their opinion, reduce recoverable damages to a maximum of $40.9 million assuming that liability had been established on every day of the class period. Which expert would be believed by a jury-and to what extent-is highly unpredictable. It is reasonable to conclude, however, that a jury would give substantial weight to the effect of independent market developments that would negatively impact the Trust's NAV. Under these circumstances a settlement of $10 million (24.4% of Defendants' estimate and 3.8% of Plaintiffs' estimate) is within the range of reasonableness for post-PSLRA securities class action settlements. *See* Laura E. Simmons & Ellen M. Ryan, *Post-Reform Act Securities Lawsuits: Settlements Reported through December 2003,* at 5 (attached as Exhibit F to the Affidavit of David J. Goldsmith (“Goldsmith Aff.”) dated May 18, 2005 and also available at http://www.businessforum.com/Cornerstone_01.html).

The Plan of Allocation of the Net Settlement Fund

In approving an allocation plan, the Court must ensure that the distribution of funds is fair and reasonable. *In re Global Crossing,* 225 F.R.D. at 462 (*citing Maley v. Del Global Tech. Corp.,* 186 F.Supp.2d 358, 367 (S.D.N.Y.2002)). When formulated by competent and experienced class counsel, an allocation plan need have only a “reasonable, rational basis.” *Id.; In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 429-30 (S.D.N.Y.2001).

The plan of allocation is based on the amount of alleged overpricing of the daily NAV per share of the Trust during the class period as calculated by counsel with the assistance of an economic consultant, Forensic Economics, Inc. The Net Settlement Fund will be distributed to all class members who submit acceptable claim information forms and did not exclude themselves (“authorized claimants”). Each authorized claimant's pro rata share of the Net Settlement Fund will be determined by the Claims Administrator based upon each claimant's “Recognized Loss.” The “Recognized Loss” will be calculated in one of two ways: for shares of the Trust that were purchased during the class period and still held as of the end of the class period, the Recognized Loss per share is equal to the alleged overpricing on the day of purchase; for shares of the Trust that were purchased during the class period and sold before the end of the class period, the Recognized Loss per share is equal to the difference between the alleged overpricing on the day of purchase and the overpricing on the day of sale. Such distribution based on investment loss is reasonable. *Global Crossing,* 225 F.R.D. at 462. Furthermore, the plan of distribution was fully disclosed in the class notice, and there have been no objections to the plan.

Attorneys' Fees and Reimbursements

***8** “Where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the

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fund are entitled to 'a reasonable fee-set by the court-to be taken from the fund." ' *In re Interpublic Securities,* 2004 WL 2397190 at *10 (citations omitted). Such fee must be "reasonable" under the circumstances. *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 47 (2d Cir.2000).

A reasonable attorneys' fee may be calculated one of two ways. Using the percentage method, the court sets some percentage of the recovery as a fee. The percentage of the settlement to be allocated to the attorneys depends on a number of factors present in the litigation, discussed below. The lodestar method of apportioning attorneys' fees involves multiplying the hours reasonably billed to the case by the appropriate hourly rate, and then, in the court's discretion, applying a multiplier to compensate the attorneys for factors such as the underlying risk and complexity of the litigation. *Id.*

The Second Circuit has declared that both the percentage and lodestar methods are permissible methods of calculating attorneys' fees in common fund cases. *Id.* Whether the reasonable attorney's fees are determined by the percentage or lodestar methods, the reasonableness of the fee is guided by consideration of factors such 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." *Id.* at 50 (citation omitted).

The trend in the Second Circuit recently has been to use the percentage method. *See Wal-Mart Stores,* 396 F.3d at 121; *In re Global Crossing,* 225 F.R.D. at 465. The percentage method, though not without flaws, is often preferable to the lodestar method to determine attorneys' fees in class actions because it reduces the incentive for counsel to drag the case out to increase the number of hours billed; also, fewer judicial resources will be spent in evaluating the fairness of the fee petition. *In re Lloyd's American Trust Fund Litig.,* 2002 WL 31663577, at *25 (S.D.N.Y.2002) (citation omitted). In addition, the PSLRA contains support for the percentage method. *See* 15 U.S.C. § 78u-4(a)(6) ("attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

Attorneys' fees will be determined in this action using the percentage method. The court will then examine what the attorneys' fees would be under the lodestar method to act as a "cross-check" on the percentage method to further ensure reasonableness. *See Goldberger,* 209 F.3d at 50 ("The lodestar remains useful as a baseline even if the percentage method is eventually chosen. Indeed, [the Second Circuit] encourage[s] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage.").

***9** Co-Lead Counsel, pursuant to Fed.R.Civ.P. 23(h) and 54(d)(2), moved for attorneys' fees of 30% of the Settlement Fund of $10,000,000, or $3,000,000, plus reimbursement of $727,433.82 for expenses. Counsel expended considerable time and effort, spanning over two years, preparing to litigate this case and leading to the settlement. Counsel deposed ten Morgan Stanley witnesses, consulted with experts, reviewed thousands of pages of documents, and prepared settlement papers and notices for the settlement class after successful negotiations. In this context, a 30% fee award, cross-checked against a lodestar calculation, constitutes a reasonable fee. The expenses are also reasonable given the amount and quality of work performed by Co-Lead Counsel, their experts, and claim administrator.

The 30% fee is consistent with fees awarded in comparable class action settlements in the Second Circuit. *See Maley v. Del Globals Techs. Corp.,* 186 F.Supp.2d 358, 370 (S.D.N.Y.2002) (awarding 33 1/3% of settlement valued at $11.5 million); *In re Warnaco Group, Inc. Securities Litig.,* 2004 WL 1574690, at *3 (S.D.N.Y.2004) (awarding 30% of $12.85 million settlement). As the size of the

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settlement fund increases, the percentage of the fund awarded as fees often decreases so as to prevent a windfall to plaintiffs' attorneys. *In re Interpublic,* 2004 WL 2397190, at *11 (citation omitted). A settlement amount of $10 million does not raise the windfall issue in the same way as would a $100 million settlement, and a 30% fee does not produce such a windfall. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* J. Empirical Legal Stud. 27 (2004), attached as Exhibit A to Goldsmith Affidavit (mean percent fee for settlement between $9.7 million and $15 million is 28%).

Percentage-of-recovery awards of attorneys' fees are appropriate even though such awards are often greater than those awards that would be granted to attorneys under the lodestar method (without applying a multiplier). The attorneys take upon themselves the risk that litigation will not be successful, including the risks of non-reimbursed expenditures and the opportunity cost of attorney time dedicated to the case. The risk of success in the litigation effort may be the most important factor to be considered in determining a reasonable attorneys' fee. *In re Global Crossing,* 225 F.R.D. at 467 (citation omitted). Attorneys in contingency cases reasonably should expect higher fees than would be had if they were guaranteed such fees up-front whether or not the party receives any relief.

Public policy considerations support the requested fee. Private actions to redress real injuries further the objectives of the federal securities laws by protecting investors and consumers against fraud and other deceptive practices. *Eltman v. Grandma Lee's, Inc.,* 1986 WL 53400, at *9 (E.D.N.Y.1986). Such actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class. *Id.* Due to the dispersed, and relatively small, losses among a large pool of investors, the class action mechanism and its associated percentage-of-recovery fee award solve the collective action problem otherwise encountered by which it would not be worthwhile for individual investors to take the time and effort to initiate the action. "To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding. The concept of a private attorney acting as a private attorney general is vital to the continued enforcement and effectiveness of the Securities Acts." *Id.* A percentage-of-recovery award above the unmodified lodestar is thus appropriate.

***10** The reasonableness of a 30% fee award is also supported by a "cross-check" against a lodestar calculation. Where the lodestar method is simply used as a "cross-check," the court does not need to scrutinize counsel's documentation of hours expended on the case in the same depth as is appropriate where the lodestar is used as the sole fee determination. *Goldberger,* 209 F.3d at 50. The lodestar is calculated by multiplying the number of hours expended on the litigation by the attorney or paralegal by the current hourly rate for such individual. Current "market rates" are proper because such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins,* 491 U.S. 274, 283-84 (1989).

Co-Lead Counsel spent 3,983.05 hours working on this action as of April 30, 2005, resulting in a combined lodestar of $1,623,033.75. *(Goldsmith Aff.,* ¶ 5). When the lodestar method of fee computation is used in class action litigation, a multiplier is usually applied to the lodestar. *In re Global Crossing,* 225 F.R.D. at 468. "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.* at 468 (*citing Goldberger*). Co-Lead Counsel's lodestar of $1,623,033.75 and the $3 million fee requested represents a multiplier of 1.85

Taking the circumstances of the case into consideration, a multiplier of 1.85 is reasonable and, as a "cross-check," supports counsel's fee

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application. In this Circuit, contingency fees of 1.85 times the lodestar and greater have been deemed reasonable by the courts. *See In re Interpublic Securities,* 2004 WL 2397190, at *12 (approving 12% fee representing multiplier of 3.96 times lodestar and noting that "[I]n recent years multipliers of between 3 and 4.5 have been common in federal securities cases") (citation omitted). Plaintiff's counsel further supports the notion that a multiplier of 1.85 is reasonable by providing numerous examples of Southern District decisions where multipliers in excess of 1.85 were approved under comparable circumstances. *See Memorandum of Law in Support of Co-Lead Counsel's Motion for an Award of Attorney's Fees,* pp. 21-22.

Co-Lead Counsel's requested fee reimbursement in the amount of $727,433.82 for out-of-pocket expenses incurred in connection with this action is also approved. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *In re Independent Energy Holdings PLC Securities Litigation,* 302 F.Supp.2d 180, *183 n. 3 (S.D.N.Y.2003) (citation omitted). The expenses incurred by Co-Lead Counsel include such expenses as expert witness fees, claims administrator fees, and other expenses necessary to the litigation and settlement of this action. *See Goldsmith Affidavit, Exhibits C and D.*[FN1]

FN1. The Notice of Settlement advised the class that counsel would apply for reimbursement of expenses (exclusive of settlement notice and administration costs) not to exceed $500,000. Expenses exclusive of settlement notice and administration costs amount to $384,853.43, well within the cap referred to in the Notice.

Finally, the court approves the reimbursement of expenses to lead plaintiff Nicholson pursuant to plaintiff's motion. Nicholson spent considerable time discharging his responsibilities as lead plaintiff and class representative. The PSLRA permits lead plaintiffs to recover reasonable costs and expenses related to their representation of the class. 15 U.S.C. § 78u-4(a)(4). Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place. *See, e.g., In re Worldcom, Inc. ERISA Litig.,* 2004 WL 2338151, at *11 (awarding the three named plaintiffs $5,000.00 each); *Dornberger v. Metropolitan Life Ins. Co.,* 203 F.R.D. 118, 124 (discussing incentive awards) (S.D.N .Y.2001).

III. Conclusion

*11 The Settlement and Plan of Allocation is approved. Counsel is awarded attorneys' fees in the amount of $3,000,000 and expenses in the amount of $727,433.82. Lead plaintiff Nicholson is awarded $7,500 for reasonable costs and expenses.

SO ORDERED.

S.D.N.Y.,2005.
Hicks v. Stanley
Not Reported in F.Supp.2d, 2005 WL 2757792 (S.D.N.Y.), Fed. Sec. L. Rep. P 93,579

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re MARSH & McLENNAN COMPANIES, INC. SECURITIES LITIGATION.

No. 04 Civ. 8144(CM).
Dec. 23, 2009.

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k65 k. Securities Law Actions. Most Cited Cases

Proposed settlement of class action, wherein proposed class members alleged that they were injured by corporation's fraudulent scheme to artificially inflate corporate securities prices by making false and misleading statements about its contingent commission practices, was fair, reasonable, and adequate. The litigation involved complex issues of securities law and insurance industry practice, making it extremely complicated to bring to trial and with significant costs, so considering that class certification was still pending, the proposed settlement was procedurally fair. Moreover, the majority of the proposed class approved of the proposed settlement.

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

McMAHON, District Judge.

INTRODUCTION

*1 Lead Plaintiffs the Public Employees Retirement System of Ohio, the State Teachers Retirement System of Ohio and the Ohio Bureau of Workers' Compensation (collectively, the "Ohio Plaintiffs"), and the State of New Jersey, Department of the Treasury, Division of Investment, on behalf of itself and the Common Pension Fund A, the DCP Equity Fund and the Supplemental Annuity Collective Trust Fund (collectively, the "New Jersey Plaintiffs" and, together with the Ohio Plaintiffs, "Lead Plaintiffs"), on behalf of themselves and the Class (as defined herein), move for final approval of a proposed settlement of $400 million (the "Settlement") with Defendants Marsh & McLennan Companies, Inc. ("MMC"), Marsh, Inc. ("Marsh"), Jeffrey Greenberg ("Greenberg") and Roger Egan ("Egan") (collectively, "Defendants"). The Court preliminarily approved the Settlement in its Preliminary Approval Order of November 10, 2009 (Docket No. 301.) Only a handful of Class members have offered any objection to the Settlement. Not one potential Class member has objected to the amount of the Settlement, or to any of the substantive terms of the Settlement. For the reasons stated below, the Court approves the Settlement, concluding that it is fair, reasonable and adequate.

With the approval of Lead Plaintiffs, the law firms of Grant & Eisenhofer, P.A. and Bernstein Liebhard LLP (together, "Lead Counsel"), move for (1) an award of attorneys' fees in the amount of 13.5% of the Settlement amount (the "Fee Application"); (2) reimbursement of $7,848,411.84 of expenses incurred by Lead Counsel in litigating this action; and (3) reimbursement of $214,657.14 of expenses incurred by Lead Plaintiffs ($70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs) in representing the Class (the "PSLRA Award Request").[FN1] For the reasons stated below, the Court grants all three requests.

FN1. In their brief submitted in support of their request for fees and expenses, Lead

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> Counsel first request an award of $320,000 for Lead Plaintiffs. (Mem. in Supp. of Lead Counsel's App. for an Award of Attorneys' Fees, Reimbursement of Expenses for Lead Counsel, and an Award of Expenses to Lead Pls., Dec. 18, 2009 ("Fees Br."), at 1.) However, Lead Counsel then state: "Pursuant to the PSLRA, Ohio Plaintiffs and the New Jersey Plaintiffs request an award totaling $214,657.14 to compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class," and "request[ ] that the Court award the Ohio Plaintiffs $70,000 and the New Jersey Plaintiffs $ 144,657.14." (*Id.* at 23–25.) Thus, the Court construes the PSLRA Award Request as a request for $214,657.14.

BACKGROUND

I. Lead Plaintiffs' Allegations and Claims

Lead Plaintiffs allege that Defendants engaged in a systematic plan to increase insurance placement revenues through improper bid manipulation and illicit client steering, all designed to generate a critical source of income known as "contingent commissions." Lead Plaintiffs further allege that Defendants violated federal securities laws by making materially false and misleading statements about their contingent commission practices, which caused the price of MMC stock to be artificially inflated during the Class Period (as defined herein), and to drop precipitously when the truth about the scheme was finally revealed, causing massive losses to investors.

Lead Plaintiffs brought claims against all Defendants under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Lead Plaintiffs also brought a claim against MMC under Section 11 of the Securities Act of 1933. Specifically, Lead Plaintiffs' Second Amended Consolidated Class Action Complaint (the "Amended Complaint") alleges, inter alia, that Defendants lied to the investing public by misrepresenting that: (1) contingent commission payments played no role in Marsh's recommendations to its clients about which carrier to choose for insurance coverage; (2) contingent commissions were paid in exchange for "services" provided by Marsh to the insurance carriers; and (3) Marsh fully disclosed contingent commissions to its clients. Lead Plaintiffs further allege that when the scheme ultimately was revealed in late 2004, following a suit brought by the New York Attorney General ("NYAG"), and the truth about Defendants' misstatements began to come out, MMC's stock price collapsed and investors suffered billions of dollars in damages.

II. Procedural Background

*2 This Settlement comes about after more than five years of hard-fought litigation. The litigation began on October 15, 2004, when the first of several class-action complaints was filed in the Southern District of New York against MMC, its subsidiary, Marsh, and others, including Greenberg, the former CEO of MMC, and Egan, the former President of Marsh. The complaints were assigned to the late Judge Kram for consolidated pretrial proceedings and the action was styled *In re Marsh & McLennan Companies, Inc. Securities Litigation,* No. 04 Civ. 8144. By Order dated January 26, 2005, Judge Kram appointed the Ohio Plaintiffs and the New Jersey Plaintiffs as Lead Plaintiffs, and Grant & Eisenhofer and Bernstein Liebhard as Lead Counsel.

Lead Plaintiffs filed their Consolidated Class Action Complaint on April 19, 2005. All Defendants moved to dismiss all claims asserted against them. On July 19, 2006, Judge Kram granted in part and denied in part the motions to dismiss. Judge Kram's decision substantially narrowed the claims and allegations asserted against Defendants and dismissed all of the state-law claims. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144, 2006 WL 2057194 (S.D.N.Y. July 19, 2006). Lead Plaintiffs filed the Amended Complaint on October 13, 2006, asserting

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only the claims and allegations that Judge Kram had not dismissed. Defendants answered the Amended Complaint on December 12, 2006.

With the discovery stay lifted, the parties proceeded to conduct extensive and vigorously contested fact discovery. Given the intensity of discovery, Judge Kram appointed a Special Master, L. Peter Parcher, to hear and rule on disputed discovery issues. Lead Plaintiffs brought twenty such motions to the Special Master and Defendants brought five, on which the Special Master issued twenty opinions. (Fees Br. at 6.)

Lead Plaintiffs and Defendants each retained an expert to address Lead Plaintiffs' motion for class certification, with each side filing detailed initial and rebuttal expert witness submissions. As discovery continued, Lead Plaintiffs retained six experts to address liability, damages and causation issues, and Defendants retained two experts. The parties exchanged lengthy, detailed initial reports from all of the experts, and rebuttal reports from four experts. By the time the parties had agreed in principle to settle, both Lead Plaintiffs and Defendants had already deposed one of the other side's expert witnesses. Both sides were preparing their other expert witnesses for depositions, which were set to continue the same week the parties reached their agreement to settle.

Lead Plaintiffs moved for certification of a class of purchasers of MMC securities from October 14, 1999 through October 13, 2004. Defendants opposed that motion. The class certification issues were hotly contested, and numerous briefs were filed on the certification question. At the time the parties agreed to settle, the Court had not yet ruled on Lead Plaintiffs' class certification motion. On November 10, 2009, at the request of Lead Plaintiffs and Defendants, the Court certified the Class for settlement purposes only in the Preliminary Approval Order.

***3** At all times, the parties sharply disputed the merits of the case, class certification and damages. Defendants denied, and still deny, each claim alleged against them. Defendants asserted, and still assert, that they made no material misrepresentations or omissions and that, even if they did, they did so without intent such that they are not liable under the federal securities laws. Further, Defendants maintain that, even if they were found liable, the amount of the damages suffered by the Class is negligible or nonexistent.

Through an experienced mediator, the Honorable Daniel Weinstein (the "Mediator")—a retired Judge of the Superior Court of California—Lead Counsel engaged in intensive, arm's-length negotiations with Defendants over a one-and-a-half year period, with the aim of settling the issues in dispute and achieving the best relief possible consistent with the interests of the Class. Formal mediation sessions were held on April 7, 2008, February 4, 2009 and October 14–15, 2009. The mediation sessions involved sophisticated demonstrative aides and written and oral presentations to Judge Weinstein, as well as separate sessions with an independent damages expert retained for the sole purpose of advising the Mediator. On November 10, 2009, a settlement was reached.

III. Summary of the Settlement

The Settlement is the result of several rounds of mediation between Lead Plaintiffs and Defendants, conducted before the Mediator. Judge Weinstein has submitted a declaration attesting to his belief that the Settlement is a fair and reasonable resolution of this matter, taking into account the complexities of the issues involved, the strengths and weaknesses of each side's position and the uncertainty of continued litigation. (*See* Decl. of Judge Weinstein, Dec. 18, 2009, ¶ 14.)

The Settlement provides for the payment of $400 million for the benefit of Lead Plaintiffs and the Class into a settlement fund (the "Settlement Fund"). Additionally, the Stipulation and Agreement of Settlement, dated November 10, 2009 (Docket No. 300) (the "Stipulation") allows

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Lead Counsel to request an attorneys' fee of up to 13.5% of the Settlement Fund and reimbursement of expenses of up to $13 million, as well as to request reimbursement for class representative expenses incurred by Lead Plaintiffs.

IV. Notice of Settlement

Pursuant to the Preliminary Approval Order, Lead Plaintiffs provided notice of the Settlement to Class members in several significant ways: (1) Lead Plaintiffs, through their claims agent, caused the Court-approved Notice of Proposed Settlement (the "Notice") to be mailed by first-class mail, postage prepaid, to all reasonably identifiable Class members and their nominees (Joint Decl. of Keith M. Fleischman & Stanley D. Bernstein, Dec. 18, 2009 ("Joint Decl."), ¶ 96; Aff. of Charlene Young, Dec. 18, 2009 ("Young Aff"), ¶ 11); (2) Lead Plaintiffs caused a copy of the Summary Notice of Proposed Settlement (the "Summary Notice") to be published in the national edition of *The Wall Street Journal* (Joint Decl. ¶ 97; Young Aff. ¶ 6); (3) Lead Plaintiffs caused a copy of the Notice to be transmitted over *Business Wire* (Joint Decl. ¶ 98; Young Aff. ¶ 6); and (4) Lead Plaintiffs established the website www.MMCSecuritiesLitigation.com, on which was published the Notice, the Proof of Claim and Release Form (the "Proof of Claim"), various Court documents and additional information regarding the Settlement (Joint Decl. ¶ 99; Young Aff. ¶ 7). The Notice described the terms of the Settlement; explained the claims and defenses in the lawsuit; provided instructions for Class members to exclude themselves from the Settlement or to object to any part of the Settlement; provided detailed information about the final Settlement fairness hearing on December 23, 2009 (the "Settlement Fairness Hearing"); and provided contact information for the claims agent and Lead Plaintiffs' counsel, among other things.

V. Objections Received

*4 Lead Plaintiffs have received only seven objections from potential Class members. (Joint Decl. ¶ 115.) In addition, twenty potential Class members have asked to be excluded from the Settlement. (*Id.* ¶ 113; Young Aff. ¶ 14.)

DISCUSSION

I. The Settlement Is Fair, Reasonable and Adequate

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). "Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999) (internal quotations omitted). In a class-action settlement, there is a presumption of fairness, reasonableness and adequacy when the settlement is the product of "arms-length negotiations between experienced, capable counsel after meaningful discovery." *Id.* at 280 (*citing Manual for Complex Litigation* (Third) § 30.42 (1995)).

A. Standards for Approval of a Class–Action Settlement

In evaluating a proposed settlement under Federal Rule of Civil Procedure 23, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995); *see In re WorldCom, Inc. Sec. Litig.,* No. 02 Civ. 3288, 2004 WL 2591402, at *10 (S.D.N.Y. Nov. 12, 2004). It is well-established that courts in this Circuit examine the fairness, adequacy and reasonableness of a class-action settlement according to the *"Grinnell* factors":

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

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(9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) (citations omitted). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.' " *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y.2004) (quoting *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003)). In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement

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

*5 "[I]n evaluating the settlement of a *securities* class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re Sumitomo,* 189 F.R.D. at 281 (emphasis in original) (internal quotations omitted). This is certainly true with respect to the claims in this case.

This litigation involved not only complex issues of securities law, but also specific issues involving the highly regulated insurance industry and its use and understanding of contingent commissions. These industry-specific issues were complex enough to require Lead Plaintiffs to hire two industry experts, at significant expense, to assist Lead Counsel during most of the five years of the litigation. (*See* Joint Decl. ¶ 74.)

This case would have been extremely complicated to bring to trial, with the prospects for Lead Plaintiffs and the Class being highly uncertain. Even the most optimistic estimates did not have trial commencing until early 2011, with the Class not receiving any recovery until at least 2013. There would have been significant additional resources and costs expended to litigate the case through trial and through the inevitable appeals of any judgment that might have been entered against Marsh. The Settlement, by contrast, provides certain and substantial recompense to Class members now, and avoids their having to await the uncertain outcome of what would have been a lengthy trial and appeals process.

Thus, the complexity, expense and uncertainty of the litigation supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The Class's reaction to the Settlement also supports approval. Lead Counsel provided Notice by mail and by publication to all ascertainable Class members, and a website was established to handle inquiries. As the Court remarked at the preliminary approval hearing on November 10, 2009, the quality of the Notice provided by Lead Counsel is exceptionally high. Lead Counsel have received only seven purported objections and twenty requests for exclusion. This is an extremely strong indication of the fairness of the Settlement. [FN2]

FN2. Counsel disagree over whether the requests for exclusion (which come from a group of entities represented by the same lawyer) were great enough to trigger Marsh's right to walk away from the Settlement. But in exchange for an opportunity to convince these opt-outs of the error of their ways, Marsh has decided not to exercise any right it might have to walk away, and has asked the Court to approve the Settlement. The Court has today signed an order giving these twenty

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opt-outs additional time to rethink their position.

3. The Stage of the Proceedings and the Amount of Discovery Completed

At the time of the Settlement, the parties had just completed merits discovery and were in the process of conducting expert depositions. (Joint Decl. ¶ 76.) The parties had already exchanged expert reports and rebuttal reports. (*Id.* ¶ 74.) By this time, Lead Plaintiffs had, inter alia, (1) inspected, reviewed and analyzed over thirty-four million pages of documents produced by Defendants; (2) subpoenaed 100 non-parties and inspected, reviewed and analyzed over two million pages produced by non-parties; (3) taken and defended over 100 depositions; and (4) researched the applicable law concerning Lead Plaintiffs' claims and potential defenses thereto, as well as numerous pretrial issues.

***6** The advanced stage of the litigation and extensive amount of discovery completed weigh heavily in favor of approval. The parties' counsel were clearly in a position to realistically evaluate the strengths and weaknesses of the claims, and to evaluate the fairness of the proposed Settlement. *See In re Lloyd's Am. Trust Fund. Litig.,* No. 96 Civ. 1262, 2002 WL 31663577, at *15 (S.D.N.Y. Nov. 26, 2002); *see also In re Sumitomo,* 189 F.R.D. at 281–82 (finding that the stage of the proceedings "strongly" favored approval of settlement reached after "[p]laintiffs had conducted extensive discovery, investigation and analyses, and the proceedings were in the advanced stage of pointing or preparing for trial"). This is not a case where the parties engaged only in "settlement discovery." Thus, this *Grinnell* factor strongly supports approval.

4. The Risks of Establishing Liability

There is some risk that Lead Plaintiffs ultimately might have failed to establish Defendants' liability. Courts have acknowledged that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages." *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. 02 Civ. 5575, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) (citations omitted). For example, with respect to the Rule 10b–5 claims, Lead Plaintiffs may have had difficulty proving that Defendants acted with scienter, or that the alleged decline in MMC's stock price was due entirely to the conduct alleged in the Amended Complaint and not to other unrelated factors.

5. The Risks of Establishing Damages

If there is anything in the world that is uncertain when a case like this one is taken to trial, it is what the jury will come up with as a number for damages. On damages, this case would have ended up as a classic "battle of the experts." There is the undeniable risk that a "jury could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses." *Maley v. Del Global Tech. Corp.,* 186 F.Supp.2d 358, 365 (S.D.N.Y.2002); *see Strougo v. Bassini,* 258 F.Supp.2d 254, 259 (S.D.N.Y.2003); *In re Lloyd's,* 2002 WL 31663577, at *21. The risk that Lead Plaintiffs would be unable to establish damages exceeding the $400 million that the Settlement provides to the Class supports approval of the Settlement. Even if Lead Plaintiffs were successful in establishing liability, they have avoided substantial risks in proving damages by virtue of this proposed Class Settlement.

6. The Risk of Maintaining the Class Action Through Trial

There is also the risk that the Court might have denied Lead Plaintiffs' motion for class certification, and thereby precluded any recovery for the Class whatsoever. At the time of the Settlement, the class certification motion was pending before the Court. Defendants had vigorously contested class certification, arguing, inter alia, that Lead Plaintiffs are not entitled to the "fraud-on-the-market" presumption. The briefing was voluminous, intense and complex. Had the

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Court rejected Lead Plaintiffs motion, no class action could have been maintained. Although Defendants have stipulated to certification of the Class for purposes of the Settlement, there would have been no such stipulation had Lead Plaintiffs brought this case to trial. Thus, the uncertainty surrounding class certification supports approval of the Settlement. *See In re AOL,* 2006 WL 903236, at *12 (finding that risk of plaintiffs' not succeeding in certifying class supported approval of settlement); *In re Global Crossing,* 225 F.R.D. at 460 (same).

7. The Ability of Defendants to Withstand a Greater Judgment

*7 It is undeniable that the current economic climate is not strong. Marsh's financial condition undoubtedly has been adversely affected by the economic turmoil of the past year. Moreover, the value of MMC stock has not recovered since the alleged wrongdoing giving rise to this litigation. In October 2004, during the five days following the announcement of the NYAG's lawsuit, the value of MMC stock dropped from $46.01 per share to $24.10. (Am.Compl.¶ 10.) MMC stock is currently trading even lower, at approximately $22 per share. There exists the legitimate concern that Defendants might not be able to pay an award higher than the Settlement, even if Lead Plaintiffs were to prevail at trial. Accordingly, this factor supports approval of the Settlement.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum ." *In re Michael Milken & Assocs. Sec. Litis.,* 150 F.R.D. 57, 66 (S.D.N.Y.1993); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litis.,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989). Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972) "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455 & n. 2 ("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.")

The Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. A recovery totaling $400 million is an excellent result when success on the claims asserted is uncertain, class certification is being vigorously challenged, and the condition of the economy and of MMC in particular is questionable. Accordingly, the eighth and ninth *Grinnell* factors support approval of the Settlement.

C. The Proposed Settlement Is Procedurally Fair

"In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also 'ensure that the settlement is not the product of collusion.' " *In re Global Crossing,* 225 F.R.D. at 461 (*quoting In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 474 (S.D.N.Y.1998)). However, "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." *Banyai v. Mazur,* No. 00 Civ. 9806, 2007 WL 927583, at *12 (S.D.N.Y. Mar.27, 2007) (approving settlement reached after months of good-faith, arm's-length negotiations) (*quoting In re PaineWebber Ltd. P'Ships Litig.,* 171 F.R.D. 104, 132 (S.D.N.Y.1997)).

***8** Where, as here, "the settlement is the result of arm's length negotiations conducted by experienced counsel after adequate discovery and the settlement provokes only minimal objections, then it is entitled to '[a] strong initial presumption of fairness.' " *In re Global Crossing,* 225 F.R.D. at 461 (citation omitted). As set forth in Lead

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Counsel's Joint Declaration, Lead Counsel entered into this Settlement after conducting extensive discovery and arm's-length negotiations, based on their good-faith belief that the Settlement is in the best interests of the Class. The Settlement was the result of protracted, difficult negotiations that stretched out over a year and a half. Moreover, those negotiations were conducted with the assistance of Judge Weinstein, a highly regarded mediator with extensive experience in securities litigation, who has submitted a declaration in support of the Settlement. There is no reason to doubt that the Settlement is procedurally fair.

II. Certification of a Settlement Class Is Appropriate Under Rule 23

The Preliminary Approval Order certified the Class pursuant to Rules 23(a) and (b)(3) on behalf of all persons who purchased or otherwise acquired MMC securities between October 14, 1999 and October 13, 2004 (the "Class Period"), and that claim to have suffered losses as a result of such purchase or acquisition. The Class excludes the following: (1) MMC, Marsh and their officers, directors, employees, affiliates, parents, subsidiaries, representatives, predecessors and assigns; (2) Greenberg and Egan and their immediate families, employees, affiliates, representatives, heirs, predecessors, successors and assigns, as well as any entity in which either Greenberg or Egan has a controlling interest; and (3) those persons that would otherwise be members of the Class but that submit valid and timely requests for exclusion in accordance with the Preliminary Approval Order. The Court also certified Lead Plaintiffs as Class Representatives and Lead Counsel as Class Counsel, for purposes of Settlement only, pursuant to Rule 23.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class-action settlement. *See Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). 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). *See In re Prudential Sec. Inc. Ltd. P'ships Litis.,* 163 F.R.D. 200, 205–10 (S.D.N.Y.1995).

A. The Requirements of Rule 23(a) Are Satisfied

Certification under Rule 23(a) is proper if (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 class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of the class.

1. The Settlement Class Is Sufficiently Numerous

***9** Rule 23(a)(1) requires a showing that the Class is so numerous that joinder of all members is impracticable. Numerosity is generally presumed when a class consists of forty or more members. *See Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995). "In securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *In re Vivendi Universal, S.A. Sec. Litig.,* 242 F.R.D. 76, 84 (S.D.N.Y.2007) (*quoting Teachers Ret. Sys. v. ACLN Ltd.,* No. 01 Civ. 11814, 2004 WL 2997957, at *3 (S.D.N.Y. Dec.27, 2004)).

At the time of the Amended Complaint, MMC was the largest insurance broker in the United States, and one of the largest in the world, with approximately $11 billion in annual revenues. (Am.Compl.¶ 43.) MMC has traded on the NYSE during all relevant times, and undoubtedly has had millions of shares outstanding at any given time. Further, Lead Plaintiffs have caused the Notice to be mailed to thousands of potential Class members or nominees, and there have been over 7,000 viewers at the Settlement website. (Young Aff. ¶ 8.) In short, the numerosity of the Class cannot seriously be disputed.

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2. There Are Questions of Law or Fact Common to the Class

Rule 23(a)(2) requires a showing that common issues of fact or law affect all Class members. "The commonality requirement, particularly in securities fraud litigation, is generally considered a low hurdle easily surmounted. Commonality does not demand that every question of law or fact be common to every class member, but instead merely requires that the claims arise from a common nucleus of operative facts. *In re Omnicom Group, Inc. Sec. Litig.*, No. 02 Civ. 4483, 2007 WL 1300781, at *3 (S.D.N.Y. Apr. 30, 2007) (internal quotations and citations omitted); *In re Vivendi,* 242 F.R.D. at 84 (stating that commonality requirement is applied "permissively" in securities litigation). In fact, a single common question may be sufficient to satisfy the commonality requirement. *See, e.g., German v. Fed. Home Mortgage Loan Corp.*, 885 F.Supp. 537, 553 (S.D.N.Y.1995). Where, as here, plaintiffs allege that class members have been injured by the same fraudulent scheme, the commonality requirement is satisfied. *See, e.g., Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 68–69 (S.D.N.Y.2000); *In re Towers Fin. Corp. Noteholders Litis.*, 177 F.R.D. 167, 170 (S.D.N.Y.1997).

Here, Lead Plaintiffs allege that they and all Class members were injured by a fraudulent scheme to artificially inflate and maintain the price of MMC securities, and that Defendants engaged in manipulative and deceptive acts in furtherance of that scheme by, among other things, making false and misleading statements about the nature of their contingent commission practices and revenues. Common questions include (1) whether Defendants engaged in a fraudulent scheme; (2) whether Defendants acted with scienter; (3) whether Defendants' acts affected the market for MMC securities; and (4) whether Defendants' conduct had the effect of concealing the circumstances that bore on the ultimate loss. There are clearly sufficient common questions to satisfy Rule 23(a)(2).

3. Lead Plaintiffs' Claims Are Typical of Those of the Class

***10** Rule 23(a)(3) requires that Lead Plaintiffs' claims be "typical" of those of the Class, Lead plaintiffs' claims are typical where, as here, they "arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi,* 242 F.R.D. at 85 (*quoting Marisol A. v. Giuliani,* 929 F.Supp. 662. 691 (S.D.N.Y.1996)). Typicality thus embraces the principle that class representatives "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individual actions." *In re NASDAQ,* 172 F.R.D. at 126 (internal quotations and citation omitted).

"Typical" does not mean "identical." *See In re Omnicom,* 2007 WL 1300781, at *4; *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y.1992). Accordingly, the "typicality requirement is not defeated by minor variations in the fact patterns of individual class member[s'] claims." *Abdul–Malik v. Coombe,* No. 96 Civ. 1021, 1996 WL 706914, at *3 (S.D.N.Y. Dec.6, 1996). Factual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct. *See, e.g., In re Baldwin–United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y.1986); *Dura–Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y.1981).

Lead Plaintiffs' claims are typical of those of the Class because their claims arise out of the same course of conduct—Defendants' alleged participation in the fraudulent scheme to artificially inflate and maintain the price of MMC securities. Lead Plaintiffs, like the members of the Class they represent, purchased MMC securities during the Class Period and suffered significant losses as a result of the violations of the federal securities laws

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alleged in the Amended Complaint. Lead Plaintiffs stand in the same position as other investors who purchased MMC securities during the Class Period, having suffered the same type of injury (purchasing MMC securities at artificially inflated prices and suffering losses when the fraud was revealed) as a result of Defendants' conduct. Such a showing is sufficient to meet the typicality requirement of Rule 23(a)(3).

4. Lead Plaintiffs Have Fairly and Adequately Protected the Interests of the Class

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Courts consider two factors in measuring adequacy of representation: (1) whether the claims of the lead plaintiffs conflict with those of the class; and (2) whether the lead plaintiffs' counsel is qualified, experienced and generally able to conduct the litigation. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.1992); *In re Oxford Health Plans,* 191 F.R.D. 369, 376 (S.D.N.Y.2000). As many courts have observed, "the issues of typicality and adequacy tend to merge because they 'serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.' " *In re Vivendi,* 242 F.R.D. at 85 (*quoting Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

***11** As discussed above, Lead Plaintiffs and the members of the Class they represent were injured by the same wrongful course of conduct. Accordingly, it is in Lead Plaintiffs' interest to vigorously prosecute this action on behalf of the Class. Lead Counsel are experienced securities class action law firms and they have more than adequately represented the interests of the Class. Accordingly, Lead Plaintiffs and Lead Counsel meet the requirements of Rule 23(a)(4).

B. The Requirements of Rule 23(b)(3) Are Satisfied

Rule 23(b)(3) authorizes class certification if "the court finds 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." Both requirements are satisfied here.

1. Common Questions of Law or Fact Predominate

"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. Paine Webber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002). "Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions." *In re Prudential,* 163 F.R.D. at 206 (*quoting Dura–Bilt,* 89 F.R.D. at 93). Accordingly, as the Supreme Court has noted, "Predominance is a test readily met in certain cases alleging ... securities fraud." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Here, the critical issues for establishing Defendants' liability include whether the Defendants (1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury. Each of these issues is susceptible of generalized proof and, accordingly, the predominance requirement of Rule 23(b)(3) is satisfied. *See, e.g., In re Salomon Analyst Metromedia,* 236 F.R.D. 208, 218 (S.D.N.Y.2006).

2. A Class Action Is the Superior Method of Adjudication

The last prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to

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other methods of adjudication. A class action is particularly appropriate for addressing the claims at issue in this case. Lead Plaintiffs represent a Class consisting of a large number of investors in MMC securities whose individual damages are likely small enough to render individual litigation prohibitively expensive. Superiority is readily found where, as here, "the alternatives [to a class action] are either no recourse for thousands of stockholders ... or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake." *Green v. Wolf Corp.,* 406 F.2d 291, 301 (2d Cir.1968).

***12** Rule 23(b)(3) specifies four factors that a court should consider in determining whether a class action is superior to other methods of adjudication: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Each of these factors weighs in favor of certification of the Settlement Class.

Class members have limited interest in individually controlling the prosecution or defense of separate actions given the prohibitive cost of instituting individual actions for securities fraud. Accordingly, the courts recognize that a class action is uniquely suited to resolving securities claims. *See In re Vivendi,* 242 F.R.D. at 91; *see also Green,* 406 F.2d at 296. This point is underscored by the fact that, to date, only a small number of Class members have opted out of this class action. Further, concentrating litigation in a single forum plainly has a number of benefits, including eliminating the risk of inconsistent adjudications and promoting the fair and efficient use of the judicial system, and "the Southern District of New York is well known to have expertise in securities law." *Albert Fadem Trust v. Duke Energy Corp.,* 214 F.Supp.2d 341, 344 (S.D.N.Y.2002). Finally, in determining whether a class action is a superior method of adjudication, a court must also consider "the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23's notice requirements." *In re Vivendi,* 242 F.R.D. at 107. Securities class actions are routinely certified and raise no unusual manageability issues. Indeed, as shown below, the streamlined and timely manner by which Lead Plaintiffs identified and notified Class members of the Settlement demonstrates that class treatment here is manageable and efficient.

III. Transmission of the Notice to the Class Satisfied Both the Preliminary Approval Order and Applicable Law

Rule 23(c) (2)(B) requires that notice of class certification must be served on all class members who can be identified through reasonable efforts. Further, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections. *See Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 67 (S.D.N.Y.2003) ("Although no rigid standards govern the contents of notice to class members, the 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." (internal quotations and citations omitted)).

***13** As with the notice approved by the court in *Thompson,* the Notice provided to Class members here provided, "in language easily understandable to a layperson, the essential terms of the settlement, including the claims asserted; who would be covered by the settlement; how to participate in or

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opt-out of the settlement; the settlement benefits; the contact information of the lawyers representing the class members and the amount sought for named Class members; how to object to the settlement and the time and place of the Court's scheduled fairness hearing if an objector or his counsel wished to appear; and who to contact if further information is sought." *Id.* at 68 (citations omitted). Indeed, as the Court stated at the preliminary approval hearing, the Notice provided by Lead Counsel was among the best the Court has encountered.

The Preliminary Approval Order authorized Lead Plaintiffs to retain Rust Consulting, Inc. as the Claims Administrator, and directed the Claims Administrator to (1) cause the Notice and Proof of Claim to be mailed, by first-class mail, postage prepaid, by November 13, 2009, to all reasonably identifiable Class members; and (2) cause the Summary Notice to be published in the *Wall Street Journal* and transmitted over *Business Wire.* In addition, the Preliminary Approval Order directed Lead Counsel to file proof of the publication of the Summary Notice and mailing of the Notice with the Court at least three days before the Settlement Fairness Hearing. Lead Plaintiffs have fully complied with these requirements. (Joint Decl. ¶¶ 96–98; Young Aff. ¶¶ 6, 7, 11.) This is sufficient to satisfy Rule 23. Accordingly, the form and manner of Notice provided to Class members satisfies both the Preliminary Approval Order and Rule 23.

IV. The Plan of Allocation Is Reasonable, Fair and Equitable

"When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.' " *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 462 (S.D.N.Y.2004) (*quoting In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001)). In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel. *See In re Painewebber Ltd. P'shps. Litig.,* 171 F.R.D. 104, 133 (S.D.N.Y.1997).

The Plan of Allocation (the "Plan") in this case meets these standards of rationality and reasonableness. As set forth in the Joint Declaration, the Plan is the product of Lead Counsel's investigation, discovery and consultation with their damages expert. In developing the Plan, Lead Counsel and their experts considered numerous factors, including (1) the volume of publicly traded MMC securities purchased, acquired or sold during the Class Period; (2) the time period in which an MMC security was purchased or acquired, or an MMC put option was sold; (3) whether the security was held until after the end of the Class Period or whether it was sold during the Class Period, and if so, when it was sold and at what price; (4) the artificial inflation in the price of MMC securities (or "artificial deflation" for put options) allegedly attributable to Defendants' misstatements; and (5) the type of security involved. The Court concludes that the Plan is rational and reasonable.

V. Attorneys' Fees

***14** Lead Counsel (1) submit their Fee Application for an award of attorneys' fees in the amount of 13.5% of the Settlement Fund; (2) petition for reimbursement of litigation expenses in the amount of $7,848,411.84; and (3) make, on behalf of Lead Plaintiffs, a PSLRA Award Request for reimbursement of class representative expenses totaling $214,657.14–$70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs. For the reasons stated below, the Court grants these requests.

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees and Reimbursement of Expenses from the Settlement Fund

Pursuant to the "equitable" or "common fund" doctrine, established more than a century ago in *Trustees v. Greenough,* 105 U.S. 527, 532–33, 26 L.Ed. 1157 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as

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compensation for their work. *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 584–85 (S.D.N.Y.2008). The Supreme Court has recognized that a lawyer who recovers a common fund for the benefit of persons other than 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, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). Fees and expenses are paid from the common fund so that all class members contribute equally toward the costs associated with litigation pursued on their behalf. *See Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000).

Courts traditionally have used two methods to calculate reasonable attorneys' fees in common fund cases: the "percentage method" and the "lodestar method." *Id.* The percentage method is the simpler method of the two and involves awarding counsel a percentage of the recovery as a fee. *Id.* The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably billed, then multiply that figure by an appropriate hourly rate. *Id.*

Although district courts may use both methods when approving an award of attorneys' fees, the Second Circuit encourages using the lodestar method only as a cross-check for the percentage method. *Id.* at 50; *see Strougo v. Bassini,* 258 F.Supp.2d 254, 263 (S.D.N.Y.2003). Indeed, 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 In re Telik,* 576 F.Supp.2d at 586 & n. 6 (collecting cases). Further, the percentage method comports with the PSLRA, which provides that "attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable *percentage* of the amount of any damages and prejudgment interest actually paid to the class." *See* 15 U.S.C. § 78u–4(a)(6) (emphasis added).

Whether determined by lodestar or percentage, the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47. "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion." *Id.* (internal citation omitted). The Second Circuit has instructed that, in exercising their discretion:

> *15 [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Id. at 50 (*quoting In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)). In applying these criteria, "a Court essentially makes no more than a qualitative assessment of a fair legal fee under all the circumstances of the case." *See In re Union Carbide,* 724 F.Supp. at 166. In this case, the fee requested by Lead Counsel is warranted under either the percentage or lodestar method.

B. The Requested Attorneys' Fees Are Reasonable Under the Percentage of the Fund Method

The requested fee of 13.5% of the Settlement Fund is reasonable. Lead Counsel vigorously pursued this litigation over the course of five years. The requested fee represents only 0.44% of the total value of Lead Counsel's lodestar. When considering percentage fee awards in securities class actions settled in the $100–$600 million range, Lead Counsel's request for 13.5% of the $400 million Settlement Fund is at the low end of the spectrum in this Circuit and elsewhere. *See, e.g., In re Initial Pub. Offering Sec. Litig.,* Master File No. 21 MC 92, 2009 WL 3397238 (S.D.N.Y. Oct. 5, 2009) ($586 million; 33.33%); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,* No. 03 MDL 1529, 2006 U.S. Dist. LEXIS 84621 (S.D.N.Y. Nov. 16, 2006) ($455 million; 21.4%); *In re Qwest*

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Commc'ns Int'l. Inc. Sec. Litig., No. 01 Civ. 01451, 2006 U.S. Dist. LEXIS 71267 (D.Colo. Sept.28, 2006) ($400 million; 15%); *In re Lucent Techs., Inc. Sec. Litis.,* 327 F.Supp.2d 426 (D.N.J.2004) ($517 million; 17%); *In re BankAmerica Corp. Sec. Litis.,* 228 F.Supp.2d 1061 (E.D.Mo.2002) ($490 million; 18%); *In re Prison Realty Sec. Litis.,* No. 3:99–0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001) ($104 million; 30%); *In re Ikon Office Solutions, Inc. Sec. Litis.,* 194 F.R.D. 166 (E.D.Pa.2000) ($111 million; 30%); *Kurzweil v. Philip Morris Cos., Inc.,* Nos. 94 Civ. 2373, 2546, 1999 WL 1076105 (S.D.N.Y. Nov.30, 1999) ($124 million; 30%); *In re Prudential Sec. Inc. Ltd. P'ships Litig.* ., 912 F.Supp. 97 (S.D.N.Y.1996) ($110 million; 27%).

Further, Lead Counsel have based their fee request on the percentage method because Lead Plaintiffs chose the percentage method for determining the fees that Lead Counsel could seek. (Decl. of Carol G. Jacobson, Dec. 18, 2009, ¶ 22; Decl. of Dennis P. Smith, Dec. 18, 2009, ¶ 16.) Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable. *See In re Cendant Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001); *In re Lucent,* 327 F.Supp.2d at 433–34; *In re Global Crossing Sec. & ERISA Litis.,* 225 F.R.D. 436, 466 (S.D.N.Y.2004) (citing *In re Cendant* for proposition that "in class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable").

***16** Indeed, public policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request. *See In re WorldCom. Inc. Sec. Litis.,* 388 F.Supp.2d 319, 356 (S.D.N.Y.2005) (finding that when "class counsel in a securities lawsuit have negotiated an arm's length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight").

Moreover, the requested fee award is plainly warranted and reasonable in light of the six *Goldberger* criteria.

C. The Fee Application Is Reasonable Under the *Goldberger* Factors

1. Lead Counsel's Time, Labor and Lodestar Are Reasonable

The first *Goldberger* factor for determining a fee's reasonableness is "the time and labor expended by counsel." 209 F.3d at 50. Similarly, the first step of the lodestar analysis is to multiply the number of hours reasonably expended in the litigation by each attorney by the appropriate hourly rate for that attorney. *Strougo,* 258 F.Supp.2d at 263. Lead Counsel have unquestionably expended an enormous amount of time over the course of five years to bring this case to a resolution. As set forth in the Joint Declaration, through November 2009, Lead Counsel have collectively spent 309,537.80 hours of attorney and litigation support time valued at $119,556,484.25, and have advanced or incurred $7,848,411.84 in expenses to litigate this case. The requested 13.5% fee represents a multiplier of 0.44—in other words, a negative multiplier—that is amply justified by application of the relevant factors.

(a) Lead Counsel's Hours 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. The Court concludes that the hours Lead Counsel expended in litigating this action are plainly reasonable given the magnitude and complexity of the case, the fierce defenses mounted and the relatively late stage at which the Settlement was reached.

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The extensive history of this litigation, the nature of the services performed, and the time expended by each attorney or other professional, are set forth in depth in the Joint Declaration and other papers submitted by Lead Counsel. All of merits discovery has been completed, including the production, review and analysis of over thirty-six million pages produced by Defendants and third parties, as well as the taking of ninety and defending of twenty depositions. Numerous procedural and substantive motions were fully briefed and argued. A substantial portion of complex expert discovery has been completed. (Joint Decl. ¶¶ 44, 68, 70, 73–76 .) Lead Counsel supervised and managed every aspect of this litigation. (*Id.* ¶ 131.) They in turn were supervised closely by Lead Plaintiffs—in effect, by the Attorneys General of Ohio and New Jersey—who exercised their oversight responsibilities zealously and with an eye to keeping fees as low as possible, given the nature and duration of this action.

*17 Given the five years over which this case has been pending, Lead Counsel's zealous prosecution of the litigation, Lead Counsel's success in overcoming Defendants' motions to dismiss, the briefing and affidavits submitted regarding class certification, and the expansive nature of discovery, with the corresponding intense and lengthy disputes that arose and required resolution by the Court-appointed Special Master, the Court concludes that the total hours billed by Lead Counsel are reasonable.

(b) Lead Counsel's Hourly Rates Are Reasonable

In a lodestar analysis, the appropriate hourly rates are those rates that are normally charged in the community where counsel practices—that is, the market rate. *Luciano v. Olsten Corp.,* 109 F.3d 111, 115–16 (2d. Cir.1997) ("The '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.' " (*quoting Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984))). Thus, awards in comparable cases are an appropriate measure of the market value of counsel's time. Courts in this Circuit and around the country have repeatedly found rates similar to those charged by Lead Counsel to be reasonable in other securities class actions. In short, a market check and substantial precedent demonstrates that the rates used by Lead Counsel in calculating their lodestars are reasonable.

2. The Magnitude and Complexity of the Litigation Support the Requested Fee

The second *Goldberger* factor—the magnitude and complexity of the case—also supports the requested fee award. 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). Shareholder class actions are notoriously complex and difficult to prove.

This action is an example of large-scale, highly complex litigation. At $400 million, the Settlement is one of the top twenty-five recoveries for shareholders in lawsuits of this nature in American history. Complex, fact-intensive pleadings were prepared and filed; multiple motions to dismiss were filed and opposed; Lead Counsel reviewed more than thirty-six million pages in electronic and paper discovery produced by Defendants; over 100 third parties were subpoenaed; 110 depositions were taken and defended; and Lead Counsel pursued class certification and engaged in attendant fact and expert discovery, which included reports and testimony from multiple experts concerning complex damage and loss causation theories and analyses. (Joint Decl. 31–34, 44, 70.)

In addition, throughout the course of the litigation, many disputes among the parties have required judicial interaction and resolution. Numerous hearings were conducted before the Special Master, either in person or telephonically. The negotiations relating to this Settlement spanned one and a half years, and included three sessions

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with the Mediator and countless phone conferences and meetings. In sum, considering the magnitude and complexity of this case, the 13.5% Fee Application is reasonable.

3. The Risks of the Litigation Support the Requested Fee

***18** 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]." *See Goldberger,* 209 F.3d at 54 (internal quotations omitted). While risk is measured as of when the case is filed, *id.* at 55, changes in the law during the course of litigation can increase those risks considerably. During the course of this litigation, significant changes occurred in the well-established standards governing the critical issue of class certification. *See, e.g., Miles v. Merrill Lynch & Co.,* 471 F.3d 24 (2d Cir.2006).

Courts in this Circuit have long recognized that the risk associated with a case bears heavily upon the determination of an appropriate fee award. *See In re Am. Bank Note Holographies, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 432–33 (S.D.N.Y.2001) ("[It is] appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award."); *In re Warner Commc'ns Sec. Litig.,* 618 F.Supp. 735, 747 (S.D.N.Y.1985), *aff'd,* 798 F.2d 35 (2d Cir.1986) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.").

Enormous risk is inherent in massive and highly complex cases like this one. As noted above, there is great uncertainty in taking a case such as this to a jury trial in what would have been a battle of the experts.

(a) Risk of Non–Payment

Lead Counsel pursued this case for five years on an entirely contingent basis, without receiving any reimbursement and with the ever-present and substantial risk of non-payment. In numerous class actions, including complex securities cases, plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever. *See, e.g., State Univs. Ret. Sys. of Ill, v. AstraZeneca PLC,* No. 08 Civ. 3185, 2009 U.S.App. LEXIS 13674 (2d Cir. June 25, 2009) (affirming district court's dismissal of securities class action); *Freedman v. Value Health, Inc.,* 34 F. App'x 408 (2d Cir.2002) (affirming district court's grant of summary judgment in favor of defendants in securities class action); *Steinberg v. Ericsson LM Tel. Co.,* No. 07 Civ. 9615, 2008 WL 5170640 (S.D.N.Y. Dec. 10, 2008) (dismissing securities class action). Here, Lead Counsel worked for five years on this large, complex case on a wholly contingent fee basis, facing the real and heightened risk that they would receive nothing for their efforts. Accordingly, the Court finds that the risk of non-payment weighs in favor of granting Lead Counsel's Fee Application.

(b) Risks of Establishing Liability and Maintaining the Class Action Through Trial

In assessing the risk of establishing liability, the Court must balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. Courts have recognized the considerable risks of failing to recover anything in securities class actions. *See In re AOL Time Warner, Inc.,* No. 02 Civ. 5575, 2006 WL 903236, at *11–12 (S.D.N.Y. Apr. 6, 2006).

***19** Throughout the course of this litigation, Lead Counsel encountered the risks of developing law in the areas of loss causation, pleading requirements and class certification jurisprudence. *See, e.g., Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005); *Miles,* 471 F.3d 24. The risks of this case for Lead Counsel increased with those legal developments.

In sum, the risks associated with this litigation support the reasonableness of Lead Counsel's Fee Applicartion.

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4. The Quality of Lead Counsel's Representation of the Class Supports the Fee Application

The fourth *Goldberger* factor is the "quality of representation" delivered in the litigation. 209 F.3d at 50. To evaluate the quality of representation, courts in the Second Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litis.,* 249 F.R.D. 124, 141 (S.D.N.Y.2008).

There is no doubt that Lead Counsel has immense experience in complex federal civil litigation, particularly the litigation of securities and other class actions. Both Grant & Eisenhofer and Bernstein Liebhard have received significant recognition for their work in these areas.

Another consideration for assessing the quality of services rendered by Lead Counsel is the quality of opposing counsel. Here, all Defendants were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations. Accordingly, the Court concludes that the quality of Lead Counsel's representation of the Class supports the Fee Application.

5. The Fee Request Is Fair and Reasonable in Relation to the Settlement Amount

In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value. As demonstrated above, when compared with fee requests in securities class-action settlements ranging from $100–$600 million, Lead Counsel's requested fee of 13.5% of the $400 million Settlement Fund is at the low end of the spectrum. *See supra* Discussion V.B.; *In re Ikon,* 194 F.R.D. at 194 ("Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent."). Thus, the Court finds that Lead Counsel's fee request is fair and reasonable in relation to the $400 million Settlement.

6. Public Policy Considerations Support the Requested Fee

Public policy is the sixth factor a court considers in determining the reasonableness of a fee request. *Goldberger,* 209 F.3d at 50. "Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *In re Merrill Lynch,* 249 F.R.D. at 141–42; *see In re WorldCom,* 388 F.Supp.2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.") Moreover, "public policy supports granting attorneys fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers,* 361 F.Supp.2d at 236.

***20** Here, Lead Counsel's willingness to assume the risks of this litigation resulted in a substantial benefit to a large Class of purchasers of MMC securities, and Lead Counsel must be adequately compensated for their efforts. Further, Lead Counsel seek a fee that is substantially less than their accrued lodestar. Public policy considerations favor granting the Fee Application,

D. A "Cross–Check" of Lead Counsel's Lodestar Demonstrates the Reasonableness of the Requested Fee

In *Goldberger*, the Second Circuit held that even in cases in which the percentage method is chosen, "documentation of hours" remains "a [useful] 'cross-check' on the reasonableness of the requested percentage." 209 F.3d at 50. However, "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 ....“ *Id.* (internal citation omitted).

Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the

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complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. *See id.* at 47; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir.1999). In this case, the cumulative lodestar reported by Lead Counsel is $119,556,484.25. (Fees Br. at 22.) The percentage fee requested represents a negative multiplier of 0.44 to the lodestar. Thus, not only are Lead Counsel not receiving a premium on their lodestar, their fee request amounts to a deep discount from their lodestar. The lodestar "cross-check" therefore unquestionably supports the requested percentage fee award of 13.5%.

E. The Expenses Incurred by Lead Counsel Were Reasonable and Necessary to the Effective Prosecution of this Action

Counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class. Lead Counsel requests reimbursement of $7,848,411.84 in expenses advanced or incurred by Lead Counsel while litigating this action. Those expenses relate principally to electronic document hosting, retention of a battery of highly regarded and experienced experts, legal research and photocopying services, deposition expenses, as well as travel expenses related to extensive discovery, settlement negotiations and mediations, court appearances and depositions. (*See* Decl. of Stanley D. Bernstein, Dec. 18, 2009 (summarizing and categorizing Lead Counsel's expenses); Decl. of Keith M. Fleischman, Dec. 18, 2009 (same).)

After reviewing the requested expenses, the Court finds that they were necessary litigation expenses that were reasonably incurred, reasonably related to the interests of the members of the Class, and adequately documented. The fact that Lead Plaintiffs, who have reviewed the requested expenses, believe that this payment represents fair and reasonable compensation to Lead Counsel, further supports the reasonableness of Lead Counsel's request for reimbursement. Accordingly, the Court grants Lead Counsel's petition for reimbursement of expenses in the amount of $7,848,411.84.

F. Lead Plaintiffs Are Entitled to an Award of Reasonable Costs and Expenses

***21** The PSLRA states that "Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class," 15 U.S.C. § 78u–4(a)(4); *see Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005) ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

Here, the Ohio Plaintiffs and the New Jersey Plaintiffs have been actively involved in this action since its inception. Pursuant to the PSLRA, the Ohio Plaintiffs and the New Jersey Plaintiffs request an award totaling $214,657.14–$70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs—to compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class. (Fees Br. at 23–25.)

Lead Plaintiffs have pursued their claims against Defendants for five years. These large institutional investors have actively and effectively fulfilled their obligations as representatives of the Class. As set forth in the Joint Declaration and in the other papers submitted by Lead Plaintiffs, they (1) reviewed and approved the complaints and other pleadings filed in this action; (2) had extensive and regular telephonic, email, and in-person communications with Lead Counsel regarding strategy and developments in the case; (3) reviewed and commented on Lead Counsel's submissions to the Court, the Special Master and the Mediator; (4) oversaw and assisted their own personnel in responding to discovery requests, including

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requests for production of documents and interrogatories; (5) reviewed and approved responses and objections to discovery requests drafted by Lead Counsel; (6) proffered several representatives to give deposition testimony; (7) reviewed and approved the retention of experts and consultants; and (8) fully participated in all mediation sessions and settlement discussions on behalf of the Class. These are precisely the types of activities that support awarding reimbursement of expenses to class representatives.

The Notice provided to Class members stated that Lead Plaintiffs would apply to the Court for approval of their PSLRA Award Request. To date, only one objection to this request has been received. (Fees Br. at 25) The Court thus awards the Ohio Plaintiffs $70,000 and the New Jersey Plaintiffs $144,657.14 as compensation for their reasonable costs and expenses incurred in representing the Class.

VI. Objections Received

Pursuant to the Preliminary Approval Order, Rust Consulting, Inc., the Claims Administrator, implemented an extensive notice program to potential Class members. The Claims Administrator mailed a total of 596,517 copies of the Notice and Proof of Claim (together, the "Notice Packet") to potential Class Members. (Young Aff. ¶ 11.) The Claims Administrator also had the Summary Notice published in the national edition of *The Wall Street Journal* and had a copy of the Summary Notice transmitted over *Business Wire*. (*Id.* Ex. B.)

***22** Through these efforts, the Claims Administrator reached hundreds of thousands of Class members, fully informing them of the Settlement terms and their rights, including the right to object to the Settlement or any part of it (including the Plan of Allocation, Lead Counsel's application for attorneys' fees and reimbursement of expenses, and reimbursement of costs and expenses for Lead Plaintiffs). Only *seven* potential Class members have objected. (Lead Pls.' Mem. in Resp. to Objections, Dec. 18, 2009, at 1.) These seven objections represent a mere 0.0012% of the Notices mailed to potential Class members.

Of these seven objectors, only one complied with the Notice's clearly stated procedures for filing a proper objection. That single objection was filed by Edward F. Siegel, Esq. ("Siegel") on behalf of purported Class member Hermine Union ("Ms. Union" or "Objector Union"). (Objection of Hermine Union, Dec. 14, 2009 ("Union Objection") (Docket No. 303).) That objection has been withdrawn. (Docket No. 330.)

A. Any Suggestion That the Requested Fee Award Is "Unreasonable" and "Excessive" Is Meritless

One objector, James M. McCague, asserts that the requested fee award is unreasonable. (*See* Decl. of Brian S. Cohen, Dec. 18, 2009 ("Cohen Decl."), Ex. 10 (McCague objection).) That is simply not so. The law in this Circuit is clear: a district court must consider several specific factors in determining the reasonableness of a fee award for class counsel. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir.2000). After considering those factors, the Court has little trouble rejecting McCague's objection. *Cf. In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C.2002) (rejecting broad, unsupported objections because "[they] are of little aid to the Court in determining whether these settlements are fair, adequate, and reasonable."

The Court-approved Notice clearly describes the massive efforts engaged in by Lead Counsel in litigating the action. The Notice explains, inter alia, the extensive and vigorously contested fact discovery (including the review of over thirty-six million pages of documents), the huge number of depositions taken and defended, the intensive class certification motion practice, and the thorough expert witness work.

Mr. McCague acknowledges these efforts, but complains that he does not understand why counsel needed to take all the actions listed. (*Id.*) The Court

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easily concludes that Lead Counsel's efforts were necessary for the zealous and effective prosecution of this action on behalf of the Class.

That only two objections to the fee request were received, and just one continues to be pressed, is powerful evidence that the requested fee is fair and reasonable. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 912 F.Supp. 97, 103 (S.D.N.Y.1996) (concluding that a single "isolated expression of opinion" should be considered "in the context of thousands of class members who have not expressed themselves similarly"); *In re Crazy Eddie Sec. Litig.,* 824 F.Supp. 320, 327 (E.D.N.Y.1993) (finding fact that "only one person has opposed the fee" to support its reasonableness). The reaction by members of the Class is entitled to great weight by the Court. The Notice was sent to hundreds of thousands of prospective Class members. Only two objections relating to the Fee Application were submitted. That strongly supports a finding that the request is fair and reasonable.

B. The Remaining Objections to the Notice Program Are Meritless

***23** Six people challenge the Notice on the ground that it was not "timely received." None of these individuals filed proper objections. Both the Notice and Summary Notice informed the Class that any objection to the Settlement must be filed with the Court and served on Lead Counsel no later than December 14, 2009. The Notice states that an objector must "include ... proof of the number of MMC securities ... purchased and sold during the Class Period." (Notice at 19.) Objectors William N. Weld ("Weld"), John F. Mencer ("Mencer"), Robert G. Coplin ("Coplin"), McCague, Thomas and Carolynn Kane ("the Kanes"), and an unidentified individual claiming via email that he/she did not receive the Notice until December 14, 2009 ("Anonymous"), failed to include this information. (*See* Cohen Decl. Exs. 7–12 (copies of objections of Weld, Mencer, Coplin, McCague, the Kanes, and Anonymous).)

Even if their objections had been proper, however, they are meritless. As the Court recognized in the Preliminary Approval Order, the Notice plan satisfied due process. Notice was first mailed on November 13, 2009. Objections were due thirty days later on December 14, 2009. Courts have repeatedly found such a time period to constitute sufficient notice. *See, e.g., Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 426, 429–30 (5th Cir.1977) (concluding, in securities fraud class action, that a period of "almost four weeks between the mailing of the notices and the settlement hearing" was adequate time, particularly when only one class member objected to the timing); *In re BankAmerica Corp. Sec. Litig.,* 210 F.R.D. 694, 707–08 (E.D.Mo.2002) (finding that timing of notice comported with due process where "[t]here were three to four weeks between the mailing of class notice and the last date to object") (*citing Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 120–21 (8th Cir.1975) (finding nineteen-day notice period sufficient, particularly when case had been ongoing for two years)); *see also Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374–75 (9th Cir.1993) (holding that initial notice sent thirty-one days before deadline for written objections was adequate); *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302, 2006 WL 2572114 (S.D.N.Y. Sept. 6, 2006) (finding distribution of notice thirty-four days before the deadline for objections was adequate).

It is well-established class-action jurisprudence in this Circuit that courts focus the due process lens on the notice efforts made by counsel, not whether class members actually received notice. *See In re "Agent Orange" Prod. Liab. Litis.,* 818 F.2d 145, 168 (2d Cir.1987) (determining that class notice was adequate and rejecting the proposition that actual notice had to be given to each and every class member); *see also Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 80 (S.D.N.Y.2003) ("It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely

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to inform persons affected.") (internal quotations and citation omitted). As the Second Circuit recently held:

> *24 Because notice of the settlement was reasonably provided through individually mailed notice to all known and reasonably identifiable class members, publication in several major newspapers, and entered on the district court's docket sheet, actual notice was not necessary and the notice provided here was sufficient. It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as class counsel "acted reasonably in selecting means likely to inform persons affected."

In re Adelphia Commc'ns Corp. Sec. & Derivative Litis., 271 F. App'x 41, 44 (2d Cir.2008) (*quoting Weigner v. City of N.Y.,* 852 F.2d 646, 649 (2d Cir.1988)).

In this case, a total of 596, 517 Notice Packets were mailed to potential Class members. (Young Aff. ¶¶ 5, 9–10.) In addition, Summary Notice was transmitted over *Business Wire* on November 16, 2009, and a copy of the Summary Notice was published in the national edition of *The Wall Street Journal* the next day. (*Id* . ¶ 6.) The Court easily concludes that the Class as a whole had adequate notice.

It must be noted that certain objectors received Notice later than others because they held their shares in "street name"—i.e., in the name of a nominee/brokerage house. Pursuant to the Preliminary Approval Order, the Claims Administrator used "reasonable efforts to give notice to nominee purchasers such as brokerage firms and other Persons that purchased or otherwise acquired MMC securities during the Class Period as record owners but not as beneficial owners." (Preliminary Approval Order at 4; *see* Young Aff. ¶¶ 3–4, 10.) In addition, the Preliminary Approval Order provides that "Such nominee purchasers are directed within seven (7) days of their receipt of the Notice to forward copies of the Notice and Proof of Claim to their beneficiaries that are Members of the Class." (Preliminary Approval Order at 4–5.)

That certain objectors' brokers failed to comply with the Preliminary Approval Order and forward their clients the necessary paperwork in a timely fashion is no fault of Lead Counsel. That is the risk a shareholder takes in registering his or her securities in street name. Moreover, "notice provided to the class members' nominees—i.e., the brokerage houses—has been deemed sufficient even if brokerage houses failed to timely forward the notice to the beneficial owners." *Fidel v. Farley,* 534 F.3d 508, 514 (6th Cir.2008) (*citing DeJulius v. New England Health Care Employees Pension Fund,* 429 F.3d 935, 936, 945–47 (10th Cir.2005) (finding notice sufficient where two beneficial owners received notice of class settlement two weeks after deadline for filing objections and on the same day as the final fairness hearing); *Silber v. Mabon,* 18 F.3d 1449, 1453–54 (9th Cir.1994) (finding notice adequate where 1,000 beneficial owners received notice after the opt-out deadline as a result of late response of brokerage house); *Torrisi,* 8 F.3d at 1374–75 (concluding notice was sufficient where notice was mailed to some beneficial owners after deadline for filing objections had passed).

*25 Accordingly, the Court rejects the remaining objections to the timeliness of the Notice program.

C. The Single Objection to the Format of the Claim Form Is Meritless

Only one objector challenges the Proof of Claim form, arguing that it is unreasonably burdensome and complex, and should be filled out by the lawyers and not the potential Class members. (*See* Cohen Decl. Ex. 11 (objection of the Kanes).) The Proof of Claim form simply asks Class members to list purchases, sales and holdings of MMC stock within the Class Period. Without that necessary information, the Claims Administrator could not calculate claimants' distributions. The single objector's claim that the lawyers should fill

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out the Proof of Claim form and that potential Class members should simply verify the information does not comport with the long-approved procedures for the efficient management of class-action settlement distributions. *See In re WorldCom. Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (holding that "[t]he [one] objection to the length and complexity of the proof of claim form is ... meritless," as "the information that claimants are required to submit is necessary in order for a fair distribution of the settlement proceeds").

D. The Single Objection to the Exclusion of Former Employees Is Meritless

One objector claims that it is "unfair" to exclude former employees from the Settlement Class. (*See* Cohen Decl. Ex. 7 (Weld objection).) Yet Lead Plaintiffs have always asserted—in the Amended Complaint, Lead Plaintiffs' class certification motion and the Stipulation of Settlement—that the wrongful conduct underlying their claims against Defendants were engaged in on a company-wide basis and ingrained in Marsh's business model. Accordingly, the Class definition has always excluded MMC and Marsh employees, and the sole objection to the definition's exclusion of former employees is rejected.

CONCLUSION

For the reasons stated above, the Court (1) approves the Settlement; (2) grants Lead Counsel's Fee Application of 13.5% of the Settlement Fund; (3) grants Lead Counsel's request for reimbursement of expenses in the amount of $7,848,411.84; and (4) grants Lead Plaintiffs' PSLRA Award Request for expenses totaling $214,657.14 ($70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs).

S.D.N.Y.,2009.
In re Marsh & McLennan Companies, Inc. Securities Litigation
Not Reported in F.Supp.2d, 2009 WL 5178546 (S.D.N.Y.)

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IN RE: PRICELINE.COM, INC. SECURITIES LITIGATION; This document relates to: ALL ACTIONS

MASTER FILE NO. 3:00-CV-1884(AVC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. LEXIS 52538; 68 Fed. R. Serv. 3d (Callaghan) 273; Fed. Sec. L. Rep. (CCH) P94,433

July 19, 2007, Decided
July 20, 2007, Filed

SUBSEQUENT HISTORY: Motion denied by, Motion granted by *In re Priceline.Com, Inc. Sec. Litig, 2007 U.S. Dist. LEXIS 97445 (D. Conn., Nov. 29, 2007)*

PRIOR HISTORY: *In re Priceline.com, Inc., Sec. Litig., 2007 U.S. Dist. LEXIS 5962 (D. Conn., Jan. 26, 2007)*

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JUDGES: [*1] Alfred V. Covello, United States District Judge.

OPINION BY: Alfred V. Covello

OPINION

RULING ON MOTIONS FOR APPROVAL OF CLASS ACTION SETTLEMENT AND ATTORNEYS' FEES AND EXPENSES

This is an action for damages brought on behalf of a class of all persons and entities who purchased or acquired Priceline.com securities during the class period of January 27, 2000 through October 4, 2000, and were damaged thereby. [1] It is brought pursuant to sections 10(b), *15 U.S.C. § 78j(b)*, and 20(a), *15 U.S.C. § 78t*, of the Securities and Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), *15 U.S.C. §§ 78a-78mm*, and *Rule 10b-5, 17 C.F.R. § 240.10b-5*. The complaint alleges that the defendants made certain misleading statements with respect to the profitability of Priceline.com and WebHouse Club, causing the plaintiff class to suffer losses on their investments in Priceline.com securities. On May 4, 2007, the plaintiffs reached a settlement with the defendants Priceline.com, Jay Walker, Dan Schulman, Richard Braddock and N.J. Nichols. On July 2, 2007, the court held a hearing to address the fairness of the proposed settlement in accordance with *Federal Rule of Civil Procedure 23(e)*. [*2] [2] For the following reasons, the court hereby approves the parties proposed settlement and the plaintiffs' requested attorneys' fees and expenses.

1 Excluded from the class are the following: (1) the settling defendants; (2) the officers and directors of Priceline.com, at all relevant times; (3) members of the settling defendants' immediate families and their legal representatives, heirs, successors or assigns; (4) any entity in which the settling defendants have or at any time had a controlling interest; and (5) Deloitte & Touche LLP, or any of Deloitte's partners, officers and directors.

2 *Federal Rule of Civil Procedure 23(e)* provides, in relevant part, that "the court may approve a settlement . . . that would bind class members only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." *Fed.R.Civ.P. 23(e)(1)(C)*.

FACTS

Examination of the complaint and the papers filed in connection with the parties' proposed settlement and the arguments made during the July 2, 2007, hearing reveal the following facts:

On October 2, 2000, the plaintiffs filed the complaint in this case, alleging that the defendants made certain misleading statements with respect to [*3] the profitability of Priceline.com and WebHouse Club, causing the plaintiff class to suffer losses on their investments in Priceline.com securities. On November 29, 2000, the court consolidated nine of the within cases. On September 12, 2001, the court consolidated the remaining 21 cases under the above-titled case number. On September 12, 2001, the court appointed lead plaintiff for the putative class.

On October 29, 2001, the plaintiff filed a consolidated amended complaint. On February 28, 2002, the defendant, Deloitte and Touche ("Deloitte"), and the defendants Priceline, Walker, Schulman, Braddock and Nichols ("Priceline Defendants"), filed motions to dismiss the consolidated amended complaint. On October 7, 2004, the court, the honorable Dominic J. Squatrito, granted in part and denied in part the defendants motions to dismiss and dismissed a portion of the allegations against the Priceline defendants and all of the allegations against Deloitte. On January 7, 2005, the plaintiffs filed a motion to certify the class. On April 4, 2006, the court certified the plaintiff class to include all persons and entities who purchased or acquired Priceline.com securities during the class period [*4] of January 27, 2000 through October 4, 2000, and were damaged thereby. During the pendency of this case, the parties filed numerous discovery motions and have produced and reviewed 5.29 million pages of WebHouse and Priceline documents.

On May 4, 2007, the plaintiffs reached agreement with defendants Priceline.com, Walker, Schulman, Braddock and Nichols for a cash settlement of $80 million. On July 2, 2007, the court held a hearing to address the fairness of the proposed settlement in accordance with *Federal Rule of Civil Procedure 23(e)*.

STANDARD

Federal Rule of Civil Procedure 23(e) provides as follows:

> (A) The court must approve any settlement . . . of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement . . . that would bind class members only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate.

Fed.R.Civ.P. 23(e)(1). The second circuit has recognized that "[t]he standard for the adequacy of a settlement notice in a class action under either the *Due Process Clause* [*5] or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc. V. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005)*. The court further stated that "[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.'" *Id. at 114* (citing *Weinberger v. Kendrick, 698 F.2d 61, 70 (2d Cir. 1982)* (internal quotation marks and brackets omitted)).

The second circuit has further recognized that "[a] court may approve a class action settlement if it is fair, reasonable and adequate and not a product of collusion." *Wal-Mart Stores, Inc. V. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005)*. "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." Id. (citing *D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001))*. Further, the court has recognized a strong policy in favor of class action settlements and also that a "'presumption of fairness, [*6] adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Id. at 116-17* (quoting *Manual for Complex Litigation, Third,* § 30.42 (1995)).

DISCUSSION

I. Adequacy of Notice to the Class

Federal Rule of Civil Procedure 23(e)(1)(B) requires that the court "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." *Fed. R. Civ. P. 23(e)(1)(B)*. In addition, *Federal Rule of Civil Procedure 23(c)(2)(B)* requires that the court "direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

> * the nature of the action
>
> * the definition of the class certified,
>
> * the class claims, issues, or defenses,
>
> * that a class member may enter an appearance through counsel if the member so desires,
>
> * that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
>
> * the binding [*7] effect of a class judgment on class members under *Rule 23(c)(3)*."

Fed. R. Civ. P. 23(c)(2).

In this case, the claims administrator, Strategic Claims Services ("Strategic Claims"), mailed individual notices, by first-class mail, to all class members at their last known-addresses. Strategic Claims mailed a total of 88,893 packets of individual notice materials. In addition, the notice of this settlement was published in the *Wall Street Journal* and *USA Today*. Further, a press release announced the settlement over the PR newswire for national distribution and the notice of settlement and settlement agreement are currently posted on the claims administrator's website. Finally, Priceline described the settlement in its 2007 first quarter Form 10-Q, which it

filed on May 10, 2007.

The court concludes that notice to the class in this case was adequate in form and content to satisfy the requirements of the federal rules and due process. The notice was sufficient for class members to understand the proposed settlement and their options.

II. Fairness of the Settlement

The federal rules next require the court to determine whether "the settlement . . . is fair, reasonable, and adequate." *Fed.R.Civ.P. 23(e)(1)(C).* [*8] The second circuit has stated that courts should consider the following factors when determining whether a particular settlement is fair: "(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 . . . ." *City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).* Further, the second circuit has recognized that 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.'" *Wal-Mart Stores, Inc. V. Visa U.S.A., Inc., 396 F.3d 96, 116-17 (2d Cir. 2005)* [*9] (quoting *Manual for Complex Litigation, Third,* § 30.42 (1995)).

In this case, the parties met in four mediation sessions before reaching agreement. The honorable Nicholas H. Politan, retired U.S. district judge, and Robert A. Meyer, esq., conducted the negotiations between the parties. The settlement in this case was ably negotiated at arms' length with the impartial participation of Judge Politan and attorney Meyer and is, therefore, entitled to a presumption of fairness and adequacy. Further, the above-referenced factors militate in favor of approving the parties' proposed settlement. This is a complex case involving many complex accounting issues and violations of the securities laws. While two entities have raised issues with respect to the amount of class counsels' fee, the reaction of the class to the terms of the proposed settlement could not be more favorable. Not one member of the class has objected to the settlement. With respect to the stage of the proceedings, the parties have been litigating this case for almost seven years. During that time, they have completed review of several millions of pages of documents and assembled and utilized teams of investigators and experts [*10] to analyze and quantify their claims. Consequently, the parties are certainly in a position to understand and gauge the strengths and weaknesses of their case and to determine an adequate settlement. See *In re AOL Time Warner, Inc. Sec. & ERISA Litig., 2006 U.S. Dist. LEXIS 17588, 2006 WL 903236 *10 (S.D.N.Y. April 6, 2006).* With respect to the risks of establishing liability, absent the within settlement, the plaintiffs would face motions for summary judgment and complex and fact-intensive analysis of accounting and fraud issues. The plaintiffs would also face significant obstacles in proving damages in this case with respect to differences between the stock's purchase price and the stock's "true" value. The determination of damages would depend upon the jury's reaction to and interpretation of conflicting expert opinions on the issue. Such a determination would be difficult to predict with any certainty. With respect to the risks of maintaining the class action through trial, although the court has certified the class in this case, the prospects of decertification certainly exist in light of the defendants' vigorous opposition to the plaintiffs' motions for certification and the defendants' defeat of one of the plaintiffs' [*11] motions for appointment of a lead plaintiff as a class representative. With respect to the defendants' ability to withstand a greater judgment, the plaintiffs' memorandum states that class counsel relied on this factor in deciding to settle this case. On its 2007 Form 10-Q, Priceline reported that $ 30 million of the $ 80 million dollar settlement amount is being funded through its insurance policies. In addition, the form states that Priceline's current liabilities exceed its current assets and that it reported an operating loss of $ 31.7 million for its most recent quarter. Finally, the range of reasonableness of the settlement in light of the best possible recovery and litigation risks weighs in favor of approving the parties settlement. Given the procedural history of this case, the previously discussed risks of proceeding to trial and the defendants' financial circumstances, the court concludes that the settlement here represents a fair, adequate and reasonable result for the class.

As part of the fairness determination, the court must

determine whether the settlement's proposed allocation of the proceeds is fair and reasonable. "[T]he adequacy of an allocation plan turns on whether [*12] counsel has properly apprised itself of the merits of all claims, and whether the proposed settlement is fair and reasonable in light of that information." *In re Paine Webber Partnerships Litigation, 171 F.R.D. 104, 133 (S.D.N.Y. 1997)*, aff'd, *117 F.3d 721 (2d Cir. 1997)*. In this case, the settlement provides for distribution of the net settlement funds on a pro rata basis and involves a formula based upon liability and damages. The settlement agreement seeks to reimburse class members for the excess amount they paid for Priceline stock because of the artificial inflation of the stock by reason of the defendants' misrepresentations. The court notes that not one class member has objected to the proposed plan of allocation. Upon careful review of the settlement agreement's allocation of the settlement fund, the court concludes that it is fair and has a "reasonable rational basis" in light of the circumstances of this case. See *Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)*.

III. Attorneys' Fees

Lead plaintiffs' counsel have also filed a motion for an award of attorneys fees in the amount of 30% of the $80 million dollar settlement and for reimbursement of litigation [*13] expenses. For the foregoing reasons, the motion is granted.

The plaintiffs argue that 30% of the settlement fund is a fair and reasonable fee in this case. The New York State Teachers' Retirement System ("NYSTRS") has filed an opposition to the requested fee and argues that the facts of this case do not support a fee award in that amount. In addition, the Pennsylvania Public Schools Employees' Retirement System ("PPSERS") has filed an objection to the proposed attorneys' fee request.

The second circuit has recognized that "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. . . . the attorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund. *Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000)* (citations omitted). The second circuit has recognized two methods for calculating a reasonable fee. "The first is the loadstar, under which 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 [*14] computation has been made, the district court may, in its discretion, increase the loadstar by a multiplier based on 'other less objective factors,' such as the risk of litigation and the performance of the attorneys." Id. (Citation omitted) (internal quotation marks omitted in original). Under the second method, "the court sets some percentage of the recovery as a fee." Id. The second circuit has recognized that regardless of the method used, "the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances." Id. The second circuit has stated that whether using the loadstar or percentage methods, "the district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Id. at 50* (quoting *In re Union Carbide Corp. Consumer Products Business Securities, 724 F. Supp 160, 163 (S.D.N.Y. 1989))*.

In this case, counsel have expended 31,768 hours [*15] at rates of between $ 50 and $ 770 per hour for a total of 12.1 million in fees. Counsel in this case state that they have investigated publicly available materials, reviewed millions of pages of documents, consulted with experts, conducted ongoing research and drafted court documents for an extensive motions practice, formulated litigation strategy, prepared for and participated in multiple mediation sessions, and negotiated and administered the within settlement. The magnitude and complexity of this case are apparent from the more than six years of contentious discovery, intricate issues regarding proof of liability and loss and complex accounting issues. With respect to the risk of litigation, the plaintiffs developed their own theory of liability and damages, as there was not a government prosecution in this case. Proving the elements of this case would be a necessary and formidable task. Further, litigation brought issues of collectibility against these defendants, a risk that the class would not be certified, and risks associated with taking a case on a contingent fee basis. The quality of representation here is demonstrated, in part, by the result achieved for the class. Further, [*16] it has been this court's experience, throughout the ongoing litigation of this matter, that counsel have conducted themselves with the utmost professionalism and respect for the court and the judicial process. The relation of the requested fee to

the settlement weighs in favor of the requested 30% fee award. The effort by counsel in this case, the result obtained and similar awards in comparable cases in this circuit, all weigh in favor of the requested fee. See e.g., *Gwozdzinnsky v. Sandler Assocs., 159 F.3d 1346 (2d Cir. 1998)* (summary order) (affirming district court's award of 25% of the common fund); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003)* (granting attorneys fees in amount of 33 and 1/3% of the settlement fund); *Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002)* (granting attorneys' fees in amount of 33 and 1/3% of the settlement fund); *In re RJR Nabisco Sec. Litig., No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992)* (recognizing that the courts increasingly use the percentage of the fund method over the loadstar method in attorneys' fee award).

Finally, public policy considerations also support the [*17] requested fee. The award of the percentage requested here will encourage enforcement of the securities laws and support attorneys' decisions to take these types of cases on a contingent fee basis. The fee fairly compensates competent counsel in a complex securities case and helps to perpetuate the availability of skilled counsel for future cases of this nature.

A cross check of the loadstar in this case also demonstrates the reasonableness of the requested percentage. The percentage requested equals a 1.98 multiplier of the $ 12.1 million dollar loadstar amount. Taking into consideration all of the aforementioned factors, the risks associated with contingent fee litigation, and the quality of representation here and the results obtained, this multiplier is reasonable in light of the circumstances of this case. See *In re Lloyd's Am. Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577 *26-28 (S.D.N.Y. 26, 2002)* (recognizing that courts typically apply a multiplier to the loadstar amount to recognize the risks of litigation and a contingent fee). The court, therefore, orders a fee award equal to 30% of the settlement amount plus accrued interest to the date of the award. The amount of the fee [*18] award shall be allocated among the plaintiffs' counsel in a fashion which fairly compensates counsel for their respective contributions in litigating this case.

Class plaintiffs' counsel also request an award for reimbursement of their litigation expenses advanced to prosecute this case, in the amount of $ 1,394,422.57. Counsel have submitted thorough records of their requested expenses. Absent any objection thereto and after careful review of the expenses at issue, the court grants the plaintiffs' request. The plaintiffs' counsel shall be reimbursed for the full amount of the expenses they have advanced in this matter.

IV. Opt Out Provision

The notice to the class of the proposed settlement gave class members the option to opt out of the settlement. On June 4, 2007, class member Barbara A. Res filed a request to opt out of the settlement in accordance with the procedures set forth in the notice of settlement. Her request is granted and she will not be part of the within settlement. In addition, Arnold J. Hoffman filed a request to opt out with respect to several trusts. That request is addressed in a separate order filed simultaneously herewith.

CONCLUSION

For the foregoing reasons, the [*19] plaintiffs' motion for final approval of the proposed class action settlement (document no. 462) and the motion for award of attorneys' fees and reimbursement of expenses (document no. 463) are **GRANTED**.

It is so ordered this 19th day of July, 2007, at Hartford, Connecticut.

/s/

Alfred V. Covello,

United States District Judge

Not Reported in F.Supp.2d, 2011 WL 6825235 (S.D.N.Y.)
(Cite as: 2011 WL 6825235 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re SADIA S.A. SECURITIES LITIGATION
This Document Relates To: All Actions.

No. 08 Civ. 9528(SAS).
Dec. 28, 2011.

Curtis Victor Trinko, Esq., Law Offices of Curtis V. Trinko, LLP, New York NY, Evan J. Smith, Esq., Brodsky & Smith, L.L.C., Mineola, NY, Catherine A. Torell, Esq., Cohen, Milstein, Sellers & Toll, P.L.L.C., New York, NY, John J. Gross, Esq., Christopher L. Nelson, Esq., Stuart Berman, Esq., D. Seamus Kaskela, Esq., David M. Promisloff, Esq., Kessler Topaz Meltzer & Check, LLP, Radnor, PA, Daniel S. Sommers, Esq., Matthew Keith Handley, Esq., Steven Jeffrey Toll, Esq., Cohen, Milstein, Sellers & Toll, P.L.L.C., Washington, DC, Katharine M. Ryan, Esq., Ryan & Maniskas, LLP, Wayne, PA, Joseph E. White, Esq., Lester R. Hooker, Esq., Maya Saxena, Esq., Christopher Steven Jones, Esq., Saxena White P.A., Boca Raton, FL, Fei–Lu Qian, Esq., Marc L. Gross, Esq., Pomerantz Haudek Block Grossman & Gross LLP, New York, NY, Alan Ian Ellman, Esq., Christopher J. Keller, Esq., Stefanie Jill Sundel, Esq., Labaton Sucharow, LLP, New York, NY, for Plaintiffs.

Lawrence Steven Hirsh, Esq., Jonathan Dick Siegfried, Esq., John Eric Schreiber, Esq., James P. Smith, III, Esq., Kelly Anne Librera, Esq., Dewey & LeBouef, LLP, New York, NY, for Defendants Sadia, S.A., Gilberto Tomazoni, Welson Teixeira, Jr., Walter Fontana Filho, Eduardo Fontana D'Avila.

Charles A. Stillman, Esq., Nathaniel Ian Kolodny, Esq., Scott M. Himes, Esq., Stillman, Friedman & Shechtman, P.C., New York, NY, for Defendant Adriano Lima Ferreira.

MEMORANDUM OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

***1** Plaintiffs sued Sadia, S.A. ("Sadia") and several of its current and former officers based on allegedly false and misleading statements and omissions regarding Sadia's currency hedging practices. On September 16, 2011, the parties executed a Stipulation and Agreement of Settlement ("Stipulation") that seeks to conclude these consolidated class action litigations.[FN1] Following the Court's preliminary approval of the proposed settlement,[FN2] plaintiffs now move for Final Approval of Class Action Settlement and Plan of Allocation. Class Counsel move for an Award of Attorneys' Fees and Expenses and an Award of Costs and Expenses to the Class Representatives. A fairness hearing was held on December 22, 2011, and no objections were raised. For the reasons stated below, plaintiffs' motion for Final Approval of Class Action Settlement and Plan of Allocation is granted. Class Counsel's motion for an Award of Attorneys' Fees and Expenses and an Award of Costs and Expenses to the Class Representatives is granted, but not for the amounts requested.

FN1. The terms of the Stipulation are incorporated into this Memorandum Opinion and Order by reference. *See* Docket No. 123. All capitalized terms not defined in this Order have the meaning given to them in the Stipulation.

FN2. *See* Docket No. 113.

I. CLASS CERTIFICATION

This Court previously granted class certification in this Action.[FN3] For purposes of clarification, the parties propose a slightly modified class definition. For the reasons discussed in the July 20, 2010 Opinion and Order, [FN4] this Court hereby finally certifies this Action as a class action on behalf of the Class as defined in the Stipulation. Individuals who have requested exclusion from the Class by filing a timely and valid request for exclusion are listed on Exhibit 1 annexed hereto.

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FN3. *See In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298 (S.D.N.Y.2010).

FN4. *See id.*

II. NOTICE

The Notice of Pendency of Class Action and Proposed Settlement, Motion for Attorneys' Fees and Expenses and Settlement Fairness Hearing, has been given to the Class, pursuant to and in the manner directed by the Preliminary Approval Order, proof of the mailing of the Notice was filed with the Court by Class Counsel, and a full opportunity to be heard has been offered to all Parties, the Class, and Persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Rule 23 of the Federal Rules of Civil Procedure.

III. APPROVAL OF SETTLEMENT

I find that the proposed settlement is fair, adequate, and reasonable and in the best interests of Class. Initially, a strong presumption of fairness attaches because the settlement was reached by experienced counsel after arm's length negotiations.[FN5] In addition, the *Grinnell* factors weigh in favor of approving the settlement.[FN6]

FN5. *See Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005).

FN6. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

First, continuing the litigation would be expensive because the defendants and all fact witnesses are in Brazil, and extensive expert testimony would be necessary. A potential trial would be complicated by the court's lack of subpoena power over many witnesses. In addition, it is not certain that courts in Brazil would enforce a U.S. securities fraud class action judgment. The settlement provides an immediate and concrete benefit to class members. *Second,* the class has reacted favorably to the settlement. There are no objections and only four exclusions. *Third,* the stage of proceedings favors settlement-a significant amount of discovery occurred. Plaintiffs' counsel reviewed over 65,000 pages of internal documents, conducted a Rule 30(b)(6) deposition, retained two financial experts, and are well aware of the strengths and weaknesses of their cases.

***2** *Fourth,* plaintiffs' counsel faced risks in establishing liability. It will be difficult to obtain necessary discovery because Brazil is not a party to the Hague Convention and the United States is not a party to the Inter–American Convention on Letters Rogatory. In addition, Brazil considers it a violation of judicial sovereignty for foreign lawyers to conduct depositions in Brazil. These difficulties will make proving scienter difficult. *Fifth,* plaintiffs' counsel faced risks establishing damages. Damages must be proved by expert testimony, which a jury may choose to reject. Plaintiffs also face another hurdle in creating a damages model admissible under *Daubert.* Moreover, it is uncertain how a jury would apportion liability between Sadia and the individual defendants. *Sixth,* while Sadia could have withstood a greater judgment, where the other *Grinnell* factors weigh in favor of approving settlement, this factor alone is insufficient to show that the settlement is unfair. *Seventh,* the risk of maintaining the Class Action through trial also favors settlement.

Eighth, the settlement is reasonable in light of the best possible recovery and the attendant risks of litigation. This settlement is fair due to the difficulties plaintiffs face and plaintiffs' maximum provable damages (ranging from $35.5 million and $91 million depending on the assumptions and damages model used). Thus, the settlement represents a recovery of between 30% and 76% of maximum provable damages, which far exceeds the average recovered in securities class action settlements.

Accordingly, the Settlement is approved as fair, reasonable, adequate, and in the best interests of the Class. These actions are hereby dismissed as to the Class Representatives and the other members of the Class, and as against each and all of the Released Parties with prejudice and without costs, except as

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otherwise provided in the Stipulation.

IV. PLAN OF ALLOCATION

The Plan of Allocation is approved as fair and reasonable, and Class Counsel and the Claims Administrator are directed to comply with and administer the Settlement in accordance with the terms and provisions of the Stipulation. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

V. ATTORNEYS' FEES AND EXPENSES

Class Counsel requests $732,228.36 in expenses plus interest on behalf of all of plaintiffs' firms. In support of these expenses, Class Counsel has submitted a summary expense report for each firm.[FN7] These costs include routine expenses relating to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation. The bulk of the expenses relate to experts, consultants, and investigators.[FN8] No objections were filed to these expenses. The expenses total approximately three percent of the Settlement Amount.

FN7. *See* 11/16/11 Declaration of David Kessler, plaintiffs' counsel, Submitted on Behalf of Kessler Topaz Meltzer & Check LLP in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses ("Kessler Decl."), Ex. 2 to 11/17/11 Joint Declaration of Christopher L. Nelson and Joseph E. White III in Support of Final Approval of Settlement, Plan of Allocation and Application for an Award of Attorneys' Fees and Expenses and Reimbursement to the Class Representatives ("Nelson & White Decl."); 11/17/11 Declaration of Joseph E. White III, plaintiffs' counsel, in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses Filed on Behalf of Saxena White P.A. ("White Decl."), Ex. 3 to Nelson & White Decl.; 11/17/11 Declaration of Curtis V. Trinko, plaintiffs' counsel, in Support of Class Counsels' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses Filed on Behalf of the Law Offices of Curtis V. Trinko ("Trinko Decl."), Ex. 4 to Nelson & White Decl.

FN8. *See, e.g.,* White Decl.

I find that these expenses are reasonable. These expenses, particularly those attributable to professional services, were a contributing factor to achieving the settlement.[FN9] Accordingly, I grant plaintiffs' counsel $732,228.36 in expenses, plus interest on such amount at the same rate as that earned by the Settlement Fund.

FN9. *See In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N.Y.2004).

*3 In addition to expenses, Class Counsel also request a fee of thirty-three and one-third percent of the Settlement Amount, or $9 million.[FN10] Although I intend to use the percentage method to award fees in this matter, the lodestar is often used as a cross-check. Class Counsel represent that the aggregate loadstar for all plaintiffs' firms is $8,036,010 for 20,890 hours.[FN11] Because the lodestar is being used merely as a cross-check, it is unnecessary for the Court to delve into each hour of work that was performed by counsel to ascertain whether the number of hours reportedly expended was reasonable.[FN12] After reviewing the supporting declarations, which include a summary of the hours expended by and the billing rates for every attorney, paralegal, and staff member that worked on this litigation, and after lowering the rates for support staff and eliminating fees for investigatory work done by non-lawyers, I find that $7,797,961.50 is a reasonable lodestar for the time expended by plaintiffs' firms.

FN10. *See* Memorandum of Law in Support of Class Counsels' Application for an Award of Attorneys' Fees and Expenses and an Award of Costs and Expenses to the Class Representatives at 1.

FN11. *See id.* at 10.

FN12. *See Goldberger,* 209 F.3d at 50 (citing

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

I further find that a fee of thirty percent, or $8.1 million, is reasonable after assessing the *Goldberger* factors. *First,* I find that the time and labor expended by plaintiffs' counsel support a thirty percent fee. After taking into account my adjustments to the lodestar, plaintiffs' counsel have invested approximately 20,530 hours in these actions. They also expect additional time to be expended administering and distributing the settlement funds. Class counsel has devoted substantial time and effort to this matter, justifying a thirty percent fee.

Second, while these actions, like all securities class actions, are likely to be complex and time consuming, this action is not on the large side of securities litigations. It focused on alleged misstatements and/or omissions concerning a discrete issue by one corporation and its officers. A thirty percent fee is reasonable compensation considering the size of this litigation.

Third, the risk of this litigation supports a thirty percent fee. "It is well-established that litigation risk must be measured as of when the case is filed." [FN13] Although there was certainly a risk of plaintiffs receiving nothing in this action, I do not find that the risk was substantial enough to justify a risk multiplier over the estimated lodestar.

FN13. *Id.* at 55 (citations omitted).

Fourth, I find that plaintiffs' counsel ably represented the interests of the Class. Thus, a thirty percent fee is warranted here.

Fifth, I find that a thirty percent fee is reasonable in relation to the settlement. Class Counsel, as discussed above, has obtained a substantial settlement justifying a thirty percent fee.

Sixth, I find that a thirty percent fee is adequate to further the public policy of encouraging private lawsuits to protect investors. Plaintiffs' counsel will recover their lodestar and all expenses invested in these lawsuits. In these actions, a significant multiplier of the lodestar is not necessary to further public policy goals.

*4 After reviewing the *Goldberger* factors I award plaintiffs' counsel fees of thirty percent of the Settlement Amount, or $8.1 million, plus interest on such amount at the same rate as that earned by the Settlement Fund. I find that the *Goldberger* factors only require a minimal multiplier of the lodestar.

This fee should therefore adequately compensate—but not overcompensate—counsel for their time and labor. The award of fees and expenses are intended to compensate plaintiffs' counsel for all of the time and labor spent until the conclusion of this litigation, including that associated with the distribution of the settlement fund. However, I realize that by awarding a fee close to the lodestar I am not compensating counsel for the risks associated with bringing these actions. However, the risks here—together with the recovery achieved—do not warrant additional fees.

VI. CLASS REPRESENTATIVES

Class Counsel also request $14,177.50 in reimbursement of costs and expenses for Class Representatives. I find that these costs and expenses were reasonably incurred in responding to document requests and interrogatories, producing responsive documents, reviewing filings, and communicating regularly with Class Counsel. Accordingly, I award Class Representatives $14,177.50 in costs and expenses. [FN14]

FN14. These funds are to be allocated among the Class Representatives as requested in the exhibits to the Nelson & White Decl.

VII. CONCLUSION

For the reasons stated above, plaintiffs' motion for Final Approval of Class Action Settlement and Plan of Allocation is granted. Class Counsel's motion for an Award of Attorneys' Fees and Expenses and an Award

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of Costs and Expenses to the Class Representatives is granted, but not for the amounts requested. The Clerk of the Court is directed to close these motions [Docket Nos. 115 and 117]. This case, and all related cases, shall remain closed.

SO ORDERED:

EXHIBIT 1

No.	Name	Address	No. of Shares
1	Madame Francine Archambault Sherbrooke, Quebec J1J 3N5	663 rue de Vimy	400
	Canada		
2	Belle B. Malone	632 Valley Green Drive NE	350
	Atlanta, GA 30342		
3	Monsieur Jacques S. Morissette Sherbrooke, Quebec J1M 0A4	49 rue Champigny	300
	Canada		
4	James H. Smith Bristol, TN 37620	108 Morse Drive	100

S.D.N.Y.,2011.
In re Sadia S.A. Securities Litigation
Not Reported in F.Supp.2d, 2011 WL 6825235 (S.D.N.Y.)

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re SONY SXRD REAR PROJECTION TELEVISION CLASS ACTION LITIGATION.
This Document Relates to: All Actions.

No. 06 Civ. 5173(RPP).
May 1, 2008.

Robert I. Lax & Associates, Attn: Robert Ian Lax, Daniel E. Sobelsohn, The Herskowitz Law Firm, Attn: Jon M. Herskowitz, Miami, FL, Lange & Koncius, LLP, Attn: Joseph J.M. Lange, Jeffrey A. Koncius, El Segundo, CA, for Plaintiffs.

Friedman Kaplan Seiler & Adelman LLP, Attn: Amy Christine Brown, New York, NY, for Defendants.

OPINION AND ORDER

ROBERT P. PATTERSON, JR., District Judge.

*1 On October 23, 2007, this Court preliminarily approved a proposed settlement agreement between Plaintiffs and Defendants in the above-captioned class action. The parties now seek final approval of the proposed settlement agreement. Plaintiffs also move for certification of the settlement class and apply for an award of attorneys' fees and reimbursement of expenses. For the reasons stated below, the proposed settlement agreement is approved, the settlement class is certified, and the application for the fee award is granted.

BACKGROUND

A. The Class Action

Plaintiff Michael Cook filed this case as a putative national class action on July 7, 2006. An identical complaint was filed by Plaintiff Paul Krasnoff on September 29, 2006. The Court consolidated the two actions on December 22, 2006, and Plaintiffs filed a consolidated complaint thereafter. After Defendants moved to dismiss the consolidated complaint, Plaintiffs filed a First Amended Consolidated Class Action Complaint (the "Complaint") dated February 19, 2007, which added sixteen new plaintiffs.[FN1]

FN1. Another case based on the same subject matter was filed in California Superior Court, San Diego County, on behalf of an asserted class of California consumers against California based Sony Electronics, USA, Inc. That case, *Croft v. Sony Electronics, Inc.*, No. GIC879778, is encompassed in the proposed settlement agreement and is similarly terminated upon this Court's final approval.

The Complaint alleges a design defect in all rear projection, high-definition SXRD televisions with the model numbers KDS–R50XBR1 and KDS–R60XBR1 (the "Televisions"), manufactured and marketed by Defendants Sony Corporation, Sony Corporation of America, and Sony Electronics, Inc. (collectively "Sony") beginning in September 2005. The design defect (the "Defect") is alleged to exist in a component known as the "Optical Block," the central component of a projection television that projects the video image onto the screen. The Complaint alleges that the Defect causes a green haze in the middle of the screen (the "green issue"), a yellow stain appearing at the edge of the screen and expanding over time (the "yellow issue"), or other color anomalies on the screens of the Televisions. The Complaint further alleges that Sony was unable to permanently repair the Defect, and that consumers were forced to pay for replacement Optical Blocks at a cost of more than $1500.00 if the Defect manifested after the one-year manufacturer's warranty had expired.

The Complaint posits a class consisting of "all

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end user consumers in the United States who purchased or received as gifts the Televisions." (Settlement § 3.1.) Excluded from the class are Sony, its affiliates, and their employees and immediate family members, persons who purchased or acquired a Television for commercial sale or resale, persons who are claims aggregators, persons who claim to be an assignee of rights associated with the Televisions, and persons who timely and validly opted to exclude themselves from the class. (*Id.* § 3.2.) The Televisions were sold by Sony from approximately September 2005 to July 2006. As defined, the class has approximately 172,000 to 175,000 members. FN2

FN2. Sony's counsel approximates the number of class members at 172,000. Plaintiffs counsel approximates the number of class members at 175,000.

The Complaint asserts nine causes of action, including statutory and common law claims for breach of warranty, a claim of unjust enrichment, and statutory consumer protection claims under the law of California, the laws of 44 other states and the District of Columbia. On March 21, 2007, Sony filed a motion to dismiss for failure to state a claim and based on the inapplicability of California consumer protection law under the choice-of-law rules. (Mulligan Decl., Ex. 2.) Without responding to Sony's motion, Plaintiffs continued negotiations with Sony, and the parties entered into mediation in April 2007.

B. Sony's Improvements to Correct the Defect

***2** Sony claims that by September 2006, all of the Optical Blocks—including those manufactured for new Televisions and those available to be used as replacements for defective Optical Blocks—contained improvements that had been made on a rolling basis to resolve both the green and yellow issues at the heart of Plaintiffs' complaint. The green issue, which manifests itself immediately (Guillou Decl. ¶ 5; Hr'g Tr. at 36:25–37:3), was for the most part resolved within one month of the Televisions entering the market. By October 2005, Sony determined that the green issue was primarily due to temperature fluctuations at the calibration stage of the assembly line and made appropriate adjustments to guarantee temperature uniformity. (Guillou Decl. ¶ 5; Hr'g Tr. at 30:19–23.) Because only about 7000 Televisions had been manufactured at that point, the great majority of Televisions manifesting the green issue were among the first 7000 produced. (Guillou Decl. ¶ 5.) Sony also recognized that there were other possible causes of the green issue, which were relatively minor and resolved by January 2006. (Guillou Decl. ¶ 6; Hr'g Tr. at 31:2–4.)

The yellow issue, which appears over time, took a relatively longer time to resolve. Sony discovered that the yellow issue was caused by the introduction of a microscopic material into one of the panels of the liquid crystal layer of the Television, which disrupted the uniformity of the liquid crystal layer when exposed to the ultraviolet radiation from the lamp that illuminates the whole Television. (Guillou Decl. ¶ 8; Hr'g Tr. at 31:9–20.) The extent of the yellow discoloration that resulted depended on how much of the microscopic material was present, which varied from set to set, and on how frequently the consumer used the Television. Between January 2006 and September 2006, Sony made two types of improvements to resolve the yellow issue: reduction of the amount of ultraviolet exposure and reduction of the amount of microscopic material introduced into the liquid crystal panel. (Guillou Decl. ¶ 9; Hr'g Tr. at 32:8–17.)

At the settlement hearing held by this Court on February 27, 2008, Plaintiffs' counsel stated that "we do think that Sony has successfully remanufactured the component." (Hr'g Tr. at 15:16–17.) The proof which satisfied them "that Sony had resolved this problem was the documents, the explanation of the engineers as to why the defect was manifesting itself in the first instance, how they overcame those problems to redesign the optical block, to assure themselves that the problem

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would not return, and the absence of consumer complaints that the defect had come back once the new optical block was installed." (*Id.* at 15:25–16:6.) FN3

FN3. Plaintiffs counsel represented that since the new Optical Blocks had been incorporated in October 2006, the only problems reported by consumers were isolated instances of malfunction due to improper installation of the Optical Block. (Hr'g Tr. at 15:13–16, 16:19–22, 18:11–13.)

C. The Settlement Negotiations

Although both Plaintiffs and Sony believed firmly in the strength of their cases, the parties agreed to negotiate a possible resolution of the case to avoid the risks and expenses inherent in complex class action litigation. (Mulligan Decl. ¶ 5.) Beginning in November 2006 and continuing through May 2007, the parties conducted intensive arm's-length negotiations. (Mulligan Decl. ¶ 5.) The negotiations culminated in a face-to-face mediation session in April 2007 before Richard C. Neal, a retired justice of the California Court of Appeals and nationally known mediator of complex matters, followed by several telephonic mediation sessions. (Lax Affirm. ¶¶ 6, 7; Mulligan Decl. ¶ 5.)

*3 Prior to and during negotiations, Plaintiffs conducted formal and informal discovery to be able to evaluate the strengths and weaknesses of their claims and set a factual predicate for a proposed resolution. (Lax Affirm. ¶ 8; Mulligan Decl. ¶ 6.) In particular, Plaintiffs conducted extensive review of key engineering documents produced by Sony, interviews of several Sony project engineers, consultation with experts, and due diligence discovery. (Lax Affirm. ¶ 9; Mulligan Decl. ¶ 6.) The discovery allowed the parties to establish the nature and cause of the green and yellow issues, the improvements Sony made to resolve those issues, the timing and efficacy of those improvements, and Sony's ability to replace defective Optical Blocks. (Lax Affirm. ¶ 8; Mulligan Decl. ¶ 6.)

Based on their discovery, investigation and evaluation of the facts and law relating to all of the matters alleged in the pleadings, Plaintiffs and Sony agreed to settle the action under the terms of the proposed settlement agreement (the "Settlement") in May 2007. (Lax Affirm. ¶ 10.) The parties then negotiated attorneys' fees, returning to California for another session with Justice Neal in mid-June 2007 for that purpose.

D. The Settlement's Terms

The Settlement is intended to ensure that class members are reimbursed for expenses they may have incurred for repairs relating to the green or yellow issue, and that class members whose Televisions manifest a green or yellow issue in the future can have the Optical Block replaced in-home without cost and with maximum convenience. The Settlement is also designed to reimburse class members for any expense they might incur prior to the effective date of the Settlement in connection with the repair of an Optical Block. Specifically to those ends, the Settlement provides as follows:

1. Extension of the Optical Block Warranty —Sony will extend its manufacturer's limited warranty on the Optical Blocks through June 30, 2009 with in-home service to correct the Defect. (Settlement § 4.2.) The Televisions came with one-year limited warranties which, for class members who purchased Televisions between September 2005 and July 2006, were scheduled to expire between September 2006 and July 2007.

2. Enhanced Warranty Fulfillment —During the warranty extension period, Sony will maintain a dedicated toll-free telephone number for settlement class members to obtain a telephone diagnosis from a technical representative who will arrange for in-home service and for any necessary parts shipments, if necessary. In the event Sony is unable to ship a replacement Optical Block, if necessary, within 14 days following the initial telephone diagnosis, the settlement class member will have the option of waiting for the repair or exchanging the

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Television for a remanufactured SXRD XBR1 television. The parties acknowledge that any such replacement television may have a lower retail selling price than the original Television. (Settlement § 4.3.)

*4 **3. Reimbursement of Expenses for Optical Block Repair** —Upon timely submission of a valid proof of claim, Sony will reimburse any settlement class member who incurred out-of-pocket expenses prior to the effective date of the Settlement for the replacement of an Optical Block (including shipping costs) for all such expenses. (Settlement § 4.4.)

4. Reimbursement of Certain Extended Service Plans —Upon timely submission of appropriate documentation, Sony will reimburse settlement class members who purchased an extended service contract from Sony or Sony's extended service plan providers after July 15, 2006 and before the effective date of the Settlement, if they wish to cancel it. (Settlement § 4.5.)

5. Reimbursement of Certain Expenses Associated with SXRD Upgrades Prior to Effective Date —Any class member who required more than one Optical Block repair before the effective date of the Settlement and who elected to upgrade to an XBR2, A2000, or A2020 SXRD television will be reimbursed for the monies paid to Sony for the upgrade. (Settlement § 4.6.)

6. Litigation Costs —Sony will pay all costs of settlement administration, including notice, and will pay Plaintiffs' reasonable counsel fees and expenses as awarded by the Court, up to $1,600,000.00, in addition to the benefits provided to the class.

E. Notice to the Class

On October 23, 2007, this Court granted preliminary approval of the proposed settlement and ordered notice to be sent to the class by mail or e-mail (where contact information was available in Sony's records), by newspaper publication, and by the establishment of a website. In compliance with the Court's order, on December 7 and 8, 2007, Sony sent the Notice of Class Action Settlement (the "Notice") (Cohen Aff, Ex. 1) by e-mail to a total of 53,151 class members, 6417 of which bounced back as undeliverable. (*Id.* ¶ 3.) On December 21, 2007, Sony sent the Notice by direct mail to 20,989 class members, including 3889 members whose e-mails had bounced back and for whom Sony had postal addresses. (*Id.*) On December 19 and 26, 2007, Sony published the Summary Notice of Class Action Settlement (*id.*, Ex. 3) in *USA Today*. (*Id.* ¶ 4 .) Lastly, in accordance with the Court's order, beginning October 30, 2007, the Notice and accompanying proof of claim form were posted on a Settlement Website maintained by Sony, and for two weeks beginning November 2, 2007, a link to the Settlement Website was maintained on the homepage of www.sonystyle.com. (*Id.* ¶ 5.)

The Notice advised class members of their right to object and to exclude themselves from the Settlement by filing and mailing a written objection or notice of exclusion by February 6, 2008. Out of the total class of approximately 175,000 members, only 22 opted out. (Mulligan Decl. ¶ 10.) Only 45 class members sent letters that could read as objections. (Mulligan Decl. ¶ 10.) On February 27, 2008, this Court held a settlement fairness hearing in accordance with Rule 23(e)(2) of the Federal Rules of Civil Procedure.

DISCUSSION

I. Final Approval of the Settlement

*5 A class action cannot be settled without the approval of the district court after a hearing and on finding that the proposed settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001). In a case such as the one before the Court, where a settlement is negotiated prior to class certification, the proposed settlement "is subject to a higher degree of scrutiny in assessing

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its fairness." *D'Amato,* 236 F.3d at 85 (citing *County of Suffolk v. Long Island Lighting,* 907 F.2d 1295, 1323 (2d Cir.1990)). To determine a proposed settlement's fairness, a district court examines both "the negotiating process leading up to the settlement as well as the settlement's substantive terms." *Id; see McBean v. City of New York,* 233 F.R.D. 377, 382–83 (S.D.N.Y.2006) (noting that the court "must examine both the procedural aspects of the settlement ... and the substantive aspects of the settlement").

A. Procedural Fairness

In assessing the fairness of the negotiating process, a court reviewing a proposed settlement must "ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *D'Amato,* 236 F.3d at 85. A proposed settlement enjoys a "presumption of fairness" where the settlement is indeed the product of "arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal-mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir.2005) (internal quotation marks omitted); *In re Austrian and German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 173–74 (S.D.N.Y.2000); *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997) ("So long as the integrity of the arm's length negotiation is preserved ... a strong initial presumption of fairness attaches to the proposed settlement"), *aff'd,* 117 F.3d 721 (2d Cir.1997). A reviewing court should be "mindful of the strong judicial policy in favor of settlements, particularly in the class action context." *Wal-mart Stores, Inc.,* 396 F.3d at 116.

Having reviewed the available information regarding the negotiation process leading to the Settlement, the Court concludes that the process was fair. The Settlement was the product of arm's length negotiations beginning in November 2006 and continued through June 2007 under the supervision of Justice Richard C. Neal, retired from the California Court of Appeals. (Lax Affirm, ¶¶ 6, 7; Mulligan Decl. ¶ 5.) The parties conducted a full-day mediation before Justice Neal in April 2007 and follow-up telephone mediation session with Justice Neal in late June 2007 to produce the final agreement. (Mulligan Decl. ¶ 5.)

Moreover, the quality of attorneys for both sides and the extent of the discovery they undertook demonstrate the procedural fairness of the Settlement. Both Plaintiffs' counsel, Robert I. Lax & Associates (*see* Compendium Pls.' Counsels' Decls., Ex. A), and Sony's counsel, Friedman Kaplan Seiler & Adelman LLP, have experience with complex commercial litigation and have dealt with similar cases. Plaintiffs' counsel, with the cooperation of Sony, conducted considerable pre-settlement and post-settlement discovery to determine the strengths and weaknesses of the case and to set a factual predicate for a proposed resolution. This discovery included failure analysis of the Televisions and the Optical Blocks through consultations with video/electronic engineering experts, interviews of several Sony project engineers, and an examination of key engineering documents produced by Sony and third parties including Texas Instruments, retailers, and after-market service providers, in addition to due diligence discovery. (Lax Affirm. ¶ 9; Mulligan Decl. ¶ 6.) In view of these undertakings, the Court concludes that counsel possessed the abilities, and conducted the discovery, necessary to represent effectively the class members' interests in this case. Accordingly, the Settlement is entitled to a presumption of fairness.[FN4]

FN4. None of the objections to the Settlement are directed toward the negotiations process.

B. Substantive Fairness

***6** In reviewing a proposed settlement for substantive fairness, reasonableness and adequacy, a district court must consider the following nine factors, known as the *Grinnell* factors:

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(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.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) (citations omitted); *see also Walmart–Stores, Inc.,* 396 F.3d at 117. When assessed in light of these factors, the Settlement is fair, reasonable and adequate.

1. Complexity, expense and likely duration of litigation

The Court agrees with both parties that the complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement. Sony asserted numerous arguments in seeking to dismiss this action and is prepared to defend this case vigorously. Were litigation to continue, Plaintiffs would face expensive and risky motion practice before the case proceeded past the pleadings and an aggressive challenge to class certification. If the case survived beyond the pleading and certification stage, a trial of this technical case would take at least one month, according to Plaintiffs' counsel's estimate, and require testimony of numerous Sony engineers through interpreters and of several expert witnesses concerning complex subject matter such as optical physics and electronic engineering.

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. The considerable expense and duration of further litigation would disadvantage the class members by potentially reducing the class recovery, providing a disincentive to later settlement, and precluding class members who desire immediate repairs to their defective Televisions from receiving such repairs. Under these circumstances, final approval of the proposed settlement is justified. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 0165, 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007) (approving settlement and concluding that "[d]elay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value").

2. Reaction of the class to the Settlement

Members of the class appear to be predominantly in favor of the Settlement. Plaintiffs' counsel attests to having received numerous telephone calls and notes from class members expressing gratitude for the result achieved in this action (Lax Affirm. ¶ 20) and several letters of support for the Settlement (*see, e.g.,* Letter from Gerald Simmons in Support of Settlement, Docket No. 72). Of approximately 175,000 class members, only 22 (0.0126%) have chosen to opt out of the class, and only 45 have voiced objections. The small number of opt-outs and objections relative to the size of the class in this case supports approval of the Settlement. *See Wal–Mart Stores, Inc.,* 396 F.3d at 118 (concluding that only 18 objections from a class of five million was indicative of the adequacy of the settlement); *D'Amato,* 236 F.3d at 86–87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement); *see also In re Am. Bank Note Holographies, Inc.,* 127 F.Supp.2d 418, 425 (S.D.N.Y.2001) (noting that "the lack of objections may well evidence the fairness of the Settlement").

3. Stage of the proceedings and amount of discovery completed

*7 The parties entered into settlement agreement only after pre-settlement informal discovery and confirmatory discovery, which

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allowed the parties to develop the facts necessary to evaluate the claims and adequacy of the Settlement. As noted earlier, Plaintiffs' counsel obtained from Sony thousands of pages of key internal documents concerning the engineering of the Televisions and access to appropriate Sony engineering personnel. Plaintiffs reviewed those Sony documents, interviewed Sony personnel, subpoenaed documents from Texas Instruments concerning the testing of the Televisions, and consulted with experts and third parties concerning the Defect. (Lax Affirm. ¶¶ 5, 9; Mulligan Decl. ¶ 6.) In addition, Plaintiffs' counsel conducted due diligence discovery to verify Sony's identification of the cause of the Defect, its successful redesign of the Optical Block to permanently correct the Defect, as well as Sony's ability to deliver and implement the repair for consumers in a timely manner. (Lax Affirm. ¶ 8.)

Although the parties did not engage in extensive formal discovery, such efforts are not required for the Settlement to be adequate, so long as the parties conducted sufficient discovery to understand their claims and negotiate settlement terms. *See D'Amato,* 236 F.3d at 87 (weighing this factor in favor of settlement approval because "although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information"); *In re Global Crossing Sec. & ERISA Litig .,* 225 F.R.D. 436, 458 (S.D.N.Y.2004) ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims."). In fact, informal discovery designed to develop a settlement's factual predicate is encouraged because it expedites the negotiation process and limits costs which could potentially reduce the value of the settlement. *See Jones v. Amalgamated Warbasse Houses, Inc.,* 97 F.R.D. 355, 360 (S.D.N.Y.1982) ("Although little formal discovery has occurred, the parties freely exchanged data during settlement talks. In view of the way this speeds the negotiation process, informal 'discovery' is to be encouraged"). The current stage of these proceedings—the point at which the parties have conducted sufficient discovery to understand the claims and reach a settlement without incurring excessive costs—weighs in favor of settlement approval.

4. Risks of establishing liability and damages

Plaintiffs, as well as the Court, acknowledge the risk of establishing liability and damages against Sony in this case. Not only has Sony vigorously denied liability, but Plaintiffs' counsel also recognizes that some of Sony's arguments both against class certification and the substance of the case could prevail were this case to proceed. In particular, Plaintiffs face difficult choice-of-law and pleading issues, which Sony raised in its motion to dismiss. Plaintiffs' California consumer protection claim is not likely viable because courts have consistently held that each class member's consumer protection claim is governed by the law of his or her home state,[FN5] and not a single named Plaintiff resides in California. Plaintiffs' breach of warranty claims face the challenge that the Sony warranty only guaranteed that, for one year, Sony would repair any defective Television without charging for either parts or labor; it did not warrant that none of the Televisions would be defective. Plaintiffs must therefore establish that Sony failed or refused to make warranty repairs to establish Sony's breach of warranty.

FN5. *See, e.g., In re Rezulin Prods. Liab. Litig.,* 392 F.Supp.2d 597, 612 (S.D.N.Y.2005); *Leider v. Ralfe,* No. 01 Civ. 3137, 2003 WL 24571746, at *11 (S.D.N.Y. Mar. 4, 2003); *Plymack v. Coply Pharm. Inc.,* No. 93 Civ. 2655, 1995 WL 606272, at *4 (S.D.N.Y. Oct. 12, 1995).

***8** In addition to these substantive issues, Plaintiffs face the more practical risks of uncertain witness testimony, the strength of Sony's expert testimony against Plaintiffs' own expert's testimony, and a jury's unfavorable determinations of fact should this case survive to the trial stage. All of these risks make the fairness of the Settlement all the more evident.

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5. Risks of maintaining the class through trial

Even if the class was certified against Sony's opposition, there is a significant risk that the class could not be maintained through trial. Rather than wait for the outcome of a lengthy litigation process, some members would conceivably seek more expedient relief in replacing or repairing their defective Televisions. In the meantime, Sony's case could gain strength if time gave way to more evidence that the green and yellow issues had been fully resolved by the improvements made between October 2005 and September 2006. The risk that Plaintiffs' would be unable to maintain the class through trial weighs in favor of approving the Settlement. It should be noted that the Settlement guarantees relief to all consumer owners of the Televisions nationwide, not merely those residing in the two jurisdictions in which cases are pending.

6. Ability of the defendants to withstand a greater judgment

Without a doubt, Sony could withstand a greater judgment. But a defendant is not required to "empty its coffers" before a settlement can be found adequate. *McBean,* 233 F.R.D. at 388. Here, the Settlement reasonably provides Plaintiffs with benefit-of-the-bargain relief in the form of repair or replacement of the defective Optical Block, a warranty extension, and reimbursement of repair costs previously incurred. Where, as here, the other *Grinnell* factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair. *See D'Amato,* 236 F.3d at 86.

7. Range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation

The final two *Grinnell* factors require the Court to consider whether the Settlement falls within the "range of reasonableness." The Second Circuit has described the "range of reasonableness" as " 'a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in ... any litigation.' " *Wal-Mart Stores, Inc.,* 396 F.3d at 96 (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)). The Settlement in this case provides a comprehensive remedy to class members, guaranteeing cost-free and expedient in-home repair to members whose Televisions are diagnosed with a green or yellow issue (or any other defect in the Optical Block), and reimbursing out-of-pocket expenses if an Optical Block repair is required. This remedy is well within the range of reasonableness in view of the risks of litigation that Plaintiffs face.

C. The Objections to the Settlement

***9** Following notification of the Settlement, 45 consumers submitted objections. The objections generally fall into one of four categories: (1) the amount of relief inadequately compensates class members; (2) the Settlement should cover different model Televisions or problems other than the Optical Block defect; (3) the reimbursement provision of the Settlement should include refunds for upgrades to other models of televisions than those covered by the Settlement; and (4) the Settlement fails to compel Sony to refund expenditures by class members who purchased extended warranties prior to the Defect becoming known or who purchased extended warranties from non-parties to this litigation. As explained below, however, none of these objections provides a basis to reject the Settlement.

1. Objection to the adequacy of relief

The first category of objections includes complaints that the Settlement should provide members of the class with complete refunds for the Televisions, brand new replacement Televisions, or indefinite extension of the warranty on the Optical Block. While such remedies may be preferable, they do not represent a reasonable compromise. A complete refund or a new Television for each member of the class, regardless of whether or not a Defect was experienced, is unwarranted if Sony fulfills the warranty under the Settlement by providing a replacement Optical Block containing all of the improvements eliminating the green and

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yellow issues. Such a remedy is particularly unreasonable in view of the fact that many of the Televisions, particularly the later-manufactured ones, contain improved Optical Blocks that are unlikely to present either the green or yellow issue in the future.

An indefinite extension of the warranty on the Optical Block is similarly outside the range of reasonableness. No electronics manufacturer warrants that their products will be free from failure forever, nor does the law require such a promise. The Settlement extends Sony's one-year warranty that came with the Television through June 30, 2009. Such an extension to a date certain is reasonable in this case because it affords the longest warranty to those class members who are most likely to experience a Defect—i.e., those who purchased their Televisions at the earliest date, when fewer or no improvements had been made to the Optical Block.

This approximately three-year extension of the warranty is also fair because it is nearly certain that any class member who will experience a problem with the Optical Block will do so before June 30, 2009. The green issue, if it exists, appears soon after the Television is first turned on. (Guillou Deck ¶ 5; Hr'g Tr. at 36:25–37:3.) According to Sony service data, the yellow issue, if it exists, will appear after the Television has been on for no more than 3000 hours. (Guillou Decl. ¶ 11; Hr'g Tr. at 37:19–23.) Based on industry statistics, the average consumer in the United States keeps his television on for 6.7 hours per day; therefore, 3000 hours is approximately 15 months of ownership. (Guillou Decl. ¶ 11; Hr'g Tr. at 37:23–38:1.) This estimate may be conservative in this case, assuming that consumers who spend $4,000 to $5,000 on a television are likely to watch television more frequently than the average consumer. (Hr'g Tr. at 38:2–5.) Finally, the warranty extension to a date certain of June 30, 2009 provides for easy administration, which benefits the class members who are entitled to repairs or reimbursements under the Settlement.

2. Objection to the scope of the Settlement

***10** Some objections to the Settlement were not made by class members, but rather by consumers of different Sony televisions or consumers experiencing problems other than the green or yellow issue in the Optical Block. These objectors wish to be included within the scope of the Settlement. While the Court makes no judgment as to the merits of the claims, these objections do not affect the reasonableness of the Settlement reached by the parties to this action. The failure of a settlement to compensate non-members of the class is not a ground for rejection of the settlement. Moreover, these objectors' claims are not prejudiced in any way because the Release of the Settlement is sufficiently narrow that it does not compromise any claims unrelated to defects in the Optical Block.

3. Objection to the limitation of the upgrade refund to certain models

The Settlement reimburses consumers who paid Sony for an upgrade of the Televisions to other Sony models after Sony unsuccessfully attempted to repair the Optical Block. After lengthy negotiations, the models to be included in this provision were limited to models with similar technology and functionality to the XBR1 Televisions. The reasoning behind this limitation was that a consumer who paid for an upgrade to a comparable Sony television after an unsuccessful repair attempt was likely seeking such an upgrade due to the Defect, rather than due to a desire for a television set with different or more advanced features. Limiting the reimbursements in such a way was consistent with Settlement's design to give class members benefit-of-the-bargain relief.

A few objectors have expressed dissatisfaction with the Settlement because it does not reimburse them for the money they paid to upgrade to a model not covered by the Settlement. But the non-covered models which the objectors seek to include have different technology or features than the XBR1

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Televisions, including LCD flat screens which can be hung on a wall. It can be assumed that a consumer choosing to upgrade to such a model was likely basing his or her decision on a desire for additional features rather than a desire simply to replace his or her defective television set. In negotiating the Settlement, the parties reasonably drew the line, which had to be drawn somewhere, to include only those models that were comparable to the XBR1 Televisions. Expanding the relief to include reimbursement for upgrades to more advanced models is not warranted, nor is it a basis to reject the Settlement.

4. Objection to the limitation of the refund for extended warranty plans to those purchased from Sony after June 15, 2006

The Complaint claims that Sony was unjustly enriched by the marketing and sale of extended warranty service plans after knowledge of the Defect had become widespread. Specifically, Plaintiffs allege that Sony used the existence of the Defect as a marketing tool to sell consumers extended warranty service plans to obtain repairs for a problem which Sony was legally bound to provide. Based on this allegation, the parties negotiated a provision in the Settlement that Sony will offer cash refunds to consumers who purchased extended warranties after July 15, 2006, the date by which the parties agreed knowledge of the Defect became generally know and the Televisions unavailable through retail sales channels. To qualify for such a refund, the class member must have purchased the extended warranty service plan after July 15, 2006, and from either Sony or Sony's extended service plan providers.

***11** Some class members object that this refund provision of the Settlement should also cover extended warranties purchased along with the Televisions and extended warranties purchased from third-party vendors, such as Best Buy and Sears, at the time the defect was known. Such a remedy, however, would go beyond the scope of the claim. Class members who purchased extended warranties along with their Televisions had no knowledge of the Defect at that time; therefore, their payments are not related to Defect and would have been incurred regardless of the Defect. Since these class members did not rely on misrepresentations by Sony regarding the Defect, they cannot demonstrate Sony's liability or their entitlement to relief based on an unjust enrichment theory. Similarly, class members who purchased extended warranties from third-party vendors are not entitled to the refund because there is no allegation that outlets like Best Buy, Wal–Mart, and Sears used unfair marketing tactics in connection with the sale of these warranties. Moreover, these third parties are not parties to this litigation and cannot be expected to refund such purchases. This category of objection therefore is not ground for rejecting the Settlement.

II. Certification of the Settlement Class

The second part of Plaintiffs' application is a motion to certify a settlement class (the “Settlement Class”), to which Sony agreed. As stated earlier, the Settlement Class consists of all end user consumers in the United States who purchased or received as gifts Sony SXRD high definition television models KDS–R50XBR1 and KDS–R60XBR1, excluding (a) Sony, its affiliates, and their employees and immediate family members; (b) persons who purchased or acquired a Television for commercial use or resale; (c) persons who are claims aggregators; (d) persons who claim to be an assignee of rights associated with the Televisions; and (e) persons who have timely and validly opted out of the Settlement Class. (Settlement § 3.1–.2.) On October 23, 2007, this Court entered an order preliminarily certifying the Settlement Class and requiring notice to be sent to the class members by mail or e-mail, by newspaper publication, and by the establishment of a website so that members who wished not to be bound by the Settlement's terms could timely opt out of the class. The parties fully complied with the order in November and December of 2007.

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Before a class may be certified, the party seeking class certification must satisfy two requisites under Rule 23 of the Federal Rules of Civil Procedure. First, Plaintiffs must show that the four requirements under Rule 23(a) are met: (i) the class is so numerous that joinder of all members is impractical; (ii) there are questions of law and fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (iv) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a); *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 132–33 (2d Cir.2001). Second, Plaintiffs must show that at least one of the provisions of Rule 23(b) is satisfied. Here, Plaintiffs seek to show they satisfy Rule 23(b)(3), which requires 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).

A. Requirements of Rule 23(a)

1. Numerosity

***12** The class is undeniably large, and joinder of all the members would be a formidable challenge. The class comprised of approximately 175,000 members across the country, totaling the number of Televisions sold in the United States. While the number of members who actually experience a Defect may be smaller, proposed classes of this size generally meet the numerosity requirement. *See Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997) (concluding that a class of 100,000 children "is obviously numerous, and individual joinder would be virtually impossible"); *Consolidated Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995) (stating that "numerosity is presumed at a level of 40 members"). In any event, "impracticable" joinder of all the members simply means difficult or inconvenient, not impossible, joinder. *See Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir.1993); *Reynolds v. Giuliani,* 118 F.Supp.2d 352, 388 (S.D.N.Y.2000). Under this standard, the numerosity requirement is certainly met.

2. Commonality

The commonality requirement is met if Plaintiffs' grievances share a common question of law or of fact. Fed.R.Civ.P. 23(a) (2); *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 166–67 (2d Cir.1987). It is "not require[d] that each class member have identical claims as long as at least one common question of law or fact is evident." *In re Currency Conversion Fee Antitrust Litig.,* 224 F.R.D. 555, 562 (S.D.N.Y.2004). Here, common issues of law and fact predominate over the case. The primary issues concern the existence of a design defect in the Optical Block which manifests as either a green or yellow issue and Sony's common course of conduct relating to the sales of the Televisions to class members. These common issues are sufficient to satisfy the commonality requirement, which is "generally considered a 'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 206 n. 8 (S.D.N.Y.1995).

3. Typicality

Typicality 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." *Robidoux,* 987 F.2d at 936 (citing *In re Drexel Burnham Lambert Group Inc.,* 960 F.2d 285, 291 (2d Cir.1992)). In this case, the claims of the representative Plaintiffs and the claims of every class member arise from the same conduct by Sony—the sale of televisions containing an alleged defect, the warranty of such televisions, and the practice of selling extended warranties after the alleged defect became known. The claims of the representative Plaintiffs are based on the same legal theories as the claims of each member of the class—breach of warranty, unjust enrichment, and

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violation of consumer protection law. To the extent there is any variation, such differences are minor and do not defeat the typicality requirement. *See In re Oxford Health Services, Inc., Sec. Litig.,* 191 F.R.D. 369, 375 (S.D.N.Y.2000) ("Typicality does not require that the situations of the named representatives and the class members be identical"). The typicality requirement is thus satisfied.

4. Adequacy

***13** "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor,* 521 U.S. 591, 625 (1997). To that end, the adequacy requirement is not satisfied unless the class representatives are part of the class and "possess the same interest and suffer the same injury as the class members." *Id.* at 625–26. In this case, the class representatives suffered the same specific injury as the class members—the loss incurred by purchasing an XBR1 Sony television containing a defective Optical Block. The class representatives also have the same interest as the rest of the class members and are in a similar position with respect to their ability to obtain a remedy in view of Sony's defenses. Under these circumstances, there appears to be no actual or potential conflict of interest between the class representatives and the class members they seek to represent.

The adequacy inquiry also factors in competency and conflicts of class counsel. *Amchem Prods.,* 521 U.S. at 626 n. 20. Here, class counsel competently handled the minor variations in the Plaintiffs' positions and obtained a settlement that resolves the issues faced by all members of the class. Plaintiffs have thus shown that the adequacy requirement is satisfied.

B. Requirements of Rule 23(b)(3)

To certify a class, Plaintiffs must also satisfy one of the provisions of Rule 23(b). Plaintiffs urge the Court to find under Rule 23(b)(3) "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).

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.,* 521 U.S. at 623. To meet the predominance requirement of Rule 23(b)(3), Plaintiffs must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof." *Visa Check/MasterMoney,* 280 F.3d at 136 (internal quotation marks omitted). As the Supreme Court has noted, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods.,* 521 U.S. at 625. This consumer fraud action is such a case. Class treatment is appropriate here because members of the class allege the same product defect and unlawful sales practice of Sony. These allegations are subject to generalized proof to establish breach of express and implied warranties, violation of consumer protection law and unjust enrichment. In other words, the same evidence would be used to prove the claims against Sony whether the claims proceed as a class action or individual actions.

***14** Moreover, members of the class are affected by Sony's actions in a substantially similar way. This is not a case where "individual stakes are high and disparities among class members great," as in certain mass tort cases. *See Amchem Prods.,* 521 U.S. at 625 (holding in an asbestos case that the fact that all members had been exposed to asbestos products was insufficient to meet predominance standard, as different members were exposed to different products for different amounts of time in different ways, and differences in state law compounded those disparities). Here, the class

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members all purchased Televisions that contain or may contain an alleged defect in the Optical Block and paid Sony or may be required to pay Sony for repairs or replacements. To the extent there are subcategories within the class—e.g., those who purchased extended warranties after the Defect became known and those who exchanged their Televisions for upgraded models after unsuccessful repair attempts by Sony—their issues do not overwhelm the common questions of the class and are covered without conflict in the Settlement. Under these circumstances, Plaintiffs meet the predominance requirement. *See In re NASDAQ Market–Makers Antitrust Litis.*, 169 F.R.D. 493, 517 (S.D.N.Y.1996) (noting that the predominance requirement is generally satisfied "unless it is clear that individual issues will overwhelm the common questions").

2. Superiority

Rule 23(b) (3) further requires "that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). In assessing whether to certify a class under Rule 23(b)(3), a court should consider the following nonexclusive factors: (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; and (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum.[FN6] Fed.R.Civ.P. 23(b)(3)(A)-(C). These factors weight in favor of certification.

> FN6. When faced with a request for settlement-only class certification, a district court need not consider the fourth factor listed under Rule 23(b)(3)(D)—whether the class action, if tried, would present intractable management problems. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997).

With respect to the first factor, the individual members of the class do not have an interest in individually prosecuting their cases. While the class-wide damages are considerable in the aggregate, the individual damages may be too small to make litigation worthwhile. The advantage of the class action is that it "permits plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Schutts,* 472 U.S. 797, 809 (1985). Certification is favored where, as here, the individual class members "may have insufficient economic justification for commencing expensive litigation." *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 386 (S.D.N.Y.1996).

The second and third factors also weigh in favor of certification. Aside from *Croft v. Sony Electronics, Inc.*, filed in California Superior Court and encompassed in the Settlement before this Court, the Court is unaware of any related cases pending in other courts. This Court is an appropriate forum for this case because the Court has personal jurisdiction over all the parties and authority to approve a release of nationwide class claims. Based on a consideration of these factors, the Court concludes that a class action is a superior method of adjudicating this case and that certification of the Settlement Class is appropriate. The Settlement Class is hereby certified.

III. Approval of Attorneys' Fees

***15** Class counsel's final application is for an award of attorneys' fees and expenses of $1.6 million, which Sony has agreed to pay. This sum is to compensate Plaintiffs' counsel as well as counsel in the related California action and covers both expenses and attorneys' fees based on the firms' individual billing rates. The firms acting as counsel for the class collectively incurred $49,750.09 in expenses and spent a total of 2414.12 hours in performance of their services. (Compendium Pls.' Counsels' Decls. at 1.)

In reviewing a class action settlement agreement for final approval, a district court must assess the reasonableness of the attorneys' fees. *See*

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4 Newberg on Class Actions § 14:1 (4th ed.2002); *see also In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 819 (3d Cir.1995) (stating that "a thorough judicial review of fee applications is required in all class action settlements"). Under Rule 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). In this case, the parties negotiated and agreed upon the attorneys' fee provision in the Settlement. The negotiation of fee agreements is generally encouraged. *See Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

The attorneys' fees in this case will not be awarded from a "common fund" created for the class as a whole. Here, Sony has agreed to pay the negotiated fee in addition to the class recovery. Thus regardless of the size of the fee award, class members who apply for recovery under the terms of the Settlement will receive the same benefit; the fee award does not reduce the recovery to the class. Under these circumstances, the danger of conflicts of interest between attorneys and class members is diminished. *See McBean,* 233 F.R.D. at 392 (stating that if "money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members"). Still, even where the defendant pays the attorneys' fees, a court must assess the reasonableness of the fee award, particularly because practical realities suggest that generally "a defendant is interested only in disposing of the total claim asserted against it," and not in "the allocation between the class payment and the attorneys' fees." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d at 819–20.

In this case, a few important factors support the reasonableness of the attorneys' fees to which the parties agreed. First, the fee was negotiated only *after* agreement had been reached on the substantive terms of the Settlement benefiting the class. (Lax Affirm. ¶ 34.) This tends to eliminate any danger of the amount of attorneys' fees affecting the amount of the class recovery. Second, the attorneys' fees were negotiated at arm's length under the supervision of Justice Neal. (Lax Affirm. ¶ 36.) In conducting negotiations before Justice Neal, the parties considered the amount of the requested fee relative to class counsel's lodestar and the value of the Settlement and reviewed confidential mediation statements specifically addressing the fee issue after all other aspects of the Settlement had been resolved. (*Id.*) Negotiations under such conditions support a finding that the requested fee is reasonable. *See McBean,* 233 F.R.D. at 392 (stating that "the fact that the award was the product of arm's-length negotiations under the supervision of Judge Katz weighs strongly in favor of approval"). And third, none of the objections to the Settlement took issue with the requested fee award. Together these factors indicate that the negotiated fee award of $1.6 million is reasonable.

***16** Finally, the reasonableness of the requested fee award can be tested by using the lodestar method of calculating reasonable attorneys' fees in common fund cases. The lodestar method calculates fees by multiplying the number of hours expended by an hourly rate appropriate for the region and experience of the lawyer. *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 47 (2d Cir.2000). The district court may in its discretion increase the lodestar by applying a multiplier based on factors such as the risk of the litigation and the performance of the attorneys. *Id.*

The Court has reviewed the hourly rates charged by each of the plaintiff firms and the number of hours expended by each attorney and finds the hours and rates to be reasonable in the context of this litigation and its settlement. Based

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on each firm's current hourly billing rates, the cumulative lodestar for the services performed by all counsel for the class is $1,279,405.00. Counsel requests a multiplier of 1.21 of the counsel for the class is $1,279,405.00. Counsel requests a multiplier of 1.21 of the cumulative lodestar for a total fee of $1,550,249.91 excluding expenses, which is the figure negotiated at arm's length before Justice Neal. A multiplier of 1.21, which is at the low end of the range of multipliers applied in this circuit, is reasonable in light of the risks undertaken by Plaintiffs' counsel in accepting this litigation and the considerable time and resources expended on behalf of Plaintiffs despite those risks, particularly because of Sony's steadfast defense of its case and the extensive technical discovery required to prove liability. Under these circumstances, the negotiated fee award of $1.6 million to cover Plaintiffs' attorneys' fees and un-reimbursed expenses is approved.

CONCLUSION

For the reasons stated above, the parties' motion for final approval of the Settlement, Plaintiffs' motions for certification of the Settlement Class, and Plaintiffs' counsel's application for an award of attorneys' fees and reimbursement of expenses are granted.

IT IS SO ORDERED.

S.D.N.Y.,2008.
In re Sony SXRD Rear Projection Television Class Action Litigation
Not Reported in F.Supp.2d, 2008 WL 1956267 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
TEACHERS' RETIREMENT SYSTEM OF LOUISIANA, individually and on behalf of itself and all others similarly situated, Plaintiff,
v.
A.C.L.N., LIMITED, Joseph J.H. Bisschops, Aldo Labiad a/k/a Abderrazak Labiadh, Alex De Ridder, Christian L. Payne, Michael S. Doherty, Earl Gould, Charles L. Brock, Marina Savva, Yiannakis Economides, BDO International, BDO International Accountants & Consultants (Cyprus), BDO Seidman, LLP, and BDO International B.V., Defendants.

No. 01–CV–11814(MP).
May 14, 2004.

Partial Settlement Pursuant to Rule 23(e)
POLLACK, Senior J.

DECISION

*1 On January 23, 2004, Lead Plaintiff, acting on behalf of itself and the Class, entered into a Stipulation and Agreement of Settlement (the "Settlement Stipulation") with A.C.L.N., Limited ("ACLN" or the "Company"), and certain of ACLN's officers and directors, namely Aldo Labiad a/k/a Abderrazak Labaidh, Christian L. Payne, Michael S. Doherty, Earl Gould and Charles L. Brock (collectively the "Settling Defendants"). The claims against defendants Joseph J.H. Bisschops (ACLN's chairman and managing director), Alex de Ridder (ACLN's Chief Operating Officer and Chief Financial Officer), and directors Marina Savva and Yiannakis Economides will be released. Not covered by the Settlement are defendants BDO International, BDO International Accountants & Consultants (Cyprus) ("BDO–Cyprus"), BDO Seidman, LLP ("Seidman"), and BDO International B.V. ("BDO B.V."). Plaintiffs' Counsel are continuing to prosecute the Action against these latter defendants, collectively referred to herein as the "BDO Entities."

The Settlement Stipulation is now before the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, after reasonable notice to all members of the Class, for a determination, after a hearing, that the Settlement is fair, reasonable, and adequate, and incident thereto, for the allowance of counsel fees and expenses and the establishment of a litigation fund to pay additional costs incurred in the continuing prosecution of the Action against the BDO Entities not part of the Settlement.

The Settlement provides for the payment of $5.5 million in cash plus accrued interest thereon, less certain amounts. The $5.5 million is being maintained in an escrow account (the "Escrow Account") and is earning interest for the benefit of the Class. The money comes from ACLN's $10 million Directors and Officers ("D & O") insurance policy.

Additional consideration for the Settlement is the agreement of the Settling Defendants to cooperate with Lead Counsel in the continuing prosecution of the Action against the BDO Entities. Finally, in conjunction with the settlement negotiations, Lead Counsel has agreed with the SEC to jointly develop a plan of allocation for the Net Settlement Fund in the Action and any recovery the SEC may obtain in its action against ACLN. The plan provides for a joint distribution of the funds through one claims administrator.

I. *The Settlement*

The standards governing approval of class action settlements are well-established in this Circuit. In evaluating a proposed settlement under Fed R. Civ. P. 23(e), the Court must determine whether the settlement, taken as a whole, is fair, reasonable, and adequate. *Maywell v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir.1995). A proposed class action settlement

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enjoys a strong presumption that it is fair, reasonable, and adequate if, as here, it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation arising under the federal securities laws, and if it occurred after meaningful discovery. *See, e.g., In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 124 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997); *New York & Maryland v. Nintendo of Am ., Inc.,* 775 F.Supp. 676, 680–81 (S.D.N.Y.1991); *see also Manual for Complex Litigation, Fourth* § 21.612 (2004) ("Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arm's length.")

***2** In *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974) (*"Grinnell"*), the Second Circuit provided a nonexhaustive list of factors to consider in reviewing a settlement proposal:

> (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....

495 F.2d at 463 (citations omitted); *See also In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281–84 (S.D.N.Y.1999) (following and applying *Grinell* factors).

The proposed Settlement is fair, reasonable, and adequate when measured under the foregoing criteria.

A. *The Complexity, Expense and Likely Duration of the Litigation*

Many of the defendants, witnesses and documents are beyond the subpoena power of the Court and many relevant documents have been seized by foreign government authorities and may not be available. The number of defendants with divergent interests is also a factor. Because of the Private Security Litigation Reform Act of 1995 ("PSLRA")'s provision for proportional fault, even as to the Settling Defendants, it was expected that they would present their own "unique" defenses and experts in support thereof.

While the Action proceeds against the BDO Entities, there would, absent the proposed Settlement, be significant additional resources needed to prosecute the claims against the Settling Defendants throughout the completion of expert discovery, summary judgment motions, the completion of pretrial and trial proceedings, and the post-trial motions and appeals they might file. Moreover, any appeals would substantially delay any payment to Class Members, even if Lead Plaintiff were to prevail.

B. *The Reaction of the Class to the Settlement*

Pursuant to this Court's Order,[FN1] a printed Notice of Pendency of Class Action, Hearing on Partial Settlement and Attorneys' Fee Petition and Right to Share in Settlement Fund (the "Notice"), in form approved by the Court, was mailed to more than 15,000 potential Class Members beginning on March 15, 2004, and a Summary Notice of Pendency of Class Action, Proposed Partial Settlement and Settlement Hearing (the "Publication Notice"), in form approved by the Court, was published in the national edition of *The Wall Street Journal* on March 25, 2004. The Notice contained a detailed description of the nature and procedural history of the Action, the terms of the Settlement, the average recovery per share and the claims that will be released in the Settlement, and Lead Counsel's fee and expense application. The Notice also advised Class Members of their right to object to the Settlement, and/or the fee and expense

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application, or to opt out of the Class by no later than April 30, 2004.

FN1. On February 18, 2004, the Court preliminarily approved the Settlement, set a hearing on May 14, 2004 to determine the fairness, reasonableness and adequacy of the Settlement (the "Settlement Hearing") and directed that notice of the proposed Settlement and the Settlement Hearing be given to the Class.

***3** No Class Member has filed an objection to the proposed Settlement and only eleven persons have requested to be and are opted out of the Class. These persons are as follows: Mary Arena; Richard W. Burg; David Freeman; the Freeman Family Partnership, A Texas Limited Partnership composed of David R. Freeman and Margaret Freeman; William Massatis; Thomas S. Pratt; Christopher Scott; Cordia V. Scott; Douglas P. Scott; Jo Ann W. Scott; and Morris Smith.

The overwhelmingly positive reaction of the Class to the proposed Settlement supports its approval by the Court. *See Grinnell,* 495 F.2d at 462 (approving settlement where only 20 objectors appeared from group of 14,156 claimants).

C. *The Stage of the Proceedings and the Amount of Discovery Completed*

To approve a proposed settlement "the Court need not find that the parties have engaged in extensive discovery." *In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 176 (S.D.N.Y.2000) (citing *Plummer v. Chem. Bank,* 608 F.2d 654 (2d Cir.1982)). "Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make ... an appraisal' of the Settlement." *Holocaust Litig., Id.*

This threshold was easily met here. Prior to executing the Stipulation, Lead Counsel investigated the events and transactions alleged in the Action, reviewed and analyzed enormous numbers of documents produced by the Settling Defendants and others, and retained and consulted with expert witnesses in damages and forensic accounting. *See* Berger Decl. ¶¶ 9, 25, 29, 36–38, 42–44. Lead Plaintiff had a wealth of information at its disposal gleaned from more than two years of investigation and litigation before entering into the Settlement Stipulation. Lead Plaintiff and Lead Counsel engaged in sufficient document discovery and sufficient discussions about the merits of the Action to fully evaluate the merits of the claims and the obstacles to success. Thus the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 745 (S.D.N.Y.1985) *aff'd,* 798 F.2d 35 (2d Cir.1986).

D. *The Risks of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial*

Grinnell holds that in assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action throughout the trial." *Grinnell,* 495 F.2d at 463 (citations omitted). Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.

The risks to establishing the Settling Defendants' liability were augmented by the fact that ACLN is a foreign company; many of the Company's records which were located abroad had been seized by various government and regulatory agencies and thus availability was doubtful. Moreover, virtually all potential witnesses with knowledge as to ACLN's operations, as well as many of the named ACLN Defendants, are foreigners and are beyond the subpoena power of the Court. While the Settling Defendants would have been able to call live witnesses in support of their position, Plaintiffs would have been forced to rely primarily on videotaped deposition testimony of defendants and third parties to prove their case.

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***4** In addition to the risks unique to the Action, Lead Plaintiff also faced significant risks in establishing damages. Experts could be expected on each side to present sophisticated analyses and methods for calculating damages, and it is impossible to predict with certainty which testimony or method might be accepted by a jury. *PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. at 129 ("[D]amages are a matter for the jury, whose determinations can never be predicted with certainty"). There was thus considerable risk that a jury might disagree with Lead Plaintiff's analysis.

E. *Collectability and the Ability of the Defendants to Withstand a Greater Judgment*

The proposed Settlement is for an amount significantly less than the damages Lead Plaintiff and Lead Counsel believe would be attributable to the Settling Defendants. Berger Decl. Exhibit A, Reeves Decl. ¶ 14. Nevertheless, the Settlement is an excellent result under the circumstances.

The overriding consideration driving the settlement negotiations was the inability of the Settling Defendants to contribute in any meaningful way to a recovery by the Class. The Company was defunct and the individual settling defendants did not have any meaningful resources to satisfy a judgment.

To the extent that ACLN may have had any remaining assets, they had been seized by various authorities and there was no assurance that the judgment here could be enforced abroad. Moreover, even if the judgment were recognized, the Class might be vying with other claimants for the same funds. Based on the Settling Defendants' representations, which it was made clear were subject to confirmation, the only practical available source of recovery for the Class was the D & O insurance policy. Given that the insurance policy was a "wasting" asset that would be used to pay the defense costs of the four firms representing the Settling Defendants, it was clear that even if Plaintiffs were able to establish Settling Defendants' liability at trial and even if the jury accepted Plaintiffs' damage analyses, by that point the only meaningful source of recovery, the insurance policy, would in all likelihood have been substantially reduced or exhausted.

The risks to collectability were further compounded by the risk that the insurer would disclaim. This was not a theoretical or remote risk given that early in the settlement negotiations, the insurer took steps to rescind the policy based on ACLN's alleged fraud in the inducement; specifically ACLN's alleged misrepresentations in its SEC-filed financial report for the year ending December 31, 1999.

The proposed Settlement was contingent upon Lead Counsel's receipt of sufficient documentation to support Settling Defendants' representations that they lacked any meaningful resources from which plaintiffs could recover. Lead Counsel received statements under oath regarding the Settling Defendants' net worth and other documentation including tax returns, statements of accounts, insurance policies and certified lists of transactions in ACLN securities during the Class Period. The information was reviewed and analyzed by Lead Counsel who determined that the information supplied confirmed that the individual defendants did not have any meaningful assets that could be used to satisfy a judgment the Class might obtain.

F. *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*

***5** In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that "[r]easonableness is not a standard susceptible to a mathematical equation yielding a sum certain." *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989); *In re Paine Webber Ltd. P'ships Litig.,* 171 F.R.D. at 130. Rather, there is "a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464

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F.2d 689, 693 (2d Cir.1972). "That a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. "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." *Id.* at 455 n. 2.

While Lead Counsel believes that, despite the obstacles facing Lead Plaintiff on the issues of liability and damages, it would be able to prove its claims and obtain a verdict for substantial damages for the members of the Class, a successful proof might result in a victory in form only. The costs of Defense Counsel's services and the significant additional costs of separate liability and damages experts might have consumed in its entirety the proceeds of the insurance policy, the only meaningful source of recovery.

Above all, the proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road. "[M]uch of the value of a settlement lies in the ability to make funds available promptly." *In re "Agent Orange" Prod. Liab. Litig.,* 611 F.Supp. 1396, 1405 (E.D.N.Y.1985), *modified on other grounds,* 818 F.2d 179 (2d Cir.1987). Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.

II. *Expenses, Litigation Fund, and Fees*

Lead Counsel, on behalf of Plaintiffs' Counsel, is applying for an award of attorneys' fees in the amount of 20% of the Settlement Amount plus accrued interest thereon, for reimbursement of out-of-pocket expenses incurred in connection with the prosecution of the Action up through February 29, 2004 in the amount of $464,444 .78, and for the establishment of a litigation fund in the amount of $250,000 to defray the ongoing costs incurred in connection with the continuing prosecution of the Action against the BDO Entities. Lead Counsel also suggests reserving $100,000 to pay the estimated costs and expenses associated with the administration of the Settlement and the provision of notice to the Class.

A. *Expenses Already Incurred*

*6 Reimbursement of expenses incurred on behalf of the Class in common fund cases is appropriate. *See In re Arakis Energy Corp ., Sec. Litig.,* No. 95 CV 3431, 201 WL 1590512, at *17 n. 12 (E.D.N.Y. Oct. 31, 2001); *In re McDonnell Douglas Equip. Leasing Sec. Litig.,* 842 F.Supp. 733, 746 (S.D.N.Y.1994). The Berger Declaration and Exhibits D and E thereto demonstrate that $464,444.78 in expenses have been incurred on behalf of the Class, and that amount is deductible from the gross recovery of $5.5 million. The amount is less than the estimated expenses of $500,000 contained in the Notice, and is reasonable given, among other things, the complexity of the litigation, the stage of the proceedings, the amount of discovery completed, the out of town travel required, service of process through the Hague Convention, and the use of forensic accounting and damages experts.

B. *The $250,000 Litigation Fund*

Lead Counsel requests that $250,000 of the Settlement Amount be set aside to fund the continued prosecution of the Action against the BDO Entities. The Application for reimbursement of expenses only covers expenses incurred through February 29, 2004. Since that time, Plaintiffs' Counsel have already incurred and expect to incur significant additional expenses on behalf of the remaining claims. For example, four depositions have been taken in March and April 2004 and an additional eight are scheduled. In conjunction with each of these depositions there will be the cost of the court reporter and possibly a videographer. Also, expert discovery is scheduled. Lead Plaintiff, an institutional investor with a significant financial stake in the outcome of the litigation, has approved

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the establishment of such a fund. *See* Berger Decl. Exhibit A, Reeves Decl. ¶¶ 20–22. It is so Ordered and said sum may be deducted from the recovery.

C. *Administering the Settlement and Providing Notice to the Class*

Costs and expenses associated with the final administration of the Settlement and notices to the Class are estimated by Lead Counsel to involve approximately $100,000. The Court is prepared to rely upon the estimates of Plaintiffs' Counsel, and such sum may be deducted from the recovery.

D. *The Fees*

In assessing fees payable to counsel, the Second Circuit has held that "district courts should continue to be guided by the traditional criteria" set forth in *Grinnell. Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir.2000) ("Goldberger"). Those factors 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.

Goldberger, 209 F.3d at 50.

11,801.66 hours were spent by the plaintiffs' firms on this case and attest to their extensive efforts.

Here, through the many proceedings before this Court, the Court has witnessed first hand the quality of services rendered by Lead Counsel in prosecuting this Action. The skill and prior experience of Plaintiffs' Counsel are also relevant in determining fair compensation. *In re Union Carbide Corp.*, 724 F.Supp. 160, 165 (S.D.N.Y.1989). Exhibit F of the Berger Declaration includes descriptions of the background and experiences of each of the plaintiffs' counsel which assisted Lead Counsel in prosecuting this action. As these submissions demonstrate, Plaintiffs' Counsel have expertise in the specialized field of shareholder securities litigation.

*7 The quality of opposing counsel is also relevant in evaluating the quality of services rendered by Plaintiffs' Counsel. *See, e.g., Warner Communications Sec. Litig.*, 618 F.Supp. at 749. Settling Defendants are represented by four nationally prominent firms of undeniable experience and skill.

In order to determine a reasonable fee for the services of counsel, it is necessary to understand what counsel has actually accomplished for their clients, the class members. This can only be done when the expenses paid by the class are deducted from the gross settlement. The amount that remains, the adjusted gross settlement, represents what counsel has been able to achieve for the benefit of the class. *Cf.* 15 U.S.C. § 77z–1(a)(6) (*"Total attorneys' fees and expenses* awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.") (emphasis added).

In this case the amount actually distributable to the Class is prospectively as follows: $5.5 million in cash plus interest thereon less: (1) $464,444.78 for reimbursable expenses incurred through February 29, 2004; (2) $250,000 for the Litigation Fund; (3) $100,000 for the estimated cost of administration of the Settlement and notice thereof to the Class, and (4) attorneys' fees. In other words, a distribution of $4,685,555.30 is available to the class, less attorneys' fees. Given the totality of the circumstances in this case, reasonable fees are fixed and shall be payable at 20% of the adjusted gross settlement of $4,685,555.30, or $937,111.06. That leaves the Class with $3,748,444.30, or approximately 63.2% of the recovery from the Settling Defendants.

III. *Additional Findings*

The Second Consolidated and Amended Class Action Complaint dated December 19, 2002, which

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was further amended on June 13, 2003 and August 8, 2003, which the Court finds, as to the claims asserted against the Settling Defendants, was filed in accordance with Fed.R.Civ.P. 11, is hereby dismissed in its entirety as to the Settling Defendants, with prejudice, and without costs to any party.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, each Class Member, whether or not such Class Member executes and delivers a Proof of Claim and Release, other than those who have filed timely requests to be excluded from the Class, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Claims against the Released Defendant Parties.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, all members of the Class should be and are forever barred and enjoined from prosecuting the Settled ACLN Claims against any of the Released Defendant Parties.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, each Released Defendant Party, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Defendants' Claims and should be and are barred and enjoined from prosecuting any of the Settled ACLN Defendants' Claims.

***8** This Decision and the Final Judgment to be entered thereon, and the Settlement Stipulation, and all papers related thereto are not, and shall not be construed to be, an admission by any of the Settling Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any other proceeding.

The administration of the Settlement, and the decision of all disputed questions of law and fact with respect to the validity of any claim or right of any Person to participate in the distribution of the Settlement Fund should and shall remain under the authority of this Court.

Any Non–Settling Defendant should be and is barred from asserting any Claim arising out of or relating to the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which any Non–Settling Defendant attempts to recover from the Settling Defendants losses arising as a result of claims made by the Plaintiffs on behalf of themselves or any portion of the Class against any Non–Settling Defendant. Notwithstanding the dismissal of the Settling Defendants provided for hereafter, if there is a final verdict or judgment against any or all Non–Settling Defendants in this action, the total amount of such verdict(s) or judgment(s) shall be reduced by the greater of (a) an amount that corresponds to the percentage of responsibility of the Settling Defendants; or (b) the amount paid to plaintiffs by the Settling Defendants.

The Settling Defendants should be and are barred from asserting any Claim arising out of the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which the Settling Defendants attempt to recover from any Non–Settling Defendant monies paid to settle the Action.

CONCLUSIONS

A. The Settlement of the Action with the Settling Defendants on the terms and conditions set forth in the Settlement Stipulation is, after hearing, determined in all respects to be fair, reasonable and adequate and is hereby approved pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

B. Eleven persons have requested to be and are opted out of the Class. These persons are as follows: Mary Arena; Richard W. Burg; David Freeman, the Freeman Family Partnership, A Texas Limited Partnership composed of David R. Freeman and Margaret Freeman; William Massatis; Thomas S. Pratt, Christopher Scott; Cordia V.

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Scott, Douglas P. Scott, Jo Ann W. Scott, and Morris Smith.

C. Expenses of $464,444.78 incurred by Plaintiffs' Counsel on behalf of the Class shall be reimbursed from the Escrow Account, and this reimbursement shall be allocated among Plaintiffs' Counsel by Lead Counsel in a fashion which fairly compensates each Plaintiffs' Counsel in view of their respective contributions to the prosecution and settlement of the Action.

D. A fund of $100,000 is to be set aside from the Escrow Account to cover the costs and expenses associated with the administration of the Settlement and notices to the Class.

*9 E. A litigation fund in the amount of $250,000 (the "Litigation Fund") shall be established out of the Escrow Account. The Litigation Fund shall be used to fund the continued prosecution of the Action on behalf of the Class against the remaining defendants, the BDO Entities. Lead Counsel is permitted to draw against the Litigation Fund without further order of the Court to pay costs of the continued prosecution of the Action against the BDO Entities.

F. Attorneys' fees of $937,111.06 shall be paid from the Escrow Account in accordance with Paragraph 14 of the Settlement Stipulation. Attorneys' fees shall be allocated among Plaintiffs' Counsel by Lead Counsel in a fashion which fairly compensates each Plaintiffs' Counsel in view of their respective contributions to the prosecution and settlement of the Action.

G. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, each Class Member, whether or not such Class Member executes and delivers a Proof of Claim and Release, other than those who have filed timely requests to be excluded from the Class, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Claims against the Released Defendant Parties.

H. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, all members of the Class are forever barred and enjoined from prosecuting the Settled ACLN Claims against any of the Released Defendant Parties.

I. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, each Released Defendant Party, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Defendants' Claims and shall forever be barred and enjoined from prosecuting any of the Settled ACLN Defendants' Claims.

J. Said Decision and the Final Judgment thereon, and the Settlement Stipulation, and all papers related thereto are not, and shall not be construed to be, an admission by any of the Settling Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any other proceeding.

K. The administration of the Settlement, and the decision of all disputed questions of law and fact with respect to the validity of any claim or right of any Person to participate in the distribution of the Settlement Fund shall remain under the authority of this Court.

L. Any Non–Settling Defendant is barred from asserting any Claim arising out of or relating to the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which any Non–Settling Defendant attempts to recover from the Settling Defendants losses arising as a result of claims made by the Plaintiffs on behalf of themselves or any portion of the Class against any Non–Settling Defendant. Notwithstanding the dismissal of the Settling Defendants provided for hereafter, if there is a final verdict or judgment against any or all Non–Settling Defendants in this action, the total amount of such verdict(s) or judgment(s) shall be reduced by the greater of (a) an amount that corresponds to the percentage of

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responsibility of the Settling Defendants; or (b) the amount paid to plaintiffs by the Settling Defendants.

***10** M. The Settling Defendants are barred from asserting any Claim arising out of the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which the Settling Defendants attempt to recover from any Non–Settling Defendant monies paid to settle the Action.

N. A judgment accordingly shall be entered pursuant to Fed.R.Civ.P. 58 in accordance with the foregoing findings of fact and conclusions of law which constitute the grounds of the Court's action.

O. Pursuant to Fed.R.Civ.P. 54(b), the Court expressly determines that there is no just reason for delay of entry of a final judgment in accordance with the foregoing decision set out herein.

P. Without affecting the finality of the judgment in any way, this Court hereby retains continuing jurisdiction over (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, costs, interest and reimbursement of expenses in the Action; and (d) all parties hereto for the purpose of construing, enforcing and administering the Settlement Stipulation.

Q. The Court retains exclusive jurisdiction over the Action with respect to the ongoing prosecution against the BDO Entities and nothing herein shall be deemed to limit or otherwise affect the prosecution thereof. Nothing herein shall limit the ability of any Non–Settling Defendant to make any argument or advance any position concerning the admissibility or inadmissibility at trial of the settlement.

SO ORDERED.

S.D.N.Y.,2004.

Teachers' Retirement System of Louisiana v. A.C.L.N., Ltd.
Not Reported in F.Supp.2d, 2004 WL 1087261 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re VEECO INSTRUMENTS INC. SECURITIES LITIGATION.
This Document Relates to All Actions.

No. 05 MDL 01695(CM).
Nov. 7, 2007.

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES TO PLAINTIFFS' LEAD COUNSEL, AND REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES TO LEAD PLAINTIFF FOR REPRESENTATION OF THE CLASS

McMAHON, District Judge.

I. INTRODUCTION

*1 Concluding almost two years of litigation, Steelworkers and Plaintiffs' Lead Counsel have obtained a settlement of $5,500,000 in cash, plus interest, for the Class (the "Settlement"). The Settlement was achieved after extensive motion practice and fact and expert discovery, and after the parties participated in two mediation sessions before a highly respected mediator, the Honorable Nicholas H. Politan. Moreover, the Settlement was reached only after extensive and near-complete pre-trial preparations, including submission of trial exhibits and a full-day pre-trial hearing before this Court on June 28, 2007. The parties executed an agreement in principle to settle the litigation on July 5, 2007, only days before trial was scheduled to begin on July 9, 2007.

In light of the risks posed by continued litigation, the $5.5 million Settlement is an excellent result for Plaintiffs. Moreover, published data on securities fraud settlements further confirms the quality of the proposed Settlement. The $5.5 million settlement results in an estimated average recovery of $.87 per share of Veeco common stock for the approximately 6.3 million shares which suffered damages in accordance with this Court's June 28, 2007 opinion, or 23.2% of the estimated maximum $3.75 per share suffered by any Class Member, The 23.2% possible recovery of estimated damages exceeds the median percentage reported by Cornerstone Research for settlements overall, which was 3.6% through year-end 2005 and 2.4% for 2006. FN1

FN1. *See* Laura E. Simmons & Ellen M. Ryan, *Cornerstone Research, Securities Class Action Settlements: 2006 Review and Analysis* (Cornerstone Research 2007), at 6, *available at* http://www.cornerstone.com (the "Cornerstone Report").

As compensation for the efforts expended to achieve the settlement for the Class. Lead Counsel Berger & Montague applied for counsel fees of $1,650,000-equaling 30% of the Settlement Fund-and for reimbursement of Plaintiffs' Counsel's out-of-pocket expenses in the amount of $774,329,29. The 30% fee requested is well within the range of fees customarily sought by (and awarded to) experienced counsel in similar securities class actions, and the fairness of the percentage fee is underscored by a lodestar crosscheck, which reveals that counsel will not be compensated for a substantial portion of the time they devoted to litigating the Action on behalf of the certified Class. Plaintiffs' Counsel litigated the case to the eve of trial on a wholly contingent basis, incurring $774,329.29 in out-of-pocket expenses, and spent over 12,000 hours incurring over $4.5 million in lodestar. The lodestar crosscheck shows that the fee requested in fact represents a fractional multiplier-only about 35.91%-of the aggregate lodestar accumulated by Plaintiffs' counsel.FN2 Berger & Montague alone bore all the risks and out-of-pocket expenses for almost two years during this litigation against an able opponent. The Steelworkers, a sophisticated institutional investor, which was actively engaged in the prosecution of this Action, approved the Settlement and fee percentage sought by Plaintiffs' Counsel.

FN2. Lead Counsel will reimburse from its fee award the law firm Milberg Weiss LLP for the

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time it expended in serving as liaison counsel from April 2005 until the time the Court decided to dispense with liaison counsel in view of the ease of electronic filing. (Order of October 12, 2005.) Lead Counsel has included the out-of-pocket expenses incurred by Milberg Weiss as liaison counsel during that period in Lead Counsel's fee and expense petition.

No Class Member has objected to the fee and expenses requested. A total of 15,528 notices of the settlement were mailed to Class Members advising them of Plaintiffs' Counsel's intent to apply to the Court for an award of attorneys' fees of 30% of the Settlement Fund, reimbursement of out-of-pocket expenses not to exceed $775,000, and reimbursement to the Steelworkers of their costs and expenses for representing the Class of $16,089. Information regarding the settlement, including downloadable copies of the Notice and Claim Form, was made available through the Claim Administrator's website. The lack of any objections further supports the fairness and reasonableness of the fee and expense reimbursement requests.[FN3]

FN3. Moreover, there has been only one request for exclusion.

*2 For the foregoing reasons, as explained in greater detail below, the Court awards to Plaintiffs' Counsel the fees and expenses that it seeks, as well as reimbursement of costs and expenses to Lead Plaintiff.

II. THE REQUESTED FEE IS FAIR AND REASONABLE

A. A Reasonable Percentage of the Fund Recovered Comports with the Legal Standards Governing Awards of Attorneys' Fees in this Circuit

Pursuant to the " 'equitable' or 'common fund' doctrine established more than a century ago in *Trustees v. Greenough,* 105 U.S. 527, 532-533, 15 Otto 527, 26 L.Ed. 1157 (1881), *Trustees v. Greenough,* 105 U.S. 527, 532-33, 26 L.Ed. 1157 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work." *In re American Bank Note Holographies,* 127 F.Supp.2d 418, 430 (S.D.N.Y.2001) (McMahon, J.). *See In re EVCI Career Colleges Holding Corp. Sec. Litig.,* 2007 U.S. Dist. LEXIS 57918, at *43, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) (McMahon, J.) ("The Supreme Court has recognized that 'a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole.' " (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), and *Savoie v. Merchants Bank,* 84 F.3d 52, 56 (2d Cir.1996))). Fees and expenses are paid from the common fund so that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 47 (2d Cir.2000) (the common fund doctrine "prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost").

Courts have 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. *See Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002) (McMahon, J.). The Supreme Court has stated that private securities actions, such as the instant action, provide " 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.' " *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (citation omitted); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* --- U.S. ----, 127 S.Ct. 2499, 168 L.Ed.2d 179, 2007 WL 1773208, at *4 (June 21, 2007).

In *Goldberger,* the Second Circuit emphasized the need for fee awards to plaintiffs' counsel to be fair and reasonable, and described two acceptable fee calculation methodologies. One is the "lodestar" method, under which "the district court scrutinizes the

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fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Goldberger,* 209 F.3d at 47. Once the lodestar is calculated, the 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." *Id.* (citation omitted). The second method for calculating fees is the "percentage of recovery" method. *Id.* "In determining what percentage to award, courts have looked to the same 'less objective' factors that are used to determine the multiplier for the lodestar." *Id.* (citation omitted). Because the percentage of recovery approach does not require courts to "exhaustively scrutinize [ ]" attorneys' time records, that methodology is "simpler" than the lodestar approach. *Id.* at 47. 50.

***3** Indeed, the Supreme Court has held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fees should be determined by the percentage of recovery method. *See, e.g., Boeing,* 444 U.S. at 478-79; *Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The advantages of this methodology led the Second Circuit in *Goldberger* to reaffirm this Circuit's view that it is an accepted means for calculating attorneys' fees in class actions, *Goldberger,* 209 F.3d at 47-50, a view which was expressed again just recently. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 121 (2d Cir.2005). The Second Circuit in *Wal-Mart* observed that "[t]he trend in this Circuit is toward the percentage method." *Id.* at 122.

Moreover, from a public policy perspective, this Court has noted that "[t]he percentage method is attractive 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, which clearly benefits both litigants and the judicial system." *American Bank Note,* 127 F.Supp.2d at 431-32. The percentage approach "is uniquely the formula that mimics the compensation system actually used by individual clients to compensate their attorneys," often serves as a favorable substitute for more costly judicial monitoring of the attorney's performance, and "can serve as a proxy for the market in setting counsel fees." *Id.* at 432 (citing *In re Sumitomo Copper Litig.,* 74 F.Supp.2d 393, 397 (S.D.N.Y.1999), and *In re Cont'l Illinois Sec. Litig.,* 962 F.2d 566, 568 (7th Cir.1992)).

This Court has recently stated that the percentage of recovery method continues to be the trend of district courts in this Circuit, and that it "has been expressly adopted in the vast majority of circuits." *EVCI,* 2007 U.S. Dist. LEXIS 57918, at *44-46 & *46, 2007 WL 2230177 n. 3 (collecting cases). This Court observed:

> For many years, courts within this Circuit recognized that "Support for the lodestar/multiplier approach in common fund cases has eroded, and there has been a 'groundswell of support for *mandating* a percentage-of-the-fund approach' in the common fund cases."

Id. at ----46-47 n. 3. (citing *In re Sumitomo Copper Litig.,* 74 F.Supp.2d at 397 (citation omitted, emphasis in original)). *See also Taft v. Ackermans,* 2007 U.S. Dist. LEXIS 9144, at *28, 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007). This view is in accord with the dictates of the Private Securities Litigation Reform Act ("PSLRA"), which provides that an award of fees and expenses should constitute "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6) (emphasis added). *See EVCI,* 2007 U.S. Dist. LEXIS 57918, at *46, 2007 WL 2230177.

B. The Requested Fee is Fair and Reasonable as a Percentage of the Settlement Benefit Obtained for the Class

***4** The requested amount of attorneys' fees, $1.65 million-representing 30% of the total all-cash recovery to the Class of $5.5 million-is consistent with fees awarded in other securities class action settlements in this Circuit. [FN4] "Thirty percent of a larger settlement fund could constitute a windfall; however, a settlement fund of this size does not create such an issue." *Taft,* 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493; *Hicks,* 2005 WL 2757792, at *9 ("A settlement amount of $10 million does not raise the windfall issue in the

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same way as would a $100 million settlement, and a 30% fee does not produce such a windfall."). A thirty percent fee, requested here by Plaintiffs' Counsel, is consistent with fees awarded in similar class action settlements of comparable value.[FN5]

FN4. *See, e.g., Taft v. Ackermans,* 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.17 million settlement); *Hicks v. Morgan Stanley,* 2005 WL 2757792, at *9 (S.D.N.Y. Oct.24, 2005) (30% of $10 million settlement); *In re Warnaco Group. Inc. Sec. Litig.,* 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *In re Bisys Sec. Litig.,* 2007 U.S. Dist. LEXIS 51087, at * 8 (S.D.N.Y. July 11, 2007) (30% of $65.87 million settlement).

FN5. *See, e.g., The Takara Trust v. Molex, Inc.,* No. 05-1245 (N.D.Ill. Mar. 1, 2007) (30% of $10.5 million settlement); *In re Amerco Sec. Litig.,* No. 04-2182 (D.Ariz. Nov. 2, 2006) (30% of $7 million settlement); *Davidco Investors, LLC v. Anchor Glass Container Corp.,* No. 04-2561 (M.D.Fla. Mar. 16, 2007) (30% of $5.5 million settlement); *In re Carreker Corp. Sec. Litig.,* No. 03-250 (N.D.Tex. Aug. 16, 2006) (30% of $5.25 million settlement); *Mairah v. Medical Staffing Network Holdings, Inc.,* No. 04-80158 (S.D.Fla. March 6, 2007) (30% of $5 million settlement); *Gulp v. Gainsco, Inc.,* No 04-723 (N.D.Tex. Feb. 13, 2007) (30% of $4 million settlement); *In re Dobson Communications, Inc. Sec. Litig.,* No. 04-1394 (W.D.Okla. Mar. 20, 2007) (30% of $3.4 million settlement).

Indeed, there are numerous other common fund cases in this District alone where fees were awarded in the amount of 33 1/3% of the settlement fund, an amount greater than that requested here. *See, e.g., Strougo v. Bassini,* 258 F.Supp.2d 254, 262 (S.D.N.Y.2003); *Maley,* 186 F.Supp.2d at 370; *Newman v. Caribiner Int'l Inc.,* No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001); *In re Net Ease.com, Inc. Sec. Litig.,* C.A. 01-CV-9405 (S.D.N.Y. May 30, 2003); *Meridian Inv. Club v. Delta Financial Corp.,* Master File No. CV-99-7033 (S.D.N.Y. April 14, 2003); *Lemmer v. Golden Books Family Entm't Inc.,* 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999); *Maywalt v. Parker & Parsley Petroleum Co.,* 963 F.Supp. 310, 313 (S.D.N.Y.1997).

C. The Percentage Fee Requested by Plaintiffs is Reasonable Under the Second Circuit's *Goldberger* Factors

The Second Circuit has set forth the following six factors that should be considered by District Courts, regardless of which method is used, in determining the reasonableness of the fee:

(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; *Wal-Mart,* 396 F.3d at 122 ("Irrespective of which method is used, the ' *Goldberger* factors' ultimately determine the reasonableness of a common fund fee"). The lodestar value then acts as a "cross check," and the hours submitted by the attorneys are reviewed but not exhaustively scrutinized. *Goldberger,* 209 F.3d at 50.

Consideration of the relevant *Goldberger* factors supports an award of a fee of 30% of the settlement fund to Lead Plaintiffs' Counsel in this case.

1. The Significant Time and Labor Expended by Plaintiffs' Counsel

The first factor set forth in *Goldberger* for determining an appropriate fee is "the time and labor expended by counsel." 209 F.3d at 50. Plaintiffs' Counsel has devoted over 12,000 hours to the prosecution and settlement of this Action, including the following matters:

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• extensive pre-filing investigatory work, including research, review, and analysis of public filings, articles, and analyst reports about Vecco.

• moving for certification of the Class under Fed.R.Civ.P. 23, and, at the same time, opposing Defendants' motion to dismiss. In connection with the motion for class certification, Lead Plaintiff produced documents in response to Defendants' requests and defended the depositions of the proposed Class Representative-Lead Plaintiff Steelworkers-and its asset manager.

• review of approximately 225,000 pages of documents produced by Defendants, including documents produced as a result of Lead Plaintiff's motion to compel Defendants' production of documents on backup tapes. Lead Plaintiff also subpoenaed documents from twenty-six third-parties, including Veeco's auditor Ernst & Young, and received and reviewed approximately ten thousand pages of documents from Ernst & Young alone.

*5 • conducting ten days of depositions, including the depositions of: Individual Defendants Braun, Rein and Kiernan; three Ernst & Young partners involved in Veeco's audit; former TurboDisc controller Bruce Huff, to whom the Company attributed the improprieties leading to the restatement; and Veeco's internal auditors during the Class Period, Gary Reifert and Herman Birnbaum. Lead Plaintiff also served interrogatories and requests for admission upon Defendants.

• during expert discovery, exchanging reports of accounting and damages experts, deposing Defendants' damages expert, and defending depositions of Plaintiffs' accounting and damages experts.

• engaging in extensive motion practice, including a number of contentious discovery motions involving briefing and court appearances, for example: (i) Lead Plaintiffs' motion to compel Defendants to produce documents concerning the internal investigation of TurboDisc by Veeco and Jefferson Wells; and (ii) Lead Plaintiffs' motion to obtain documents on Defendants' backup tapes.

• completing substantial preparation for trial, including submission of pre-trial order and exhibits, and filing responses to motions *in limine.* The parties attended a pre-trial conference on June 28, 2007 and were prepared to select a jury on July 9.2007.

In total, Plaintiffs' Counsel reported spending over 12,000 hours litigating this case up until trial, representing a lodestar of about $4,6 million. Plaintiffs' Counsel also incurred $774,329.29 in out-of-pocket expenses on this matter since its initiation. Plaintiffs' Counsel's efforts were undertaken on a contingent fee basis despite the possibility that Plaintiffs would not prevail in this litigation (and would therefore receive no compensation). The tasks performed by Plaintiffs' Counsel were necessary in order to achieve the Settlement, and the time and labor expended by counsel in producing this Settlement supports the requested fee. Indeed, Plaintiffs' fee request represents a fractional multiplier of .3591 in this case. As a result, Lead Counsel will receive no compensation for almost two-thirds of its time spent litigating this case.

2. The Complexity, Magnitude and Risks of Litigation, and the Contingent Nature of the Fee Supports the Requested Fee

A securities case, "by its very nature, is a complex animal." *Maley,* 186 F.Supp.2d at 372 (quotation omitted). Berger & Montague, P.C. prosecuted this Action by itself against a team of defense lawyers from the well-known law firm Gibson Dunn & Crutcher, LLP. for almost two years, up until the eve of trial. Plaintiffs' Counsel did not "piggy back" on any prior governmental action related to Veeco. *Maley,* 186 F.Supp.2d at 371. Prosecution of this Action was heavily dependent on expert testimony, thereby adding substantially to its costs. Plaintiffs have encountered-and would certainly continue to encounter at trial, absent the Settlement-significant litigation risks, including successfully proving all of the necessary elements to establish that Defendants' dissemination of materially false and misleading statements regarding Veeco violated Rule 10b-5, and proving that any or all

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of the price drop of the stock was attributable to the disclosure of the alleged fraud as opposed to market factors.

***6** The complex and difficult issues in this case included the following:

- the difficulty of proving Plaintiffs' case through the testimony of Veeco's employees and former employees, who could be considered hostile witnesses.

- the difficulty of establishing loss causation in light of the Supreme Court's decision in *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005).

- the complexity of the legal and factual accounting issues involved, including GAAP and the relative novelty of the internal control issues involving the Sarbanes-Oxley Act that had to be presented to substantiate Plaintiffs' allegations of fraud and scienter.

- the difficulty of proving that Defendants' public statements were materially false and misleading.

- the difficulty in proving that any or all of the Defendants acted with scienter where there was no insider selling and no finding of wrongdoing by any governmental or other investigative body.

The Courts of this Circuit, including this District, have expressly recognized that the contingent nature of counsel's fee. with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded. As the Second Circuit stated:

> 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); *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 747 (S.D.N.Y.1985) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.") (citations omitted).

Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery.[FN6] As the Court stated in *Warner:* "Even a victory at trial is not a guarantee of ultimate success.... An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." 618 F.Supp. at 747-748.

> FN6. *See, e.g., Robbins v. Koger Props.,* 116 F.3d 1441 (11th Cir.1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.,* 113 F.3d 738 (7th Cir.1997) (Seventh Circuit affirmed the lower court's granting of summary judgment in favor of defendants); *Anixier v. Home-Stake Prod. Co.,* 77 F.3d 1215 (10th Cir.1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973-and tried in 1988-on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.,* 910 F.2d 10 (1st Cir.1990) (*en banc*) (class won a substantial jury verdict and a motion for judgment n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed, after 11 years of litigation); *Winkler v. NRD Mining, Ltd.,* 198 F.R.D. 355 (E.D.N.Y.2000) (granting defendants' motion for judgment as matter of law after jury verdict for plaintiffs); *Krinsk v. Fund Asset Mgmt., Inc.,* 715 F.Supp. 472 (S.D.N.Y.1988), *aff'd,* 875 F.2d 404 (2d Cir.1989) (verdict for defendants after trial); *Landy v. Amsterdam,*

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815 F.2d 925 (3d Cir.1987) (directed verdict for defendants after five years of litigation; affirmed on appeal); *Bentley v. Legent Corp.*, 849 F.Supp. 429 (E.D.Va.1994) (directed verdict in favor of defendants after plaintiffs' presentation of its case to jury).

3. The Quality of Plaintiffs' Counsel's Representation and Substantial Benefit to the Class Supports the Requested Fee

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("[T]he most critical factor is the degree of success obtained."); *Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 547-48 (S.D.Fla.1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.").

*7 In this case, the quality of the representation of Plaintiffs' Counsel is best evidenced by the result. Despite vigorous opposition by Defendants at every stage up to trial. Plaintiffs obtained a Settlement of $5.5 million in cash. Not only did Plaintiffs' Counsel's "skill and expertise contribute to the favorable settlement for the class, it contributed to the overall efficiency of the case." *Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317, 352 (S.D.N.Y.2005).

Defendants were represented by a well-staffed team of lawyers from the New York office of Gibson, Dunn & Crutcher, LLP, one of the country's largest law firms, who tenaciously challenged Plaintiffs at every stage of the litigation up until the eve of trial. That Plaintiffs' Counsel was able to obtain a substantial settlement from these Defendants confirms the quality of Plaintiffs' Counsel's representation in this matter, and is a factor in determining the reasonableness of the fee request. *See, e.g., Taft,* 2007 U.S. Dist. LEXIS 9144, at *31, 2007 WL 414493 (noting that, in determining the quality of the representation, courts review, *inter alia,* the recovery obtained and the backgrounds of the lawyers involved in the suit).

4. The Requested Fee Award is Reasonable in Relation to the Settlement Amount

As discussed above, a fee of 30% of the $5.5 million settlement fund is consistent with fees awarded in a similar class action settlements of comparable value. Moreover, it does not create a windfall. *See Wal-Mart,* 396 F.3d at 122; *Taft v. Ackermans,* 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493; *In re Greenwich Pharm. Sec. Litig.,* 1995 WL 251293, at * 7 (E.D.Pa. April 26, 1995) (fee award of 33% of $4.3 million settlement does not present danger of windfall that would accompany a "megafund" of, for example, $100 million settlement).

5. Public Policy Considerations Fully Support the Requested Fee

The Second Circuit has also noted that "public policy considerations" should be considered in determining the fee awarded to plaintiffs' counsel in class actions. *Goldberger,* 209 F.3d at 50.

Private enforcement of the federal securities laws, as is the nature of the action here, is a necessary adjunct to government intervention because neither the SEC nor the Justice Department has sufficient assets to address all forms of securities fraud. *See, e.g., Bateman Eichler, Hill Richards, Inc.,* 472 U.S. at 310 (lawsuits brought by investors provide " 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action' " (quoting *J.I. Case Co. v. Barak,* 377 U.S. 426, 432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964))). As this Court has stated:

> "It is ... imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks for pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts. Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities like securities fraud."

*8 *Maley,* 186 F.Supp.2d at 374. *See also Goldberger,* 209 F.3d at 51 (noting the "commendable

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sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest").

Moreover, public policy considerations support the award in this case because the Lead Plaintiff and Class Representative, Steelworkers Pension Trust-a large public pension fund-conscientiously supervised the work of lead counsel and has approved the fee request. Since passage of the PSLRA, courts-including this Court have found that in a PSLRA case, a fee request which has been approved and endorsed by a properly-appointed lead plaintiff is "presumptively reasonable," especially where the lead plaintiff is a sophisticated institutional investor. *EVCI,* 2007 U.SDist. LHXIS 57918. at *49-50 (citing *In re Cendanl Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001)). This accords with Congress's belief that institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request. *In re EVCI,* 2007 U.S. Dist. LEXIS 57918, at *50 n. 4, 2007 WL 2230177.

D. A "Cross-Check" Of Plaintiffs' Counsel's Lodestar Demonstrates the Reasonableness of the Requested Percentage Fee

The Second Circuit "encourages" an analysis of counsel's lodestar "as a 'cross-check' on the reasonableness of the requested percentage." *Goldberger,* 209 F.3d at 50; *EVCI,* 2007 U.S. Dist. LEXIS 57918, at *54, 2007 WL 2230177. Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger,* 209 F.3d at 50.

1. The Number of Hours Expended By Plaintiffs' Counsel Was Reasonable

The starting point for a lodestar analysis is the calculation of the lodestar-which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential Sec. Ltd. P'shps. Litig.,* 985 F.Supp. 410, 414 (S.D.N.Y.1997); *see EVCI,* 2007 U.S. Dist. LEXIS 57918, at *54, 2007 WL 2230177. Here, Plaintiffs' Counsel devoted 12,185 hours to this matter, and their lodestar through October 18, 2007, was $4,594,233.40. The requested fee represents only a fractional multiplier of the lodestar. Plaintiffs' Counsel performed substantial work on behalf of the Class, litigating this case to the eve of trial against a formidable opponent.

Berger & Montague bore all the risks and expenses of the litigation, including extensive fact and expert discovery, motion practice, participation in and preparation of submissions for mediations, and preparation for trial. Berger & Montague was efficient in litigating this action, as it is highly experienced in prosecuting securities law claims and shareholder class actions. *Cf. Teachers' Ret. Sys. v. A.C.L.N., Ltd.,* 2004 U.S. Dist. LEXIS 8608, at *20, 2004 WL 1087261 (S.D.N.Y. May 14, 2004) (noting that the skill and prior experience of counsel in the specialized field of shareholder securities litigation is relevant in determining fair compensation).

2. The Rates Charged By Plaintiffs' Counsel Are Reasonable

***9** The second step in the lodestar cross-check analysis is to evaluate the reasonableness of the current billing rates charged by plaintiffs' counsel. The Second Circuit in *Goldberger* noted that the overall goal of the fee-setting process is to replicate the rate that counsel would be paid in a perfect market. 209 F.3d at 52 ("market rates, where available, are the ideal proxy for their compensation"). The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 283-84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("an appropriate adjustment for delay in payment" by applying "current" rate is appropriate); *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 determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have held that the standard is the rate charged in the community where the services were performed for the

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type of service performed by counsel. *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' " (quoting *Blum,* 465 U.S. at 896 n. 11)); *accord In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998); *see also Sutton v. Bernard,* 504 F.3d 688, 2007 WL 2963940, at *4 (7th Cir. Oct.12, 2007) (in deciding fee award in common fund cases, courts should look to marketplace for legal services as guide to what is reasonable). Viewed in light of a "marketplace" barometer, Plaintiffs' Counsel's rates are reasonable.

In class actions, courts in this district and around the country have consistently found to be reasonable rates comparable to those at issue here, given the nature of plaintiffs' counsel's work in such cases and the risks associated with financing class actions.[FN7] Thus, substantial precedent-as well as a market check-demonstrates that the rates utilized by Plaintiffs' Counsel in calculating its lodestar is are reasonable.

FN7. *See, e.g., In re Indep. Energy Holdings PLC Sec. Litig.,* 2003 U.S. Dist. LEXIS 17090, at *30 (S.D.N.Y. Sept. 26, 2003) (rates of $650/hour for a partner, and $300-$425/hour for associates, are "not extraordinary for a topflight New York City law firm"); *In re Bankamerica Corp. Secs. Litig.,* 228 F.Supp.2d 1061, 1065 (E.D.Mo.2002) ("IWJhilc the hourly rates ranging up to S695 are high for the Eastern District of Missouri, they are nonetheless within the range of reasonableness in the realm of nationwide securities class actions.").

E. The Requested Fee Is Reasonable Because It Implies a Fractional Multiplier, Indicating that Plaintiffs' Counsel Will Not Be Compensated for Much of Their Time Spent Litigating This Case

Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross-check" for a percentage of recovery analysis, counsel may be entitled to a "multiplier" of their lodestar rate to compensate them for the risk assumed by them, the quality of their work, and the result achieved for the class. *See, e.g., Goldberger,* 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." (citation omitted)); *Prudential,* 985 F.Supp. at 414 ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee.").

***10** Berger & Montague spent over 12,000 hours on this case and their lodestar for the services performed by the firm is approximately $4.6 million. Lodestar multiples of over 4 are routinely awarded by courts, including this Court. *See, e.g., Maley,* 186 F.Supp.2d at 369 (awarding fee equal to 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *EVCI,* 2007 U.S. Dist. LEXIS 5791S, at *56 & n. 7, 2007 WL 2230177 (2.48 multiplier "is within the range found to be reasonable"; collecting cases and noting that "[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District" (citation omitted)). Here, Lead Counsel seeks no multiple of its lodestar. In fact, Plaintiffs' Counsel will recoup less than 36% of their lodestar. Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar "cross-check" unquestionably supports a percentage fee award of 30%.

F. The Reaction of the Class Demonstrates The Reasonableness of the Fee Request

Finally, "[t]he reaction by members of the Class is entitled to great weight by the Court" and confirms the reasonableness of the requested fees. *Maley,* 186 F.Supp.2d at 374. The Notice mailed to members of the Class specifically indicated that Plaintiffs' Counsel would apply for a fee award of 30% of the Gross

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Settlement Fund, and that any class member could object to the fee application by October 19, 2007. No member of the Class has objected to either the Settlement or to Plaintiffs' Counsel's request for an award of attorneys' fees. This response suggests that the fee request is fair and reasonable. *Id.*

III. LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND APPROPRIATE

It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class. *See, e.g., Teachers' Ret. Sys.,* 2004 U.S. Dist. LEXIS 8608, at *17, 2004 WL 1087261 (citations omitted). "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *EVCI,* 2007 U.S. Dist. LEXIS 57918, at *57, 2007 WL 2230177 (citations omitted); *see American Bank Note,* 127 F.Supp.2d at 433; *Taft,* 2007 U.S. Dist. LEXIS 9144, at *35, 2007 WL 414493; *Miltland Raleigh-Durham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients" (citation omitted)).

As set forth in the affidavit of Plaintiffs' Counsel, the total unreimbursed out-of-pocket expenses incurred by them to date are $774,329.29. The expenses were incurred on an ongoing basis for such items as consultant and expert fees, photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for service of subpoenas to witnesses, on-line research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel and other expenses directly related to the prosecution of this Action, including preparation for trial. All of these expenses are customary and necessary expenses for a complex securities action, and were necessary for Plaintiffs' Counsel to successfully prosecute this case to trial. Moreover, Plaintiffs had no co-counsel or local counsel to perform any of these tasks.

***11** The largest portion of the $774,329.29 in out-of-pocket expenses incurred by Plaintiffs in litigating this case was for accounting and damages experts retained by Plaintiffs, which comprised over $543,000, or over 70% of the total costs. These expenses reflected the fact that this was a complex case which was litigated until a week before trial.

The prosecution of this Action was heavily dependent on expert assistance and testimony. The case involved a $10.2 million restatement of Veeco's financials and allegations concerning complex accounting, internal financial reporting and disclosure control issues. Plaintiffs alleged that Defendants violated the Securities Exchange Act of 1934 by issuing statements and financial reports for the first, second and third quarters of 2004, by employing improper accounting at the Company's TurboDisc division, including alleged improper revenue recognition, and accounting for inventory, and warranty costs. Plaintiffs requested and received over 225,000 pages of documents from Defendants and another 10,000 pages of documents from Defendants' internal auditor, Ernst & Young.

During the course of discovery, Plaintiffs retained accounting and damages experts to assist Plaintiffs, including analyzing the documents produced. During expert discovery, the parties exchanged expert reports and took and defended expert depositions. Plaintiffs' damages expert Steven P. Feinstein, Ph.D., CFA, opined on damages and loss causation, and their accounting expert, Robert W. Berliner, CPA, CFE, opined on issues of liability, materiality, and scienter with respect to the alleged fraud involving accounting and internal control issues. The non-testifying expert assisted Plaintiffs in the factual investigation and analysis in connection with the amended complaint and during merits discovery, and also assisted Plaintiffs in preparing their submissions for mediation, including the two-day mediation in October 2006. Expert accounting and damages testimony would have been crucial at trial, and Dr. Feinstein and Mr. Berliner were prepared to testify. The expenses for Plaintiffs' accounting and damages experts totaled $543,196.49, as follows:

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•	Non-testifying forensic accounting expert	$218,000.00
•	Robert W. Berliner, CPA, CRD (testifying accounting expert)	$252,349.49
•	Stephen P. Feinstein,, Ph.D., CFA (testifying damages expert)	$ 72,847.00

This Court and others have reimbursed such expert witness fees where "[t]he expenses incurred were essential to the successful prosecution and resolution of [the] Action." *EVCI,* 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177. at *57-58.[FN8]

FN8. *See also In re Media Vision Technology Sec. Litig.,* 913 F.Supp. 1362, 1366 (N.D.Cal.1995) (courts award consulting and expert expenses where the testimony is "crucial or indispensable" to the litigation al hand); *In re Immune Response Secs. Litig.,* 497 F.Supp.2d 1166, 1178 (S.D.Cal.2007) (reimbursement for experts and consultants was "reasonable" given the "complex factual nature" of case in which experts opined on materiality, loss causation, and damages, which was "crucial or indispensable" to the litigation (internal quotation omitted)); *Uniroyal Goodrich Tire Company v. Mutual Trading Corp.,* 63 F.3d 516, 526 (7th Cir.1995) (court reimbursed counsel for expert expenses where the expert testimony was "reasonably necessary" for plaintiff to prove its case); *In re Greenwhich Pharm. Secs. Litig.,* 1995 WL 251293, at *7 (E.D.Pa. Aug.26, 1995) (awarding expert witness fees, which was "a reimbursable expense since expert testimony would have been crucial at trial"); *Hicks,* 2005 WL 2757792, at *10 (awarding expenses incurred by co-lead counsel including expert witness fees and other expenses "necessary to the litigation and settlement of [the] action").

The Notice to the Class advised Class members that Lead Counsel would seek reimbursement of expenses in addition to attorneys' fees, in an amount not to exceed $775,000, exclusive of costs of notice and claims administration. Lead Counsel received no objections to this request. The requested expenses are well within the amount specified in the notice Accordingly, Berger & Montague are awarded $774,329.29 for out-of-pocket expenses.

IV. AN AWARD OF REASONABLE COSTS AND EXPENSES FOR THE STEELWORKERS IS APPROPRIATE

***12** The PSLRA states 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 serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

The Steelworkers were appointed Lead Plaintiff and, subsequently, Class Representative in this action. The Steelworkers expended over eighty hours valued at a total of $15,964.20, and incurred $125 of out-of-pocket expenses directly relating to the representation of the Class. From the outset of the litigation to settlement, the Steelworkers monitored the litigation and participated in prosecuting the case, including participation in discovery, subjecting itself to deposition, and reviewing significant pleadings and briefs. "Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks,* 2005 WL 2757792, at *10; *see In re Worldcom, Inc. ERISA Litig.,* 2004 WL 2338151, at *11 (S.D.N.Y. Oct.18, 2004) (awarding $5,000 to each of the three named plaintiffs who were involved in the litigation, had been deposed, and had "performed an important service to the class").

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The Notice to the Class advised Class members that Lead Counsel would seek reimbursement of $16,089 to Steelworkers for their reasonable costs and expenses, including lost wages, directly relating to its representation of the Class. Lead Counsel has received no objections to this request. Accordingly, the Court awards the Steelworkers $16,089.20 as compensation for their reasonable costs and expenses incurred in representing the Class.

CONCLUSION

For the foregoing reasons, the Court hereby awards; (I) attorneys' fees in the amount of $1,650,000, or 30% of the $5,500,000 settlement fund, together with reimbursement of Plaintiffs' Counsel's expenses in the amount of $774,329.29; and (ii) reimbursement of Lead Plaintiff Steelworkers Pension Trust's reasonable costs and expenses related to their representation of the Class in the amount of $16,089.20.

S.D.N.Y.,2007.
In re Veeco Instruments Inc. Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 4115808 (S.D.N.Y.)

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Not Reported in F.Supp.2d, 2007 WL 4115809 (S.D.N.Y.)
(Cite as: 2007 WL 4115809 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re VEECO INSTRUMENTS INC. SECURITIES LITIGATION.
This Document Relates to All Actions.

No. 05 MDL 0165(CM).
Nov. 7, 2007.

ORDER GIVING FINAL APPROVAL TO THE SETTLEMENT AND PLAN OF ALLOCATION
McMAHON, District Judge.

I. INTRODUCTION

*1 This settlement resolves a securities fraud class action brought by the purchasers of Veeco securities between April 26, 2004 and February 10, 2005, inclusive (the "Class Period"). The Action was brought against Veeco Instruments Inc. ("Veeco"), and Individual Defendants Edward H. Braun, John F. Rein, Jr., John P. Kiernan, and R. Michael Weiss (collectively, the "Defendants"). The complaint alleged that Defendants artificially inflated the market price of Veeco securities during the Class Period by issuing false and misleading financial statements in the first, second, and third quarters of 2004, which the Company was forced to restate shortly after the Class Period, which the Company attributed to accounting improprieties at its newly-acquired TurboDisc division, and which the Company admitted had concealed the unprofitability of TurboDisc from investors. The Class was certified on March 21, 2006. Pursuant to Fed.R.Civ.P. 23, class members were given notice of the pendency of the Action and trial date, and were given an opportunity to opt-out of the Action. Only two shareholders have opted out.

This Action has been actively litigated for almost two years, with extensive motion practice and discovery, and completed preparations for trial, including a full-day pre-trial hearing before this Court on June 28, 2007, with trial scheduled to begin on July 9, 2007.

On July 5, 2007, the parties entered into a Memorandum of Understanding ("MOU") agreeing in principle to settle the case for $5.5 million in cash. The proposed settlement was achieved following negotiations between the parties, with the assistance of retired Judge the Honorable Nicholas H. Politan, who had served as a mediator throughout the litigation, including a two-day mediation in October 2006. The Settlement, which was crafted at arm's length by very experienced counsel on both sides, provides guaranteed immediate relief for the Class, while eliminating all of the many risks and delays associated with the continued litigation of this Action, including the risk of no recovery at all.

Most important, the Settlement has the implicit approval of an overwhelming number of Class members. By Order dated August 23, 2007, the Court preliminarily approved the Settlement and directed that a hearing be held on November 2, 2007 to determine the fairness, reasonableness and adequacy of the proposed Settlement. Pursuant to this Order, 15,528 copies of the Notice of the Proposed Settlement, Motion for Attorneys' Fees and Settlement Fairness Hearing and Proof of Claim and Release were mailed to potential Class members or their nominees beginning on September 12, 2007. (Sincavage Aff. at ¶ 10.) A summary notice was also published in *The Wall Street Journal on* September 19, 2007. (Sincavage Aff. at ¶ 11.) The Notice and the Proof of Claim and Release contained a detailed description of the history of the Action and the terms of the proposed Settlement, a statement of the attorneys' fees and expenses sought, a description of the claims to be released, the deadline for filing objections, proof of claim forms and the time and place of the fairness hearing, and advised Class members of their right to object to the Settlement or to request exclusion from the Class by October 19, 2007. As of October

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24, 2007, there were no objections to the settlement, and only one request for exclusion, from a shareholder-Mr. Harold P. Houser who was one of the two class members who had previously requested to be excluded from the Class in response to the Notice of Pendency mailed to the Class in June 2007, before the Settlement was reached. (Sincavage Aff. at ¶ 12.)

II. BACKGROUND

A. History Of The Litigation

*2 The Action was commenced on February 15, 2005 by the filing of a complaint captioned *L.I.S.T., Inc. v. Veeco Instruments Inc.*, Edward H. Braun, and John F. Rein, Jr., No. 7:05-2189, and alleged claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. Additional complaints were filed thereafter in both the Eastern District of New York and the Southern District of New York. On May 15, 2005, all of the cases then filed in the Eastern District of New York were transferred to the Southern District of New York and assigned to this Court for coordinated or consolidated pretrial proceedings with the cases then filed in the Southern District of New York. By Order dated October 12, 2005, the Court appointed Steelworkers Pension Trust ("Steelworkers") as Lead Plaintiff, and Berger & Montague, P.C. as Lead Counsel for the Class and sole counsel.

On November 7, 2005, Steelworkers filed a Consolidated Amended Class Action Complaint (the "Complaint"), which superseded all prior complaints filed in the Action, and named additional Defendants John P. Kiernan and R. Michael Weiss.

The Complaint alleged, *inter alia,* that the Defendants issued false and misleading statements in their financial statements, reports and related press releases, and during analyst conference calls for the first, second, and third quarters of 2004, which, as Defendants admitted after the Class Period, overstated Veeco's pre-tax earnings by $10.2 million, causing the Company to restate its financial statements for those quarters. The Complaint also alleged that certain of the Individual Defendants also issued false and misleading certificates of compliance with the Sarbanes-Oxley Act; that Veeco's financial statements during the Class Period concealed the unprofitability and true profit margins and accounting improprieties of Veeco's TurboDisc division; that TurboDisc had deficient or absent financial controls; and that Veeco's financial statements could not be relied on by the investing public. The Complaint alleged that these facts were concealed by Defendants during the Class Period, and that the problems were first disclosed to the public on the morning of February 11, 2005, before the market opened, when Veeco announced it would postpone the release of its audited results for the 2004 fourth quarter and full year, pending completion of an internal investigation of improper accounting transactions at TurboDisc. In the announcement, Veeco explained that the investigation focused principally on the value of inventory, accounts payable, liabilities, and revenue transactions, and that the investigation would likely lead to adjustments requiring the restatement of its financial statements for the first three quarters of 2004. The Complaint alleged that this announcement of the previously undisclosed material information resulted in more than a 10% drop in the price of Veeco stock, thereby causing damages to Lead Plaintiff and the other members of the Class.

*3 By Order dated March 21, 2006. this Court denied Defendants' Motion to Dismiss the Complaint, and, pursuant to Fed.R.Civ.P. 23, also certified a Class consisting of all persons who purchased the securities of Veeco Instruments Inc. between April 26, 2004 and February 10, 2005 (inclusive) and were damaged as a result thereof. The Court appointed Lead Plaintiff Steelworkers as class representative and Berger & Montague, P.C. as sole class counsel.

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On April 10, 2006, Defendants answered the Consolidated Amended Class Action Complaint, denying all allegations of liability therein and asserting affirmative defenses thereto. On October 11 and 12, 2006, the parlies attempted to mediate the case under the supervision of Judge Nicholas H. Politan as mediator. However, the mediation was unsuccessful and the parties resumed document and deposition discovery, with a trial date set for July 9, 2007.

In preparation for trial, the parties prepared extensive pre-trial submissions and filed numerous motions *in limine.* On June 28, 2007, the Court held a final pre-trial conference, during which the Court ruled, *inter alia,* on the admissibility of the parties' proposed evidence and on the motions *in limine.* Among the Court's rulings on the motions *in limine,* the Court ruled that members of the Class who purchased Veeco stock during the Class Period and who either sold those shares at a profit after the Class Period, or who retained those shares past the point when the price of Veeco stock first recovered to the price at which those shares were purchased, were not damaged by Defendants' alleged wrongful conduct.

Soon thereafter, the parties engaged in settlement discussions, with the assistance of mediator Politan. On July 5, 2007, the parties entered into a Memorandum of Understanding (the "MOU") to settle the Action for $5.5 million in cash. On August 16, 2007, the Parties signed a Stipulation and Agreement of Settlement (the "Stipulation"). The Court approved the Stipulation on August 23, 2007, preliminarily approving the proposed Settlement.

B. Extensive Discovery Was Conducted

Following the denial of the motion to dismiss in March 2006, extensive fact and expert discovery began. Lead Plaintiff reviewed approximately 225,000 pages of documents produced by Defendants in response to Lead Plaintiff's document requests, including documents produced as a result of Lead Plaintiff's motion to compel Defendants' production of documents on backup tapes. Lead Plaintiff also subpoenaed documents from twenty-six third parties-including Veeco's outside auditor Ernst & Young, Veeco customers and suppliers, and analysts who covered Veeco during the Class period-and received and reviewed approximately ten thousand pages of documents from Ernst & Young alone, and hundreds of pages more from the other third parties.

Lead Plaintiff took and defended many depositions in this case, beginning with Lead Plaintiff's defense of the depositions of Lead Plaintiff/class representative Steelworkers and its asset manager, Fox Asset Management, in connection with Lead Plaintiff's motion for class certification. During fact discovery, Lead Plaintiff conducted ten days of depositions, including the depositions of Individual Defendants Braun, Rein and Kiernan, three Ernest & Young partners involved in Veeco's audit before and during the Class Period, former TurboDisc controller Bruce Huff (to whom the Company attributed the improprieties leading to the restatement), and Veeco's internal auditors during the Class Period, Gary Reifert and Herman Birnbaum. The parties also engaged in other fact discovery, including serving interrogatories and requests for admission upon Defendants. Following merits discovery, the parties conducted expert discovery, exchanging the reports of their respective accounting and damages experts, and took and defended expert depositions.

***4** The parties completed substantial preparation for trial, including preparation of all the exhibits to the pre-trial order, which were submitted to the Court on June 6, 2007. The parties also filed and responded to numerous motions *in limine,* served trial witnesses subpoenas, attended a pre-trial conference on June 28, 2007, and were prepared to begin jury selection on July 9, 2007.

In sum, the parties had conducted almost all of the fact and expert discovery necessary for trial. There is no question the parties were fully informed of the strengths and weaknesses of the their

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respective positions.

C. Extensive Motion Practice Was Conducted

In addition to the motion to dismiss and the motion for class certification, the parties engaged in extensive motion practice, including a number of hard-fought discovery motions in this case before Magistrate Judge George A. Yanthis. These motions included Plaintiff's motion to compel Defendants to produce documents concerning the internal investigation of TurboDisc by Veeco and Jefferson Wells (as well as oral argument on that motion), and a motion to obtain documents on backup tapes from Defendants. In addition, each party filed a number of motions *in limine* before this Court on June 6, 2007, and responses thereto followed.

D. Class Certification Was Granted And A Notice of Pendency Of The Action Was Sent To The Class

On November 7, 2005, Lead Plaintiff moved for certification of the Class under Fed.R.Civ.P. 23. In connection with the motion, Lead Plaintiff produced documents in response to Defendants' requests, and defended the depositions of the proposed Class Representative, Lead Plaintiff Steelworkers, and its asset manager. This Court, by Order dated March 21, 2006, certified the Class, appointed the Steelworkers as Class Representative and Berger & Montague as Class Counsel, and ruled that the Class Period would begin on April 26, 2004 (rather than November 3, 2003).

Pursuant to this Court's Order of May 15, 2007, Lead Plaintiff caused a Notice of Pendency of Class Action (the "Initial Notice") to be sent to putative class members. Beginning on June 1, 2007, Heffler, Radetich & Saitta LLP ("HRS"), the notice administrator retained by Plaintiffs, mailed out more than 11,390 notices of the action and caused the summary notice of the Action to be published in *The Wall Street Journal* on June 8, 2007. The Initial Notice provided class members with an opportunity to opt-out by July 6, 2007. As of that date, only two class members opted out. Defendants and the Court were advised of the very small number of opt-outs. [FN1] The Notice of Settlement, which was mailed to the Class on September 12, 2007, provided a second opportunity to opt-out, resulting in only one opt-out and no objections by the October 19, 2007 deadline.

FN1. One of the opt-outs, Mr. Harold P. Houser, asserted that he bought Veeco stock on June 7, 2004 at a cost of $2,603.00, and sold on April 27, 2006 for $2,230.73, for a loss of $372.27, without indicating the number of shares bought or sold on those dates. The other opt-out reported a purchase of 100 shares of Veeco on December 10, 2004, without providing any further information. On September 20, 2007, Mr. Houser again opted out following receipt of the Notice of Settlement, but still gave no further information.

E. Terms of the Proposed Settlement

As set forth in the Stipulation dated August 16, 2007, the central terms of the Settlement are as follows: The Settlement provides for the creation of a fund in the amount of $5.5 million in cash, plus interest ("Gross Settlement Fund"). The Gross Settlement Fund less all taxes, approved costs, fees, and expenses is the "Net Settlement Fund." The Net Settlement Fund is to be distributed to those Class Members who submit timely and valid Proofs of Claim to the Claims Administrator (the "Authorized Claimants"). Based on this Court's June 28, 2007 decision on the proper calculation of damages, Plaintiffs estimate that there were approximately 6.3 million damaged shares of Veeco common stock traded during the Class Period. Plaintiffs estimate that the average recovery per damaged share of Veeco common stock under the settlement is $.87 per damaged share before deduction of Court-awarded attorneys' fees and expenses, and notice and claims administration costs.

*5 The Plan of Allocation was prepared according to the analysis of Plaintiffs' damage

expert, Steven P. Feinstein, Ph.D., CFA, with the assistance of Plaintiffs' Counsel, and in accordance with this Court's June 28, 2007 decision on Defendants' motion *in limine* regarding damages. The Plan takes into account that (I) Class Members were not damaged if they purchased Veeco stock during the Class Period and either sold it at a profit or retained it past the point after the Class Period when the price of Veeco stock recovered to the price paid by them; (ii) the price varied at which Veeco stock declined following the Company's corrective disclosure on February 11, 2005; and (iii) any Class Member who sold before the corrective disclosure was not damaged. Thus, an Authorized Claimants' recognized loss ("Recognized Loss") is primarily determined by the date the Authorized Claimant purchased or sold any of Veeco's securities, as set forth in detail in the Notice.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

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). "Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.' " *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* 2007 U.S. Dist. LEXIS 57918, at *10, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) (McMahon, J.) (citing *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999); *accord Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 361 (S.D.N.Y.2002) (McMahon,J.); *In re American Bank Note Holographies,* 127 F.Supp.2d 418, 423 (S.D.N.Y.2001) (McMahon, J.). As this Court has stated: "In its exercise of that discretion, the Court must engage in a careful balancing act: 'The 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.' " *American Bank Note,* 127 F.Supp.2d at 424 (citing *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974)). "In evaluating a proposed settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate." *EVCI,* 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177, at k10.

"A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws." *Id.* at *11 (citation omitted). Moreover, under the PSLRA, a settlement reached-as this one was under the supervision and with the endorsement of a sophisticated institutional investor (here, the Steelworkers Pension Trust) is "entitled to an even greater presumption of reasonableness.... Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *Id.* at *12.

***6** The factors that the Court should consider in reviewing the settlement are well established in the Second Circuit. *See Grinnell,* 495 F.2d at 463. They are the following:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the Settlement;

(3) the stage of the proceeding 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 trial;

(7) the ability of Defendants to withstand a greater judgment;

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(8) the range of reasonableness of the settlement in view of the best possible recovery; and

(9) the range of reasonableness of the settlement to a possible recovery in view of all the attendant risks of litigation.

Grinnell 495 F.2d at 463; *Strougo v. Bassini,* 258 F.Supp.2d 254, 258 (S.D.N.Y.2003) (and cases cited therein). As set forth below, under these criteria, the proposed Settlement is fair, reasonable and adequate.

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

This Action, like most securities fraud cases, presented complex factual and legal issues. Plaintiffs encountered (and would have continued to encounter at trial, absent the Settlement) significant litigation risks, including proving all of the necessary elements to establish that Defendants' dissemination of materially false and misleading statements regarding Veeco violated Sections 10(b) and 20(a) of the Exchange Act of 1934, and Rule 10b-5 promulgated thereunder.

Plaintiffs were successful in withstanding the motion to dismiss and obtaining certification of the Class. Subsequently, Plaintiffs obtained critical evidence to support their claims during merits and expert discovery. However, it was far from certain whether a jury would find that any or all of the Defendants were liable or that the jury would find that their level of culpability rose to the level of scienter, where there was no alleged insider trading by any Defendants and neither the SEC nor any other governmental agency had charged the Company with wrongdoing. Defendants were represented by highly experienced counsel who presented Plaintiffs with a number of serious obstacles, including requiring Plaintiffs to file motions to obtain critical evidence. These included Plaintiffs' motion to compel Defendants' production of documents relating to Veeco's internal investigation of the TurboDisc accounting issues that led to the Restatement, and for production of documents on backup tapes. Defendants filed numerous substantial motions including the motion *in limine* to preclude Plaintiffs' damages expert from including certain damages in his calculations. Thus, Plaintiffs' Counsel recognized that continued litigation would be costly with no assurance of success, and, even if Plaintiffs won a judgment at trial, there was no assurance they would obtain damages beyond the amount of the Settlement.

*7 The proposed $5.5 million Settlement provides a substantial and tangible present recovery, without the attendant further expenses, uncertainties, and risk of *no* recovery that Plaintiffs would encounter in a lengthy, complex trial and likely appeals. This case involved complex issues of accounting and internal financial controls which could be difficult to present and prove to a jury, and, even if Defendants' liability was proven, the Court had already reduced the number of Class members who could claim damages, thus reducing the total amount of damages that a jury could award. As this Court has repeatedly stated:

> Settlement at this juncture results in a substantial and tangible present recovery. without the attendant risk and delay of trial. These factors weigh in favor of the proposed Settlement. As the court in *Slomovics v. All for a Dollar, Inc.,* 906 F.Supp. 146, 149 (E.D.N.Y.1995), concluded: "The 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." *Id.* (citation omitted). The same reasoning applies here. Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value.

EVCI, 2007 U.S. Dist. LEXIS 57918, at * 16-17, 2007 WL 2230177 (citing *Maley,* 186 F.Supp.2d at 361-62) (citation omitted).

2. The Reaction of the Class to the Settlement

It is "well-settled" that the reaction of the class to a settlement is considered perhaps "the most

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significant factor to be weighed in considering its adequacy." *Maley,* 186 F.Supp.2d at 362-63; *American Bank Note,* 127 F.Supp.2d at 425; *EVCI,* 2007 U.S. Dist. LEXIS 57918 at * 17, 2007 WL 2230177. The lack of objections provides effective evidence of the fairness of the Settlement. *American Bank Note,* 127 F.Supp.2d at 425; *In re PaineWebber,* 171 F.R.D. 104, 126 (S.D.N.Y.1997).

Here, 15,528 copies of the Notice of the Settlement were sent to potential class members or their nominees. (Sincavage Aff. at ¶ 10.) Not a single objection has been received, and the deadline for objections has passed. Moreover, there has been only one request for exclusion, from Mr. Harold P. Houser. (*Id.* at ¶ 12.) Mr. Houser had previously opted-out from the Class in response to the Notice of Pendency of the action, before settlement was ever reached.

Therefore, those affected by the Settlement have overwhelmingly endorsed it. *See Strougo,* 258 F.Supp.2d at 259. The strong favorable reaction of the class is overwhelming evidence that the Settlement is fair, reasonable and adequate.

3. The Stage of Proceedings and The Amount of Discovery Completed

The stage of the proceedings is another factor that should be considered in evaluating a proposed settlement, although the parties need not have engaged in full discovery for a settlement to be approved as fair. *See American Bank Note,* 127 F.Supp.2d at 425-26. This case was litigated to the very eve of trial, after completion of merits and expert discovery during which Plaintiff received and analyzed the expert reports of Defendants' accounting and damages experts, deposed Defendants' damages expert, and proffered Plaintiffs' own accounting expert, Robert W. Berliner, CPA, CFE, to opine on issues of liability, and its own damages expert, Steven P. Feinstein, Ph.D., CFA, to opine on issues of loss causation and damages. The parties had completed almost all pre-trial preparations, including attendance at the final pre-trial hearing at which the Court considered and ruled on the admissibility of key evidence. In addition to the completion of merits and expert discovery, the parties learned the strength and weaknesses of their respective cases during a two-day mediation. In written submissions to the mediator and oral presentations during the mediation, both sides presented their best arguments in support of their respective positions.

***8** Accordingly, the parties' knowledge of the strength and weakness of their claims was more extensive than the norm in securities cases which are resolved at an earlier stage. It is evident that Plaintiffs "have a clear view of the strengths and weaknesses of their case[ ]" and of the adequacy of the Settlement. *American Bank Note,* 127 F.Supp.2d at 426 (citation omitted); *Maley,* 186 F.Supp.2d at 363-64; *see also Meijer, Inc. v. 3M,* 2006 U.S. Dist. LEXIS 56744, at **46-47, 2006 WL 2382718 (E.D.Pa. Aug. 14, 2006) (parties had "an adequate appreciation of the merits" of case at time settlement negotiated where: Class Counsel, *inter alia,* reviewed hundreds of thousands of pages of documents and depositions and consulted extensively with economic expert; and parties engaged in mediation, including exchange of mediation statements regarding merits of respective positions in order to inform and facilitate negotiations); *Goldsmith v. Tech. Solutions Co.,* 1995 U.S. Dist. LEXIS 15093, at *15, 1995 WL 17009594 (N.D.Ill. Oct. 10, 1995) (plaintiffs' counsel's endorsement of the settlement "bears particularly significant weight" where counsel reviewed thousands of pages of documents, took several depositions, and worked closely with accounting and damages experts in evaluating the claims and estimating the potential recovery).

4. The Risks of Establishing Liability

In assessing this factor, the Court is not required to "decide the merits of the case or resolve unsettled legal questions," *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), or to "foresee with absolute

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certainty the outcome of the case." *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 177 (S.D.N.Y.2000). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y.2004).

The claims in this case under section 10b-5 of the Exchange Act focus on: whether Defendants issued false and misleading financial statements with scienter during the Class Period in Veeco's quarterly reports filed with the SEC for the first, second, and third quarters of 2004, and in other statements concerning the Company's financial performance in press releases and analyst conference calls during the Class Period; whether certain of the Individual Defendants issued false and misleading certificates of compliance with the Sarbanes-Oxley Act in those Forms 10-Q; whether the price of Veeco securities was inflated during the Class Period; and whether Defendants' disclosure of the truth before the market opened on the morning of February 11, 2005 caused the price of Veeco stock to fall, thereby damaging Plaintiff and the other Class Members. Defendants have sharply contested the merits of these claims, asserting that Plaintiffs could not prove that any Defendant is liable because the Company's restatement of the first three quarters of 2004 was caused solely by the accounting errors of the TurboDisc controller, and that the Company look corrective action as soon as the errors were discovered, including firing the controller and launching an independent investigation. Thus, Defendants would continue to assert that even if Veeco's financial statements were restated for three quarters because of accounting errors at TurboDisc, Plaintiffs would be unable to prove that the statements were materially false and misleading, and that even if they could prove the falsity of any statements, Plaintiffs would be unable to prove that any of the Defendants acted with scienter.

*9 Plaintiffs recognize that scienter would be hard to prove since there were no allegations that any of the Individual Defendants had any financial motive to commit fraud, none of the Defendants engaged in insider trading during the Class Period, and neither the SEC nor any other governmental agency pursued a case against the company. Defendants would also claim that any flaws in their accounting were the result of reasonable reliance on their auditor, Ernst & Young LLP. Plaintiffs would have to prove scienter by circumstantial evidence of Defendants' conscious or reckless behavior, and it is difficult to predict whether a jury would find the circumstantial evidence convincing to prove scienter. Indeed, a jury might have concluded that Defendants were liable for simple mismanagement-by failing to fire an incompetent employee and failing to adequately supervise its TurboDisc division-which is not actionable under the securities laws, thereby resulting in judgment for Defendants. *See In re Blech Sec. Litig.*, 2002 U.S. Dist. LEXIS 23170, at *4-5, 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) ("Plaintiffs recognize that establishing scienter, necessary for a showing of liability under Section 10(b), posed a substantial risk to their claims").

Plaintiffs' Counsel assert that ample evidence exists to support their claims. Nevertheless, they recognize that ultimately a court or a jury may agree with Defendants' arguments and find that the Defendants did not violate the federal securities laws. Shareholder class action litigation is notably unpredictable.

Moreover, in attempting to prove to a jury the elements of liability, materiality, causation, and scienter including the issues of the role of specific Individual Defendants in the alleged fraud, whether the actions violated GAAP and/or the Sarbanes-Oxley Act, and whether the decline in Veeco's stock price at the end of the Class Period was caused by disclosure of the alleged fraud-Plaintiffs likely would need to rely heavily on the testimony of their accounting and damages experts, who would be challenged by Defendants. Thus, a very

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lengthy and complex battle of the parties' experts likely would have ensued at trial, with unpredictable results. These risks as to liability strongly militate in favor of the Settlement. *Maley,* 186 F.Supp.2d at 364 (noting the many obstacles to plaintiffs' ability to prevail on the merits in a 10b-5 case).

5. The Risks of Establishing Damages

Had this Action gone to trial, Defendants would not only have asserted strong defenses as to liability, but would also have raised strong defenses to Plaintiffs' claims of damages. First, the Defendants would likely have asserted that little or no damages existed and that any decline in the price of Veeco securities was attributable to market or other non-fraud factors. Indeed, the damage assessments of experts retained by the parties vary substantially, and the assessment of this crucial element of Plaintiffs' case in particular would be reduced at trial to an argument between experts having conflicting analyses of highly complex economic data. *See, e.g., In re Lloyd's Am. Trust Fund Litig.,* 2002 U.S. Dist. LEXIS 22663, at *61, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002) ("The reaction of a jury to such complex expert testimony is highly unpredictable."). A jury could be swayed by Defendants' expert seeking to establish that damages were caused by factors other than Defendants' wrongdoing, or, alternatively, trying to minimize the amount of losses suffered by the class. *American Bank Note,* 127 F.Supp.2d at 427.

***10** Even in a less challenging case, "[c]alculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing,* 225 F.R.D. at 459 (citations and internal quotations omitted). The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.

Undoubtedly, expert testimony would be needed to fix not only the amount, but the existence, of actual damages .... In this "battle of experts." It is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad non-actionable factors such as general market conditions.

American Bank Note, 127 F.Supp.2d at 427 (quoting *Warner Communications Sec. Litig.,* 618 F.Supp. 735, 744-745 (S.D.N.Y.1985)); *see also Blech,* 2002 U.S. Dist. LEXIS 23170, at *5, 2002 WL 31720381 ("Establishing damages from the drop in the relevant stock price, would, Plaintiffs claim, have degenerated into a 'battle of the experts' and thus posed a risk to Plaintiffs.").

Most important, Plaintiffs' Counsel recognized that even if they could overcome all the obstacles and could prove that one or more of the Defendants was liable and had acted with scienter, Plaintiffs were constrained in their ability to prove that certain Class members had been damaged, in light of this Court's June 28, 2007 ruling on one of Defendants' motion *in limine,* which held that Plaintiffs' damages calculations could not include Class Members who purchased Veeco stock during the Class Period and either sold it at a profit, or retained it past the point after the Class Period when the stock price first recovered to the price at which the shares were purchased. This is because such Class Members can prove no economic loss that is attributable to any of the Defendants' alleged misrepresentations. This ruling diminished the number of damaged class members and, thus, the amount of the calculated damages.

Consequently, while Plaintiffs believe that their claims were meritorious, and that the Class suffered real and substantial damages, there were no guarantees that Plaintiffs could recover their estimated damages, let alone recover any damages at all. By virtue of the proposed $5.5 million Settlement, Plaintiffs have avoided substantial risks in proving damages. The fairness and

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reasonableness of the proposed Settlement, in light of the risks, are manifest.

6. The Risks of Maintaining the Class Action Through Trial

There is no issue here. The Court certified a class early in this litigation (March 2006). Only two Class Members opted out after the Initial Notice of pendency in June 2007. The Defendants did not seek decertification. This factor had no bearing on settlement negotiations.

7. Defendants' Ability to Withstand a Greater Judgment

***11** This factor had little bearing on settlement negotiations. Although the Individual Defendants had limited resources and limited insurance, Veeco does have substantial net worth. However, this factor alone does not prevent the Court from approving the Settlement where the other *Grinnell* factors are satisfied. *See Meijer,* 2006 U.S. Dist. LEXIS 56744, at *51, 2006 WL 2382718 ("this determination in itself does not carry much weight in evaluating the fairness of the Settlement"); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001) (upholding approval of settlement despite defendants' ability to withstand greater judgment, where other *Grinnell* factors were met).

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and in Light of Litigation Risks

In evaluating the proposed Settlement, the Court is not required to engage in a trial on the merits to determine the prospects of success. *Strougo,* 258 F.Supp.2d at 260 (citing *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 46, 54 (S.D.N.Y.1993)). Similarly, the Court is not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion. *Republic Nat'l Life Ins. Co. v. Beasley,* 73 F.R.D. 658, 668 (S.D.N.Y.1977). In view of the risks of proving liability and of recovering damages, discussed above, this Settlement provides a substantial recovery.

In *Grinnell,* the Second Circuit noted that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. The Court further noted: "[T]here 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." *Id.* at 455 n. 2. *Maley,* 186 F.Supp.2d at 366 (same). *See also Weinberger v. Kendrick,* 698 F.2d 61, 65 (2d Cir.1983) (settlement which amounted to only a negligible percentage of the losses suffered by the class was affirmed); *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 142 F.R.D. 588, 596 (S.D.N.Y.1992) (court approved settlement after determining that the settlement would provide "slightly more than 48 cents [per share]" out of the potential recovery of approximately $30 per share).

The $5.5 million all-cash recovery in this Action is significant, and-in light of the risks facing Plaintiffs, the unpredictability of a lengthy and complex trial, the inevitable appellate process that would follow, the risk of reversal, and the limits on damages posed by the Court's opinion-the $5.5 million Settlement falls squarely within the "range of reasonableness." *In re PaineWebber,* 171 F.R.D. at 130-31 (citations and internal quotations omitted); *American Bank Note,* 127 F.Supp.2d at 428.

***12** Moreover, published data on securities fraud settlements further confirms the quality of the proposed Settlement. The $5.5 million settlement results in an estimated average recovery of $.87 per share for the approximately 6.3 million shares which suffered damages in accordance with the Court's June 28, 2007 opinion, or 23.2% of the estimated maximum $3.75 per share suffered by any Class Member. The 23.2% possible recovery of estimated damages exceeds the median percentage reported by Cornerstone Research for settlements

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overall, which was 3.6% through year-end 2005 and 2.4% for 2006; for settlements where the estimated damages were less then $50 million (similar to this case) the percentage was 10.5% through year-end 2005 and 8.8% in 2006. [FN2] In view of the risk that the jury could have found that Plaintiffs were entitled to *no* recovery, the proposed settlement that represents a recovery of up to 23.2% of the possible damages supports approval of the settlement. *See Maley,* 186 F.Supp.2d at 366.

FN2. *See* Laura E. Simmons & Ellen M. Ryan, *Cornerstone Research, Securities Class Action Settlements: 2006 Review and Analysis* (Cornerstone Research 2007), at 6, available at http://www.cornerstone.com (the "Cornerstone Report").

9. The Settlement Negotiations

In assessing whether a settlement is fair, reasonable and adequate, courts often focus on the "negotiating process by which the settlement was reached." *American Bank Note,* 127 F.Supp.2d at 428 (citation omitted). Courts look to this process in order to ensure that the settlement resulted from "arm's-length negotiations" between counsel with the "experience and ability necessary to effective representation of the class's interests." *Id.; Grinnell,* 495 F.2d at 463-66. In this context, courts consider the opinion of experienced counsel with respect to the value of the settlement. *PaineWebber,* 171 F.R.D. at 125 (" 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted). In this case, qualified and experienced counsel for both sides, who litigated the case vigorously for many months up to the very eve of trial, recommend final approval of the Settlement.

The negotiations for the Settlement were conducted with an experienced mediator and, like every step of the litigation, at arm's length between experienced and skilled attorneys who knew the strengths and weaknesses of their respective cases and were ready for trial to begin on July 9, 2007. Moreover, in the course of litigation, both sides had exchanged mediation statements which revealed the respective strengths and weaknesses of the claims and defenses. The mediation that finally resulted in this settlement occurred after the end of merits and expert discovery and preparation for trial. "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." *American Bank Note,* 127 F.Supp.2d at 428 (citing *PaineWebber,* 171 F.R.D. at 125). That presumption applies here.

THE PROPOSED PLAN OF ALLOCATION IS APPROVED AS FAIR AND REASONABLE

***13** A plan of allocation is fair, reasonable and adequate as long as it has a "reasonable, rational basis." *Maley,* 186 F.Supp.2d at 367. Because it is virtually impossible in a large class to calculate each member's claim with mathematical precision, 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." *In re PaineWebber,* 171 F.R.D. at 133.

Lead Counsel, together with its damages expert, Steven P. Feinstein, Ph.D., CFA, determined the appropriate allocation of damages. The Plan reflects an assessment of an individual Class Member's damages based on when the Class Member bought or sold Veeco stock. The plan of allocation follows the Supreme Court's decision in *Dura Pharmaceuticals,* and requires that the claimant must have purchased the security during the Class Period and held it on the day of corrective disclosure, recognizing that Class Members suffered an economic loss only if they bought shares during the Class Period and sold them after the Class Period ended on February 10, 2005. *See, e.g., Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005). The plan of allocation also recognizes that, in accordance with this Court's June 28, 2007 decision, Class

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Members' shares sold after the corrective disclosure at a price higher than or equal to the initial purchase price-and any shares of Class Members who chose to retain their shares past the point when the stock price first recovered to the price at which the shares were purchased-can prove no economic loss. In practical terms, this means that under the Plan, any shares held at the close of trading on May 8, 2006, have no recognized loss, because on May 9, 2006, Veeco's stock traded at a price equal or greater than any price at which Veeco traded during the Class Period. (*See* Notice at p. 9.)

Incorporating these principles, the Plan of Allocation provides for the distribution of the Net Settlement Fund on a proportionate basis, using a formula based on the decline in the price of Veeco stock following the disclosure-before the market opened on February 11, 2005-that the Company expected to restate its financials for the first three quarters of 2004. (*See* Notice at p. 9.) "Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim." *American Bank Note,* 127 F.Supp.2d at 429. "[T]here is no rule that settlements benefit all class members equally...." *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1148 (11th Cir.1983). Instead, the general rule is that an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent class counsel. *American Bank Note,* 127 F.Supp.2d at 429-30. Plaintiffs' Counsel's conclusion that the Plan of Allocation is fair and reasonable is therefore entitled to great weight. *Id.* at 430 (approving allocation plan and according counsel's opinion "considerable weight" because there were "detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery").

***14** Under the Plan of Allocation, an independent claims administrator, Heffler, Radetich & Saitta LLP, will calculate each claimant's "recognized loss" based on the class member's proof of claim. Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants.

The Plan of Allocation fairly, equitably, and adequately allocate the proceeds of the settlement among the class members who submit valid claims, with a minimum of complication, ensuring efficiency in claims administration. Finally, not one class member has objected to the Plan of Allocation which was fully explained in the Notice of Settlement sent to all Class Members. This favorable reaction of the Class supports approval of the Plan of Allocation. *Maley,* 186 F.Supp.2d at 367.

S.D.N.Y.,2007.
In re Veeco Instruments Inc. Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 4115809 (S.D.N.Y.)

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Not Reported in F.Supp.2d, 2008 WL 5110904 (S.D.N.Y.)
(Cite as: 2008 WL 5110904 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re WARNER CHILCOTT LIMITED
SECURITIES LITIGATION.

No. 06 Civ. 11515(WHP).
Nov. 20, 2008.

David Avi Rosenfeld, Esq., Evan Jay Kaufman, Esq., Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP, Melville, NY, Jack Gerald Fruchter, Esq., Lawrence Donald Levit, Esq., Abraham Fruchter & Twersky LLP, New York, NY, for Plaintiffs.

Richard A. Rosen, Esq., Robyn F. Tarnofsky, Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Mary Jane Eaton, Esq., Willkie Fan & Gallagher LLP (N.Y.), New York, NY, for Defendants.

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge.

*1 Lead Plaintiffs in this securities class action move for: (1) preliminary approval of the settlement; (2) approval of the form of notice; and (3) the setting of a date for a final approval hearing. Defendants do not oppose the motion.

In a Consolidated Amended Complaint filed on May 4, 2007, Lead Plaintiffs alleged that in connection with the company's initial public offering, Defendants Warner Chilcott Ltd. and certain of its officers made false and misleading statements regarding the Company's Ovcon 35 and Ovcon Chewable products. The parties commenced discovery after Defendants filed an answer on June 18, 2007. Defendants produced 1.1 million pages of documents and three third-party witnesses produced 2,000 pages of documents in response to Lead Plaintiff's discovery requests. Lead Plaintiffs interviewed Warner Chilcott's three top executives, including two Defendants. In connection with Lead Plaintiff's motion for class certification, Defendants took three depositions. Defendants did not oppose class certification, but indicated that they wished to depose class members who attended roadshows, at which Defendants claim certain disclosures were made. On February 4, 2008, this Court certified a class of all persons who purchased shares pursuant to or traceable to the IPO on September 20, 2006 through September 26, 2006.

The parties participated in a mediation on March 17 and 18, 2008 before the Honorable Daniel Weinstein and subsequently reached a settlement. Lead Plaintiffs submit a declaration from Judge Weinstein representing that the negotiations before, during, and after the mediation were undertaken at arm's length. The settlement provides for a payment of $16.5 million in exchange for a release of all claims against the Defendants.

DISCUSSION

I. *Settlement*

The settlement of complex class action litigation is favored by the Courts. *Wal–Mart Stores, Inc. v. VISA U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005); *In re Paine Webber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). 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." *Wal–Mart,* 396 F.3d at 116. Nonetheless, when considering whether to approve a class action settlement, a district court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (citation omitted).

In *City of Detroit v. Grinnell Corp.,* 495 F.2d

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448, 462 (2d Cir.1974), the Second Circuit identified nine factors for the Court to consider in determining whether to approve a class action settlement:

> "(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."

***2** *Grinnell,* 495 F.2d at 463 (citations omitted). Although a complete analysis of these factors is required for final approval, at the preliminary approval stage, "the Court need only find that the proposed settlement fits 'within the range of possible approval' " to proceed. *In re Prudential Secs. Inc. Ltd. P'Ships Litig.,* 163 F.R.D. 200, 210 (S.D.N.Y.2005) (citation omitted).

A. *Complexity, Expense and Likely Duration of the Litigation*

This is a complex securities case that has already been pending for two years. While Defendants did not move to dismiss, they intended to seek discovery from 30 class members regarding statements at road shows, which may have impacted class certification and liability with respect to those plaintiffs. There was also a high likelihood of significant expenditure on experts. These points establish that this factor weighs in favor of preliminary approval.

B. *Reaction of the Class to the Settlement*

Since no notice has been sent, consideration of this factor is premature.

C. *Stage of Proceedings and Amount of Discovery*

As the Court has noted, lead plaintiff engaged in a review of more than one million pages of documents and interviewed three top executives. All parties have been represented by capable counsel and this Court is persuaded that everyone has at least a relatively clear view of the strengths and weaknesses of their respective cases. Accordingly, this factor weighs in favor of preliminary approval. *See In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 458 (S.D.N.Y.2004) ("the question is whether the parties had adequate information about their claims").

D. *Risks of Establishing Liability*

In assessing the risk of establishing liability, the Court must balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *Grinnell,* 495 F.2d at 463. Prior cases have recognized that the risks of failing to recover anything in securities class actions are considerable. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* No. 02 Civ. 5575, 2006 U.S. Dist. LEXIS 17588 (S.D.N.Y. Apr. 6, 2006). The claims in this case were complex, which *ipso facto* gives rise to uncertainty. Moreover, Plaintiffs undoubtedly faced motion practice regarding class members who attended road shows. In light of these facts, the Court finds that a settlement of $16.5 million represents a significant recovery.

E. *Risks of Establishing Damages*

Proving damages in this action would have been extremely complicated and would almost certainly require a large amount of expert testimony and computer analysis, which could well be confusing to a jury. This weighs in favor of preliminary approval.

F. *Risks of Maintaining the Class Action Through Trial*

While this Court has certified the class, information that may come to light through Defendants' discovery of certain class members could affect the Court's prior certification.

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Accordingly, this Court finds that there is a cognizable risk that the class action could not be maintained through trial, and that this factor weighs in favor of preliminary approval.

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

***3** Lead Plaintiffs concede that Defendants could pay more than the $16.5 million they have agreed to pay in this settlement. Nonetheless, the Second Circuit has held that this factor is not dispositive and need not affect the conclusion that the settlement is within the range of reasonableness. *See, e.g., D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001).

H. *Range of Reasonableness of Settlement in Light of Best Possible Recovery*

To a large extent, these factors overlap with each other and many of the other factors previously discussed.

Accordingly, this Court is persuaded that the settlement fits within the range of possible approval and concludes that preliminary approval of the settlement is warranted.

II. *Notice*

Fed.R.Civ.P. 23(e)(1)(B) provides that, in the event of a settlement of a class action, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." To satisfy due process, the notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Prudential, 164 F.R.D. at 368. "It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as Co–Lead Counsel acted reasonably in selecting means likely to inform persons affected." Prudential, 164 F.R.D. at 368.

The notice plan proposed by the parties meets the standards of Rule 23 and due process. Notice will be mailed to class members that appear in the company's transfer records at his or her last known address and to approximately 4,400 brokers, banks and other financial institutions that may hold stock for class members. Notice will also be published in *Investor's Business Daily* and on a dedicated website on the internet. The notice provides detailed information about the settlement to class members, and provides them with adequate opportunity to obtain additional information and to file objections with the Court.

The proposed claims administrator, A.B. Data, has submitted a detailed declaration concerning its own history and qualifications, as well as the scope of the notice plan. A.B. Data estimates an initial mailing of approximately 4,700 claim packets and that approximately 12,000 to 47,500 notice packets will eventually be mailed. The Court finds that this should be sufficient to reach the vast majority of class members.

Turning to the proposed Plan of Allocation of the settlement proceeds, it appears that the plan reflects the damages rationales alleged in the Consolidated Amended Complaint and would allocate the settlement proceeds *pro rata* based on the number of shares purchased by each claimant and the timing of those purchases.

CONCLUSION

The Court grants the motion for preliminary approval of settlement, approves the form of notice and authorizes the parties to proceed with the mailing and publication of notice. A.B. Data is appointed Claims Administrator. The parties are directed to arrange for the deposit of the settlement funds in a CRIS account in this district. The final approval hearing will be held on April 30, 2009 at 10:30 a.m.

***4** SO ORDERED:

S.D.N.Y.,2008.
In re Warner Chilcott Ltd. Securities Litigation
Not Reported in F.Supp.2d, 2008 WL 5110904

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(S.D.N.Y.)

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Westlaw.

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Adam WHITE, et ano., Plaintiffs,
v.
FIRST AMERICAN REGISTRY, INC., et ano.,
Defendants.

No. 04 Civ. 1611(LAK).
March 7, 2007.

MEMORANDUM AND ORDER

KAPLAN, J.

*1 Plaintiffs brought this putative class action against defendants First American Registry and First Advantage SafeRent, Inc. for violating the Fair Credit Reporting Act [FN1] ("FCRA"), the New York Fair Credit Reporting Act [FN2] ("NYFCRA"), and Section 349 of the New York General Business Law. They contend that defendants lack reasonable procedures to assure the maximum possible accuracy of the consumer reports they furnish to their customers, which, in this case, are New York City landlords. The matter now is before the Court on plaintiffs' motions for (1) class certification and approval of a settlement and (2) an award of attorneys' fees and other relief.

FN1. 15 U.S.C. §§ 1681 *et seq.*

FN2. N.Y. GEN. BUS. LAW. §§ 380 to 380-t (McKinney 1996 & Supp.2005).

Class Certification

The parties agree that the following class should be certified:

All persons who are listed, or who were listed from February 26, 2001 to March 16, 2006 in Defendant First Advantage SafeRent, Inc.'s RegistryCheck™ database as a tenant, occupant, respondent, defendant or other similar categorization in a proceeding commenced in the Civil Court of the City of New York, Housing Part. Excluded from the Class is Defendant, any entity in which defendant has a controlling interest, and any of its subsidiaries, affiliates, and officers, directors, employees and agents as well as any person or entity who is named in any such proceeding as a landlord.

Although I previously denied certification on the ground that plaintiff White was not an adequate representative, a new plaintiff has been joined. I now am satisfied that each of the requirements of Rule 23 is satisfied and so certify the proposed class.

The Settlement

This lawsuit arises by reason of the nature of defendants' business, which consists of selling landlords the opportunity to consult a list of individuals who have been involved in landlord-tenant litigation. As defendants doubtless well understand,[FN3] risk averse landlords are all too willing to use defendants' product as a blacklist, refusing to rent to anyone whose name appears on it regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant. Thus, defendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals. The problem is compounded by the fact that the information available to defendants from the New York City Housing Court ("NYCHC") is sketchy in the best of cases and inaccurate and incomplete in the worst. Any failure by defendants to ensure that the information they provide is complete, accurate, and fair heightens the concern-and there has been ample reason for heightened concern.

FN3. The use of the name First Advantage SafeRent above evidences this understanding.

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Against that background, the parties propose to settle the case for both programmatic and monetary relief.

The programmatic relief would include principally the following:

- Defendants' reports of summary non-payment proceedings indicating "Case Filed" in which there has been no disposition for 12 months as reported by the NYCHC would contain a note indicating that there has been no disposition within 12 months and that proceedings in which no disposition has been obtained within 1 year after a default are subject to dismissal.

*2 • Defendants' reports would contain a note indicating that the filing of a case does "not mean that an applicant was evicted from an apartment or was found to owe rent. Lawsuits may be filed in error or lack merit."

- Defendants would improve their customer service in a variety of ways.

On the monetary side, the settlement proposes creation of a Class Settlement Fund of $1,900,000 and payment by defendants' insurer of up to $1,065,000 in fees and expenses to plaintiffs' attorneys. Settlement expenses and proposed payments to the two named plaintiffs totaling $20,000 would be paid out of the $1.9 million, with the balance applied to pay each class member who submits a timely and proper claim $100 or, if the total of such claims exceeds the available balance, a *pro rata* reduced amount. Any part of the $1.9 million left after paying the settlement expenses, the named plaintiffs, and the individual class members would be donated to appropriate governmental and/or charitable entities "to further the goal of increasing awareness of tenant screening and the duties and obligations under" pertinent laws.

A court confronted with a proposed class action settlement is called upon to determine whether the settlement is "fair, adequate, and reasonable" to class members,[FN4] a standard that includes both procedural and substantive components.[FN5] Assessing procedural fairness requires attention to such matters as the negotiation history and adequacy of class representation. Factors pertinent to substantive fairness are included among those set out in *City of Detroit v. Grinnell Corp.*: [FN6]

FN4. *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 473 (S.D.N.Y.1998).

FN5. *E.g., Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983); *see D'Amato v. Deutsche Bank,* 236 F.3d 78, 85-86 (2d Cir.2001).

FN6. 495 F.2d 448 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Res.,* Inc., 209 F.3d 43 (2d Cir.2000).

"(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." [FN7]

FN7. *Id.* at 463.

Moreover, the settlement court must assess the fairness of a proposed settlement in a practical way on the basis of reasonably available information. It should not attempt to approximate a litigated determination of the merits of the case [FN8] lest the process of determining whether to approve a settlement simply substitute one complex, time

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consuming and expensive litigation for another.

> FN8. *See West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

I am troubled by this settlement. It leaves defendants' business model essentially intact. While there will be very modest improvements, the potential for abuse quite plainly remains. The fact that defendants are willing, indeed anxious, to engage in activities that are bound to harm innocent people is distressing. Moreover, while this litigation has been hard-fought, and I do not impugn anyone's motives, the structure of the deal does not put my mind entirely at ease. If approved as proposed, plaintiffs' counsel would receive over $1 million. The two named plaintiffs would receive a total of $20,000 above and beyond anything to which they would be entitled as class members. Individual class members, for all practical purposes, would receive nothing of substantial monetary value. Defendants would be rid of a troublesome and embarrassing lawsuit for programmatic consideration that costs them little and economic consideration that at best would be a small multiple of the legal fees required to litigate the case to conclusion.

*3 Nevertheless, substantial factors point in favor of approval. To begin with, I acknowledge that my discomfort stems in part from defendants' business model, which in and of itself is not unlawful, however distasteful and deserving of legislative attention it may be. Notice has been widely disseminated, yet there have been only 21 opt-outs from a class of over 35,000 people. There has been only one objector. It is not clear that plaintiffs could obtain greater programmatic relief even if they prevailed. The litigation would be difficult and costly.

Accordingly, in all the circumstances, I have concluded that the basic terms of the settlement, as amended most recently, should be approved. I do not, however, see any reason to approve the additional payments to the individual plaintiffs. This is especially true of Mr. White, who was rejected as an adequate class representative. Indeed, approving these proposed payments, in the context of this case, would create an incentive for other representatives to act in a manner inconsistent with the interests of other classes.

Attorneys' Fees

Plaintiffs' counsel seek an award of $990,000 in attorneys' fees and $75,000 in expenses against total expenses of $80,084.18.

Counsel asserts that they devoted 1,900 hours to this case through the filing of the initial motion for approval of the settlement. They claim a lodestar of $836,318.75. I accept that as reasonable. I see no reason for a multiplier. In addition, I am aware that plaintiffs' counsel subsequently have devoted additional efforts to the matter in seeking approval of the settlement, which in my judgment are worth an additional $25,000.

Conclusion

Plaintiffs' motion to approve the settlement as amended [docket item 148] is granted save that the proposed payments to the individual plaintiffs are not approved. Plaintiffs' motion for an award of attorneys' fees and expenses [docket item 149] is granted to the extent that they shall recover attorneys' fees in the amount of $861,318.75 plus expenses in the amount of $75,000 for a total of $936,318.75.

SO ORDERED.

S.D.N.Y.,2007.
White v. First American Registry, Inc.
Not Reported in F.Supp.2d, 2007 WL 703926 (S.D.N.Y.)

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