UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WEATHERFORD INTERNATIONAL SECURITIES LITIGATION	11 Civ. 1646 (LAK) (JCF) CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Court-appointed Lead Plaintiff and proposed Settlement Class Representative, American Federation of Musicians and Employers' Pension Fund ("AFME" or "Lead Plaintiff"), and additional named plaintiff and proposed Settlement Class Representative, the Georgia Firefighters' Pension Fund ("GFPF") (together, "Plaintiffs" or "Settlement Class Representatives"), respectfully submit this memorandum of law in support of their Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation.[1]

I. PRELIMINARY STATEMENT

Pursuant to the terms of the Stipulation, Plaintiffs, through their counsel, have obtained $52,500,000 in cash (the "Settlement Amount") for the benefit of the Settlement Class, in exchange for the dismissal of all claims brought in the above-captioned action (the "Action") and a full release of claims against Defendants[2] and the other Released Parties.[3] Subject to Court approval, the proposed Settlement represents a substantial recovery for the Settlement Class and avoids the risks and expense of continued litigation, including the risk of recovering less than the

[1] Unless otherwise indicated herein, capitalized terms shall have those meanings contained in the Stipulation of Settlement and Release dated January 28, 2014 (ECF No. 240-1) (the "Stipulation") and the Declaration of Eli R. Greenstein in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Greenstein Declaration" or "Greenstein Decl."), submitted herewith. Unless otherwise noted, all emphasis is added and internal citations and footnotes are omitted.

[2] Defendants are Weatherford International Ltd. ("Weatherford" or the "Company"), Bernard J. Duroc-Danner, Andrew P. Becnel, Jessica Abarca and Charles E. Geer, Jr.

[3] The term "Released Parties" means: (1) Defendants; (2) Defendants' immediate family members, heirs, executors, administrators, successors, assigns, present and former employees, officers, directors, managers, attorneys, legal representatives, insurers, re-insurers, auditors and agents; (3) any person or entity that is or was related to or affiliated with any Defendant or in which any Defendant has or had a controlling interest and the present and former parents, subsidiaries, divisions, affiliates, predecessors, successors, employees, officers, directors, managers, attorneys, assigns, auditors and agents of each of them; and (4) the present and former employees, officers, directors, managers, attorneys, assigns, auditors and agents of any of the foregoing. *See* Stipulation at ¶1(cc).

Settlement Amount—or no recovery at all—after significant delay. Moreover, to Lead Counsel's knowledge, the Settlement represents the *only* recovery for the Settlement Class arising from the conduct alleged in this Action, despite an ongoing three-year investigation by the SEC.

At every stage of the Action, Plaintiffs faced vigorous opposition from Defendants and aggressive defenses to Plaintiffs' claims. Had the Settlement not been reached, the Settlement Class would have faced considerable obstacles in proving its case, particularly with respect to the elements of scienter, loss causation, and damages. Indeed, following the Court's ruling on Defendants' motions to dismiss, the only remaining claims in the case were those arising from Weatherford's internal controls and Defendants' certifications pursuant to Sarbanes-Oxley (the "Internal Controls Misstatements"). Plaintiffs' other claims arising from Weatherford's restatements of its financial results and representations regarding its tax expenses and effective tax rate ("ETR") (the "Tax Accounting Misstatements") were dismissed from the Action entirely. Accordingly, with respect to loss causation, Plaintiffs faced the significant risk of disaggregating losses and proving that the Company's stock price declines were the result of the disclosure of material weaknesses in its internal controls—as opposed to the Tax Accounting Misstatements or other confounding information alleged by Defendants. Even if Plaintiffs could legally establish some loss causation, however, they still faced substantial risk that a jury could find that only a small fraction of the alleged damages were recoverable for the Internal Controls Misstatements.

With respect to scienter, given the complex tax accounting issues in the Action, including the interplay between GAAP and tax reporting under various foreign tax regimes in which Weatherford operated, Plaintiffs faced substantial risk in proving that the single remaining

Individual Defendant who made actionable statements (CFO Becnel) possessed the requisite level of recklessness or intent—as opposed to negligence or mismanagement. In addition, Plaintiffs faced significant uncertainty and risk in connection with the Supreme Court's forthcoming decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 636 (Mem) (Nov. 15, 2013) ("*Halliburton II*") which will address the applicability and contours of the fraud-on-the-market presumption of reliance affirmed in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978 (1988). Suffice it to say, an unfavorable decision in *Halliburton II* threatened to potentially limit or negatively impact the Settlement Class's ability to recover from the Defendants at all.

As detailed in the Greenstein Declaration, the Settlement was reached after nearly three years of intense litigation. The Settlement is the fruit of well-informed and extensive arm's-length settlement negotiations between experienced and knowledgeable counsel with the assistance of a highly respected mediator, the Honorable Daniel Weinstein. Greenstein Decl. at ¶¶6-7, 78-81. "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 Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008). Moreover, before the Settlement was reached, Plaintiffs, through the efforts of their counsel Kessler Topaz Meltzer & Check, LLP ("Lead Counsel") vigorously prosecuted their case for nearly three years, including through numerous stages of litigation such as: (i) conducting an extensive investigation into Plaintiffs' claims, including interviews of nearly 20 former Weatherford employees; (ii) researching and drafting a comprehensive consolidated complaint and two proposed amended complaints; (iii) opposing two motions to dismiss; (iv) consulting with multiple experts and consultants in the areas of, *inter alia*, tax accounting, foreign tax reporting, internal controls, loss causation, and damages;

(v) submitting extensive class certification briefing and engaging in rigorous class certification discovery, including expert and client depositions; (vi) engaging in extensive discovery, including reviewing approximately 2.3 million pages of documents produced by Defendants and various third parties; (vii) filing seven motions to compel, all of which were granted in part; and (viii) taking and/or defending 14 depositions and preparing for 10 additional depositions scheduled for the remaining two-week period prior to the January 24, 2014 discovery cutoff. Greenstein Decl. at ¶¶21-76. Following the substantial completion of fact discovery and just prior to the exchange of expert reports, the parties reached an agreement in principle to settle the Action for $52,500,000. *Id*. at ¶81.

Plaintiffs in this Action are the type of sophisticated institutional investors favored by Congress when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Both Plaintiffs have closely monitored and participated in this litigation, including the settlement negotiations leading to the resolution of the Action, and recommend that the Settlement be approved. *See* Exhibits 3 and 4 to the Greenstein Declaration. Further, Lead Counsel, a law firm with extensive experience in prosecuting securities class actions, strongly believes that the Settlement is in the best interests of the Settlement Class. Greenstein Decl. at ¶¶85, 120.

In accordance with the Court's April 1, 2014 Order Concerning Proposed Settlement (ECF No. 249) (the "Notice Order"), the Court-authorized Claims Administrator, The Garden City Group, Inc. ("GCG"), mailed over 660,000 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Settlement Class Members and nominees.[4] Greenstein Decl. at ¶99. As ordered by the Court and set forth in the Notice, any requests for exclusion from the

[4] *See* Affidavit of Jose C. Fraga Regarding (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Requests for Exclusion Received to Date (the "Fraga Aff."), at ¶¶2-10, attached as Exhibit 1 to the Greenstein Declaration.

Settlement Class are due to be received no later than June 8, 2014, and any objections to the Settlement, the Plan of Allocation and/or the request for attorneys' fees and reimbursement of litigation expenses are due to be received no later than June 13, 2014. To date, Lead Counsel has received only one objection (primarily related to the request for attorneys' fees and expenses). *Id*. at ¶¶101, 130. In addition, only six requests for exclusion from the Settlement Class have been received thus far. *Id*.; *see also* Fraga Aff. at ¶14.

Plaintiffs and Lead Counsel firmly believe that the Settlement is eminently fair, reasonable, and adequate and provides a substantial result for the Settlement Class. Accordingly, Plaintiffs respectfully request that the Court grant final approval of this Settlement, and deem the Plan of Allocation a fair and reasonable method for distributing the Net Settlement Fund to the Settlement Class.

II. FACTUAL BACKGROUND AND HISTORY OF THE ACTION

This Action involves the restatement of Weatherford's financial results for 2007-2010 and the Company's announcement of a material weakness in its internal controls. Greenstein Decl. at ¶¶9, 17. Specifically, the Complaint alleged that between April 25, 2007 and March 1, 2011 (the "Class Period") Defendants violated the federal securities laws by making materially false and misleading public statements regarding Weatherford's income tax results, its ETR and the adequacy of its internal controls. *Id*. at ¶17; *see also* Complaint (ECF No. 59) at ¶¶1, 4-18. Lead Plaintiff alleged that Weatherford understated its ETR largely to increase its net income and earnings per share, thereby creating the illusion of financial success during an otherwise difficult period for the Company. Greenstein Decl. at ¶17; Complaint at ¶¶5, 73-133. Lead Plaintiff further alleged that, for each quarter and year during the Class Period, Defendants Duroc-Danner and Becnel executed certifications pursuant to §§302 and 906 of the Sarbanes-Oxley Act of 2002, falsely representing that they had designed, reviewed and certified the adequacy of Weatherford's internal controls. Greenstein Decl. at ¶17; Complaint at ¶¶15, 141-45. Lead Plaintiff alleged that these misrepresentations artificially inflated the price of Weatherford stock during the Class Period and that members of the proposed Settlement Class suffered damages when the price of Weatherford stock declined on news causally connected to Defendants' internal control misrepresentations. Greenstein Decl. at ¶17; Complaint at ¶¶235-41.

For the sake of brevity and to avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Greenstein Declaration for a detailed discussion of the procedural history of the Action. Greenstein Decl. at ¶¶18-76.[5]

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A class action settlement must be presented to the Court for approval. Fed. R. Civ. P. 23(e). The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). As a matter of public policy, "federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004). *See also 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.'").

In ruling on final approval of class settlements, courts examine both the negotiating process leading to the settlement (*i.e.*, procedural fairness), and the settlement's substantive

[5] In addition to the Greenstein Declaration, Plaintiffs are also simultaneously submitting to the Court, on behalf of Lead Counsel, the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Fee Memorandum"). The Greenstein Declaration and Fee Memorandum are incorporated by reference herein.

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.[6] 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); *In re Sony Corp. SXRD*, 448 F. App'x. 85, 87 (2d Cir. 2011) ("[W]hen evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'").

A. <u>The Settlement Negotiations Demonstrate Procedural Fairness</u>

The parties here negotiated the Settlement at arm's-length with the assistance of an experienced mediator and former judge, the Honorable Daniel H. Weinstein (Ret.), *see* Greenstein Decl. at ¶¶6-7, 78-81. "The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached [after protracted settlement negotiations] supervised by Judge Weinstein." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ. 3400 (CM) (PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010). *See also*

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[6] *See IMAX*, 283 F.R.D. at 189; *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *1 (S.D.N.Y. Dec. 28, 2011) (finding initial presumption of fairness attaches to proposed settlement where it is "reached by experienced counsel after arm's length negotiations"); *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.").

D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) (presumption of fairness and adequacy applied in part because "[s]ettlement was reached…with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multi-party, high stakes litigation") (collecting cases). The extensive negotiation process was hard-fought by both sides and required the parties' careful analysis of complex factual and legal issues and the changing dynamics of the evidentiary record and legal landscape during the litigation. Greenstein Decl. at ¶¶80-81.

The negotiation process also included a formal in-person mediation session in June 2013, the submission and exchange of detailed mediation statements, and intensive presentations and vigorous debate by the parties. *Id.* at ¶81. Although these negotiations did not resolve the matter, they did allow for an exchange of views on the strengths and weaknesses of the parties' respective positions. Additional telephonic and in-person negotiations took place towards the end of 2013 with the continued assistance of Judge Weinstein. *Id.* at ¶¶80-81. In addition, both Plaintiffs took an active role in monitoring the settlement negotiation process, precisely as the PSLRA intended. *See* Exhibits 3 and 4 to the Greenstein Declaration.[7] After engaging in a comprehensive analysis of the merits and dynamics of this Action, including reviewing updated

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[7] *See In re Global Crossing*, 225 F.R.D. at 462; *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, Nos. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *7 (S.D.N.Y. Apr. 6, 2006) ("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'"); *Veeco*, 2007 WL 4115809, at *5 ("Moreover, under the PSLRA, a settlement reached...under the supervision and with the endorsement of a sophisticated institutional investor...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.'").

merits and evidentiary submissions by the parties after discovery was substantially complete, Judge Weinstein presented the parties with a formal mediator's proposal, which both parties ultimately accepted to settle the Action. Greenstein Decl. at ¶81.

Lead Counsel who negotiated the Settlement was fully informed of the strengths and weakness of Plaintiffs' claims. Indeed, it was not until after nearly three years of contentious litigation, including an extensive investigation, significant motion practice and the substantial completion of fact discovery, that the parties reached an agreement in principle to settle the Action for $52,500,000. Greenstein Decl. at ¶¶5, 77. *See D'Amato*, 236 F.3d at 85 (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'"); *IMAX*, 283 F.R.D. at 189 (S.D.N.Y. 2012) ("[G]reat weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.").

B. Application of the *Grinnell* Factors Supports Approval of the Proposed Settlement As Fair, Reasonable and Adequate

The Second Circuit has identified nine factors to consider in determining whether a settlement is fair, reasonable and adequate:

> (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, *see also Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) *cert denied, Suarez v. Charron*, 134 S. Ct. 1941 (2014); *Aeropostale*, 2014 WL 1883494, at *3. "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. 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).

As demonstrated herein, and in the accompanying Greenstein Declaration, the proposed Settlement more than satisfies each of the foregoing *Grinnell* factors. Accordingly, it is the considered judgment of Plaintiffs and Lead Counsel that the Settlement represents a fair, reasonable and adequate resolution of the Action and warrants this Court's final approval.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

"[D]istrict courts in this Circuit have 'long recognized' that securities class actions are 'notably difficult and notoriously uncertain' to litigate." *Aeropostale*, 2014 WL 1883494, at *5. "Indeed, the courts recognize that '[s]ecurities class actions are generally complex and expensive to prosecute.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15. 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." *Id.*; *AOL*, 2006 WL 903236, at *8 (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials").

This Action was unquestionably complex. It involved difficult tax accounting concepts and the analysis of foreign intercompany transactions between dozens of Weatherford subsidiaries, including the tax treatment of intercompany dividends and hybrid investment instruments between numerous entities in various tax jurisdictions. Greenstein Decl. at ¶¶42, 73-

76, 94. Accordingly, many of the documents obtained in discovery were highly specialized and technical in nature and required consultation with accounting and tax experts. *Id*. at ¶¶73-76. Developing and synthesizing this highly technical tax accounting documentation into an easily digestible format for the Court and a jury was, and would continue to be, extremely time-consuming and expensive. Further, even if Plaintiffs established a compelling evidentiary record of liability, any recovery could be reduced, delayed or wiped out entirely by defenses to loss causation, damages and the establishment of proportionate fault. *Id*. at ¶¶88-93. As demonstrated throughout the course of this Action, Defendants and their experienced counsel were committed to forcefully defending this Action through and beyond trial and would have continued to vigorously contest Plaintiffs' claims.

The expense and delay of continued litigation also counsel in favor of the Settlement. Although Plaintiffs have litigated this Action for nearly three years and were nearing the completion of fact discovery when the Settlement was reached, the costs associated with the completion of discovery, including extensive expert discovery, summary judgment motions, *Daubert* motions, a lengthy and complicated trial and the inevitable post-trial appeals, would have been substantial. As a result, additional years could pass before the class would receive a recovery, if any. *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.”). Notably, in one of the most recent PSLRA cases to proceed through trial, *Lawrence E. Jaffee Pension Plan v. Household International*, *Inc*., *et al*., Case No. 02-CV-5893 (N.D. Ill.), although the case was originally filed in 2002 and received a favorable jury verdict in 2009, Plaintiffs have yet to recover any of the damages awarded by the jury. In fact, the first appeal of the judgment is currently scheduled for May 28, 2014, twelve years after the case was filed and five years after the jury reached its verdict. This factor also was considered as part of the total mix of information in settling the claims now on favorable terms for the Settlement Class.

In sum, the complexity, expense and delay of continued litigation would be substantial. Unlike protracted litigation with an uncertain outcome, the proposed $52.5 million Settlement provides Settlement Class Members with prompt, efficient, and guaranteed relief. Accordingly, this factor favors approval of the Settlement.

2. The Stage of the Proceedings and Amount of Discovery Support Approval of the Settlement

When courts “look [ ] to the ‘stage of the proceedings and the amount of discovery completed,’” they “focus[] on whether the plaintiffs ‘obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal.” *In re Advanced Battery Techs.*, *Inc. Sec. Litig*., No. 11 Civ. 2279 (CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014); *see also Visa*, 396 F.3d at 118. This requirement “is intended to assure the [c]ourt ‘that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them.’” *Global Crossing*, 225 F.R.D. at 458.

Here, the Settlement was reached after nearly three years of intensive litigation and discovery, during which time Plaintiffs conducted a detailed investigation and exhaustive research into the applicable law; drafted several comprehensive amended complaints;

aggressively pursued and secured multiple amended Answers from Defendants; reviewed approximately 2.3 million pages of documents; filed numerous discovery motions; conducted, defended, or prepared for the depositions of 24 witnesses; and consulted extensively with multiple experts in conjunction with the pleadings, discovery and the preparation of formal expert reports. Greenstein Decl. at ¶¶21-72. Perhaps most importantly, through its seven motions to compel and numerous depositions, Plaintiffs were able to generate a robust evidentiary record to support a full and considered analysis of the strengths and weaknesses of Plaintiffs' claims. The record not only included the typical discovery obtained in PSLRA cases, but also had the benefit of certain materials generated during a comprehensive independent Audit Committee investigation of the allegations at issue, including dozens of witness interview memoranda. This record allowed Plaintiffs to further scrutinize and assess the strengths and pitfalls of Plaintiffs' remaining claims. Greenstein Decl. at ¶¶58-60; ECF Nos. 217, 235.

In sum, the knowledge and insight gained by Plaintiffs and Lead Counsel following years of investigating, developing and fine-tuning their claims, conducting extensive discovery, reviewing and analyzing millions of pages of evidence, deposing current and former employees and third party auditors, and the settlement negotiations and mediation process itself, provided Plaintiffs and Lead Counsel with more than sufficient information to make intelligent, informed appraisals of the strengths and weaknesses of the Settlement Class's claims, Defendants' defenses, and the likelihood of obtaining a larger recovery for the Settlement Class had this Action continued to be litigated. *See In re Bear Stearns Cos*., 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues").

Consequently, 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*, 2006 WL 903236, at *10. This factor strongly supports approval of the Settlement.

3. The Risks of Establishing Liability and Damages Support Approval of the Settlement

In assessing this factor, the Court is not required to "decide the merits of the case[,] 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," *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8331 (CM)(MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014). "[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 Defendants have merit, they also recognize that there were considerable risks and uncertainties to pursuing the Action through summary judgment, trial and appeals. The most significant risks and uncertainties to continued litigation, which were extensively considered by Lead Counsel and informed its recommendation of the Settlement to Plaintiffs, are discussed below.

a. Risks to Establishing Defendants' Liability

Plaintiffs faced considerable risks to establishing Defendants' liability if the Action continued. First, Plaintiffs faced the risk that the Court or a jury would find that the complexity of Weatherford's tax accounting, particularly the foreign intercompany tax and dividend exclusion transactions underlying the restatements at issue here, made it less likely that a high-level executive such as Becnel, would be aware of the granular tax accounting errors and processes underlying the ultimate conclusion that a material weakness existed in internal controls. *Id*. at ¶94. This risk was even more acute because Weatherford operated approximately 100 subsidiaries in vastly different foreign tax jurisdictions, adding multiple layers of accounting and tax reporting complexity that Defendants would seek to emphasize and exploit at summary judgment and trial. *Id*. For example, Defendants would have likely argued that in certifying the accuracy of the Company's financial results and the adequacy of Weatherford's internal controls, Becnel reasonably relied on the expertise of Weatherford's outside auditors, tax consultants, internal tax managers, and the Company's Internal Audit department. *Id*. at ¶95. Even if Plaintiffs could prove, moreover, that lower-level tax personnel were reckless in disregarding internal controls or incorrectly accounting for income taxes to boost results, Plaintiffs faced the risk that the Court on summary judgment, or the jury at trial, would find that: (a) those employees did not make any statements; (b) the employees were not senior enough in the corporate hierarchy to impute scienter to the Company itself; or (c) the only remaining Individual Defendant that made an actionable statement (CFO Becnel) was not sufficiently aware of adverse facts and red flags indicating that his statements were fraudulent. *Id*. Thus, Plaintiffs faced the risk that they could not prove liability or scienter consistent with *Janus Capital Group*, *Inc*. *v*. *First Derivative Traders*, 131 S. Ct. 2296 (2011). *Id*.

Simply put, given the complexity of tax accounting in general, and the added dynamic of Weatherford's corporate structure, proving that Defendants knew, or were reckless in not knowing, that a "material weakness" existed in the Company's tax accounting controls was far from certain. Additionally, Plaintiffs had to overcome the inference repeatedly asserted by Defendants that Weatherford was simply plagued by the complexity of its tax structure and its rapid growth such that Defendants either negligently or mistakenly failed to appreciate the severity of its tax accounting errors and weaknesses in internal controls. As a result, Plaintiffs faced significant risks in establishing that Defendants acted with the requisite scienter necessary to sustain a securities fraud claim. This risk was underscored by the fact that the Court had already dismissed claims arising from the Company's financial restatements and Defendants' Tax Accounting Misstatements for failure to plead scienter. Greenstein Decl. at ¶122.

b. <u>Risks to Establishing Causation and Damages</u>

Plaintiffs also faced formidable challenges to establishing loss causation and damages for the remaining internal control claims. With respect to loss causation, Plaintiffs faced a substantial risk that they would be unable to "disaggregate" the portion of losses attributable to Defendants' Internal Controls Misstatements from losses attributable to other confounding information, *i.e.*, the announcement of a $500 million restatement due to tax accounting errors, and negative news from the Middle East regarding oil prices. Greenstein Decl. at ¶88. Indeed, Plaintiffs faced the possibility moving forward that a significant portion of the alleged losses would be apportioned to the Tax Accounting Misstatements (*i.e.*, the claims that were previously dismissed), as opposed to revelations regarding Weatherford's internal controls. *Id*.

Additionally, Defendants may have challenged whether the Internal Controls Misstatements, standing alone, were material such that they were significantly likely to alter the total mix of information and influence investors' decisions to purchase, hold or sell Weatherford stock. Although Plaintiffs would argue that Defendants' Internal Controls Misstatements were inextricably intertwined with, and inseparable from, the Tax Accounting Misstatements such that the former misstatements were still a "substantial cause" of the stock price declines alleged in the Complaint, Plaintiffs still faced a significant risk that such an argument would be rejected during summary judgment, trial, post-trial or appellate proceedings. *Id*. at ¶89.

Further, even if Plaintiffs could establish at summary judgment and trial that Defendants' Internal Controls Misstatements were a factor in causing the alleged stock price declines, Plaintiffs still faced a significant risk that the Court and/or a jury would find that only a small fraction of the total damages can be apportioned to the Internal Controls Misstatements, thus significantly reducing any recovery for the class. Moreover, Defendants would have likely asserted a proportional fault defense, asserting that the Company relied on third parties, including Weatherford's auditor who issued opinions on Weatherford's financial results and internal controls during the Class Period. Greenstein Decl. at ¶90. The parties' differing arguments on loss causation and damages hinged upon extensive expert discovery and testimony. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Although Plaintiffs believe they would have been able to present expert testimony to meet their burden on loss causation and damages, "establishing damages at trial would lead to a 'battle of experts' … with no guarantee whom the jury would believe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001).[8] As a result, this factor further supports approval of the Settlement.

4. The Risks of Maintaining the Class Action <u>Through Trial Support Approval of the Settlement</u>

While Plaintiffs believe that this Action satisfies each element of Rule 23 and could have been maintained as a class action through trial, the Settlement was reached before the Court issued an opinion on Plaintiffs' motion for class certification. Even if this Court had certified the class, moreover, no class certification decision is immune from a possible reversal either upon

8 *See also 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").

motion of a party, by the Court, or on appeal. *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207, 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) ("There is no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime during the proceedings."). Here, this risk was particularly acute given that the Supreme Court's decision in *Halliburton II* was on the horizon at the time of Settlement. *See Aeropostale*, 2014 WL 1883494, at *9 ("[T]he law of class actions is developing at a rapid clip, and it is always possible that some new Supreme Court decision would counsel in favor of decertification."). The Settlement avoids any uncertainty with respect to these issues, and therefore this factor weighs in favor of approving the Settlement.

5. Defendants' Ability to Withstand a Substantially Greater Judgment Does Not Suggest that the Settlement Is Unfair

While Defendants likely could withstand an even greater judgment against them, the Second Circuit has made clear that "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato*, 236 F.3d at 86. Indeed, "a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *Sony*, 2008 WL 1956267, at *8. 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). This factor does not, therefore, alter the conclusion that the Settlement here is reasonable and fair.

6. The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and All the Attendant Risks of Litigation 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 analyzing these two factors, a reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Massiah v. Metroplus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, "there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Visa*, 396 F.3d at 119. Moreover, the settlement amount must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *JPMorgan Chase*, 2014 WL 1224666, at *11.

Here, although Plaintiffs' damages expert estimates that likely recoverable damages approximate $500 million, that amount does not take into account any of Defendants' arguments regarding disaggregation, loss causation, damages or proportionate fault. Greenstein Decl. at ¶87.[9] In contrast to the delays, costs and uncertainty of continued litigation, the proposed

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9 For example, Defendants would have continued to vigorously challenge Plaintiffs' damages calculation and theory of causation, especially given the dismissal of all claims arising from the Tax Accounting Misstatements and the overall uncertainty of disaggregating losses. Greenstein Decl. at ¶¶88-92. *See In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("[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...[r]ather, the percentage recovery, must represent a material percentage recovery to plaintiff in light of all the risks..."); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, Nos. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007)
(Cont'd)

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

7. The Reaction of the Settlement Class to Date <u>Supports Approval of the Proposed Settlement</u>

Pursuant to the terms of the Notice Order, GCG has mailed more than 660,000 copies of the Notice Packet to potential Settlement Class Members and nominees. *See* Fraga Aff. at ¶¶2-10. In addition, the Summary Notice was published in the national edition of *The Wall Street Journal* and *Investor's Business Daily* and transmitted over *PR Newswire*. *Id*. at ¶11. 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 in order to be potentially eligible to receive a payment from the Settlement.

The deadline for objecting to the Settlement, the Plan of Allocation and/or Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses is June 13, 2014. To date, there has been only one objection received, and only six requests for

(finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class actions securities litigations").

exclusion from the Settlement Class. Greenstein Decl. at ¶101.[10] Plaintiffs will address all objections, as well as requests for exclusion, in their reply submission to be filed with the Court on June 20, 2014. *Id*. at ¶101, n.4.

In sum, the *Grinnell* factors—including the complexity, expense and delay of further litigation, the well-developed stage of the proceedings and the substantial risks of continued litigation—support a finding that the Settlement is fair, reasonable and adequate.

IV. 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 IMAX*, 283 F.R.D. at 192; *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."). Generally, "[a] plan of allocation that reimburses class members based on the extent of their injuries is [] reasonable." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). 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). Rather, broad classifications may be used in order to promote "[e]fficiency, ease of administration and conservation" of the settlement fund. *Id*. at 133-35. A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Maley*, 186 F. Supp. 2d at 367; *see In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009).

[10] A copy of the objection submitted by Stephen Shoeman is attached to the Greenstein Declaration as Exhibit 2. Mr. Shoeman—who objects primarily to the attorneys' fees and expenses set forth in the Notice—has not provided any documentation to prove that he is a member of the Settlement Class as required by the Court's Notice Order and as set forth in the Notice.

In determining the fairness, reasonableness and adequacy of a proposed allocation plan, Courts give considerable weight to the opinion of experienced class counsel.[11] Here, Lead Counsel developed the Plan of Allocation in consultation with Plaintiffs' damages expert and believes that the Plan of Allocation provides a fair and reasonable method to equitably distribute the Net Settlement Fund among eligible Settlement Class Members.

If approved, the Plan of Allocation will govern how the Net Settlement Fund will be distributed among Settlement Class Members who submit timely and valid Claim Forms to the Claims Administrator, in accordance with the requirements established by the Court, and who are approved for payment ("Authorized Claimants"). Although not a formal damages study, the Plan of Allocation reflects Plaintiffs' damages expert's analysis, including a review of publicly available information regarding Weatherford and statistical analysis of the price movements of Weatherford common stock and the price performance of relevant market and peer indices during the Settlement Class Period. Greenstein Decl. at ¶103.

Pursuant to the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each share of Weatherford common stock purchased or otherwise acquired during the Settlement Class Period (*i.e.*, the period between April 25, 2007 and March 1, 2011, inclusive) that is listed in the Claim Form and for which adequate documentation is provided. *Id*. at ¶104. In order to have a Recognized Loss Amount, eligible Weatherford common stock must have been held

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[11] *See In re Marsh ERISA Litig*., 265 F.R.D. 128, 145 (S.D.N.Y. 2010) ("In determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel."); *Am. Bank Note Holographics*, 127 F. Supp. 2d at 429-430 ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel....As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight.").

through January 25, 2010 or March 1, 2011. *Id*. at ¶105 & n.5.[12] The sum of a claimant's Recognized Loss Amounts will be the claimant's Recognized Claim. The Net Settlement Fund will be allocated on a *pro rata* basis to Authorized Claimant's based on each Authorized Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants. Under the Plan of Allocation, if a claimant's *pro rata* payment calculates to less than $10.00, no distribution will be made to that claimant. *Id*. at ¶106.

To date, there have been no objections to the Plan of Allocation. Accordingly, for all of the reasons set forth herein and in the Greenstein Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

V. THE SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

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

> All Persons who purchased or otherwise acquired Weatherford common stock between April 25, 2007 and March 1, 2011, inclusive, and who were allegedly damaged thereby. Excluded from the Settlement Class are Defendants and Weatherford's officers, affiliates, and directors, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which a Defendant has a controlling interest. Also excluded from the Settlement Class are any persons or entities who exclude themselves from the Settlement Class by filing a timely request for exclusion in accordance with the requirements set forth in the Notice.

In its April 1, 2014 Notice Order, the Court found upon a preliminary evaluation, and for purposes of the Settlement only, that the Settlement Class met the requirements of Rule 23(a)

[12] Recognized Loss Amounts also take into account the PSLRA's statutory limitation on recoverable damages, whereby losses on eligible Weatherford common stock cannot exceed the difference between the purchase price paid for the stock and the average price of the stock during the 90-day period subsequent to the Settlement Class Period if the share was held through May 27, 2011 (*i.e.*, the end of the 90-day period) and losses on eligible Weatherford common stock purchased or otherwise acquired during the Settlement Class Period and sold *during* the 90-day period subsequent to the Settlement Class Period cannot exceed the difference between the purchase price paid for the stock and the average price of the stock during the portion of the 90-day period elapsed as of the date of sale. *Id*. *See also* Fraga Aff. Exhibit A at 9.

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.[13]

"The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement." *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) (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)); *see also In re Am. Int'l Grp. Inc. Sec. Litig.*, 689 F.3d 229, 238-39 (2d Cir. 2012). 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. *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 readily satisfies the requirements of Rule 23(a) and Rule 23(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. 240, pp. 4-8), incorporated herein by reference, Plaintiffs request that the Court reiterate its prior ruling, certifying (i) the Settlement Class for purposes of effectuating 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.

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[13] The proposed Settlement Class Representatives are the Court-appointed Lead Plaintiff, AFME, and additional named plaintiff GFPF. *See* ECF No. 249 at ¶4.

VI. 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; *Vargas v. Capital One Fin. Advisors*, No. 13 Civ. 3262, 2014 WL 960935, at *3 (2d Cir. Mar. 13, 2014). "Notice need not be perfect" or received by every class member, but instead be reasonable under the circumstances." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008); *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."). Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *Id.* (citing *Visa*, 396 F.3d at 114).

Both the substance of the Notice as well as the method through which it was disseminated to potential members of the Settlement Class satisfies 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. §§77z-1(a)(7), 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims asserted against Defendants; (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; and (viii) notice of the binding effect of a judgment on members of the Settlement Class. The Notice also provides recipients with information on how to submit a Claim Form in order to be potentially eligible to receive a distribution from the Settlement.

Further, in accordance with the Court's Notice Order, as of May 21, 2014, GCG has mailed over 660,000 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. Fraga Aff. at ¶10. To disseminate the Notice Packets, GCG used data received from the Company's transfer agent regarding shareholder names and addresses during the Settlement Class Period. *Id*. at ¶¶3-6. GCG also mailed copies of the Notice Packet to the largest and most common U.S. banks, brokerage firms, and nominees contained in GCG's proprietary mailing database, as well as the names and addresses of additional potential Settlement Class Members provided to GCG by nominees. *Id*. at ¶¶7-9.

In addition, GCG caused the Summary Notice to be published in the national edition of *The Wall Street Journal* and *Investor's Business Daily* and transmitted over *PR Newswire* on April 9, 2014. *Id*. at ¶11. In addition, GCG established a toll-free informational telephone line and caused information regarding the Settlement to be posted on the website specifically established for the Settlement, www.WeatherfordSecuritiesLitigationSettlement.com, which provides access to, among other important documents, downloadable copies of the Notice, Summary Notice and Claim Form. *Id*. at ¶¶12-13.

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), 296 F.R.D. 147, 154 (S.D.N.Y. 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).

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court approve the proposed Settlement 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: May 27, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of May, 2014, I hereby caused a true and correct copy of the foregoing document to be served via Overnight Mail upon:

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Westfield, NJ 07090

s/ Eli R. Greenstein
ELI R. GREENSTEIN

Addendum of Unpublished Authorities

In re Advanced Battery Techs., Inc. Sec. Litig.,
No. 11 Civ. 2279 (CM), 2014 WL 1243799 (S.D.N.Y. Mar. 24, 2014)

In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,
Nos. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006)

Bellifemine v. Sanofi-Aventis U.S. LLC,
No. 07 Civ. 2207, 2010 WL 3119374 (S.D.N.Y. Aug. 6, 2010)

City of Providence v. Aeropostale, Inc.,
No. 11 Civ. 7132, 2014 WL 1883494 (S.D.N.Y. May 9, 2014)

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

Hicks v. Morgan Stanley & Co.,
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)

Massiah v. Metroplus Health Plan, Inc.,
No. 11-cv-05669 (BMC), 2012 WL 5874655 (E.D.N.Y. Nov. 20, 2012)

In re Merrill Lynch & Co. Research Reports Sec. Litig.,
Nos. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007)

Shapiro v. JPMorgan Chase & Co.,
Nos. 11 Civ. 8331 (CM)(MHD), 11 Civ. 7961 (CM), 2014 WL 1224666
(S.D.N.Y. Mar. 24, 2014)

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)

Vargas v. Capital One Fin. Advisors,
No. 13 Civ. 3262, 2014 WL 960935 (2d Cir. 2014)

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.,
No. 04 Civ. 1611 (LAK), 2007 WL 703926 (S.D.N.Y. Mar. 7, 2007)

H

United States District Court,
S.D. New York.
In re ADVANCED BATTERY TECHNOLOGIES, INC. SECURITIES LITIGATION.

Civil Action No. 11 Civ. 2279 (CM).
Signed March 24, 2014.

Background: Investors filed securities fraud class actions against Chinese company, company officials, and company's outside auditors. After cases were consolidated, plaintiffs moved for settlement approval and reimbursement of expenses.

Holdings: The District Court, Colleen McMahon, J., held that:
(1) proposed settlement was fair, reasonable, and adequate;
(2) class counsel satisfied adequacy of representation requirement; and
(3) notice to class members complied with due process.

Motion granted.

West Headnotes

[1] Compromise and Settlement 89 ⚷ 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Class action settlement's procedural and substantive fairness should be examined in light of strong judicial policy in favor of settlement of class action suits.

[2] Compromise and Settlement 89 ⚷ 56.1

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases

Due to presumption in favor of settlement, absent fraud or collusion, courts should be hesitant to substitute their judgment for that of parties who negotiated settlement.

[3] Compromise and Settlement 89 ⚷ 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Class action settlement enjoys strong presumption of fairness where it is product of arm's-length negotiations concluded by experienced, capable counsel after meaningful discovery. Fed.Rules Civ.Proc.Rule 23(e)(1, 2), 28 U.S.C.A.

[4] Compromise and Settlement 89 ⚷ 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

To determine whether proposed class action settlement is fair, reasonable, and adequate, court should consider: (1) complexity, expense, and likely duration of litigation; (2) class's reaction to settlement; (3) stage of proceedings and amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining class action through trial; (7) defendants' ability to withstand greater judgment; (8) range of reasonableness of settlement fund in light of best possible recovery; and (9) range of reasonableness of settlement fund to possible recovery in light of all attendant risks of litigation. Fed.Rules Civ.Proc.Rule 23(e)(1, 2), 28 U.S.C.A.

[5] Compromise and Settlement 89 65

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 securities fraud class action against Chinese company, company officials, and company's outside auditors was fair, reasonable, and adequate, and thus warranted final approval, where further litigation would have been complex, expensive, and protracted, key witnesses were located in China, class certification would have presented additional complexities and obstacles, no formal objections to proposed settlement were filed, only 14 of 82,019 potential class members opted out, lead counsel was knowledgeable with respect to possible outcomes and risks in matter, defendants articulated arguably credible defenses, collectibility of any judgment against Chinese defendants was unlikely, settlement was reasonable in light of settlement class's best possible recovery against Chinese defendants, and settlement was product of arm's-length negotiations. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(e)(1, 2), 28 U.S.C.A.

[6] Compromise and Settlement 89 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

When formulated by competent and experienced class counsel, plan for allocation of net settlement proceeds need have only reasonable, rational basis.

[7] Compromise and Settlement 89 67

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k67 k. Class, Existence and Determination; Parties. Most Cited Cases

Before granting preliminary approval of class action settlement, court should determine that proposed settlement class is proper class for settlement purposes. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[8] Federal Civil Procedure 170A 187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187 k. Stockholders, Investors, and Depositors. Most Cited Cases

Proposed settlement class in securities fraud class action satisfied numerosity requirement for class certification, where over 82,000 notices were sent to potential class members, and 1,640 claims forms had been received. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[9] Federal Civil Procedure 170A 187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187 k. Stockholders, Investors, and Depositors. Most Cited Cases

Class counsel satisfied adequacy of representation requirement for class action in securities fraud action, where counsel had extensive experience and stellar reputation in field of class action and securities litigation, had been appointed lead or co-lead counsel in many complex securities class actions, and had recovered substantial monies for its clients and class members. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[10] Compromise and Settlement 89 68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

Constitutional Law 92 3983

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3980 Class Actions
92k3983 k. Compromise and Settlement. Most Cited Cases

Federal Civil Procedure 170A 179

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak179 k. Sufficiency. Most Cited Cases

Notice to class members of proposed settlement of securities fraud class action complied with due process, where individual notice was sent to each member of settlement class whose address was reasonably ascertainable, summary notice was transmitted over internet and published in national publication, and notice described settlement's terms, claims at issue, releases, process for objecting and opting out of settlement, how to make claim, all pertinent deadlines, and time, date, and place of final approval hearing. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

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MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SETTLEMENT APPROVAL AND REIMBURSEMENT OF EXPENSES

COLLEEN McMAHON, District Judge.

***1** Lead Plaintiff Ruble Sanderson, individually and on behalf of all other members of the Settlement Class ("Lead Plaintiff"), has moved for final approval of the Proposed Settlement and Reimbursement of Expenses in these consolidated class actions. The settlement terms originally agreed upon by the parties are set forth in the Stipulation of Settlement, which was preliminarily approved by this Court by Order dated November 26, 2013, and Amendment No. 1 thereto. (Dkt. No. 120.) Since preliminary approval, the agreement has been modified in one respect—Amendment No. 1 to the Stipulation of Settlement delinks this settlement from the settlement of related derivative litigation, which this court has declined to approve. The Court will refer to the terms of the Stipulation of Settlement, as amended by Amendment No. 1, as the "Settlement."

For substantially the reasons advanced by Class Counsel in support of this motion, the Settlement as modified is approved.

BACKGROUND

On April 1, 2011 and thereafter, several securities class action complaints were filed in the United States District Court for the Southern District of New York against the ABAT Defendants and others. (*See* Dkt. No. 1; *Burns v. Adv. Battery Techs., Inc.,* No. 11 Civ. 2354–CM; *Cohen v. Adv. Battery Techs., Inc.,* No. 11 Civ. 2849–CM (the "*Cohen Action* "); and *Connors v. Advanced Battery Techs., Inc.,* No. 11 Civ. 3098–CM.) The complaints asserted claims under Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. §§ 78j(b), and 78t(a)), and Rule 10b–5 promulgated thereunder by the Securities and Exchange Commission, (17 C.F.R. § 240.10b–5), alleging that the ABAT Defendants, among others, made material misstatements and omissions concerning the Company's financial results, and specifically, that the Company reported inflated gross profits, net income, and profit margins, and further, misrepresented the related party nature of certain business transactions. (*See, e.g.,* Dkt. No. 1, ¶¶ 1–2, 22–36; *Cohen Action,* Dkt. No. 1, ¶¶ 1–5, 7, 18–46.) On September 9, 2011, the Court consolidated the related securities class actions, appointed Mr. Ruble Sanderson as Lead Plaintiff and approved Lead Plaintiff's choice of Pomerantz LLP as Lead Counsel ("Lead Counsel"). (Dkt. No. 50.)

On September 29, 2011, Lead Plaintiff filed the Corrected First Amended Consolidated Class Action Complaint ("First Amended Complaint"), naming as defendants the ABAT Defendants, as well as ABAT's outside auditors, Bagell, Josephs, Levine & Co., LLC and Friedman LLP (collectively, "Bagell Josephs"), and EFP Rotenberg, LLP ("EFP") (collectively, the "Auditor Defendants"). (Dkt. No. 52.) By Decision and Order dated August 29, 2012, the Court denied the ABAT Defendants' motion to dismiss the First Amended Complaint, but granted the motions to dismiss filed by the Auditor Defendants. (Dkt. No. 90.)

On September 25, 2012, Lead Plaintiff filed a Motion for Leave to File a Second Amended Consolidated Class Action Complaint (Dkt. Nos. 96, 97), which the Auditor Defendants opposed. (Dkt. Nos. 100 and 101.) On September 18, 2012, Lead Plaintiff filed a Motion for Class Certification. (Dkt. Nos. 94, 95.)

***2** On October 5, 2012, the ABAT Defendants filed an Answer to the First Amended Complaint. (Dkt. No. 98.) On October 11, 2012, the Court entered a stay of all proceedings. (Dkt. No. 99.)

Thereafter, the Settling Parties commenced settlement negotiations. Counsel for Lead Plaintiff and the ABAT Defendants engaged in extensive negotiations concerning the possible resolution of this Litigation. Such negotiations included extensive correspondence, an exchange of information relevant to the Settlement, telephonic negotiations and in-person negotiation sessions. These negotiations included discussions not only about the merits of the claims, but also about the Company's financial condition and assets.

After difficult negotiations, the Settling Parties reached an agreement to settle this lawsuit. In the course of settlement discussions, the ABAT Defendants produced documents reflecting minimal insurance coverage applied to Lead Plaintiff's claims and that their U.S. assets are not significant enough to withstand a multimillion dollar judgment, that the majority of the Company's assets are located in the People's Republic of China ("China") and that recovery of any judgment against them is unlikely.

These settlement negotiations ultimately resulted in a proposed Settlement which was memorialized in a Stipulation of Settlement dated April 24, 2013. The Stipulation of Settlement was conditioned upon, among other things, dismissal of two derivative actions captioned *Blumka v. Fu,* (N.Y. Cty. Index No. 651343/2011) and *Braun v. Fu,* 11 Civ. 4383 (S.D.N.Y.) ("Derivative Actions").

On November 5, 2013, the papers in support of preliminary approval of the Settlement were filed with the Court. (Dkt. Nos. 116, 117.) On November 26, 2013, the Court entered an order preliminarily approving the Settlement, certifying the Settlement Class, certifying Lead Plaintiff as class representative for the Settlement Class, appointing Pomerantz LLP as Lead Counsel for the Settlement Class and providing for notice of the Settlement to all potential Settlement Class members. (Dkt. No. 120.)

Pursuant to the preliminary approval order, notice of the Settlement was sent subsequently to Settlement Class members. *See* Walsh Decl. at Ex. 1, Affidavit of Michael Rosenbaum at ¶¶ 3–4, 9 (the "Rosenbaum Aff.").

On February 21, 2014, this Court held a final settlement hearing with respect to both this Settlement and a settlement in the Derivative Actions. At the hearing, the Court expressed serious reservations concerning the terms of the settlement of the Derivative Actions, and indicated that the Court would not approve that settlement in its current form. Given that approval of the Derivative Actions' settlement was originally a condition of the settlement in the case, the Court requested that the parties advise within fourteen days whether they would be prepared to proceed with the class action settlement. By letter dated March 7, 2014, the parties informed the Court that they were prepared to proceed with this settlement regardless of the status of the Derivative Actions' settlement. The Stipulation of Settlement was subsequently amended by an Amendment No. 1 to the Stipulation of Settlement, dated March 18, 2014, to remove the condition of the dismissal of the Derivative Actions.

DISCUSSION

I. THE SETTLEMENT IS APPROVED.

A. The Settlement Is Fair, Adequate and Reasonable.

***3** [1] The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. Thus, the procedural and substantive fairness of a settlement should be examined "in light of the 'strong judicial policy in favor of settlement[ ]' of class action suits." *Aponte v. Comprehensive Health Mgmt., Inc.,* No. 10 Civ. 4825 JLC, 2013 WL 1364147, at *2 (S.D.N.Y. Apr. 2, 2013) (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005)) (brackets in original); *see also Spann v. AOL Time Warner, Inc.,* No. 02 Civ. 8238(DLC), 2005 WL 1330937, at *6 (S.D.N.Y. Jun. 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions."); *Newberg on Class Actions* § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

[2] Due to the presumption in favor of settlement, "[a]bsent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* No. 05 Civ. 10240(CM), 2007 WL 2230177, at *4 (S.D.N.Y. Jul. 27, 2007). More explicitly, the Supreme Court has cautioned that, in reviewing a proposed settlement, courts should "not 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, 67 L.Ed.2d 59 (1981).

[3] As in this case, a settlement of claims brought as a class action is subject to court approval after reasonable notice and a hearing. *See* Fed.R.Civ.P. 23(e)(1)-(2). Courts generally approve a settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Wal–Mart,* 396 F.3d at 116 (internal quotation omitted). A court determines the fairness of a settlement by looking both at the terms of the settlement and the preceding negotiation process. *Id.* at 116. With respect to the settlement process, a class action settlement enjoys a strong "presumption of fairness" where it is the product of arm's-length negotiations concluded by experienced, capable counsel after meaningful discovery. *Id.; see also In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 461 (S.D.N.Y.2004).

B. The Settlement Satisfies the *Grinnell* Factors.

[4] To determine whether a settlement is fair, reasonable, and adequate, the Court should consider the so-called " *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 litigation. *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, 48 (2d Cir.2000). "All nine factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003) (citing *D'Amato v.*

Deutsche Bank, 236 F.3d 78, 86 (2d Cir.2001)).

***4** [5] Here, the Settlement substantially satisfies the *Grinnell* factors and, thus, wholly warrants final approval.

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

The Settlement provides the Settlement Class with fair relief, given the delay and expenses of trial and post-trial proceedings, and the likelihood that any judgment recovered would be uncollectible. Courts consistently recognize that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement, especially in a securities class action. *See, e.g., In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* MDL Dkt. No. 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005); *In re Alloy, Inc. Sec. Litig.,* No. 03 Civ. 1597(WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (granting approval and noting that complex securities fraud issues “were likely to be litigated aggressively, at substantial expense to all parties”).

Regardless of the ultimate outcome, there is no question that further litigation would have been expensive and complex. With respect to discovery generally, given the complexities of the issues involved in this action, thousands of pages of documents would have been reviewed and numerous depositions taken. Moreover, the ABAT Defendants and key witnesses are located in China, which would add tremendous complication and cost to pursue discovery. *See In re China Sunergy Sec. Litig.,* No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (expense and protracted nature of discovery of Chinese defendants favored settlement); *see also 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).

Class certification would have presented additional complexities and obstacles. Lead Plaintiff procured expert opinion(s) on the issue of market efficiency; Defendants would have done the same had the case proceeded. The parties would also have enlisted experts on the issues of loss causation and damages. In addition to full briefing, documents would have been produced and expert depositions would have been taken.

Were plaintiffs to prevail on their motion for class certification, extensive discovery would have ensued, implicating the significant challenges detailed above concerning obtaining documents and other discovery from witnesses in China. Following the close of merits discovery, the parties would engage in expert discovery and trial preparation, which would be expensive and complex.

The parties resolved this action prior to the resolution of Lead Plaintiff's class certification motion, or the filing of any summary judgment and *Daubert* motions, thereby avoiding contentious motion practice, a complex and costly trial, and likely appeals. At summary judgment, Lead Plaintiff would have faced numerous hurdles, including Defendants' challenges to loss causation, and arguments that there were no actionable misrepresentations during the Class Period. Even if the First Amended Complaint survived Defendants' likely motion(s) for summary judgment and any ensuing appeals, continued prosecution of the action would be complex, expensive, and lengthy, with a more favorable outcome than the Settlement highly uncertain. Moreover, regardless of which party might prevail at trial, appeals likely would ensue.

***5** Indeed, the present value of a certain recovery at this time, compared to the slim chance for a greater one down the road, supports approval of a settlement that eliminates the expense and delay of continued litigation, as well as the significant risk that the Class could receive no recovery. Accordingly, any potential recovery by Class members in the absence of a settlement would occur years in the future, substantially delaying payment to Class members. By contrast, the Settlement offers the opportunity to provide definite recompense to the Class now. *See Hicks,* 2005 WL 2757792, at *6 ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."). Thus, the likely duration, complexity and expense of further litigation supports a finding that the Settlement is fair and weighs in favor of final approval.

2. The Lack of Objections and Minimal Number of Opt–Outs Support Final Approval.

The absence of valid objections and minimal investors electing to opt out of the Settlement provides evidence of Class members' approval of the terms of the Settlement. *See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.,* No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). Indeed, "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal–Mart,* 396 F.3d at 118 (citations omitted).

Pursuant to the preliminary approval order, and as stated in the Notice of Pendency and Proposed Settlement of Class Action (the "Long Notice"), Settlement Class members were originally notified that they have until January 31, 2014 to request exclusion from the Settlement Class or to object to the Settlement (*i.e.,* 20 days prior to the Court's final approval hearing on February 21, 2014, plus one day to ensure that objections could be filed on a day the Clerk's office was open). Rosenbaum Aff. at ¶ 10. At the parties' request, because of the discovery of additional data, the time for sending notices and for requesting exclusion was extended. Through February 18, some 82,019 post card notices were sent to potential class members, their names and addresses derived from transfer records, Depository Trust's Participant Proxy Contact List, databases maintained by Berdon Claims Administration's listing of compliance personnel for nominees, and the Vickers Directory of Institutional Investors. No formal objections were filed. The objector to the contemporaneous (and now disapproved) Derivative Settlement, Joel Caplan, commented variously in his numerous communications with the court about this settlement—sometimes complaining about it, other times insisting that he did not oppose it—but in the end, he chose to opt out of the settlement, as did 13 other shareholders. Rosenbaum Aff. at ¶ 10. By contrast, 1,640 completed claims forms have been received. This attests to the overwhelming support for the settlement among class members.

3. Lead Plaintiff Has Sufficient Information to Make Informed Decisions as to Settling This Case.

***6** The third *Grinnell* factor, which looks to the "stage of the proceedings and the amount of discovery completed," *Wal–Mart,* 396 F.3d at 117, focuses on whether the plaintiffs "obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Bellifemine v. Sanofi–Aventis U.S. LLC,* No. 07 Civ. 2207(JGK), 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010) (citations omitted).

The substance of Lead Counsel's knowledge of the merits and potential weaknesses of Plaintiff's claims are adequate to support the Settlement in this case. By the time the parties agreed to settle this action, Lead Counsel had, among other things:

- reviewed and analyzed ABAT's Class Period and pre-Class Period public filings, annual reports, press releases, quarterly earnings call and investment conference transcripts, and other public statements;

- collected and reviewed a comprehensive compilation of analyst reports and major financial news service reports on ABAT;

- reviewed and analyzed stock trading data relating to ABAT;

- utilized the services of a private investigator in China, who located and interviewed ABAT customers and former employees, visited certain ABAT production facilities in China and obtained ABAT's Chinese regulatory filings;

- researched, investigated, and drafted one of the initial complaints (*Cohen Action,* Dkt. No. 1) and the First Amended Complaint (Dkt. No. 52);

- researched and drafted the motion to appoint the Lead Plaintiff (Dkt. Nos. 16, 17, 40);

- researched and drafted memoranda opposing Defendants' Motions to Dismiss (Dkt. No. 79);

- researched and drafted Lead Plaintiff's motion to strike documents offered by the ABAT Defendants (Dkt. Nos. 80, 81, 88); and

- researched and drafted Lead Plaintiff's motion for class certification (Dkt. Nos. 94, 95) and supporting memoranda of law thereto.

While no merits discovery occurred in this case to date, Lead Counsel conducted targeted post-Settlement discovery with respect to ABAT's recoverable assets. Thus, Lead Counsel is knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement. *See* *Global Crossing,* 225 F.R.D. at 458 ("[T]he question is whether the parties had adequate information about their claims....").

4. Lead Plaintiff Faces Significant Risks in Establishing Liability and Damages.

In analyzing the risks of establishing liability, a court does not "need to decide the merits of the case or resolve unsettled legal questions." *Cinelli v. MCS Claim Servs., Inc.,* 236 F.R.D. 118, 121 (E.D.N.Y.2006) (internal quotations and alterations omitted). Rather, courts should weigh the likelihood of success on the merits against the relief provided by the Settlement. *Id.* at 122. Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *See* *Global Crossing,* 225 F.R.D. at 459.

***7** In assessing the Settlement here, the Court balances the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell,* 495 F.2d at 463. Securities class actions present hurdles to proving liability that are particularly difficult for plaintiffs to meet. *See AOL Time Warner,* 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *Alloy,* 2004 WL 2750089, at *2 (finding that issues present in a securities action presented significant hurdles to proving liability).

While Lead Counsel believes, based on their investigation, that Lead Plaintiff's claims against the ABAT Defendants have merit, they also recognize that they would face substantial hurdles. Defendants have articulated arguably credible defenses that could be accepted by the Court or jury. Indeed, proving liability and establishing damages is far from a foregone conclusion. *See In re Milken and Assocs. Sec. Litig.,* 150 F.R.D. 46, 54 (S.D.N.Y.1993) (approving settlement of a small percentage of the total damages sought because the magnitude of damages often becomes a "battle of experts ... with no guarantee of the outcome"); *see also In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y.1997) (same), *aff'd,* 117 F.3d 721 (2d Cir.1997).

The ABAT Defendants argued in their motion to dismiss that Lead Plaintiff failed to establish the type of conscious misbehavior and recklessness implicating scienter. Specifically, the ABAT Defendants submitted documentary evidence to support their argument that one of the transactions challenged in the complaint as an undisclosed related party deal was not, in fact, related. (*See* Dkt. Nos. 70–24 and 70–25.) The Court refused to consider these documents when deciding the ABAT Defendants' motion to dismiss; however, it is far from clear that Lead Plaintiff would have prevailed on this issue at trial.

More importantly, the Settlement acknowledges the practical reality that collectability of any judgment against the ABAT Defendants is unlikely. In particular, documents produced by the ABAT Defendants indicate that they have minimal insurance coverage applying to Lead Plaintiff's claims, and that, in all likelihood, any judgment against the ABAT Defendants would be uncollectible because a majority of their assets are outside of the United States. Lead Counsel relied on this information provided by the ABAT Defendants in recommending the reasonableness of the Settlement—which affords some recovery to class members, versus no recovery at all even if this case were successfully litigated to judgment.

Given the uncertain prospects for ***any*** recovery in this action, settlement at this point in the litigation provides a tangible benefit to the Class. Absent this Settlement, the Class faces a very real risk of no recovery, possibly after years of additional proceedings. The Settlement, however, will provide certain relief to the Class now, and "without subjecting them to the risks, complexity, duration, and expense of continuing litigation." *Global Crossing,* 225 F.R.D. at 456–57; *see also Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 362 (S.D.N.Y.2002).

5. Maintaining Class Action Status through Trial Presents a Substantial Risk.

***8** While Lead Counsel believes in the merits of the case, Defendants surely would have raised vigorous challenges to class certification. Moreover, even if the Class were certified, Defendants may have moved to decertify the Class before trial or on appeal at the conclusion of trial, as class certification may always be reviewed. Indeed, Federal Rule of Civil Procedure 23(c) authorizes a court to decertify a class at any time. *See Chatelain v. Prudential–Bache Sec., Inc.,* 805 F.Supp. 209, 214 (S.D.N.Y.1992) ("Even if certified, the class would face the risk of decertification."); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, UA.,* 657 F.2d 890, 896 (7th Cir.1981) ("[A] favorable class determination by the court is not cast in stone...."). Given such risk, this factor weighs in favor of approval of the Settlement.

6. The Risk that Any Judgment against the ABAT Defendants Would Be Uncollectible Is Significant.

Even if Lead Plaintiff prevailed at trial and obtained judgment against the ABAT Defendants, based on the post-Settlement discovery and representations made by the ABAT Defendants, it is questionable whether Lead Plaintiff would ever be able to collect on that judgment. This factor weighs heavily in support of approval. *See Aramburu v. Healthcare Fin. Services, Inc.,* No. 02–CV–6535MDG, 2009 WL 1086938, at *4 (E.D.N.Y. Apr. 22, 2009) (approval favored where "defendant's 'dire financial condition,' [made] 'obtaining a greater recovery than provided by the [s]ettlement ... difficult.' "); *see also Maley,* 186 F.Supp.2d at 365 (considering contribution of insurance policies to be minimal because the policies would be significantly depleted by defense costs or possibility of carrier disclaiming coverage).

In light of documents produced by the ABAT Defendants reflecting that they have minimal insurance coverage and no significant collectible assets in the United States, Lead Counsel negotiated a fair and reasonable Settlement for the Settlement Class. In particular, Lead Counsel reviewed: (1) the ABAT Defendants' insurance documents, which indicate that the amount of coverage is extremely limited; and (2) documents provided by the ABAT Defendants reflecting that their assets in the United States are of limited value.

This fundamental collectability issue could easily result in no recovery at all. Thus, this factor weighs heavily in favor of approving the Settlement.

7. The Settlement Is Reasonable in Light of the Best Possible Recovery.

The Settlement is reasonable in light of the Settlement Class' best possible recovery against the ABAT Defendants, which is severely limited by the minimal assets that would be available to pay any judgment that may be won. "The 'best possible' recovery necessarily assumes Plaintiffs' success on both liability and damages covering the full Class Period alleged in the Complaint ***as well as the ability of Defendants to pay the judgment***." *Maley,* 186 F.Supp.2d at 365 (finding that the settlement provided maximum available cash in light of the "limited insurance coverage and poor cash position of the Company") (emphasis added).

***9** The settlement amount is sufficient when limited insurance coverage, minimal domestic assets, and significant risk of being unable to collect any judgment against the ABAT Defendants are taken into account. *See, e.g., Holden v. Burlington N., Inc.,* 665 F.Supp. 1398, 1414 (D.Minn.1987) ("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.") (internal quotations and citations omitted); *Boyd v. Bechtel Corp.,* 485 F.Supp. 610, 618 (N.D.Cal.1979) ("[S]imply because a settlement may amount to only a fraction of the potential recovery does not in itself render it unfair or inadequate. Compromise is the very nature of settlement.") (citations omitted).

In sum, the Settlement is reasonable in light of the substantial resources that can be conserved by avoiding the time, cost, rigor, and risk of prolonged litigation. Securities litigation is a complex and evolving area of law requiring the devotion of significant resources. There is a high likelihood that the costs involved in shepherding a securities action like this one through the discovery process, pre-trial motions, trial, and appeals will far outweigh—and indeed subsume—any recovery that might be realized by the Settlement Class. Moreover, because the ABAT Defendants continue to deny any liability while asserting numerous defenses, the potential for any recovery remains highly uncertain. Most importantly, in light of the ABAT Defendants' apparent lack of assets against which any judgment may be brought, this Settlement represents reasonably certain monetary relief available to the Class.

C. The Settlement Is Entitled to a Presumption of Fairness Because It Is the Product of Arm's–Length Negotiations Among Experienced Counsel.

Finally, a strong initial presumption or fairness attaches to the proposed settlement if, as here, the settlement is reached by experienced counsel after arm's-length negotiations. Courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Clark v. Ecolab Inc.,* No. 07 Civ. 8623(PAC), 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010); *In re Milken,* 150 F.R.D. at 66; *Chatelain,* 805 F.Supp. at 212.

A presumption of fairness is appropriate here. The Settlement was entered into by the parties in good faith, at arm's-length, and without collusion. *See, e.g.,* Walsh Decl. ¶¶ 4, 5. In addition, the parties' discussions leading to the Settlement were not held until after Lead Counsel had obtained an understanding of the strengths and weaknesses of the claims through its investigation and subsequent motion practice, including the filing of an amended complaint and briefing on Defendants' motions to dismiss. *See id.* at ¶¶ 4, 19.

Counsel for Lead Plaintiff and Defendants engaged in extensive negotiations to reach resolution of this action, including extensive correspondence, an exchange of information relevant to the Settlement, and post-Settlement discovery. *See* Walsh Decl. ¶ 19. After settlement negotiations, the Settling Parties finally submitted the Settlement Agreement to the Court for preliminary approval, which was granted by order dated November 26, 2013. (Dkt. No. 120.)

***10** As set forth herein, the proposed Settlement is reasonable according to the *Grinnell* factors. Lead Counsel weighed the strengths and weaknesses of the relevant claims, defenses and likelihood of recovery and, after extensive negotiations, reached an informed compromise. Under these circumstances, Lead Plaintiff respectfully submits that the Settlement should be afforded the presumption of fairness, and that final approval should be granted.

II. THE PLAN OF ALLOCATION IS APPROVED.

As part of the Order Preliminarily Approving Settlement and Providing for, the Court preliminarily approved the Plan of Allocation that was published in the Class Notice. (Dkt. No. 120.) I now grant final approval of the Plan of Allocation for the purpose of administering the Settlement. FN1

[6] The Plan of Allocation is rational and reasonable. When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel. "When formulated by competent and experienced class counsel," a plan for allocation of net settlement proceeds "need have only a reasonable, rational basis." *Global Crossing,* 225 F.R.D. at 462 (quotation omitted); *In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001).

Here, the minimum claim amount set in the Plan of Allocation ($100) is necessary in order to "save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs...." *In re Gilat Satellite Networks, Ltd.,* No. CV–02–1510 CPS, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007); *see In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* No. 02 MDL 1484JFK, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) (approving a $50 minimum cut-off amount "in order to foster the efficient administration of the settlement"); *In re Global Crossing Sec. and ERISA Litig.,* 225 F.R.D. at 463 ("Class 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 addition, nothing about the Plan of Allocation gives preferential treatment to Lead Plaintiff. *See Louie v. Kaiser Found. Health Plan, Inc.,* No. 08cv0795 IEG RBB, 2008 WL 4473183, at *6–7 (S.D.Cal. Oct. 6, 2008).

The Plan was formulated by Lead Counsel with the goal of reimbursing Settlement Class members in a fair and reasonable manner. *See Global Crossing,* 225 F.R.D. at 462.

III. THE SETTLEMENT CLASS IS FINALLY CERTIFIED FOR SETTLEMENT PURPOSES.

[7] The Second Circuit has long acknowledged the propriety of certifying a class solely for settlement purposes. *See Weinberger v. Kendrick,* 698 F.2d 61, 72–73 (2d Cir.1982). Before granting preliminary approval of a class action settlement, however, the Court should determine that the proposed Settlement Class is a proper class for settlement purposes. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *see also Manual for Complex Litigation* § 21.632 (4th ed. 2004). To certify a class, the Court must determine whether four threshold requirements of Federal Rule 23(a) are met, namely, (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Amchem,* 521 U.S. at 613, 117 S.Ct. 2231. Additionally, the action must be maintainable under Fed.R.Civ.P. 23(b)(1), (2), or (3). *Id.* at 614, 117 S.Ct. 2231. In certifying a Settlement Class, however, the Court is not required to determine whether the action, if tried, would present intractable management problems, "for the proposal is that there be no trial." *Id.* at 620, 117 S.Ct. 2231; *see also* Fed.R.Civ.P. 23(b)(3)(D). Here, the proposed Settlement Class meets

all of the requirements of Rule 23(a) and satisfies the requirements of Rule 23(b)(3).

***11** [8] A class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). "Joinder is generally presumed to be impracticable when a putative class exceeds 40 members." *Menkes v. Stolt–Nielsen S.A.,* 270 F.R.D. 80, 90 (D.Conn.2010) (citing *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997)). Impracticable does not mean impossible, but "only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, LLC,* 504 F.3d 229, 244–45 (2d Cir.2007). As noted above, over 82,000 notices were sent to potential class members and 1,640 claims forms have already been received. This attests to the numerosity of the class and establishes that individual joinder is impracticable.

The proposed Settlement Class also meets the commonality requirement of Rule 23(a). Commonality is generally easily satisfied, as it is established so long as the plaintiffs can "identify some unifying thread among the [class] members' claims...." *In re Vivendi Universal S.A.,* 242 F.R.D. 76, 84 (S.D.N.Y.2007) (citing *Cutler v. Perales,* 128 F.R.D. 39, 44 (S.D.N.Y.1989)). The requirement is met "if there are questions of fact and law which are common to the class." Fed.R.Civ.P. 23(a)(2). "Securities-fraud cases generally meet Rule 23(a)(2)'s commonality requirement." *Global Crossing,* 225 F.R.D. at 451–52 (citation omitted). Securities fraud class actions are " 'essentially course of conduct cases' because 'the nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication.' " *In re Oxford Health Plans, Inc.,* 191 F.R.D. 369, 374 (S.D.N.Y.2000) (citation omitted).

Lead Plaintiff also meets Rule 23(a)'s typicality requirement because the claim " 'arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.' " *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 574 F.3d 29, 35 (2d Cir.2009) (citing *Robidoux v. Celani,* 987 F.2d 931, 936 (2d Cir.1993)). Like all other Settlement Class members, Lead Plaintiff was subject to the ABAT Defendants' alleged false and misleading statements in violation of Sections 10(b) and 20(a) of the Exchange Act.

Finally, Rule 23(a) requires that the class representative "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This inquiry focuses "on uncovering 'conflicts of interest between named parties and the class they seek to represent.' " *In re Flag Telecom Holdings,* 574 F.3d at 35 (quoting *Amchem Prods.,* 521 U.S. at 625, 117 S.Ct. 2231). Lead Plaintiff adequately represents the Settlement Class because he has no individual interests or claims that are antagonistic to the Class and has zealously represented the interests of the Class to date.

***12** [9] Additionally, Rule 23(g) states that the adequacy of Lead Plaintiff's counsel is determined by four factors: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions; (3) counsel's knowledge of the applicable law; and (4) the resources counsel commits to representing the class. Fed.R.Civ.P. 23(g)(1)(A). Pomerantz LLP has extensive experience and a stellar reputation in the field of class action and securities litigation. *See* Walsh Decl. at Ex. 3 (Pomerantz LLP firm resume). The firm has been appointed lead or co-lead counsel in many complex securities class actions and has recovered substantial monies for its clients and class members. Lead Counsel will continue to commit adequate resources to ensure that the Settlement Class is properly represented in this Litigation.

Finally, the proposed Settlement Class meets the predominance and superiority requirements of Rule 23(b)(3). To satisfy predominance, " 'a plaintiff must show that those issues in the proposed action that are subject to generalized proof outweigh those issues that are subject to individualized proof.' " *In re Salomon Analyst Metromedia Litig.,* 544 F.3d 474, 480 (2d Cir.2008) (citation omitted). This inquiry "tests whether a proposed class is sufficiently cohesive to warrant adjudication by representation." *Id.* (citation omitted); *see also Amgen, Inc. v. Connecticut Ret. Plans and Trust Funds,* ––– U.S. ––––, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013). There are questions of law and fact common to the Settlement Class that predominate over any individual questions, specifically whether the ABAT Defendants' alleged actions, which were centralized and uniform, violated federal securities laws and whether those violations were knowing or reckless. These common issues predominate over any individual issues.

"Together with predominance, the superiority requirement 'ensures that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " *Menkes,* 270 F.R.D. at 99–100 (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 104 (2d Cir.2007)) (other citations omitted). "[C]lass treatment is often deemed superior in 'negative value' cases, in which 'each individual class member's interest in the litigation is less than the anticipated cost of litigating individually.' " *Menkes,* 270 F.R.D. at 100 (citation omitted).

A class action is also superior to other methods available for the fair and efficient adjudication of this controversy. Members of the Settlement Class are not likely to (and many do not have) an interest or the means to prosecute an individual case against the ABAT Defendants. Additionally, concerns of efficiency and economy tip the scales in favor of litigating the issues in one suit before this Court.

***13** Because the Settlement Class meets all of the requirements for certification under Rule 23(a) and (b)(3), the Court grants final class certification of the Class solely for the purposes of settlement.

IV. NOTICE TO THE SETTLEMENT CLASS COMPLIED WITH DUE PROCESS.

Rule 23(e) provides that "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed.R.Civ.P. 23(e)(1). FN2 The purpose of the notice is to "afford members of the class due process which, in the context of the [R]ule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp.,* 966 F.2d 1483, 1486 (D.C.Cir.1992) (citing *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–74, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)). A notice program must provide the "best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *See Eisen,* 417 U.S. at 173, 94 S.Ct. 2140 (citing Fed.R.Civ.P. 23(c)(2)). The Notice program utilized here, as set by the Preliminary Approval Order, meets this standard.

The Notice program was carried out by a third-party claims administrator, Berdon Claims Administration LLC (the "Claims Administrator" or "Berdon"), a nationally-recognized notice and claims administration firm, under the supervision of Lead Counsel. *See* Rosenbaum Aff. at ¶ 2. Berdon provided individual notice via first-class mail (the "Post Card Notice") FN3 to each member of the Settlement Class whose address was reasonably ascertainable. *Id.* at ¶ 3. Given the small size of the Settlement, Lead Counsel sought to minimize notice costs by utilizing the Post Card Notice, which provided the basic Settlement information and instructions for Settlement Class members to access the highly-detailed Long Notice on the internet or request that a Long Notice be mailed to them. *Id.* at ¶¶ 4, 5. In addition, Berdon caused the summary notice to be transmitted over *PR Newswire* and published in *Investor's Business Daily. Id.* at ¶ 9.

[10] The Notice amply describes the terms of the Settlement, the claims at issue, the releases, the process for objecting and opting out of the Settlement, how to make a claim, all pertinent deadlines, and the time, date and place of the Final Approval hearing. *Id.* at ¶ 10. The effort to inform Class members of the Settlement, and their rights and obligations associated therewith, more than satisfies due process requirements. *See In re Nissan Motor Corp. Antitrust Litig.,* 552 F.2d 1088, 1104–05 (5th Cir.1977) (holding that notice must contain "an adequate description of the proceedings written in objective, neutral terms, that ... may be understood by the average absentee class member").

V. REQUESTS FOR REIMBURSEMENT OF LEAD COUNSEL'S EXPENSES AND LEAD PLAINTIFF'S AWARD ARE APPROVED.

A. Lead Counsel's Expenses Are Reasonable and Were Necessary to Achieve the Benefit Obtained.

***14** In order to maximize the recovery to the Class members, Lead Counsel has chosen to forgo any request for attorneys' fees. Lead Counsel does request reimbursement in the amount of $115,000.00 for out-of-pocket expenses reasonably and necessarily incurred in conjunction with the prosecution of this action. The Walsh Declaration attests to the accuracy of Lead Counsel's expenses. *See* Walsh Decl. at ¶¶ 21–23. It is well established that expenses are properly recovered by counsel. *See, e.g., In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003); *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.").

Because the expenses were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. Lead Counsel made a concerted effort to avoid unnecessary expenditures and economize wherever possible. The expenses were incurred for items necessary to the prosecution of the action, and Lead Counsel submits, are reasonable. Moreover, Lead Counsel is requesting less than its total incurred expenses—further highlighting the reasonableness of counsel's request for its discounted expenses. *See* Walsh Decl. at Ex. 2 (Pomerantz LLP expense report). In addition, because the expenses were incurred for the benefit of the Class and are of a type generally reimbursed in the marketplace, they should be reimbursed from the common fund in the same manner as an individual client would reimburse counsel's expenses.

a. An Award to Lead Plaintiff Is Reasonable.

The PSLRA permits Lead Plaintiff to seek an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class...." 15 U.S.C. § 78u–4(a)(4). In accordance with the PSLRA, and the inherent powers of the Court, courts routinely grant reimbursement of substantial sums to lead plaintiffs and class representatives. *See Hicks,* 2005 WL 2757792, at *10 ("Courts in [the Second] 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, Lead Plaintiff at all times adequately represented the Class. Lead Plaintiff has no individual interest or claim that is antagonistic to the Class and has represented the interests of the Class zealously throughout the litigation. Moreover, Lead Plaintiff devoted substantial time and effort to prosecuting the action, including time spent: reviewing pleadings, motions, and other documents; searching for and producing documents; traveling to New York to appear for a deposition; and communicating with counsel concerning the status of the case, and staying apprised of all developments in the case, including discussions about the Settlement. *See* Walsh Decl. at ¶¶ 24–26. The relatively modest request of an award in the amount of $3,000.00 to compensate Lead Plaintiff for his time and service to the Class in this case, as well as to function as an incentive to serve as lead plaintiff, is reasonable in this case.

CONCLUSION

***15** For the foregoing reasons, the Court hereby: (i) grants final approval of the Settlement and Plan of Allocation; (ii) finally certifies the Settlement Class for purposes of the Settlement; (iii) finds that notice to the Class satisfied due process; (iv) approves an award to the Lead Plaintiff in the amount of $3,000; and (v) approves Lead Counsel's request for reimbursement of expenses in the amount of $115,000. The Clerk of the Court is directed to remove Docket No. 130 from the Court's list of pending motions and to close the files (11–cv–2279, 11–cv–2354, 11–cv–2849, 11–cv–3098, and 11–cv–3729).

FN1. No distribution from the Settlement Fund will be made until the remaining claims against the Auditor Defendants are resolved. Once a final judgment is entered in this case against the ABAT Defendants, Lead Plaintiff plans to appeal dismissal of the claims against ABAT's auditors.

FN2. Moreover, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed.R.Civ.P. 23(c)(2)(B).

FN3. The use of a combination of a mailed post card directing class members to a more detailed online notice has been approved by courts. *See, e.g., In re Mutual Funds Investment Litig.,* MDL No. 1586, 2010 WL 2342413, at *6–7 (D.Md. May 19, 2010); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.,* 789 F.Supp.2d 935, 973 (N.D.Ill.2011) (holding that postcard notice was “more than sufficient” despite not providing detailed information about class members' options and deadlines because website and claims administrator via phone did).

S.D.N.Y.,2014.
In re Advanced Battery Technologies, Inc. Securities Litigation
--- F.R.D. ----, 2014 WL 1243799 (S.D.N.Y.), Fed. Sec. L. Rep. P 97,873

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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 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 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 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 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 Plaintiff's 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 Plaintiff's 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 Plaintiff's interests conflict with the rest of the Class. Similarly, the Court continues to be impressed with the quality of representation provided by Lead Plaintiff's 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.

***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 "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 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 .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.

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 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 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 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 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 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 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. 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 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 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 counterproductive 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.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2010 WL 3119374 (S.D.N.Y.)
(Cite as: 2010 WL 3119374 (S.D.N.Y.))

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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.
Karen BELLIFEMINE, Amy Zeoli, Michelle Popa, Nancy Beaney, and Jennifer Storm, Individually and on Behalf of Others Similarly Situated, Plaintiffs,
v.
SANOFI–AVENTIS U.S. LLC, Defendant.

No. 07 Civ. 2207(JGK).
Aug. 6, 2010.

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge.

***1** A hearing was held on August 3, 2010, during which time the Court heard the Plaintiffs' unopposed Motion for Final Approval of the Class Action Settlement in this case. The Court had previously entered an Order of Preliminary Approval appointing Class Counsel, approving notice to the Class, establishing deadlines for objections, setting a date for a final fairness hearing, certifying the Class and preliminarily approving the Settlement Agreement. Having considered the written submissions of the parties and having held a final fairness hearing and having considered the arguments offered at the final fairness hearing, it is hereby ORDERED that the Class is finally certified and the settlement is finally approved as follows:

I. *CLASS CERTIFICATION*

The proposed Class is defined as:

> All female sales force employees employed by sanofi-aventis in the United States for at least one day between May 12, 2005 to March 23, 2010, excluding individuals who held management level positions higher than district sales manager, excluding individuals who previously entered into individual releases as part of individual agreements with sanofi-aventis up to August 3, 2010, and excluding individuals who opt out of the settlement on a timely basis.

For the reasons set forth below, for purposes of this settlement, the Class may be certified because it satisfies the requirements of Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

A. *The Settlement Meets The Rule 23(a) Criteria.*

The Class encompasses 5,262 potential members, too many for joinder of all to be practicable, and thus, Rule 23's numerosity requirement is satisfied. *See Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995) ("[N]umerosity is presumed at a level of 40 members.").

For purposes of this settlement, Named Plaintiffs' allegations also fulfill the typicality requirement because their claims arise from the same factual and legal circumstances as other members of the class. *See Lenahan v. Sears, Roebuck & Co.,* No. 02 Civ. 0045, 2006 U.S. Dist. LEXIS 60307, at *25–26 (D.N.J. July 10, 2006) ("Here, the same allegedly unlawful conduct affected both the named Plaintiffs and the ... class members .... Accordingly, this Court finds that a typicality requirement ... is also satisfied."). The commonality requirement is met because the Named Plaintiffs' claims involve allegations of common pay and promotion claims arising from the same alleged policies and practices of the company. Finally, the Named Plaintiffs are also adequate representatives under Rule 23(a)(4) because their interests mesh with those of the other members of the Class. *Toure v. Cent. Parking Sys.,* No. 05 Civ. 5237, 2007 WL 2872455, at *7–8 (S.D.N.Y. Sept. 28, 2007). The Named Plaintiffs also satisfy the adequacy requirement because their attorneys have "an established record of competent and successful prosecution of large ... class actions." *Reyes v. Buddha–Bar NYC,* No. 08 Civ. 02494, 2009 WL 5841177, at *3 (S.D.N.Y. May 28, 2009).

B. *The Settlement Meets The Relevant Rule 23(b)(3) Criteria For A Settlement Class.*

***2** To meet the requirements of Rule 23(b)(3) the Court must find that common factual allegations and a common legal theory predominate over any factual or legal variations among class members. *See Mohney v. Shelly's Prime Steak,* No. 06 Civ. 4270, 2009 WL 5851465, at *4 (S.D.N.Y. Mar. 31, 2009). For purposes of this settlement, the Named Plaintiffs' claims meet that test because they are unified by common factual allegations that sanofi-aventis allegedly disfavored female sales force employees compared to males in terms of compensation and promotion. When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b) (3)(D), for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *see also Blyden v. Mancusi,* 186 F.3d 252, 270 (2d Cir.1999). Thus, for purposes of this settlement class, the Named Plaintiffs satisfy the relevant Rule 23(b)(3) criteria.

II. *NOTICE WAS APPROPRIATE*

In accordance with the procedures approved in the Preliminary Approval Order, the Class was provided with the Notice regarding the proposed Settlement Agreement and the deadlines and procedures for objecting and opting out of the class. The Notice and measures taken by the Claims Administrator in mailing the Notices were adequate to inform the members of the Class of the proposed settlement and such actions provided sufficient notice to satisfy the requirements of due process.

III. *SETTLEMENT APPROVAL*

Having determined that the Class is properly certified for settlement purposes and that Notice was appropriate, the Court must next address the proposed Settlement Agreement. To approve the settlement, the Court must find the proposed settlement is "fair, reasonable and adequate." Fed.R.Civ.P. 23(e)(2); *In re Luxottica Group S.p.A. Sec. Litig.,* 233 F.R.D. 306, 310 (E.D.N.Y.2006); *In re Indep. Energy Holdings PLC Sec. Litig.,* No. 00 Civ. 6689, 2003 WL 22244676, at *3 (S.D.N.Y. Sept. 29, 2003). The Court of Appeals for the Second Circuit has identified nine substantive factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

> (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.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) (internal citations omitted). All nine factors need not be satisfied. Instead, the Court looks at the totality of these factors in light of the specific circumstances involved. *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003).

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

***3** This Court has recognized that discrimination class actions are notoriously complex and protracted. *See Wright v. Stern,* 553 F.Supp.2d 337, 344 (S.D.N.Y.2008). Specifically, as counsel for the parties have concluded, the probability of further protracted litigation, including appeals, would be a near certainty in the absence of settlement. Additional litigation in this case would likely include: (1) discovery, including the depositions of four of the five Named Plaintiffs, as well as representatives of sanofi-aventis and the review and production of millions of pages of electronic documents; (2) contested class certification proceedings; (3) a potential appeal under Federal Rule of Civil Procedure 23(f); (4) dispositive motions; (5) extensive pretrial filings; (6) a lengthy trial; (7) post-trial proceedings in this District Court; and, (7) further appeal proceedings. Having considered the complexity, expense and likely duration of the litigation, this factor weighs in favor of approving the proposed settlement.

B. ***The Reaction Of The Class To The Settlement.***

A favorable reception by the class constitutes “strong evidence” of the fairness of a proposed settlement and supports judicial approval. *Grinnell,* 495 F.2d at 462; *see also Wal–Mart Stores, Inc. v. Visa USA, Inc.,* 396 F.3d 96, 119 (2d Cir.2005). A small number of objections is convincing evidence of strong support by class members. *See Grinnell,* 495 F.2d at 462 (“Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that ... [o]nly twenty objectors appeared from the group of 14,156 claimants.”). In this case, no objections were filed by absent members of the Class and only 28 class members have requested exclusion. In light of the nationwide notice, and the complete lack of opposition to the settlement, this factor weighs heavily in favor of approving the proposed settlement.

C. ***The Stage Of The Proceedings And The Amount Of Discovery Completed.***

Approval of a settlement is appropriate when Named Plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal. *See Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1982); *Chatelain v. Prudential–Bache Sec. Inc.,* 805 F.Supp. 209, 213–14 (S.D.N.Y.1992). The parties in this case engaged in extensive discovery prior to the settlement negotiations and mediation. The parties exchanged extensive and detailed interrogatory responses and millions of pages of relevant documents. As part of the Defendant's production, sanofi-aventis provided the Named Plaintiffs with millions of rows of employment data over multiple years pertinent to the claims of the Class, including pay and promotion information for all employees who worked in the field sales force for at least one day from January 1, 2005 until March 14, 2008. The parties continued to engage in ongoing document productions and produced additional W–2 payroll data and other supplemental employment data. Sanofi-aventis also began to depose the Named Plaintiffs beginning with Michelle Popa on January 24, 2009. There was sufficient discovery to permit a realistic appraisal of the reasonableness of the settlement.

D. ***The Risks Of Establishing Liability And Damages.***

***4** When assessing the risks of litigation against the certainty of recovery offered by the settlement, approval of the settlement is justified because of the complexity and difficulty that would be associated with further litigation. *See Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317, 338 (S.D.N.Y.2005), *rev'd on other grounds,* 443 F.3d 253 (2d Cir.2006). This litigation involved numerous complex issues of fact and law, many of which would have been the subject of expert testimony if the case continued. Class Counsel believe—after conducting the discovery described above—that the Plaintiffs had developed sufficient evidence to obtain class certification, survive motions for summary judgment, and prove their claims at trial. However, the Defendant has denied any wrongdoing or liability. If this action proceeded, the Defendant would file motions for summary judgment and would oppose the Plaintiffs' motion for class certification. In addition, outside of the settlement context, the superiority prong of Rule 23(b)(3) would have required this Court to assess, among other issues, potential challenges in the manageability of the Plaintiffs' proposed class action at trial. The complexity of the case weighs in favor of approving the proposed settlement.

E. ***Risks Of Maintaining The Class Action Through The Trial.***

There is no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime during the proceedings. *See In re Remeron Direct Purchaser Antitrust Litig.,* No. 03 Civ. 0085, 2005 WL 3008808, at *8 (D.N.J. Nov. 9, 2005) (noting that "the risks faced by Plaintiffs with regard to class certification weigh in favor of approving the Settlement"); *In re NASDAQ Mkt–Makers Antitrust Litig.,* 187 F.R.D. 465, 476–77 (S.D.N.Y.1998) (risk of class being decertified at trial or risk of class certification being reversed on appeal supported approval of settlement); *Chatelain,* 805 F.Supp. at 214 ("Even if certified, the class would face the risk of decertification."). Because there is a real risk that class certification may not be granted, or, if granted, it may later be rejected on appeal or decertified, the Court concludes that this factor also weighs in favor of approving the proposed settlement.

F. ***The Reasonableness Of The Settlement In Light Of The Best Possible Recovery And The Attendant Risks Of Litigation.***

"In evaluating the proposed [s]ettlement," the Court determines whether it provides a "substantial recovery" in light of the relevant circumstances and does not "compare the terms of the [s]ettlement with a hypothetical ... measure of a recovery that might be achieved" through trial. *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 0165, 2007 WL 4115809, at *11 (S.D.N.Y. Nov.7, 2007). The Court may approve a settlement when it amounts to a small percentage of the recovery sought by the class. *See Grinnell,* 495 F.2d at 455 n. 2. In this case, the value of the settlement fund justifies settling the case. First, because the Plaintiffs asserted that one of their primary purposes in advancing this litigation was to obtain injunctive relief, there are substantial programmatic relief provisions throughout the settlement including sanofi-aventis engaging in a pay equity analysis for current employees, engaging an industrial psychologist to review and enhance its existing policies and practices on pay and promotions, enhancements to its complaint procedures and job posting practices, and the establishment of an internal compliance panel concerning these changes. Second, the settlement not only provides for backpay payments but a claims process for seeking recovery for individual compensatory damages awards and pay adjustments for current employees, which will have permanent on-going economic benefit for years to come. The value of the settlement is substantial in comparison to the potential harm identified by the Plaintiffs' expert and is well within the acceptable range for a fair and reasonable settlement. Because this settlement will secure an adequate advancement for the Class and because of the risks noted above associated with the Named Plaintiffs pursuing this case, this factor weighs in favor of approving the proposed settlement.

***5** The Court finds that (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 range of reasonableness of the settlement fund in light of the best possible recovery, and (8) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation, all weigh in favor of approval, especially in this case where there have been no objections to settlement. The Court therefore finds the Settlement Agreement to be fair, reasonable and adequate.

IV. *ATTORNEYS FEES AND EXPENSES*

The proposed award of attorneys' fees, $4,590,000, was set forth in the Settlement Agreement filed on March 12, 2010, the notices to members of the Class, and the CAFA notices that went to 52 attorneys general. To date, there has been no opposition to that award. *See In re Veeco Instruments,* 2007 WL 4115808, at *14; *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 374 (S.D.N.Y.2002).

An agreed upon award of attorneys' fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances. *See* Fed.R.Civ.P. 23(h) (providing that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by ... the parties' agreement."). The proposed attorneys' fees and expenses award is reasonable pursuant to the *Grinnell* factors and the lodestar and percentage of recovery methods.

A. *Plaintiffs' Attorneys' Fees Are Reasonable Under The Grinnell Factors.*

To decide an appropriate amount of attorneys' fees for class actions, courts have followed the principles articulated by the Court of Appeals for the Second Circuit in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 471 (2d Cir.1974), and confirmed in *Goldberger v. Integrated Research, Inc.,* 209 F.3d 43, 47–50 (2d Cir.2000). Under this approach, courts do not consider that a "just and adequate fee" can be ascertained by merely multiplying an attorney's hours by the attorney's typical hourly fees. *Grinnell,* 495 F.2d at 471. The courts regard this calculation as "the only legitimate starting point for analysis." *Id.* To this, "other, less objective factors" are applied to reach the ultimate award. *Id.* The foremost of these factors is the attorney's "risk of litigation, i.e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed." *Id.* (internal quotation mark omitted). Other generally accepted factors as stated in *Grinnell* are:

1. the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

2. time and labor spent,

3. magnitude and complexity of the litigation,

***6** 4. responsibility undertaken,

5. the amount recovered,

6. what it would be reasonable for counsel to charge a victorious plaintiff.

Id. at 470.

As set forth above, this is a complicated and difficult class action with numerous risks, and thus, at no time has the Named Plaintiffs' success been guaranteed. The action was litigated zealously by counsel on both sides. Class Counsel engaged in significant discovery, complicated statistical analysis, and a complex mediation process, and in doing so, they spent more than 4,000 hours to arrive at this settlement. In addition, following the approval of this settlement, Class Counsel will continue to be responsible for post-settlement work, including monitoring the settlement and sanofi-aventis' pay equity analysis. There are substantial programmatic relief provisions throughout the settlement including sanofi-aventis engaging in a pay equity analysis for current employees, engaging an industrial psychologist to review and enhance its existing policies and practices on pay and promotions, enhancements to its complaint procedures and job posting practices, and the establishment of an internal compliance panel concerning these changes. The settlement also provides for a claims process for seeking recovery for individual compensatory damages awards, and pay adjustments for current employees, which will have permanent on-going economic benefit for years to come. Class Counsel will remain involved in ensuring compliance with the settlement and facilitating the claims form process. Therefore, class counsel can be expected to incur a significant amount of additional time in connection with this litigation.

B. *Plaintiffs' Attorneys' Fees Are Reasonable.*

The Court of Appeals for the Second Circuit has approved the use of either the "lodestar" or "percentage" method to calculate attorneys' fees. *See Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 504 F.3d 229, 249 (2d Cir.2007). The percentage method "calculates the fee award as some percentage of the settlement fund created for the benefit of the class." *Id.* The lodestar method uses a presumptively reasonable fee, which is computed by multiplying the number of hours each attorney has expended by the hourly rate attorneys of similar skill charge in the area; then it applies to that figure a multiplier which factors in the litigation risks and other considerations. *Id.; see Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 190 (2d Cir.2008).

Here, Class Counsel's requested attorney's fees are within the range of reasonableness under either method given the complexity of the case; the risks involved in the litigation, which was "litigated on purely a contingent basis," *see Central States,* 504 F.3d at 249; the extensive efforts of Counsel; and the favorable result achieved on behalf of the class. The requested fee amounts to less than 20% of the total relief available through the settlement and is within the range of awards typically approved for settlements of similar size. *See In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 587–88 (S.D.N.Y.2008) (collecting cases). Furthermore, applying a lodestar "cross-check," counsel requests a multiplier of 2.05, which is within a range of reasonableness for other awards that have been approved. *See In re AOL Time Warner S'holder Derivative Litig.,* 02 Civ. 6302, 2010 WL 363113, at *22 (S.D.N.Y. Feb.1, 2010) (collecting cases); *In re Lloyd's Am. Trust Fund Litig.,* No. 96 Civ. 1262, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002); *see also Maley,* 186 F.Supp.2d at 371. Moreover, because class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower. Both the percentage of the fund requested and the multiplier sought in this case are justified under the circumstances.

C. *Plaintiffs' Expenses Are Reasonable.*

***7** "It is well-established that counsel who create a common fund ... are entitled to the reimbursement of [all reasonable] litigation costs and expenses." *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 150 (S.D.N.Y.2010). In this case, Class Counsel has incurred expenses through the date of filing their final approval motion of $150,302.51. These expenses include the costs of filing fees, expert witnesses and consultants, electronic discovery services, photocopies, mailing, and travel. The requested costs are reasonable, and therefore, Class Counsel should be reimbursed for these litigation related expenses.

Overall, the requested attorneys' fees and expenses are within the range of attorneys' fees awards made in comparable cases and is reasonable under both the lodestar and percentage of fund methods of calculation. Accordingly, the Court awards $4,740,302.51 to Class Counsel, to be paid by sanofi-aventis pursuant to the settlement for their fees and expenses incurred in prosecuting this case and in monitoring and enforcing the Settlement Agreement.

V. *SERVICE PAYMENTS TO CLASS REPRESENTATIVES*

In the Second Circuit, "the Courts have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award." *Roberts v. Texaco, Inc.,* 979 F.Supp. 185, 200 (S.D.N.Y.1997). The service payments to the Named Plaintiffs Karen Bellifemine, Amy Zeoli, Michelle Popa, Nancy Beaney, and Jennifer Storm are justified in light of the Named Plaintiffs' willingness to devote their time and energy to this civil rights representative action and reasonable in light of the overall benefit conferred on the Class. Similarly, the service payments to Amy Johnson, Lucy Velez, Beth Green, and Patrice Sutherland for their assistance in the prosecution of this action are also justified in light of the time and energy that they have devoted to this case, and the benefit conferred on the Class.

The Court approves the requested service payments in the following amounts:

-Karen Bellifemine: $75,000

-Amy Zeoli: $75,000

-Michelle Popa: $75,000

-Nancy Beaney: $75,000

-Jennifer Storm: $75,000

-Amy Johnson: $25,000

-Lucy Velez: $50,000

-Beth Green: $60,000

-Patrice Sutherland: $25,000

VI. *CONCLUSION*

Based on the foregoing analysis, the settlement, as evidenced by the parties' agreement, is determined to be fair, reasonable and adequate. The $4,590,000.00 in attorneys' fees and $150,302.51 in expenses requested by Class Counsel are reasonable, as are the service payment awards to Karen Bellifemine, Amy Zeoli, Michelle Popa, Nancy Beaney, Jennifer Storm, Amy Johnson, Lucy Velez, Beth Green, and Patrice Sutherland. THE COURT FURTHER FINDS AND ORDERS AS FOLLOWS:

1. Plaintiffs' Motion for Final Approval of Class Action Settlement and Entry of Final Judgment is GRANTED.

***8** 2. The Civil Action is dismissed with prejudice and without further costs, including but not limited to claims for interests, penalties, costs and attorneys' fees, that Named Plaintiffs and any members of the Class have alleged or may have alleged in connection with this Litigation.

3. The Clerk is directed to enter Judgment consistent with this Order and is further directed to close this case. The Clerk is also directed to close all pending motions.

SO ORDERED.

S.D.N.Y.,2010.
Bellifemine v. Sanofi-Aventis U.S. LLC
Not Reported in F.Supp.2d, 2010 WL 3119374 (S.D.N.Y.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
The CITY OF PROVIDENCE, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
AEROPOSTALE, INC., Thomas P. Johnson and Marc D. Miller, Defendants.

No. 11 Civ. 7132(CM)(GWG).
Signed May 9, 2014.

MEMORANDUM OPINION AND ORDER GRANTING LEAD PLAINTIFF'S MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, PLAN OF ALLOCATION, AND ATTORNEYS' FEES AND EXPENSES

McMAHON, District Judge.

***1** This Action was commenced on October 11, 2011 by the filing of an initial complaint alleging that Defendants violated the federal securities laws. ECF No. 1. On January 29, 2014, after more than two years of litigation, the Parties signed a settlement Stipulation resolving Lead Plaintiff's and the Class' claims for fifteen million dollars ($15,000,000). Under the terms of the proposed Settlement, these funds will be allocated to all eligible Class Members FN1 allegedly impacted by Defendants' alleged violations of the federal securities laws.

FN1. On July 17, 2013, the Court entered an order that certified a class consisting of "all persons and entities that purchased or otherwise acquired the publicly traded common stock of Aeropostale from March 11, 2011 through August 18, 2011, inclusive, and who were damaged thereby." ECF No. 40.

The Court concludes that the Settlement should be approved. As set forth in detail in the Declaration of Jonathan Gardner in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Payment of Litigation Expenses, dated April 4, 2014 (the "Gardner Declaration" or "Gardner Decl."), when viewed in light of the risks that Lead Plaintiff would not prevail on Defendants' likely summary judgment motion or at trial, the Settlement is a very favorable result for the Class. In addition, the Settlement also saves the Class the delay posed by continued litigation through summary judgment, trial, and any subsequent appeals.

The Parties reached the Settlement only after aggressively, extensively, and thoroughly litigating this Action. Lead Plaintiff's efforts are detailed in the Gardner Declaration and include, *inter alia:* (i) a detailed pre-filing investigation that included the review and analysis of documents filed publicly by Aeropostale with the SEC as well as other publicly available information about Aeropostale and the retail industry and interviewing 40 former Aeropostale employees-a number of whose accounts were included in the Complaint as confidential witness ("CW") accounts; (ii) responding to and defeating Defendants' motion to dismiss; (iii) fact discovery that involved, among other things, numerous meet and confer sessions to ensure the efficient production of relevant material, the collection and review of over 1 .3 million pages of documents from Defendants and third parties, and five weeks of depositions, including a 30(b)(6) deposition and those of 12 current or former employees of Aeropostale; (iv) negotiation of a stipulation with Defendants regarding class certification after Lead Plaintiff had filed its motion for class certification, Providence and its investment advisors produced over 20,000 pages of documents, and after Defendants took the deposition of Providence as well as two representatives of its investment manager; and (v) a protracted mediation session before Judge Weinstein preceded by the exchange of detailed mediation statements and verbal presentations by counsel that culminated in an arm's-length agreement in principle to settle the claims against Defendants. *See* Gardner Decl. ¶¶ 6–7, 19–75, 93–95.

In short, this case presents a near-ideal set of circumstances that give the court confidence that the Settlement as proposed is fair and reasonable. It is approved.

I. NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

***2** On January 30, 2014, the Court entered its Preliminary Approval Order (ECF No. 55), which directed that a hearing be held on May 9, 2014 to determine the fairness, reasonableness, and adequacy of the Settlement (the "Settlement Hearing"). The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice must be provided in a "reasonable manner"-*i.e.,* it must " 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.' " *Wal–Mart Stores, Inc. v. VISA U.S.A. Inc.,* 396 F.3d 96, 114 (2d Cir.2005) (quoting *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir.1982)).

Pursuant to the Preliminary Approval Order, the Notice was mailed to all known potential Class Members on February 20, 2014 and Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on March 6, 2014. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ("Mailing Declaration" or "Mailing Decl."), Ex. 3 ¶¶ 2–11.[FN2] The Notice contains a detailed description of the nature and procedural history of the Action, as well as the material terms of the Settlement, including, *inter alia:* (i) the total recovery under the Settlement; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to opt out or exclude themselves from the Class; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses.

FN2. All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits are referenced as "Ex.-," which is how Lead Counsel refers to them in the moving brief. The first numerical references refers to the designation of the entire exhibit itself attached to the Gardner Declaration and the second reference refers to the exhibit designation with the exhibit itself.

One objection was received to the sufficiency of notice. It came from an attorney, Forrest S. Turkish, who has apparently filed similar objections in at least 12 other recent class actions. He is, as we say in the trade, a "professional objector." When his objections are overruled, he files a notice of appeal. As far as this court is aware, every one of those appeals has either been dismissed for failure to perfect or voluntarily dismissed. This pattern of litigiousness from a single attorney-objector without more seriously undermines the credibility of the objection in the eyes of this court. I have little time for "professional objectors," who, as one of my colleagues has noted, "undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients." *In re Initial Public Offering Sec. Litig.,* 728 F.Supp.2d 289, 295 (S.D.N.Y.2010). They are a throwback to the days when this court was practicing law, and when the filing of securities fraud class actions by certain attorneys was chalked up as a "cost of doing business" by corporations-leading to the passage of the Private Securities Litigation Reform Act.

***3** Furthermore, the objection is patently without merit. Indeed, it is patently frivolous. Responding to it has wasted the time of Lead Plaintiff's counsel, and dealing with it has wasted the time of this Court.

Mr. Turkish is hereby ordered to show cause why he should not be sanctioned by this court, in the amount of the costs incurred by Lead Plaintiff in responding to his objection, for filing a patently frivolous objection. An affidavit explaining why that sanction ought not be imposed must be filed with this court by Friday, May 16, 2014.

II. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Standard for Evaluating Class Action Settlements

Rule 23(e) requires review and approval by the Court for any class action settlement to be effective. A settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R Civ. P. 23(e)(2); *In re Sony Corp SXRD,* 448 Fed. App'x. 85, 86 (2d Cir.2011). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal–Mart Stores,* 396 F.3d at 116; *Wright v. Stern,* 553 F.Supp.2d 337, 343 (S.D.N.Y.2008); *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 246 F.R.D. 156, 165 (S.D.N.Y.2007).

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *Wal–Mart,* 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.' ") (citation omitted); *see also In re WorldCom, Inc. ERISA Litig.,* No. 02 Civ. 4816(DLC), 2004 WL 2338151, at *5 (S.D.N.Y. Oct. 18,2004).

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 must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974); *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

> (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.

***4** *Grinnell,* 495 F.2d at 463 (citations omitted). "[N]ot 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); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig,* No. 02 MDL 1484(JFK), 2007 WL 4526593, at *13 (S.D.N.Y. Dec. 20, 2007).

Here, the Settlement satisfies the criteria for approval articulated by the Second Circuit.

B. The Settlement Is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations. *See Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.); *In re Luxottica Grp. S.p.A. Sec. Litig,* 233 F.R.D. 306, 315 (E.D.N.Y.2006). A court may find the negotiating process is fair where, as here, "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 v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (quoting *Weinberger,* 698 F.2d at 74); *In re PaineWebber 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 process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd,* 117 F.3d 721 (2d Cir.1997) (citation omitted).

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multiparty, high stakes litigation, and one in whom this court reposes considerable confidence as a result of past experience. *See In re Flag Telecom Holdings, Ltd. Sec. Litig* No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (noting that 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"); *In re Wachovia Equity Sec. Litig,* No. 08 Civ. 617(RJS), 2012 WL 2774969, at *3 (S.D.N.Y. June 12, 2012) (noting the procedural fairness of settlement mediated by Judge Weinstein); *see also Silverman v. Motorola, Inc.,* No. 07 C 4507, 2012 WL 1597388, at *3 (N.D.Ill. May 7, 2012), *aff'd sub nom. Silverman v. Motorola Solutions, Inc.,* 739 F.3d 956 (7th Cir.2013) (approving settlement and describing Judge Weinstein as "a nationally-recognized and highly-respected mediator"); Gardner Decl. ¶ 5.

Moreover, the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor ... is entitled to an even greater presumption of reasonableness." *Veeco,* 2007 WL 4115809, at *5 (internal citation omitted). " 'Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.' " *Id.* at *5 (citation omitted). Lead Plaintiff Providence is a sophisticated institutional investor managing approximately $300.8 million in retirement fund assets. *See* Declaration of Jeffrey Padwa, Ex. 2 ¶ 1. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including extensive efforts in discovery and participation in settlement negotiations. *Id.* ¶¶ 3–4. Lead Plaintiff approves of the Settlement without reservation. *Id.* ¶ 5.

***5** Lead Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair, reasonable, and adequate, but is an excellent result for Lead Plaintiff and the Class. *See* Gardner Decl. ¶ 8. This opinion is entitled to "great weight." *PaineWebber,* 171 F.R.D. at 125 (citation omitted); *see also Veeco,* 2007 WL 4115809, at *12.

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

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

1. The Complexity, Expense and Likely Duration of the Litigation Support Final Approval of the Settlement

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro,* 2014 WL 1224666, at *8. Here, the litigation was complex and likely would have lasted for quite some time in the absence of settlement. Indeed, securities class actions are by their very nature complicated and district courts in this Circuit have "long recognized" that securities class actions are "notably difficult and notoriously uncertain" to litigate. *In re Bear Stearns Cos. Inc. Sec., Derivative & ERISA Litig.,* 909 F.Supp.2d 259, 266 (S.D.N.Y.2012); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999).

Lead Plaintiff's claims raise numerous complex legal and factual issues concerning the retail industry, inventory account, and loss causation. *See generally* Gardner Decl. ¶¶ 76–92. It would be costly and time-consuming to pursue this litigation all the way through to trial, with no guarantee of success. Even if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini,* 258 F.Supp.2d 254, 261 (S.D.N.Y.2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation ... the passage of time would introduce yet more risks ... and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Furthermore, even winning at a trial does not guarantee a recovery to the Class, because there is always a risk that the verdict could be reversed on appeal. *See, e.g., Robbins v. Koger Props., Inc.,* 116 F.3d 1441, 1449 (11th Cir.1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. The Reaction of the Class to the Settlement Supports Final Approval of the Settlement

The reaction of the Class to the Settlement is a significant factor in assessing its fairness and adequacy, and ' "the absence of objections may itself be taken as evidencing the fairness of a settlement." ' *PaineWebber,* 171 F.R.D. at 126 (citation omitted); *see also Luxottica Grp.,* 233 F.R.D. at 311–12. This Court has previously noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.' " *Veeco,* 2007 WL 4115809, at *7 (citation omitted).

***6** Here, pursuant to the Preliminary Approval Order, a total of 39,429 copies of the Notice have been mailed to potential Class Members and the Summary Notice was published in *Investor's Business Daily* and issued over the *PR Newswire. See* Ex. 3 ¶¶ 10–l. Only two requests for exclusion were received, representing 40.43 shares of Aeropostale's common stock. (*see id.* ¶ 16).

The only objection to the Settlement itself was filed by a Mr. Opp, who takes issue with the start date of the Class Period and the fact that only purchasers of stock during the Class Period are member of the class. (Mr. Opp also objected to the request for attorneys' fees; that will be taken up separately at the end of this opinion). For the reasons set forth at pages 9–10 of the Reply Brief filed by Lead Plaintiff, neither of those objections has the slightest merit, and I reject them.

That almost no Class Member objected to the Settlement or chose to exclude himself from it is indeed the strongest indication that the Settlement is fair and reasonable.

3. The Stage of the Proceedings and Discovery Completed Support Final Approval of the Settlement

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

Here, Lead Counsel conducted its own initial investigation without the benefit of any government investigation to formulate its theory of the case and develop sufficient detail to defeat Defendants' motion to dismiss. As set forth in the Gardner Declaration, the investigation included, *inter alia,* reviewing and analyzing publicly available information and data concerning Aeropostale; interviewing numerous former Aeropostale employees and other persons with relevant knowledge after locating over a hundred potential witnesses; and consulting with experts about the retail industry, accounting, valuation, and causation issues. Gardner Decl. ¶¶ 6, 19–20.

In addition, Lead Plaintiff and Lead Counsel have conducted extensive formal discovery, including the review and analysis of over 1.3 million pages of documents from Defendants and various third parties as well as substantially completing fact depositions. *See* Gardner Decl. ¶¶ 36–55, 59–60, 61–64. Lead Counsel has worked extensively with Lead Plaintiff's damages and liability experts, including a retail industry expert and an accounting expert, in order to analyze the strengths and weaknesses of Lead Plaintiff's claims. *Id.* ¶ 74. Indeed, this Action settled only three days before the close of fact discovery and only three weeks before Lead Plaintiff was set to serve its expert reports. *Id.*

***7** Lead Plaintiff also filed its motion for class certification, arguing that the Action was particularly well-suited for class action treatment and that all the requirements of Federal Rule of Civil Procedure 23 were satisfied. *See* ECF No. 31. Accompanying Lead Plaintiff's class certification motion were numerous exhibits supporting that the market for Aeropostale common stock was efficient during the Class Period. Lead Plaintiff also submitted a declaration from Providence demonstrating Lead Plaintiff's adequacy to represent the proposed class in connection with its class certification motion. *See* ECF No. 34. Class discovery was conducted, including the deposition of Lead Plaintiff, after which Defendants ultimately stipulated to class certification. *See* ECF No. 40.

Accordingly, Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had “a clear view of the strengths and weaknesses of their case” and of the range of possible outcomes at trial. *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,* No. 01–CV–11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted). Accordingly, this factor supports approval of the Settlement.

4. The Reasonableness of the Settlement in Relation to the Risk of Establishing Liability Supports Approval of the Settlement

In assessing the Settlement, the Court should balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell,* 495 F.2d at 463; *Veeco,* 2007 WL 4115809, at * *8–9. Although Lead Plaintiff and Lead Counsel believe that they had a reasonable likelihood of prevailing on the claims at summary judgment and at trial, they also recognize that there were considerable risks involved in pursuing the litigation against Defendants that could have led to a substantially smaller recovery or no recovery at all.

As set forth in detail in the Gardner Declaration (¶¶ 76–92), Lead Plaintiff faced numerous hurdles to establishing liability. In particular, Defendants have raised a number of arguments and defenses (which they would likely raise at summary judgment and trial) involving, *inter alia:* whether there were actionable misstatements and omissions; the ability of Lead Plaintiff to establish that Defendants acted with scienter; whether the market was fully aware during the Class Period of the issues the Company was having with its inventory, before the alleged corrective disclosures; and whether the market reacted to general negative earnings disclosures, not revelations of any allegedly fraudulent statements or omissions. *See id.*

For example, with respect to the falsity of statements, Defendants would have likely argued that, in a March 2011 investor call, well in advance of the first alleged corrective disclosure, Defendants explained to investors that the Company was aggressively clearing through an "overhang" in inventory caused by "women's assortment" issues that would not be recalibrated until its "fall and holiday product." As a result of such warnings, and others, Defendants would likely contend that the market knew, and Defendants did not conceal, the facts and risks that Lead Plaintiff claims were allegedly not disclosed. *Id.* ¶¶ 78–82.

***8** Additionally, Defendants would have continued to challenge Lead Plaintiff's ability to prove that Defendants acted with scienter. In particular, Defendants would likely contend that they lacked any fraudulent motive, illustrated by the lack of insider trading during the Class Period. Additionally, Defendants would argue that Aeropostale repurchased $100 million worth of stock at the beginning of the Class Period, thereby showing that the Company believed that the stock was undervalued. *Id.* ¶¶ 84–86.

Defendants undoubtedly would have also continued to argue that any potential investment losses suffered by Lead Plaintiff and the Class were actually caused by external, independent factors, and not caused by Defendants' alleged conduct. In particular, Defendants would undoubtedly argue that Aeropostale's guidance misses were attributable to market forces and other macroeconomic considerations, including, among others, that during the Class Period (i) Aeropostale's competitors in the teen retail market adopted Aeropostale's "highly promotional" strategy which historically gave it a competitive edge, and (ii) its core customer base had not responded to a slow and bifurcated economic recovery. *Id.* ¶¶ 87–88.

Defendants would also have argued that Lead Plaintiff could not establish liability with respect to Aeropostale's 2Q2011 earnings miss. If successful, this defense would have eliminated two of the four alleged corrective disclosure dates in the case, and would have reduced the Class's maximum damages by $91 million. Among the facts that did not favor Lead Plaintiff in this regard, the Company issued conservative guidance for 2Q2011,[FN3] highlighted the increasingly promotional nature of the Company's competition in public statements to the market, and warned that the Company continued to face margin pressure resulting from a buildup of unsold inventory. *Id.* ¶¶ 8, 81.

FN3. Indeed, the Company issued EPS guidance in 2Q2011 of $0.11 to $0.16, dramatically lower than 2Q2010 results of $0.46, citing margin pressure from the inventory overhang and assortment issues.

The Company ultimately reported 2Q2011 EPS of $0.04. *Id.* ¶ 81.

The risks of the case being lost or its value diminished on a pre-trial motion or at trial, when weighed against the immediate benefits of settlement, reinforce Lead Plaintiffs judgment that the Settlement is in the best interest of the Class.

5. The Reasonableness of the Settlement in Relation to the Risk of Establishing Damages Supports Final Approval of the Settlement

Even if Lead Plaintiff successfully established liability, it also faced substantial risk in proving damages. Once causation is established, damages remain "a complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s true value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004) (internal quotation omitted). Should Lead Plaintiff have succeeded in proving liability, considerable risk remained with proving damages at trial. The elimination of even one alleged corrective disclosure would have material consequences. As noted above, if, for example, a jury were to find no loss causation or artificial inflation with respect to Aeropostale's 2Q2011 earnings miss, this would have eliminated two of the four alleged corrective disclosure dates and would have drastically reduced the Class's damages. A jury might also have credited Defendants' argument that macroeconomic conditions led to the Company's earnings miss at the end of the Class Period-significantly reducing or eliminating the Class' damages.

***9** Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky "battle of the experts" and the "jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable." *Flag Telecom,* 2010 WL 4537550, at *18. The complex issues surrounding damages, therefore, support final approval of the Settlement.

6. The Risks of Maintaining the Class Action Through Trial Supports Final Approval of the Settlement

Had the Settlement not been reached, there is no assurance that Class status would be maintained. This is not a significant factor favoring settlement, since it appears to this court unlikely that decertification would have occurred. But the law of class actions is developing at a rapid clip, and it is always possible that some new Supreme Court decision would counsel in favor of decertification.

7. The Ability of Defendant to Withstand a Greater Judgment

Lead Counsel does not dispute the viability of Aeropostale and has no reason to believe that Defendants could not withstand a greater judgment. Courts, however, generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement.

The Amount of the Settlement Supports Final Approval

The last two substantive factors courts consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell,* 495 F.2d at 463. 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.' " *Id.* at 462 (citation omitted). 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 (citation and internal quotation marks omitted). 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).

The Settlement here provides a recovery well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. According to analyses prepared by Lead Plaintiff's consulting damages expert, using certain assumptions and modeling, the maximum damages recoverable by the Class would be approximately $163 million (assuming 100% recovery for all four alleged corrective disclosure dates), but the most realistic maximum provable damages would likely be as low as $72 million. Gardner Decl. ¶ 8. The $15 million Settlement therefore represents a recovery in the range of approximately 9.2% to 21% of estimated damages. This recovery, particularly in view of the risks and uncertainties discussed above, falls well within the range of possible approval and courts have generally approved other settlements in PSLRA cases that recover a comparable or smaller percentage of estimated damages. *See, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig.,* No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement with a recovery of approximately 6.25% of estimated damages and noting that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigations"); *In re Gilat Satellite Networks, Ltd.,* No. CV 02–1510(CPS), 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (approving $20 million settlement representing 10% of maximum damages); *see also In re Omnivision Techs., Inc. Sec. Litig.,* 559 F.Supp.2d 1036, 1042 (N.D.Cal.2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

***10** Moreover, the $15 million Settlement is well above the $9.1 million median settlement amount of reported securities class action settlements in 2013, and greater than the median reported settlement amounts since the passage of the PSLRA, which have ranged from $3.7 million in 1996 to $9.1 million in 2013 (with a peak of $12.3 million in 2012). *See* Gardner Decl. ¶ 8; Ex. 1 at 28.

Accordingly, the court concludes that the *Grinnell* factors favor approval of the Settlement.

III. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of a plan of allocation is the same as the standard for approving the settlement as a whole: ' "namely, it must be fair and adequate.' " *Maley,* 186 F.Supp.2d at 367 (citation omitted); *In re WorldCom, Inc. Sec. Litig,* 388 F.Supp.2d 319, 343 (S.D.N.Y.2005). "As a general rule, the adequacy of an allocation plan turns on ... whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig,* 297 F.Supp.2d 503, 518 (E.D.N.Y.2003) (citation omitted), *aff'd sub nom. WalMart Stores, Inc.,* 396 F.3d 96 (2d Cir.2005). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Am. Bank Note Holographies Inc.,* 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001); *see also WorldCom,* 388 F.Supp.2d at 344 (same).

The Plan of Allocation, which was fully described in the Notice, was prepared with the assistance of Lead Plaintiff's consulting damages expert. It provides for the distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata basis* based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. These formulas are tied to the amount of alleged artificial inflation in the share prices, as quantified by Lead Plaintiff's expert. Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Class. *See* Gardner Decl. ¶¶ 103–07.

Notably, no Class Member has objected to this straightforward Plan of Allocation.

IV. THE MOTION FOR ATTORNEYS' FEES IS GRANTED

For its efforts in achieving this result, Lead Counsel seeks a percentage fee of 33% of the Settlement Fund (or $4,950,000), and payment of $455,506.85 in expenses incurred in prosecuting this Action.

Attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated for their services from that settlement fund. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) ("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"). *See also Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000); *In re Beacon Assocs. Litig.,* No. 09 Civ. 777(CM), 2013 WL 2450960, at *4 (S.D.N.Y. May 9, 2013) (McMahon, J.). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger,* 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 0165(CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

***11** Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See, e.g., Hicks v. Morgan Stanley,* No. 01–cv–10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002) (McMahon, J.) ("courts recognize that such awards serve the dual purposes of encouraging representatives to seek redress for injuries caused to public investors and discouraging future misconduct of a similar nature") (citation omitted). Courts in this Circuit have consistently adhered to these teachings. *See, e.g., In re Top Tankers, Inc. Sec. Litig.,* No. 06 Civ. 13761(CM), 2008 WL 2944620, at *12 (S.D.N.Y. July 31, 2008) (McMahon, J.) ("It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to 'a reasonable fee-set by the court-to be taken from the fund.' ") (citations omitted).

The Second Circuit has authorized district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used); *Veeco,* 2007 WL 4115808, at *2. In expressly approving the percentage method, the Second Circuit recognized that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger,* 209 F.3d at 48, 49; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir.1999) (stating that "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

The trend among district courts in the Second Circuit is to award fees using the percentage method. *See, e.g., Beacon,* 2013 WL 2450960, at *5 ("the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128(NRB), 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (" 'the percentage method continues to be the trend of district courts in th[e Second] Circuit' ") (citation omitted); *see also Veeco,* 2007 WL 4115808, at *3; *Hicks,* 2005 WL 2757792, at *22.

The issue in this case is whether 33%—which is at the high end of the range of other percentage fee awards within the Second Circuit in comparable settlements—is reasonable. Given the advanced stage of the litigation at the time that the settlement was achieved, I hold that it is.

***12** This Court has held, in another case, that "[i]n this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund." *Beacon,* 2013 WL 2450960, at *5. I also recognize that other courts in this District have approved attorneys' fees in the amount requested here. *See Fogarazzo v. Lehman Bros. Inc.,* No. 03 Civ. 5194(SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig .,* 279 F.R.D. 151, 165 (S.D.N.Y.2001) (awarding 33% of $13 million settlement); *In re Van Der Moolen Holding N.V. Sec. Litig.,* No. 1:03–CV–8284 (RWS), slip op. at 2 (S.D.N.Y. Dec. 6, 2006) (awarding 331/3% of $8 million settlement) (Ex. 9); *Maley,* 186 F.Supp.2d at 368 (awarding 331/3% of $11.5 million settlement and citing two cases which awarded 331/3% of the settlement amount: *In re Apac Teleservs., Inc. Sec. Litig.,* No. 97 Civ. 9145, at 2 (S.D.N.Y. June 29, 2001), awarding 331/3% of $21 million settlement, and *Newman v. Caribiner Int'l Inc.,* No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001), awarding 331/3% of $15 million settlement); *see also Mohney v. Shelly's Prime*

Steak, Stone Crab & Oyster Bar, No. 06 Civ. 4270(PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Khait v. Whirlpool Corp.,* No. 06–6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement). The same is true in other districts. *See, e.g., In re Heritage Bond Litig.,* No. No. 02–ML–1475 DT(RCx), 2005 WL 1594403, at *23 (CD. Cal. June 10, 2005) (awarding 331/3% of $27.78 million settlement); *In re Corel Corp. Inc. Sec. Litig,* 293 F.Supp.2d 484, 498 (E.D.Pa.2003) (awarding 331/3% of $7 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig.,* No. 01–258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 331/3% of $20 million settlement); *In re Green Tree Fin. Corp. Stock Litig/Options Litig,* Nos. 97–2666 and 97–2679, slip op. at 9 (D.Minn. Dec. 18, 2003) (awarding 331/3% of $12.45 million settlement) (Ex. 9).

Nonetheless, in cases where the settlement amount-while reasonable-is not a large fraction of the total amount sought by the class (and this is such a case), this court believes it incumbent to scrutinize the fee request with great care, lest it authorize a fee award that is out of proportion to the amount of work performed by class counsel.

I handily conclude that Lead Counsel have earned the fee they request.

The Second Circuit in *Goldberger* explained that a court should consider the traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) public policy considerations. *Goldberger,* 209 F.3d at 50. As explained fully above, all the factors are satisfied. Plaintiffs' Counsel have expended substantial time and effort pursuing the Action on behalf of the Class—since its inception, Plaintiffs' Counsel have devoted more than 14,000 hours to this Action with a lodestar value of $7,047,145. *See also* Ex. 7. The Settlement follows two years of litigation, the scope of which was described above. This is not a class action that was settled early on, with only minimal or preliminary discovery. The case involved substantial expenditure of time and effort by Lead Counsel. The case was complicated. And the risks of continuing litigation were substantial.

***13** To ensure the reasonableness of a fee awarded under the percentage method, "the Second Circuit encourages a crosscheck against counsel's lodestar." *Beacon,* 2013 WL 2450960, at *15. "Where the lodestar is 'used as a mere cross-check, the hours document by counsel need not be exhaustively scrutinized by the district court.' " *Veeco,* 2007 WL 4115808, at *8 (quoting *Goldberger,* 209 F.3d at 50).

Under the lodestar method, the court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g., Flag Telecom,* 2010 WL 4537550, at *25–26. Performing the lodestar cross-check here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Plaintiffs' Counsel have spent, in the aggregate, 14,119 hours in the prosecution of this case. *See* Gardner Decl. ¶¶ 12, 122; Exs. 4–B, 5–B, 6–B, and 7 (summary table of lodestars and expenses). This represents time spent on the Action by partners, of counsel, associates, staff attorneys, paralegals, investigators, and professional analysts. *Id.* The resulting lodestar at Plaintiffs' Counsel's billing rates is $7,047,145. Applying 2013 or 2014 rates to the work done (which has the approval of both the Second Circuit and the Supreme Court), the hourly billing rates of Plaintiffs' Counsel here range from $640 to $875 for partners, $550 to $725 for of counsels, and $335 to $665 for other attorneys. *See* Gardner Decl. ¶ 121. "In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of services performed by counsel," *Telik,* 576 F.Supp.2d at 589, and the rates charges by Lead Counsel are in line with rates charged by New York firms that *defend* class actions on a regular basis." *Id., See* Gardner Decl. ¶ 121. The fee request is a negative multiplier of 0.70 of Plaintiffs' Counsel's lodestar. Such a multiplier is well below the parameters used throughout district courts in the Second Circuit, which affords additional evidence that the requested fee is reasonable. *See, e.g., In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.,* 909 F.Supp.2d 259, 271 (S.D .N.Y.2012) (approving requested fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee") (citation omitted of reasonableness and noting that lodestar multiples of over 4 are awarded by this Court).

Furthermore, while the fee is set, the legal work on this Action will not end with the Court's approval of the proposed Settlement. Additional hours and resources necessarily will be expended assisting members of the Class with their Proof of Claim and Release forms, shepherding the claims process, responding to Class Member inquiries, and moving for a distribution order. The time and effort devoted to this case by Plaintiffs' Counsel to obtain this $15 million Settlement confirm that the 33% fee request is reasonable.

A. The Risks of the Litigation

1. The Contingent Nature of Lead Counsel's Representation

***14** The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award:

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

Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir.1974); *In re Am. Bank Note Holographies, Inc. Sec. Litig,* 127 F.Supp.2d 418, 433(S.D.N.Y.2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award") (citation omitted); *In re Prudential Sec. Ltd P'ships Litig,* 985 F.Supp. 410, 417 (S.D.N.Y.1997) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

Lead Counsel undertook this Action on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute the Action without a guarantee of compensation or even the recovery of expenses. Unlike counsel for Defendants, who is paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began, and would have received no compensation or expenses had this case not been successful. From the outset, Lead Counsel understood that it was embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the enormous investment of time and money the case would require. In undertaking that responsibility, Lead Counsel was obligated to ensure that sufficient attorney and paraprofessional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the considerable costs which a case such as this entails. Because of the nature of a contingent practice where cases are predominantly complex lasting several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance the expenses of the litigation. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. *See* Gardner Decl. ¶¶ 12–13.

2. Risks Concerning Liability

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,* No. 01–CV–11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees.]' " *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *18 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.) (citing *Goldberger,* 209 F.3d at 54). While Lead Plaintiff remains confident in its ability to prove its claims and to effectively rebut Defendants' defenses, it recognizes that proving liability was far from certain. Although the Court sustained Lead Plaintiff's claims at the motion to dismiss stage, it faced substantial risks if the Action continued. To succeed on its claims, Lead Plaintiff must establish that Defendants made misstatements or omissions of material fact with scienter in connection with the purchase of Aeropostale common stock and that the Class suffered losses as a result of the revelation of truth regarding Defendants' misstatements and omissions.

***15** As set forth in the Gardner Declaration and in the Settlement Brief, Defendants countered the existence of scienter, falsity, materiality, and loss causation, and presented arguments and defenses that required considerable legal skill to rebut. *See* Gardner Decl. ¶¶ 76–92; Settlement Brief § I.C4. For example, since the beginning of the Action, Defendants have argued that Lead Plaintiff has not satisfied its scienter burden and they would continue to argue that Lead Plaintiff would not be able to prove scienter. Specifically, a central theme to the defense was that no one benefited from the alleged fraud; rather, because the Individual Defendants' bonus compensation was tied to achieving the announced projections, they stood to lose hundreds of thousands of dollars by knowingly setting the projections at unattainably high levels. In further support of its position, Defendants argued that Aeropostale had repurchased $100 million of Company stock at the beginning of the Class Period because it believed that the stock was undervalued. *See* Gardner Decl. ¶¶ 84–86.

Defendants would also continue to argue that their Class Period statements were not false and misleading because the market was already aware of the factors that caused the Company's earnings miss, including, *inter alia:* (i) a slow, bifurcated economic recovery had helped more well-off customers but had not yet reached the Company's customer base, therefore, its core customer base was spending less at Aeropostale; (ii) aggressive promotional activity by its competitors harmed Aeropostale's position in the teen retail sector; and (iii) merchandising decisions, including failing to predict what fashion would appeal to a fickle teen customer had negatively affected sales and margins. *Id.* ¶¶ 79–82.

Additionally, Defendants would have also continued to argue that Lead Plaintiff would not be able to prove loss causation, arguing that the stock price drops following announcements of the Company's first and second quarter 2011 results were attributable to market forces and other macroeconomic considerations, not the correction of an alleged misstatement or omission. *Id.* ¶ 87.

Lead Counsel was able to rebut these arguments, and others, in connection with the Defendants' motion to dismiss, however Defendants would never concede their liability and would likely continue to press these defenses and others at summary judgment and trial.

3. Risks Concerning Damages

Whether Lead Plaintiff could prove damages was also unsettled and would continue to require a significant amount of effort on the part of Lead Counsel. “Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.” *Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.). Lead Plaintiff's expert estimated that, depending on consideration of different alleged corrective disclosures, aggregate damages ranged between $72 million (if 100% of the two alleged corrective disclosures pertaining only to 1Q2011 are considered) and $163 million (if 100% of the four alleged corrective disclosures pertaining to both 1Q2011 and 2Q2011 are considered). *See* Gardner Decl. ¶ 8. In order for the Class to recover damages at the maximum level estimated by Lead Plaintiff's damages expert, they would need to prevail on each and every one of the claims alleged and establish loss causation related to the four alleged disclosures. The damage assessments of the Parties' trial experts would be sure to vary substantially, and expert discovery and trial would become a “battle of experts” requiring significant work on the part of Lead Counsel. *See, e.g., In re Flag Telecom Holdings Ltd. Sec. Litig.,* No. 02–CV–3400 (CM) (PED), 2010 WL 4537550, at *28 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (burden in proving the extent of the class's damages weighed in favor of approving fee request).

B. The Magnitude and Complexity of the Litigation

***16** The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. *See Chatelain v. Prudential–Bache Sec. Inc.,* 805 F.Supp. 209, 216 (S.D.N.Y.1992). Indeed, the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request. *See Fogarazzo,* 2011 WL 671745, at *3 ("courts have recognized that, in general, securities actions are highly complex"). As described in greater detail in the Gardner Declaration, this Action involved difficult, complex, hotly disputed, and expert-intensive issues related to the retail industry, inventory accounting, and loss causation. Further, there was no road-map for Lead Counsel to follow in this Action as no governmental agency investigated or brought action against Defendants. *See, e.g., Flag Telecom,* 2010 WL 4537550, at *27 (noting lack of prior governmental action against defendant on which lead counsel could "piggy back" in considering fee request); *In re Med. X–Ray Film Antitrust Litig.,* No. CV–93–5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) (noting that "class counsel did not have the benefit of a prior government litigation or investigation" in approving requested fee). Thus, Lead Counsel were left to investigate and develop sufficient facts (without formal discovery) so as to overcome Defendants' motion to dismiss governed by the heightened pleading standards of the PSLRA.

In connection with formal discovery, Lead Counsel undertook to review and analyze over 1.3 million pages of documents, which included complex accounting work papers and intricate and voluminous inventory and sales reports. Counsel prepared for and took 12 fact depositions of executives of the Company. Lead Counsel also prepared an extensive motion for class certification and engaged in class discovery, which resulted in the Defendants stipulating to class certification.

Accordingly, the magnitude and complexity of the Action and the difficulty of the legal and factual issues involved support the requested fee.

The quality of the representation and the standing of Lead Counsel are important factors that support the reasonableness of the requested fee. *See Flag Telecom,* 2010 WL 4537550, at *28.

Lead Counsel is nationally known as a leader in the fields of class actions and complex litigation, and has had substantial experience litigating securities class actions in courts throughout the country with success. *See* Gardner Decl. ¶ 124; Ex. 4–A. As a firm with experienced securities class action litigators, Lead Counsel has not only had to use its knowledge, skill and efficiency from past experiences, but has also developed expertise in the unique issues presented here to overcome significant obstacles in the past two years of this litigation. Gardner Decl. ¶¶ 17–18. This favorable Settlement is attributable to the diligence, determination, hard work, and reputation of Lead Counsel, who developed, litigated, and successfully negotiated the settlement of this Action, an immediate cash recovery in a very challenging case.

***17** The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. *See Flag Telecom,* 2010 WL 4537550, at *28; *Teachers Ret. Sys.,* 2004 WL 1087261, at *20. Indeed, Defendants' Counsel, Weil, Gotshal & Manges LLP, is a long-time leader among national litigation firms, with well-noted expertise in corporate litigation practices. The highly skilled attorneys at Weil Gotshal zealously fought Lead Plaintiff's claims at every turn, but notwithstanding this formidable opposition, Lead Counsel was able to develop Lead Plaintiff's case so as to resolve the litigation on terms favorably to the Class.

Finally, the federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson,* 485 U.S. 224, 230–31 (1988). The Supreme Court has emphasized that private securities actions such as this 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) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 319 (2007) (noting that the 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).

Courts in the Second Circuit have held that "public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *Flag Telecom,* 2010 WL 4537550, at *29. Specifically, "[i]n 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." *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005). The significant expense combined with the high degree of uncertainty of ultimate success means that contingent fees are virtually the only means of recovery in such cases. Indeed, this Court recently noted the importance of "private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis" in *Shapiro:*

> [C]lass actions serve as private enforcement tools when ... regulatory entities fail to adequately protect investors ... plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences ... awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

2014 WL 1224666, at *24 (citing *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 515–16 (S.D.N.Y.2009)); *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."); *Med. X–Ray Film Antitrust Litig,* 1998 WL 661515, at *23 (E.D.N.Y. Aug. 7, 1998) ("an adequate award furthers the public policy of encouraging private lawsuits"); *Chatelain,* 805 F.Supp. at 216 ("an adequate award furthers the public policy of encouraging private lawsuits in pursuance of the remedial federal securities laws"); *In re Warner Commc'ns Sec. Litig.,* 618 F.Supp. 735, 750–51 (S.D .N.Y.1985) (observing that "[f]air awards in cases such as this encourage and support other prosecutions, and thereby forward the cause of securities law enforcement and compliance"), *aff'd,* 798 F.2d 35 (2d Cir.1986).

***18** Lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Lead Counsel's reasonable attorneys' fee request.

In accordance with this Court's Preliminary Approval Order, 39,429 copies of the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") were sent to potential Members of the Class. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ¶ 10. The Notice informed Members of the Class that Lead Counsel would make an application up to 33% of the Settlement Fund plus litigation expenses not to exceed $650,000, plus interest on such amounts. The time to object to the fee request expires on April 18, 2014.

Two objections have been filed to the fee request. One came from professional objector Turkish, which does not recommend it to the court. All Mr. Turkish says is that the fee request is too high-indeed, is "presumptively unjustified." Actually, neither the Second Circuit nor the Supreme Court has established any presumption at all concerning any particular level of fee award that would be unreasonable in a securities fraud class action-nor would such a "presumption" be appropriate, since a fee request must be analyzed in accordance with the particulars of the case at bar, not against some arbitrary one-size-fits-all standard. As for Mr. Turkish's contention that the settlement compensation of $0.50 per share is extremely low in comparison to "damages of as much as $12.34 per share alleged by Plaintiffs," I can only say that his apparent inability to distinguish between the gross drop in the stock price between the beginning and the end of the class period (which was originally alleged to be, and in fact was, $12.34) and the damages that could be recovered by any given plaintiff suggests that this court would be well advised not to listen to his suggestions. In fact, had this case gone to trial, Plaintiffs' expert would have testified that damages would have ranged between $2.42 and $5.48 per share, while Defendant's expert (who had not yet submitted a report) would undoubtedly have testified that the per share damages were even less. The risk that various corrective disclosures would cut off damages altogether at an early date was far from insubstantial. In short, this court concludes that Mr. Turkish does not know whereof he speaks.

The other objection comes from a Mr. Opp, who suggests that the requested attorneys' fee should be no more than 4.8%—which he calculates is the percentage of eventual recovery after trial that the Settlement provides. Lead Counsel expended over $7 million, using reasonable local billing rates, in prosecuting this hard-fought action over a two year period. 4.8% of the Settlement (assuming, contrary to fact, that 4.8% is the correct figure-Mr. Opp, like Mr. Turkish, simplistically assumed that the proper calculation of damages was simply the difference between the price of the stock at the start and the end of the Class Period) is $720,000. Public policy considerations alone compel the conclusion that an award of that magnitude—representing about 10 cents on the dollar worked-would be inappropriate.

V. PLAINTIFFS' COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS ACTION

***19** Plaintiffs' Counsel also respectfully request $455,506.85 in expenses incurred in prosecuting this Action. Plaintiffs' Counsel's individual declarations attest to the accuracy of these expenses, which are properly recovered by counsel. *See* Gardner Decl. ¶¶ 129; Exs. 4 through 6; *see also In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) (court may compensate class counsel for reasonable expenses necessary to the representation of the class). Much of Plaintiffs' Counsel's expenses were for professional services rendered by Lead Plaintiff's experts and consultants, and expenses relating to discovery taken in the case. Gardner Decl. ¶¶ 131–33; Exs. 4 ¶ 8–C, 5 ¶ 8, 6 ¶ 8. The remaining expenses are attributable to such things as travel for depositions and for mediation, the costs of computerized research, duplicating documents, and other incidental expenses. *Id.* ¶ 134. These expenses were critical to Lead Plaintiff's success in achieving the proposed Settlement. *See In re Global Crossing Sec. & ERISA Litig,* 225 F.R.D. 436, 468 (S.D.N.Y.2004) ("The expenses incurred-which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys ... [and][F]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

Not a single objection to the expense request has been received. Lead Counsel is entitled to payment for these expenses, plus interest earned on such amounts at the same rate as that earned by the Settlement Fund.

VI. THE COURT AWARDS COSTS AND EXPENSES TO LEAD PLAINTIFF

Finally, Lead Counsel seeks an expense award of $11,235.04 for Lead Plaintiff for its lost wages and expenses, pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u–4(a)(4). The Notice disseminated to the Class stated that Lead Plaintiff may seek reimbursement of up to $15,000 from the Settlement Fund as compensation for the time and expense it incurred. *See* Ex. 3–A at 2. Lead Plaintiff claims to have expended, in wages and expenses for City employees who worked on aspects of this lawsuit, more than the amount requested.

A practice has grown up recently of awarding extra money (that is, money in addition to the fees awarded to the counsel to prosecute the case) to Lead Plaintiffs themselves. Although the PSLRA authorizes (but does not mandate) such awards, this court has always been troubled by the practice-even though I have not rocked the boat and disallowed such awards in prior cases. For the most part, I fail to see why a party who chooses to bring a lawsuit should be compensated for time expended in appearing at a deposition taken in order to insure that he is actually capable of fulfilling his statutory obligations, or responding to document requests, or performing what are essentially duplicative reviews of pleadings and motions that his lawyers are perfectly capable of reviewing for him. Meaning no disrespect to the City Solicitor of the City of Providence, he selected eminent and experienced outside counsel to prosecute this case, who needed no assistance in understanding the issues involved. There are no "lost wages" for the City to recover in this case: as counsel admitted at the final settlement hearing, all the employees of the City of Providence who worked on this case were paid their usual wages every day; they were simply assigned to tasks associated with the lawsuit that they City chose to prosecute, and no concrete evidence has been offered that City operations suffered as a result.

***20** Ironically, in this case, the Lead Plaintiff has probably been more involved in working on this lawsuit than most are-and more competently as well. I have no doubt that the City Solicitor for Providence and his staff have spent more than 150 hours providing various kinds of assistance to Lead Counsel. But what they did involves no more than (1) responding to perfectly legitimate discovery demands, including attending exactly one deposition, (2) commenting on papers prepared and filed by outside counsel, and (3) attending the mediation session. *See* Declaration of Jeffrey M. Padwa, City Solicitor for Providence, attached as Ex. 2 to Gardner Decl. These are activities for which we ordinarily do not "pay" plaintiffs-even prevailing plaintiffs. There has been no adjudication that Aeropostale violated the federal securities laws; there has been a settlement. It is entirely possible that this lawsuit is lacking in merit and that the City of Providence ought not to have bothered the court with it in the first place.

Courts may well "routinely award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley,* 2005 WL 2757793, at *10; *see also Varljen v. H.J. Meyers & Co.,* No. 97 CIV 6742(DLC), 2000 WL 1683656, at *4 (S.D.N.Y. Nov. 8, 2000) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel"). However, I personally believe that this sort of "tip" to the Lead Plaintiff ought not be routine. After much soul searching, and after hearing Lead Counsel extol the assistance he received from the City Solicitor's office, I have decided to authorize the payment of the requested sum to the City of Providence. But this opinion should serve notice that this court, at least, will not routinely decide to "tip" Lead Plaintiffs simply because their names appear in the caption, and will view with some skepticism conclusory arguments that they actually made a meaningful substantive contribution to the lawsuit.

CONCLUSION

For the foregoing reasons, the Court hereby (1) finds that due and adequate notice was directed to persons and entities who are Class Members, advising them of the Plan of Allocation and of their right to object thereto, and a full and fair opportunity was accorded to persons and entities who are Class Members to be heard with respect to the Plan of Allocation.; (2) finds that the formula in the Plan of Allocation for the calculation of the claims of Authorized Claimants that is set forth in the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") disseminated to Class Members, provides a fair and reasonable basis upon which to allocate the net settlement proceeds among Class Members; (3) finds that the Plan of Allocation set forth in the Notice is, in all respects, fair and reasonable; (4) grants final approval of the Plan of Allocation; (4) authorizes Settlement Class Counsel to make disbursements to Class members; and (5) awarded attorneys' fees in the amount of $4,950,000 plus interest at the same rate earned by the Settlement Fund (or 33% of the Settlement Fund, which includes interest earned thereon) and payment of litigation expenses in the amount of $455,506.85, plus interest at the same rate earned by the Settlement Fund, which sums the Court finds to be fair and reasonable; and (6) authorizes an award of $11,235.04 to Lead Plaintiff. The Clerk of the Court is directed to remove Docket Nos. 57 and 59 from the Court's list of pending motions and to close the file.

S.D.N.Y.,2014.
City of Providence v. Aeropostale, Inc.
Slip Copy, 2014 WL 1883494 (S.D.N.Y.)

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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 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 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*

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]

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 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 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]

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 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 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 document production issues were also mediated and resolved as between the Trustee and the Class.

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. THE COURT GRANTS FINAL APPROVAL TO THE PROPOSED SETTLEMENT

A. *The Standard for Evaluating Class Action Settlements*

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

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

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

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

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

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

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

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

Metropolitan Life Ins. Co., 216 F.R.D. 55, 61 (S.D.N.Y.2003)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• Plaintiffs could not prove causation and damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Under the proposed Settlement, the Class will receive $24.4 million, well in excess of the $14.2 million estimated by Plaintiffs' expert to be the potential damages in light of the Second Circuit ruling excluding in-and-out traders from the Class. More aggressive methods of calculation could result in damages ranging from approximately $25 million to approximately $120 million . 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 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 much of the artificial inflation was suddenly eliminated on February 13, 2002 when FLAG made disclosures that at least partially corrected its prior misstatements, and that any remaining artificial inflation was eliminated by April 11, 2002. The Plan reflects the requirements for establishing damages promulgated by *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), and complies with the requirements of the PSLRA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F.Supp.2d 503, 524 (E.D.N.Y.2003) ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."), *aff'd sub nom. Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96 (2d Cir.2005) .

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

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

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

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

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

In the Milberg and Finkelstein Declarations, counsel have detailed and documented the $1,910,420.76 in expenses that they incurred in connection with this action.[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, online 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 $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 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.)

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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.

***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 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 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 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 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 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 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 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

END OF DOCUMENT

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.

West KeySummary**Compromise and Settlement 89 65**

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 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 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 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 (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 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 Court rejected Lead Plaintiff's 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 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.

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 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 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 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 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 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.

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 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.

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 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 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 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 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 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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Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Claude MASSIAH and Natalie Mieles, individually and on behalf all others similarly situated, Plaintiffs,
v.
METROPLUS HEALTH PLAN, INC. and New York City Health and Hospitals Corporation, Defendants.

No. 11–cv–05669 (BMC).
Nov. 20, 2012.

FINAL ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTIONS FOR CERTIFICATION OF SETTLEMENT CLASS, FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AND APPROVAL OF FLSA SETTLEMENT, FOR APPROVAL OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND FOR CLASS REPRESENTATIVE SERVICE A WARDS

BRIAN M. COGAN, District Judge.

***1** Plaintiffs and the class members are approximately 552 current and former Marketing Representatives, Document Collection Specialists, Retention Representatives, or Business to Business Representatives (collectively, "Marketing Representatives") who work or worked for MetroPlus Health Plan Inc. ("MetroPlus") and New York City Health and Hospitals Corporation ("HHC") (collectively, "MetroPlus" or "Defendants") in New York. Plaintiffs' job duties involved educating and assisting eligible individuals about available health insurance options and completing health insurance applications, collecting and photocopying documentation that supports the individual's eligibility for Medicaid, Medicare, or other health insurance programs.

On November 18, 2011, Plaintiffs Claude Massiah and Natalie Mieles filed a class and collective lawsuit on behalf of MetroPlus Marketing Representatives who worked in New York, claiming that Defendants violated the overtime provisions of the FLSA and NYLL by failing to pay its Marketing Representatives overtime for hours worked over forty in a week. On January 4, 2012, Defendants answered the Complaint and filed a motion to dismiss, or in the alternative for summary judgment of, Plaintiffs' NYLL claim arguing that since Marketing Representatives were employees of a city agency or political subdivision, the protections of the NYLL would not apply to them. On April 11, 2012, the Court denied Defendants' Motion to Dismiss on the grounds that neither defendant is a political subdivision for purposes of the NYLL.

On January 6, 2012, Plaintiffs sent a Court-approved notice to current and former Marketing Representatives who were employed by Defendants within three years of the mailing of the notice. A total of 163 Marketing Representatives opted in to the case.

On May 29, 2012, after engaging in significant investigation and discovery to enable Plaintiffs to calculate damages and undertake extensive settlement negotiations, the parties reached a settlement totaling $4,040,000. (Decl. of Justin M. Swartz in Support of Plf.'s Mot. for Certification of Settlement Class, Final Approval of Class Action Settlement, and Approval of FLSA Settlement ("Swartz Decl.") ¶ 28); Swartz Decl., Ex. A (Settlement

Agreement). On August 3, 2012, this Court entered an Order preliminarily approving the settlement on behalf of the class set forth therein (the "Class" or the "Class Members") and authorizing notice to all Class Members. (Docket No. 88).

On August 24, 2012, Settlement Services Inc., a third-party claims administrator, sent the Notice to all Class Members informing them of their right to opt out of or object to the settlement and of Class Counsel's intention to seek aggregate service awards of $10,000 for the named plaintiffs, up to one-third of the settlement fund for Class Counsel's attorneys' fees, and out-of-pocket expenses. No Class Members objected to the terms of the settlement and no Class Members requested exclusion.

***2** On November 9, 2012, Plaintiffs filed their Motion for Certification of Settlement Class, Final Approval of Class Action Settlement, and Approval of FLSA Settlement ("Motion for Final Approval"). On November 12, 2012, Plaintiffs also filed their Motion for Approval of Attorneys' Fees and Reimbursement of Expenses ("Motion for Attorneys' Fees") and their Motion for Class Representative Service Awards ("Motion for Service Awards"). As part of the Settlement Agreement, Defendants agreed not to oppose these motions.

The Court held a fairness hearing on November 13, 2012. Having considered the Motion for Final Approval, the Motion for Attorneys' Fees, the Motion for Service Award, the supporting declarations, the arguments presented at the November 13, 2012 fairness hearing, and the complete record in this matter, for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Approval of the Settlement Agreement

1. The Court hereby grants the Motion for Final Approval and approves the settlement on behalf of the class as set forth in the Settlement Agreement and this Order under Federal Rule of Civil Procedure 23.

2. Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Fed.R.Civ.P. 23(e). To determine whether a settlement is procedurally fair, courts examine the negotiating process leading to the settlement. *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001). To determine whether a settlement is substantively fair, courts evaluate whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v.. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir.2000).

3. Courts examine procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. *Wal–Mart Stores,* 396 F.3d at 116; *see also Spann v. AOL Time Warner, Inc.,* No. 02 Civ. 8238, 2005 WL 1330937, at *6 (S.D.N .Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions."). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

4. "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess

the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Clark v. Ecolab Inc .,* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) (internal quotation marks and citation omitted). The Court gives weight to the parties' judgment that the settlement is fair and reasonable. *See Torres v. Gristede's Operating Corp.,* Nos. 04 Civ. 3316, 08 Civ. 8531, 08 Civ. 9627, 2010 WL 5507892, at *3 (S.D.N.Y. Dec. 21, 2010); *Diaz v. E. Locating Serv. Inc.,* No. 10 Civ. 4082, 2010 WL 5507912, at *3 (S.D .N.Y. Nov. 29, 2010); *Clark,* 2010 WL 1948198, at *4.

Procedural Fairness

***3** 5. The settlement is procedurally fair, reasonable, adequate, and not a product of collusion. *See* Fed.R.Civ.P. 23(e); *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 184 (citing *Joel A. v. Giuliani,* 218 F.3d 132, 138–39 (2d Cir.2000)). Here, the settlement was reached after Class Counsel had conducted a thorough investigation, engaged in significant discovery, and evaluated the claims, and after extensive negotiations between the parties. The parties engaged in extensive investigation before agreeing to settle the lawsuit, including conducting detailed interviews with more than 100 Marketing Representatives regarding their job duties and hours worked. Defendants produced information relating to each potential plaintiffs' dates of employment. In addition, the parties relied on some of the discovery from *Drayton,* where Defendants deposed the named Plaintiffs and one opt-in Plaintiff and Plaintiffs deposed two Fed.R.Civ.P. 30(b)(6) witnesses and produced hundreds of pages of documents in response to Plaintiffs' document requests. The parties also responded to interrogatories and document requests. Defendants produced hundreds of pages of documents in response to Plaintiffs' document requests, including corporate policies, training materials, work schedules, payroll records, personnel files, emails, and memoranda. From these sources, Class Counsel was able to evaluate the strengths and weaknesses of Plaintiffs' claims.

Substantive Fairness

6. The settlement is substantively fair. All of the factors set forth in *City of Detroit.,* 495 F.2d at 463, which provides the analytical framework for evaluating the substantive fairness of a class action settlement, weigh in favor of final approval.

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

8. Litigation through trial would be complex, expensive, and long. Therefore, the first *Grinnell* factor weighs in favor of final approval.

9. The class's reaction to the settlement was positive. The Notice included an explanation of the allocation formula and an

estimate of each class member's award. (Swartz Decl., Ex. B ("Patron Decl.")) ¶ 3). The Notice also informed class members that they could object to or exclude themselves from the settlement, and explained how to do so. (Swartz Decl. ¶ 31); (Swartz Decl., Ex. F (Court–Authorized Notice).

***4** 10. No Class Members have objected to or requested exclusion from the settlement. This favorable response recommends final approval. "The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Wright v. Stern,* 553 F.Supp.2d 337, 344–45 (S.D.N.Y.2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out); *see also Willix v. Healthfirst, Inc.,* No. 07 Civ. 1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (approving settlement where only 7 of 2,025 class member submitted timely objections and only 2 requested exclusion). As of November 9, 2012, class Counsel's efforts have resulted in a 79% participation rate. This 79% participation rate is well above average in class action settlements. *See* 2 McLaughlin on Class Actions § 6:24 (8th ed.) ("Claims-made settlements typically have a participation rate in the 10–15 percent range."); *Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.,* 758 F.2d 86, 92 (3d Cir.1985) (noting that only 12% of the class responded to the notice by filing a claim to share in the settlement); Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 9–37 (2000) ("It was estimated that somewhere between 14 and 33 percent of all eligible consumers filed claims in the Levi Strauss suit."); William Simon, Class Actions–Useful Tool or Engine of Destruction, 55 F.R.D. 375, 379 (1973) ("Even after a settlement, where class members are notified that they can share in the recovery merely by filing a simple proof of claim, only 10% to 15% bother to do so"). Therefore, the second *Grinnell* factor weighs in favor of final approval.

11. The parties have completed enough discovery to recommend settlement. The pertinent question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Ira Haupt & Co.,* 304 F.Supp. 917, 934 (S.D.N.Y.1969); *see also Velez v. Majik Cleaning Serv., Inc.,* No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007). Here, Plaintiffs conducted extensive interviews of over 100 class members. In addition, in *Drayton,* Class Counsel obtained substantial discovery, including documentary evidence, declaration testimony, deposition testimony, interviews, and data on Class Members' damages. The third *Grinnell* factor weighs in favor of final approval.

12. The risk of establishing liability and damages further weighs in favor of final approval. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 126 (S.D.N.Y.1997). One purpose of a settlement is to avoid the uncertainty of a trial on the merits. *In re Ira Haupt & Co.,* 304 F.Supp. 917, 934 (S.D.N.Y.1969). Here, a trial on the merits would involve significant risk as to both liability and damages. Plaintiffs would be required to prove the amount and extent of overtime that they worked through testimony because Defendants did not keep accurate records of their hours. Defendants' potential appeal of the Court's decision denying their motion to dismiss and the risks of Fed.R.Civ.P. 23 class certification amplifies these risks. The proposed settlement alleviates this uncertainty. The fourth

and fifth *Grinnell* factors weigh in favor of final approval.

***5** 13. The risk of obtaining and maintaining class status throughout trial also weighs in favor of final approval. A motion to certify and/or decertify the class would likely require more extensive discovery and briefing, possibly followed by an appeal, which would require additional rounds of briefing. Settlement eliminates the risk, expense, and delay inherent in this process. The sixth *Grinnell* factor weighs in favor of final approval.

14. The risk of collection weighs in favor of final approval, because the settlement decreases the risk of collection. Accordingly, the seventh *Grinnell* factor favors final approval.

15. The substantial amount of the settlement weighs strongly in favor of final approval. The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.' " *Frank,* 228 F.R.D. at 186 (quoting *In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d at 178). "Instead, '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.' " *Id.* (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)). Moreover, when a "settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road,' " settlement is reasonable under this factor. *See Gilliam v. Addicts Rehab. Ctr. Fund,* No. 05 Civ. 3452, 2008 WL 782596, at *5 (March 24, 2008) (quoting *Teachers' Ret. Sys. of Louisiana v. A.C.L.N. Ltd.,* No. 01 Civ. 11814, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)). The eighth and ninth *Grinnell* factor favors final approval.

Approval of FLSA Settlement

16. The Court hereby approves the FLSA settlement.

17. The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement. *McKenna v. Champion Int'l Corp.,* 747 F.2d 1211, 1213 (8th Cir.1984); *Sewell,* 2012 WL 1320124, at *10; *Torres,* 2010 WL 5507892, at *6.

18. Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *See Diaz v. E. Locating Serv. Inc.,* No. 10 Civ. 4082, 2010 WL 5507912, at *6 (S.D.N.Y. Nov. 29, 2010); *deMunecas v. Bold Food, LLC,* No. 09 Civ. 440, 2010 WL 3322580, at *7 (S.D.N.Y. Aug. 23, 2010). Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Lynn's Food Stores, Inc. v. U.S.,* 679 F.2d 1350 at 1353–54 (11th Cir.1982). If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement. *Id.* at 1354; *Diaz,* 2010 WL 5507912, at *6; *deMunecas,* 2010 WL 3322580, at *7.

***6** 19. The Court finds that the FLSA settlement was the result of contested litigation and arm's-length negotiation.

Dissemination of Notice

20. Pursuant to the Preliminary Approval Order, the Notice was sent by first-

class mail to each identified class member at his or her last known address (with re-mailing of returned Notices). (Swartz Decl., Ex. B ("Patton Decl.")) ¶ ¶ 3–4.) This Court finds that the Notice fairly and adequately advised Class Members of the terms of the settlement, as well as the right of Class Members to opt out of the class, to object to the settlement, and to appear at the fairness hearing conducted on November 13, 2012. Class Members were provided the best notice practicable under the circumstances. The Court further finds that the Notice and distribution of such Notice comported with all constitutional requirements, including those of due process.

Award of Fees and Costs to Class Counsel and Award of Service Awards to Named Plaintiffs and Opt–In Plaintiffs

21. On August 3, 2012, the Court appointed Outten & Golden LLP as Class Counsel because they met all of the requirements of Federal Rule of Civil Procedure 23(g).

22. Class Counsel did substantial work identifying, investigating, prosecuting, and settling Plaintiffs' and the Class Members' claims.

23. Class Counsel have substantial experience prosecuting and settling employment class actions, including wage and hour class actions, and are well-versed in wage and hour law and in class action law. *See Velez,* 2007 WL 7232783, at *8 (holding that "Lead Counsel's experience representing plaintiffs in class actions" supported fee award); *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 189 (W.D.N.Y.2005) (citing plaintiffs' counsel's experience as one factor supporting an attorneys' fee award of 40% of the fund).

24. The work that Class Counsel have performed in litigating and settling this case demonstrates their commitment to the Class and to representing the Class's interests. Class Counsel have committed substantial resources to prosecuting this case.

25. The Court hereby grants Plaintiffs' Motion for Attorneys' Fees and awards Class Counsel $1,212,000 in attorneys' fees, or thirty percent of the fund (including any interest in the fund).

26. The Court finds that the amount of fees requested is fair and reasonable using the "percentage-of-recovery" method, which is consistent with the "trend in this Circuit." *See McDaniel v. Cty. Of Schenectady,* 595 F.3d 411, 417 (2d Cir.2010); *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir.2005); *Sewell,* 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) (following percentage-of-the-fund method); *Willix,* 2011 WL 754862, at *6 (same); *Diaz,* 2010 WL 5507912, at *7–8; *Clark,* 2010 WL 1948198, at *8–9 (same); *Reyes v. Buddha–Bar NYC,* No. 08 Civ. 2494, 2009 WL 5841177, at *4 (S.D.N.Y. May 28, 2009) (same); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini,* 258 F.Supp.2d 254, 261–62 (S.D.N.Y.2003) (collecting cases adopting the percentage-of-the-fund method); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 483–85 (S.D.N.Y.1998) (same).

***7** In wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award. *See Toure v. Amerigroup Corp.,* 10 Civ. 5391, 2012 WL 3240461, at *5 (E.D.N.Y. Aug. 6, 2012); *Sewell v. Bovis Lend Lease, Inc.,* No. 09 Civ. 6548, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012); *Willix v. Healthfirst, Inc.,* No. 07 Civ. 1143, 2011 WL 754862, at *6 (E.D.N.Y. Feb. 18, 2011).

Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 338–39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk. *Goldberger v. Integrated Res. Inc.,* 209 F.3d 43, 51 (2d Cir.2000) (commending the general "sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest"). Adequate compensation for attorneys who protect wage and hour rights furthers the remedial purposes of the FLSA and the NYLL. *Sewell,* 2012 WL 1320124, at *13; *Willix,* 2011 WL 754862, at *6; *deMunecas,* 2010 WL 3322580, at *8; *see also Khait v. Whirlpool Corp.,* No. 06 Civ. 6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) ("Adequate compensation for attorneys who protect wage and hour rights furthers the remedial purposes of the FLSA and NYLL."); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 338–39 (1980).

Class Counsel's request for thirty percent of the fund is reasonable and "consistent with the norms of class litigation in this circuit." *See, e.g., Davis,* 827 F.Supp.2d at 184–86 (awarding one-third of a $42 million settlement in a FLSA and NYLL misclassification case); *Willix,* 2011 WL 754862, at *6–7 (awarding class counsel one-third of $7,675,000 settlement fund in FLSA and NYLL wage and hour action. *Toure,* 2012 WL 3240461, at * 5 (awarding one-third of $4,450,000 in a wage and hour misclassification case). Request for one-third of the fund is reasonable and "consistent with the norms of class litigation in this circuit." *Toure,* 2012 WL 3240461, at * 5 *Id.* at * 5. Courts in this Circuit have routinely granted requests for one-third or more of the fund in cases with settlement funds similar to or substantially larger than this one. *See, e.g., Clark v. Ecolab Inc.,* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *8–9 (S.D.N.Y. May 11, 2010) (awarding class counsel 33% of $6 million settlement fund in FLSA and multi-state wage and hour case); *Khait,* 2010 WL 2025106, at *8–9 (awarding class counsel 33% of $9.25 million settlement fund in FLSA and multi-state wage and hour case); *Westerfield v. Wash. Mut. Bank,* Nos. 06 Civ. 2817, 08 Civ. 0287, 2009 WL 5841129, at *4–5 (E.D.N.Y. Oct. 8, 2009) (awarding 30% of $38 million fund in nationwide overtime suit); *Mohney v. Shelly's Prime Steak,* No. 06 Civ. 4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (awarding 33% of $3,265,000 fund in FLSA and NYLL tip misappropriation case); *Stefaniak v. HSBC Bank USA,* No. 05 Civ. 720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) (awarding 33% of $2.9 million settlement). A fee of 30% of the fund is reasonable and "consistent with the norms of class litigation in this circuit." *Willix,* 2011 WL 754862, at *7 (internal quotation marks omitted).

***8** 27. Class Counsel risked time and effort and advanced costs and expenses, with no ultimate guarantee of compensation. A percentage-of-recovery fee award of one-third is consistent with the Second Circuit's decision in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany,* 493 F.3d 110, 111–12 (2d Cir.2007), *amended on other grounds by* 522 F.3d 182 (2d Cir.2008), where the Court held that a "presumptively reasonable fee" takes into account what a "reasonable, paying client" would pay. While *Arbor Hill* is not controlling here because it does not address a common fund fee petition, it supports a one-third recovery in a case like this one where Class Counsel's fee entitlement is entirely contingent upon success. *Toure v. Amerigroup Corp.,* 2012 WL 3240461, at *6; *Willix,* 2011 WL 754862, at *7; *Diaz,* 2010 WL 5507912, at *7; *Clark,* 2010 WL 1948198, at *9.

28. All of the factors in *Goldberger v. Integrated Res. Inc.,* 209 F.3d 43, 50 (2d Cir.2000) weigh in favor of a fee award of one-third of the fund.

29. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request. *Toure,* 2012 WL 3240461, at *6 (Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward); *Parker v. Jekyll & Hyde Entm't Holdings, LLC,* No. 08 Civ. 7670, 2010 WL 532960, at *2 (S.D.N.Y. Feb. 9, 2010) ("[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time").

30. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of $4,486.26, which the Court deems to be reasonable. Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *See In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) (citing *Miltland Raleigh–Durham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993)).

31. The attorneys' fees awarded and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement.

32. The Court finds reasonable service awards of $5,000 each to Claude Massiah and Natalie Mieles. These amounts shall be paid from the settlement. Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs. *See Toure v. Amerigroup Corp.,* No. 10 Civ. 5391, 2012 WL 3240461, at * 5 (E.D.N.Y. Aug. 6, 2012) (approving service awards of $10,000 and $5,000); *Sewell,* 2012 WL 1320124, at *14–15 (finding reasonable and approving service awards of $15,000 and $10,000 in wage and hour action); *Reyes,* 2011 WL 4599822, at *9 (approving service awards of $15,000 to three class representatives and $5,000 to fourth class representative in restaurant case challenging tip and minimum wage policies); *Willix,* 2011 WL 754862, at *7 (approving service awards of $30,000, $15,000, and $7,500); *Torres,* 2010 WL 5507892, at *8 (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); *Khait v. Whirlpool Corp.,* No. 06 Civ. 6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of $15,000 and $10,000, respectively, in wage and hour class action); *see also Roberts v. Texaco, Inc.,* 979 F.Supp. 185, 200–01 (S.D.N.Y.1997) ("The guiding standard in determining an incentive award is broadly stated as being the existence of special cir-

cumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claims, and, of course, the ultimate recovery.").

Conclusion and Dismissal

***9** 33. The parties shall proceed with the administration of the settlement in accordance with the terms of the Settlement Agreement.

34. This entire case is dismissed on the merits and with prejudice, with each side to bear its own attorneys' fees and costs except as set forth in the Settlement Agreement. This Final Order and Judgment shall bind, and have *res judicata* effect with respect to all FLSA Collective Action Members, and all Rule 23 Class Members who do not opt out of the applicable classes.

35. The Court approves of the release of the Released Federal Law Claims and Released State Law Claims, which shall be binding on all FLSA Collective Action Members. The Court approves of the release of the Released State Law Claims, which shall be binding on all Rule 23 Class Members who do not opt out of the applicable classes.

36. Neither this Order, Settlement Agreement, nor any other documents or information relating to the settlement of this action shall constitute, be construed to be, or be admissible in any proceeding as evidence (a) that any group of similarly situated or other employees exists to maintain a collective action under the FLSA, or a class action under Rule 23 of the Federal Rules of Civil Procedure or comparable state laws or rules, (b) that any party has prevailed in this case, or (c) that the Defendants or others have engaged in any wrongdoing.

37. Without affecting the finality of this Final Order, the Court retains jurisdiction over this action for the purpose of receiving the Consent forms returned by the FLSA Collective Action Members, and for enforcing the Settlement Agreement. The parties shall abide by all terms of the Settlement Agreement and this Order.

38. This document shall constitute a judgment for purposes of Rule 58 of the Federal Rules of Civil Procedure.

It is so ORDERED this *16* day of *Nov,* 2012.

E.D.N.Y.,2012.
Massiah v. MetroPlus Health Plan, Inc.
Not Reported in F.Supp.2d, 2012 WL 5874655 (E.D.N.Y.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re MERRILL LYNCH & CO., INC. RESEARCH REPORTS SECURITIES LITIGATION
This Document Relates To: In re MERRILL LYNCH & CO., INC. INTERNET STRATEGIES FUND SECURITIES LITIGATION

No. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 02 Civ. 7854(JFK), 02 Civ. 10021(JFK).
Feb. 1, 2007.

Abbey, Spanier, Rodd, Abrams & Paradis, LLP, New York, New York, Arthur N. Abbey, Jill Abrams, Wolf, Haldenstein, Adler, Freeman & Herz, LLP, New York, New York, Daniel W. Krasner, Jeffrey G. Smith, George Peters, Aya Bouchedid, for Class Plaintiffs, of counsel.

Clifford Chance, LLP, New York, New York, Mark Holland, Mary K. Dulka, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, New York, Jay B. Kasner, Scott D. Musoff, Bressler, Amery & Ross, P.C., New York, New York, Christopher G. Massey, for Defendants, of counsel.

Garwin, Gerstein & Fisher, LLP, New York, New York, Scott W. Fisher, Wechsler Harwood, LLP, New York, New York, Daniella Quitt, for Objector April Scalisi, of counsel.

Frank Quinn, Riverside, CT, for Objector Frank Quinn, objector pro se.

OPINION AND ORDER

KEENAN, J.

***1** This Opinion considers the petition of the lead plaintiffs for class certification and final approval of a proposed settlement and plan of allocation in these putative securities class actions brought on behalf of investors in three different Merrill Lynch mutual funds. The Court also considers lead counsel's application for an award of attorneys' fees and expenses, and an award as reimbursement for one of the lead plaintiffs. For the reasons that follow, the Court (1) grants class certification to the settling plaintiffs, (2) approves the settlement and plan of allocation, (3) awards attorneys' fees in the amount of 22.5% of the settlement fund, (4) awards reimbursement of litigation expenses to counsel, and (5) denies lead plaintiff's request for an award.

BACKGROUND

These three securities class actions (collectively, the “Actions”) were among numerous securities class actions brought against Merrill Lynch in the wake of the New York Attorney General (“NYAG”)'s investigation into an alleged scheme by Merrill Lynch's research division to publish false or misleading analysis of internet stocks in an effort to generate investment banking business. The cases were consolidated before the late Honorable Milton J. Pollack for pre-trial purposes, in *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* 02 MDL 1484 and reassigned to me upon Judge Pollack's death. Although most of the cases before Judge Pollack were brought on behalf of classes of direct purchasers of stock in companies that were the subject of allegedly misleading research reports, the plaintiffs in these Actions are shareholders in three different

Merrill Lynch mutual funds (collectively, the "Funds"): the Merrill Lynch Internet Strategies Fund, Inc. (the "ISF"); the Merrill Lynch Global Technology Fund (the "Global Fund"); and the Merrill Lynch Focus Twenty Fund (the "Focus Twenty Fund"). Defendants are the Funds, their directors, their investment advisors and affiliates, and the advisors' corporate parent, Merrill Lynch & Co., Inc., and broker-dealer affiliate, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF & S"). FN1 Plaintiffs alleged, *inter alia,* (1) that the Funds' prospectuses and registration statements failed to disclose a conflict of interest between Merrill Lynch's brokerage and underwriting operations, namely that the Funds invested in the securities of companies with which MLPF & S had or sought investment banking business; (2) that MLPF & S issued falsely optimistic research reports on many of the securities held in the Funds' portfolios; and (3) that the Funds invested in companies at market prices inflated by the misleading research reports in order to improve MLPF & S' ability to obtain investment banking business from those companies, without regard to whether they were good investments for investors in the Fund. The factual background of the Actions and the plaintiffs' claims are set forth in previous decisions and orders of Judge Pollack, including *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 272 F.Supp.2d 243 (S.D.N.Y.2003) and *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 289 F.Supp.2d 429 (S.D.N.Y.2003), and in Judge Pollack's decision and order in a related class action case, *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 273 F.Supp.2d 351 (S.D.N.Y.2003). Familiarity with those decisions is assumed.

FN1. The defendants, as defined in the Stipulation of Settlement, are Merrill Lynch & Co., Inc., MLPF & S, Merrill Lynch Focus Twenty Fund, Inc., Fund Asset Management, L.P., Princeton Funds Distributors, Inc., Princeton Services, Inc., FAM Distributors, Inc., Merrill Lynch Global Technology Fund, Inc., Merrill Lynch Asset Management, L.P., Merrill Lynch Investment Managers, L.P., Terry K. Glenn, Donald C. Burke, Donald Cecil, Roland M. Machold, Edward H. Meyer, Charles C. Reilly, Richard D. West, Arthur Zeikel, Edward D. Zinbarg, Roscoe S. Suddarth, Ronald W. Forbes, Cynthia A. Montgomery, Kevin A. Ryan, Merrill Lynch Internet Strategies Fund, Inc., Paul G. Meeks, and Master Internet Strategies Trust.

Procedural History

***2** The first of these Actions commenced on April 24, 2002, with the filing of the first of nine securities class action suits against the ISF. Those cases were subsequently consolidated as the ISF Action. A class action complaint was filed on October 1, 2002 against the Global Fund and was eventually consolidated as the Global Action. The first class complaint against the Focus Twenty Fund was filed on December 23, 2002 and was consolidated with other subsequent complaints as the Focus Twenty Action. The Actions were subsequently transferred to Judge Pollack, pursuant to an order of the Judicial Panel on Multidistrict Litigation which consolidated before Judge Pollack numerous claims against Merrill Lynch and other defendants, alleging securities fraud in analysts' research reports

On February 5, 2003, Judge Pollack appointed Ruth Manton as lead plaintiff and Abbey, Spanier, Rodd, Abrams & Paradis, LLP ("Abbey Spanier") FN2 as lead counsel in the ISF action and Michal N. Merritt as lead plaintiff and Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein") as lead counsel in the Global Action.FN3 On July 22, 2003, Judge Pollack appointed Archie Lofberg as lead plaintiff and Wolf Haldenstein as appointed lead counsel in the Focus Twenty Action.FN4 Lead plaintiff in each of the three Actions subsequently filed a consolidated amended class complaint ("Complaint," and collectively, the "Complaints").

FN2. At the time Pre-Trial Order No. 3 was issued, Abbey Spanier's name was Abbey Gardy, LLP.

FN3. Abbey Spanier and Wolf Haldenstein will be referred to, collectively, in this Opinion as "counsel" or "lead counsel."

FN4. Unappointed counsel that participated on the plaintiffs' behalf in the Actions are: BrowerPiven, P.C.; Lockridge, Grindal, Nauen P.L.L.P.; Stull, Stull & Brody; Weiss & Lurie; Law Offices of Mark S. Henzel; and Wolf Popper, LLP.

In May 2003 the defendants filed motions to dismiss the Complaint in the Global Action. In July and September 2003, the defendants filed motions to dismiss the Complaints in the ISF and Focus Twenty Actions. By an order dated July 2, 2003, the Court dismissed the Global Action Complaint with prejudice on the grounds, *inter alia,* that defendants had no duty to disclose the information that was allegedly omitted from the prospectuses and registration statements; that the claims were time-barred; and that the plaintiffs had failed to plead loss causation. *See In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 272 F.Supp.2d at 243. On September 17, 2003, lead plaintiff in the Global Action filed a notice of appeal to the Second Circuit. At the time settlement was reached, the appeal was fully briefed by the parties and awaiting oral argument.

On October 29, 2003, the Court dismissed with prejudice the Complaint in the ISF Action on substantially the same grounds as were set forth in the opinion and order in which the Global Action was dismissed. *See In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 289 F.Supp.2d at 429. On November 24, 2003, lead plaintiff in the ISF Action filed an appeal to the Second Circuit. The appeal in the ISF Action was fully briefed and awaiting oral argument at the time the parties reached the settlement agreement.

On October 22, 2003, the Court dismissed the Complaint in the Focus Twenty Action, striking various allegations as irrelevant, but granted leave to replead. Lead plaintiff subsequently filed an amended Complaint, and Defendants filed a motion to dismiss the amended Complaint. Lead plaintiff also filed a motion for the disqualification of Judge Pollack, which the Court denied in February 2004. The motion to dismiss the amended Complaint in the Focus Twenty Action was fully briefed and awaiting oral argument in this Court at the time settlement was reached.

***3** On October 6, 2004, following Judge Pollack's death, the Judicial Panel for Multidistrict Litigation reassigned the cases consolidated in *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* 02 MDL 1484, including these Actions, to this Court.

On January 20, 2005, while the parties awaited the scheduling of oral argument in the Second Circuit of the appeals from the dismissals in the ISF and Global Actions, and oral argument in this Court regarding the motion to dismiss the amended Complaint in the Focus Twenty Action, the Second Circuit issued its decision in a related securities class action that was among the cases consolidated for pre-trial proceedings before Judge Pollack, *Lentell v. Merrill Lynch,* 396 F.3d 161 (2d Cir.2005), *cert. denied,* --- U.S. ----, 126 S.Ct. 421, 163 L.Ed.2d 321 (2005). In *Lentell,* direct purchasers of two internet stocks, 24/7 Real Media, Inc. and Interliant, Inc., sued Merrill Lynch and related defendants, alleging the "publication by Merrill Lynch's Internet Group of false and misleading research and investment recommendations aimed at fraudulently driving up the market prices of [those] companies ... and motivated by the desire to obtain and maintain investment banking business for Merrill Lynch." *Lentell,* 396 F.3d at 165 (citation and internal quotations omitted). Judge Pollack dismissed the complaints with prejudice on the ground, *inter alia,* that plaintiffs had failed to plead loss causation. The Circuit affirmed Judge Pollack's dismissal on the ground of loss causation. *Id.* at 178.

Settlement

In 2005, following the Second Circuit's decision in *Lentell,* the parties began to conduct settlement negotiations. During negotiations, the parties requested that the Second Circuit and this Court stay action, respectively, on the fully briefed appeals in the Global and ISF Actions and the motion to dismiss in the Focus Twenty Action. On February 16, 2006, the parties executed a Memorandum of Understanding, which contained key terms of a settlement agreement. On September 22, 2006, after seven months of negotiations, counsel informed the Court that the parties had reached an agreement regarding the settlement of the Actions and submitted to the Court an executed Stipulation of Settlement ("Stipulation"), to which were attached as exhibits a Notice of Pendency of Class Action ("Notice") and Proposed Settlement ("Settlement"), and a Proposed Preliminary Order in Connection with Settlement Proceedings.

On October 20, 2006, the Second Circuit issued a mandate, pursuant to the parties' stipulation, withdrawing the appeals in the ISF and Global Actions without prejudice and returning those Actions to this Court for review of the Settlement.

Settlement Terms

The Stipulation provides for the cash payment of $39 million plus an additional payment in lieu of interest FN5 (the "Settlement Fund"). The Stipulation defines the classes in each of the Actions as follows: the ISF Class consists of all persons who purchased shares of the ISF from March 16, 2000 through October 12, 2001; the Global Class consists of all persons who purchased shares of the Global Fund from October 2, 1999 through October 1, 2002; and the Focus Twenty Class consists of all persons who purchased shares of the Global Fund from March 3, 2000 through December 23, 2002 (collectively, the "Class Members").

FN5. The additional amount is calculated as if simple interest was earned on the $39 million base amount, from March 30, 2006 until five days after entry of the final order of this Court approving the settlement, at the LIBOR 30-day rate listed in *The Wall Street Journal* on March 30, 2006. As of September 22, 2006, the additional amount that had accrued was $1,328,017.

***4** Pursuant to the Stipulation, the Settlement Fund will be used to pay taxes and tax expenses; administrative costs of the Actions, including the costs of providing notice; and attorneys' fees and expenses. The remaining amount of the Settlement Fund ("Net Settlement Fund") then will be distributed to valid claimants pursuant to the Plan of Allocation. The Stipulation also contains a release and waiver, barring any participating Class Members from bringing against any defendant in these Actions any future claims, known or unknown, that arise out of or relate to the Actions.

Plaintiffs moved for preliminary approval of the Settlement on September 22, 2006. On September 26, 2006, the Court issued a Preliminary Order in Connection with Settlement Proceeding ("Preliminary Order"). The Preliminary Order granted preliminary class certification to the Actions for settlement purposes and certified the lead plaintiffs in the Actions as class representatives. The Preliminary Order also approved the form of the proposed Notice of Pendency of Class Action and Proposed Settlement (the "Notice"), the Proof of Claim and Release Form (the "Proof of Claim"), the Notice of Recognized Loss and Release Form (the "Notice of Recognized Loss"), and the Summary Notice of Pendency and Proposed Settlement of Class Action (the "Publication Notice"), and scheduled a Fairness Hearing for November 28, 2006. The Preliminary Order directed counsel to send the Notice, Proof of Claim, or Notice of Recognized Loss via first class mail, no later than October 11, 2006, to all identifiable class members and further directed counsel to publish the Publication Notice in *The Wall Street Journal, The New York Times,* and on the PR Newswire within two weeks after mailing of the Notice. The Preliminary Order required any class member who wished to be excluded from the settlement to mail notice of the request for exclusion by November 13, 2006. The Preliminary Order further required any objection to the settlement to be filed with the Court and served on the parties no later than November 13, 2006. The Order also stated that the deadline for submission of claims was December 31, 2006.FN6

FN6. The deadline for post-marked claims subsequently was extended to January 3, 2007 because post offices were closed from December 31, 2006 through January 2, 2007, as December 31, 2006 fell on a Sunday, January 1, 2007 was New Years Day, and post offices were closed on January 2, 2007 due to President Ford's death.

Notice to Class

On October 11, 2006, pursuant to the Preliminary Order, counsel, through the Court-approved claims administrator, the Garden City Group, Inc. ("GCG"), began the process of mailing claim packets to identifiable class members. Each claim packet contained the Notice and the Proof of Claim. The GCG ultimately sent 399,179 claim packets to potential Class Members via first class mail. On October 23, 2006, the GCG published the Publication Notice in the national editions of *The Wall Street Journal* and *The New York Times,* and on the PR Newswire. The GCC also posted downloadable copies of the Notice and Proof of Claim on the GCG's website.

The Notice provided a background of the Actions, described the circumstances leading up to the Settlement, supplied the details of the Settlement, gave notice of the November 28, 2006 Fairness Hearing, and provided instructions for class members regarding submissions of claims, exclusion from the Settlement, objection to the terms of Settlement and/or the application for attorneys' fees and reimbursement of expenses, and attendance at the Fairness Hearing. The Notice also stated that lead counsel would apply for attorneys' fees not to exceed 30% of the Settlement Fund, reimbursement of attorneys' costs and expenses incurred in connection with the litigation of the Actions not to exceed $350,000, and reimbursement of reasonable costs and expenses incurred by the lead plaintiffs not to exceed $15,000.

Plan of Allocation

***5** The proposed Plan of Allocation was appended to the Notice and included in each claim packet. The Plan of Allocation explains that the Net Settlement Fund will be distributed to the Class Members on the basis of a recognized loss formula that will be applied to shares of each of the three mutual funds that were purchased, sold, or held by the Class Members during the class periods. The recognized loss formula is based on the difference between the price paid and price received for shares of mutual funds that were purchased and sold during the applicable class period. The formula also applies to shares held but not sold as of the expiration of each class period, and is calculated as the difference between the price paid for each share and the price at which each share was trading on a specific date stated in the Plan of Allocation.[FN7] Plaintiffs' damages expert has concluded that approximately 616 million shares will be eligible to claim a recognized loss. Based on the proposed settlement sum of $39 million, counsel calculate that the settlement will yield an average recovery per eligible share of $.063, or $.0649, when the additional payment in lieu of interest is included.

FN7. For ISF shares held on October 21, 2001, the last day of the ISF class period, the recognized loss is the difference between the price paid per share and $1.74, the price at which ISF shares were trading on October 12, 2001. For Global Fund shares held on October 1, 2002, the last day of the Global Fund class period, the recognized loss is the difference between the price paid per share and $4.25, the price at which Global Fund shares were trading on October 1, 2002. For Focus Twenty Fund shares held on December 23, 2002, the last day of the Focus Twenty Fund class period, the recognized loss is the difference between the price paid per share and $1.19, the price at which Focus Twenty Fund shares were trading on October 1, 2002.

Reaction of Class to the Notice of Proposed Settlement

The response of the classes to the proposed settlement has been highly positive. Only 34 investors opted to be excluded from the settlement, out of nearly 400,000 potential class members. As of the November 13, 2006, deadline for filing objections, only three persons, Frank Quinn, Daniel Harris, and April Scalisi, have submitted objections.[FN8] As discussed below, those objections are either overruled or have been rendered moot since they were submitted.

FN8. Frank Quinn, acting *pro se,*

filed his objection with the Court on October 26, 2006 but failed to serve the objection on counsel, as required by the Notice. April Scalisi, through counsel, served her objection on counsel but failed to file timely the objection with the Court, as required by the Notice. Despite the deficiencies in the submissions of Mr. Quinn's and Ms. Scalisi's objections, the Court accepted the objections and permitted Mr. Quinn, *pro se,* and Ms. Scalisi, through counsel, to be heard at the Fairness Hearing.

Fairness Hearing

On November 28, 2006, the Court held the Fairness Hearing. Lead counsel and counsel for the Fund adviser defendants spoke in favor of the settlement. Lead counsel spoke in support of the application for an award of attorneys' fees of 28%, reimbursement of litigation expenses, and an award of $8,000 for ISF lead plaintiff Ruth Manton. Counsel for defendants took no position on lead counsel's application for attorneys' fees and reimbursement of expenses but opposed the application for the award for Ruth Manton. Objector Frank Quinn attended and stated his objection to the proposed settlement. Objector April Scalisi's counsel attended and stated Ms. Scalisi's objection to the settlement. Objector Daniel Harris did not attend.

DISCUSSION

A. Certification of the Settlement Class

The Stipulation contemplates certification of the settlement class. “Before certification is proper for any purpose-settlement, litigation, or otherwise-a court must ensure that the requirements of Rule 23(a) and (b) have been met.” *Denny v. Deutsche Bank, A.G.,* 443 F.3d 253, 270 (2d Cir.2006). Rule 23(a) imposes four threshold requirements on putative class actions: numerosity, commonality, typicality, and adequacy of representation. *Id.* at 267. In addition, Rule 23(b)(3) imposes the following two additional requirements: “Common questions must ‘predominate over any questions affecting only individual members'; and class resolution must be ‘superior to other available methods for the fair and efficient adjudication of the controversy.’ ” *Id.* (quoting Fed.R.Civ.P. 23(b)(3)). The Court considers each requirement in turn.

Numerosity

***6** Rule 23(a)(1) requires that the putative class be “so numerous that joinder of all class members is impracticable.” Fed.R.Civ.P. 23(a)(1). While no minimum number of plaintiffs is required for a suit to be maintained as a class action, “[g]enerally, courts will find a class sufficiently numerous when it comprises 40 or more members.” *DeMarco v. Nat'l Collector's Mint. Inc.,* 229 F.R.D. 73, 80 (S.D.N.Y.2005) (citation and internal quotations omitted). Here, the GCG identified nearly 400,000 potential Class Members. Lead counsel have notified the Court that, as of January 3, 2007, the GCG received 34,629 claims. The settlement class clearly is so large that individual actions by all potential plaintiffs would not be possible. The numerosity requirement therefore is satisfied.

Commonality

Under Rule 23(a)(2), class certification is appropriate where “there are questions of law or fact common to the class.” Fed.R.Civ.P. 23(a)(2). The commonality requirement of Rule 23(a)(2) is satisfied if “all class members are in a substantially identical factual situation and the questions of law raised by the plaintiff[s] are applicable to each class member." *In re Playmobil Antitrust Litig.,* 35 F.Supp.2d 231, 240 (E.D.N.Y.1998). The rule does not require that every question of law or fact be common to each class member. *Id.* "The commonality requirement has been applied permissively in the context of securities fraud litigation." *In re Veeco Instruments, Inc., Sec. Litig.,* 235 F.R.D. 220, 238 (S.D.N.Y.2006). Here, the Actions raise questions of law and fact that are common to each class member. Plaintiffs are suing under the same federal securities laws, alleging the same misrepresentations and/or omissions of material statements in the Funds' prospectuses and registration statements, and "the success of each plaintiff's claim turns on establishing the existence, nature and significance of the same alleged misrepresentations and omissions." *Id.* Thus, the commonality requirement is satisfied.

Typicality

Rule 23(a)(3) is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). The "typicality" requirement is met where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Schwab v. Philip Morris USA, Inc.,* 449 F.Supp.2d 992, 1104 (E.D.N.Y.2006) (internal quotations and citation omitted). Here, there is no indication that the claims of the lead plaintiffs differ in any respect from the claims of the rest of the putative Class Members. Thus, the typicality requirement is satisfied.

Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This necessitates a two-part inquiry: (1) whether the lead plaintiffs' interests are antagonistic to the interests of other members of the class, and (2) whether plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000). Regarding the first prong, there is no indication that lead plaintiffs' claims conflict in any way with the claims of other Class Members. As stated above, the claims of the named plaintiffs appear to be typical of the claims of the remainder of the class. The second prong also is satisfied. As the resumes submitted by lead counsel and unappointed counsel amply demonstrate, plaintiffs' counsel have wide experience in the field of securities class litigation. In appointing Wolf Haldenstein as lead counsel in the Global and Focus Twenty Actions, and Abbey Spanier as lead counsel in the ISF Action, the Court already has recognized counsel's experience in the field of securities litigation and counsel's ability to provide the Class Members with adequate representation. Thus, the final requirement of Rule 23(a) has been met.

Rule 23(b)(3): Predomination and Superiority

***7** Rule 23(b)(3) requires "[1] that common questions of law or fact predominate over individual questions and [2] that a class action is superior to other methods of adjudication." *In re Veeco Instruments, Inc.,* 235 F.R.D. at 240. "In determining whether common questions of fact predominate, a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class." *In re Blech Sec. Litig.,* 187 F.R.D. 97, 107 (S.D.N.Y.1999). Common questions also predominate where "even if each Class member were to bring an individual action, each would be required to prove the existence of the alleged activities of the defendants in order to prove liability." *Id.* In these Actions, defendants' liability will be identical as to each class member; only the amount of damages will differ from one class member to another, depending upon the number of mutual fund shares owned by a given class member and when those shares were purchased and/or sold. Further, as discussed above, the Class Members' claims involve the same questions of fact and law. Thus, even if each Class Member were to bring suit individually, each plaintiff would have to allege and prove virtually identical facts. Therefore, common questions predominate.

Rule 23(b)(3) sets forth the following factors to be considered in making a determination of superiority: "(A) The interest of members of the class in individually controlling the prosecution ... of separate actions; (B) The extent and nature of any litigation concerning the controversy already commenced by ... members of the class; (C) The desirability ... of concentrating the litigation of the claims in the particular forum; and (D) The difficulties likely to be encountered in the management of a class action." Fed.R.Civ.P. 23(b)(3). As the court observed in *In re Blech Sec. Litig.,*

> In general, securities suits ... easily satisfy the superiority requirement of Rule 23. Most violations of the federal securities laws ... inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible. 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. Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.

187 F.R.D. at 107.

The reasoning of the court in *Blech* applies with force in this case, where there are potentially hundreds of thousands of Class Members and the expected recovery per share amounts to a few pennies. Because of the large number of potential claimants and the relatively small damage suffered by potential individual claimants, it is unlikely that individual plaintiffs would endure the expense of litigation in order to bring their claims. There is no indication that counsel are likely to encounter any difficulties in administering the settlement of the actions. Therefore, because class action treatment is superior to any other method for the fair and efficient adjudication of these Actions, the requirements of Rule 23(b)(3) are satisfied.

***8** Because the factors for class certification set forth in Rule 23(a) and Rule 23(b)(3) have been met, the application to certify the classes for settlement is granted.

B. Approval of Final Settlement

Federal Rule 23(e) governs the settlement of class actions and requires court approval before a settlement is executed. Adequate notice of the proposed settlement must be provided and the proposed settlement must be the subject of a fairness hearing. Fed.R.Civ.P. 23(e)(1). In addition, a court may approve a settlement that is binding on the class only if it determines that the settlement is "fair, adequate, and reasonable" and not a "product of collusion." *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000). This evaluation requires the court to consider both "the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005). The determination of the fairness of a settlement is a matter addressed to the Court's discretion. *Joel A.,* 218 F.3d at 139.

Adequacy of Notice

While there are no rigid rules to determine the adequacy of notice in a class action, the standard is generally that of reasonableness. *Wal-Mart,* 396 F.3d at 113-14. Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members. *Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir.1988). Notice is generally deemed reasonable if the average person understands the terms of the proposed settlement and the options provided to class members thereunder. *Wal-Mart,* 396 F.3d at 114.

In these Actions, counsel provided potential Class Members with adequate notice of the Settlement. Counsel, through a Court-approved claims administrator, disseminated the Notice to nearly 400,000 potential claimants. In plain language that is readily comprehensible to the average person, the Notice set forth essential information, including the background of the Actions, the terms of the Settlement, and the various rights of Class Members under the settlement (including the right to opt out and the right to file objections). Appended to each Notice was a form for Proof of Claim and Release, which contained detailed instructions for filing claims under the Settlement, including a "Reminder Checklist," that summarized the steps that a putative Class Member needed to take in order to submit a claim. Counsel also complied with the publication requirement, causing the Publication Notice to be published in appropriate publications. The Publication Notice contained the required information regarding the Settlement terms and process and provided clear instructions on how potential claimants could obtain a copy of the Notice and Proof of Claim.

The Court finds that Notice of the proposed settlement of the Actions was reasonable.

Procedural Fairness

***9** "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 (quoting Manual for Complex Litigation, Third, § 30.42 (1995)). " '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." *Hicks v. Morgan Stanley & Co.,* No. 01 Civ. 10071, 2005 U.S. Dist. LEXIS 24890, at *13 (S.D.N.Y. Oct. 24, 2005) (quoting *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983)).

The record of this case demonstrates the procedural fairness of the settlement. The parties first met to discuss the potential for settlement in 2005. After agreeing on key settlement terms in February 2006, the parties spent seven months conducting negotiations before executing the Stipulation, in September 2006. In sum, counsel with wide experience and demonstrated skill in the field of class action securities litigation represented both sides in reaching the Stipulation after the protracted negotiations. The Court thus finds that the process by which the parties negotiated the proposed settlement was fair and reasonable.

Substantive Fairness

Courts of the Second Circuit examine the well-established "*Grinnell* factors" to determine whether a settlement is substantively fair and reasonable as required by Rule 23(e). The factors that a district court considers are:

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

D'Amato v. Deutsche Bank, 236 F.3d 78, 86 (2d Cir.2001) (citing *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463, abrogated on other grounds by *Goldberger v. Integrated Reserves, Inc.,* 209 F.3d 43 (2d Cir.2000)). A court need not find that every factor militates in favor of a finding of fairness; rather, a court "consider[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).

Based on an evaluation of the relevant *Grinnell* factors, the Court finds that the substantive terms of the Settlement are fair, adequate, and reasonable. Given the dire procedural posture of this case, "[t]here is little question that the settlement agreements ... are fair and adequate to the class because they would provide what further litigation could not-any recovery for class members." *In re Stock Exchs. Options Trading Antitrust Litig.,* No. 99 Civ. 0962, 2006 U.S. Dist. LEXIS 87825, at *26 (S.D.N.Y. Dec. 4, 2006) (internal quotations and citation omitted)). The proposed settlement in this case provides Class Members with the immediate and certain benefit of a cash settlement. If plaintiffs continued to litigate these Actions, they faced a high likelihood of complete nonrecovery. As discussed above, Judge Pollack dismissed the Complaints in the Global and ISF Actions with prejudice. Appeals from those dismissals were fully briefed and awaiting the scheduling of oral argument when the parties executed the Stipulation. Given the Circuit's decision in *Lentell,* in which the Second Circuit affirmed Judge Pollack's dismissal of the complaints in the related 24/7 Real Media and Interliant case on loss causation grounds, it was extremely likely that the dismissals of the Complaints in the Global and ISF Actions also would have been upheld. As Judge Pollack noted in dismissing the Complaint in the Global Action on the ground of failure to plead loss causation, "Plaintiff here has done no more to plead loss causation than the Plaintiffs in [the 24/7 Real Media and Interliant] case." *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 272 F.Supp.2d at 262. In dismissing the Complaint in the ISF Action, Judge Pollack stated that the plaintiffs' failure to plead loss causation in that action warranted dismissal "[f]or the same reason" as the reason given in the decision and order dismissing the Global Action. *In re Merrill Lynch & Co., Research Reports Sec. Litig.,* 289 F.Supp.2d at 437. Thus, it is highly likely that the Focus Twenty Action would have suffered the same fate as the Global and ISF Actions: that is, dismissal with prejudice in this Court on the ground, *inter alia,* of failure to plead loss causation, followed by affirmance of that dismissal in the Second Circuit. In light of the high likelihood of non-recovery faced by the plaintiffs at the time the Stipulation was executed, the Settlement represents a fair recovery for the plaintiffs.

***10** The size of the Settlement Fund is particularly significant in light of plaintiffs' position at the time of settlement, and it also weighs heavily in favor of approval. Plaintiffs sought $645 million in damages, based on the calculations of their damages expert. The Settlement Fund is approximately $40.3 million. The settlement thus represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations. *See Hicks,* 2005 U.S. Dist. LEXIS 24890, at *19 (finding a settlement representing 3.8% of plaintiffs' estimated damages to be within range of reasonableness); *see also* Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Post-Reform Act Securities Settlements: 2005 Review and Analysis,* at 5, *available at* http://www.businessforum.com/Cornerstone_04.html (stating that, in 2005, the median settlement as a percentage of estimated damages was 3.1% in securities class actions where plaintiffs estimated damages between $501 million and $1 billion)).

The overwhelmingly positive reaction of the class also weighs heavily in favor of approval of the settlement. After nearly 400,000 Notices were mailed to potential Class Members, only three objections were submitted, and only 34 persons requested exclusion from the settlement. "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart,* 396 F.3d at 118. Here, the minimal number of objections and requests for exclusion militates in favor of approving the settlement as be fair, adequate, and reasonable. *See, e.g., D'Amato,* 236 F.3d at 86 (approving settlement where 18 objections were filed after notice was sent to 27,883 class members); *McBean v. City of New York,* 233 F.R.D. 377, 386 (S.D.N.Y.2006) (approving settlement where, after notice was sent to 40,352 class members, only four objected and 36 opted out of settlement); *Hicks,* 2005 U.S. Dist. LEXIS 24890, at *16 (finding that reaction of class supported approval, where 123 class members out of approximately 100,000 requested exclusion and only three filed objections).

After consideration of the relevant *Grinnell* factors, the Court finds that the Settlement is substantively fair and reasonable.

Objections to Settlement

The three objections do not weigh against approval of the settlement. The first objection, filed by Mr. Quinn *pro se,* was filed under the mistaken belief that he would not be deemed to be a member of the Focus Twenty Fund class because he purchased shares in the Fund on February 29, 2000, three days before the March 3, 2000 commencement of the Focus Twenty Fund class period. However, lead counsel advised Mr. Quinn by letter, dated November 10, 2006, that February 29 was the "trade date" of the transaction, that the settlement of the purchase did not occur until March 3, and that Mr. Quinn is therefore included in the Focus Twenty Class. The letter also assured Mr. Quinn that counsel would forward his share purchase statement to the claims administrator. At the Fairness Hearing, counsel advised the Court that the claims administrator had been instructed to use either the trade date or settlement date of purchases of the Focus Twenty Fund shares to determine whether a claimant will be included in the class and that Mr. Quinn "is part of the class. He will be included and anybody else who has an issue will also be included." (Tr. Fairness Hearing, at 8.) In response to Mr. Quinn's concern, which he expressed at the Fairness Hearing, that the Proof of Claim form stated that class membership was to be determined by the trade date, rather than the settlement date, counsel has subsequently informed Mr. Quinn, and notified the Court, that Mr. Quinn's Proof of Claim will be honored and that the GCG has processed the claim. Thus, Mr. Quinn's objection has been rendered moot.

***11** The second objection, filed by Ms. Scalisi through counsel, also has been rendered moot. Ms. Scalisi objected to the proposed settlement "in so far as it purports to release claims in a stockholders derivative action captioned *Scalisi v. Grills,* 04 CIV. 5513(TCP)," a case pending in the Eastern District. (Objection of April Scalisi, at 1.) In response to Ms. Scalisi's objection, counsel for the Fund advisor defendants in these Actions confirmed in a letter, dated November 27, 2006, that "the release in the proposed settlement of [the Actions] is not intended to, and shall not be deemed to, release any claims asserted in *Scalisi v. Fund Asset Management, L.P., et al.,* 04-cv-05513-TCP/WDW (E.D.N.Y.)." (Letter of David J. Libowsky, at 1.). Similarly, counsel for defendant Fund Asset Management, L.P., which is also a defendant in the Eastern District case in which Ms. Scalisi is a plaintiff, assured Ms. Scalisi by letter, dated November 21, 2006, that the release of claims in the proposed settlement of these Actions will not release any of Ms. Scalisi's claims in the Eastern District case. On the basis of the representations made by defendants' counsel, therefore, the Court overrules Ms. Scalisi's objection to the proposed settlement.

The third objection was filed by Daniel Harris, *pro se.* Mr. Harris did not appear at the Fairness Hearing. Nevertheless, his objection was properly served on the parties and timely filed with the Court. Mr. Harris's three-sentence submission objects to the proposed settlement on the grounds that (1) "the notice does not clearly tell all class members that they have a right to object"; (2) "the claim form makes it appear that class members who submit claims have no right to object"; and (3) "the attorneys' fees requested seem excessive for a case that was settled on appeal after a successful motion to dismiss." The first two grounds for objection are without merit. The Notice clearly states that any person who does not seek exclusion from the class has the right to object to the proposed settlement as long as objection is served on the parties and filed with the Court in a timely manner. FN9 The fact that Mr. Harris complied with the Notice's instructions and properly served and filed his objection is itself evidence of the Notice's sufficiency. The second ground is equally without merit. The Court has carefully examined the Proof of Claim form and cannot discern how, as Mr. Harris contends, the form "makes it appear" that claimants who do not request exclusion are barred from objecting to the terms of the proposed settlement. The merits of Mr. Harris's final ground for objection, that of excessive attorneys' fees, will be discussed below.

> FN9. The Notice states as follows: "Any Class Member who does not exclude him, her or itself from the Class(es) of which that Class Member is a part may appear at the Settlement Hearing and be heard on any of the foregoing matters, provided, however, that no such person shall be heard unless his, her or its objection is made in writing" and is filed with the Court and served on counsel. (Notice, at 7.)

Plan of Allocation

"In approving an allocation plan, the Court must ensure that the distribution of funds is fair and reasonable." *Hicks,* 2005 U.S. Dist. LEXIS 24890, at *19-20 (citations omitted). A plan of allocation that is devised by competent and experienced class counsel "need have only a reasonable, rational basis." *Id.* (internal quotations and citation omitted).

***12** The Plan of Allocation calls for the Net Settlement Fund to be distributed to Class Members who submit valid claim forms and do not exclude themselves from the settlement, on the basis of each claimant's pro rata "recognized loss" of value in the shares of each of the three mutual funds for the relevant class periods. The recognized loss formula was developed by lead counsel with the assistance of the GCG and plaintiffs' expert in damages and is based upon the loss in value of each Class Member's shares during the relevant class period. A plan of allocation that calls for the pro rata distribution of settlement proceeds on the basis of investment loss is reasonable. *See Hicks,* 2005 U.S. Dist. LEXIS 24890, at *21 (citing *In re Global Crossing,* 225 F.R.D. at 462). Further, the Court notes that the Plan of Allocation was described in detail in the Notice that was sent to each potential class member, and there have been no objections to the Plan. Thus, the Court approves the Plan of Allocation as fair and reasonable.

C. Attorneys' Fees and Reimbursements

Plaintiffs' counsel request a fee award of 28% of the Settlement Fund of $40,328,017.[FN10] This amounts to the sum of $11,291,845. Counsel also request reimbursement of litigation expenses in the amount of $301,642.62.

> FN10. This reflects the amount of the Settlement Fund as of September 22, 2006.

"[W]here 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,* 209 F.3d at 47. A district court has broad discretion to award attorneys' fees, and an award of fees will be overturned only for abuse of that discretion. *Id.* In the Second Circuit, a district court may calculate attorneys' fees in one of two ways. Under the "lodestar" method, "an attorney fee award is derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *A.R. v. N.Y. City Dep't of Educ.,* 407 F.3d 65, 79 (2d Cir.2005) (internal quotations and citations omitted). The court then may apply a multiplier to the lodestar figure to account for other factors, such as the risk of the litigation, the performance of counsel, or the success achieved. *See In re Twinlab corp. Sec. Litig.,* 187 F.Supp.2d 80, 84-85 (E.D.N.Y.2003). The percentage of the fund method is a simpler calculation where the award is based on "some percentage of the fund created for the benefit of the class." *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999) (citing *Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)).

Both the lodestar and percentage methods are permissible methods of calculating reasonable attorneys' fees. *Goldberger,* 209 F.3d at 50. The trend in the Second Circuit, however, has been to express attorneys' fees as a percentage of the total settlement, rather than to use the lodestar method to arrive at a reasonable fee. *Wal-Mart,* 396 at 121; *In re Elan Sec. Litig.,* 385 F.Supp.2d 363, 373 (S.D.N.Y.2005). The Second Circuit disfavors application of the lodestar method because the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart,* 396 F.3d at 122 (internal quotations and citation omitted); *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. 02 Civ. 5575, 2006 U.S. Dist. LEXIS 78101, at *24 (S.D.N.Y. Sept. 28, 2006), report and recommendation adopted by 2006 U.S. Dist. LEXIS 77926 (S.D.N.Y. Oct. 25, 2006) (noting that "every significant Southern District opinion facing the issue since *Goldberger* has embraced the percentage approach"). The percentage method usually is deemed to be preferable "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." *Hicks,* 2005 U.S. Dist. LEXIS 24890, at *23 (citation omitted). Use of the percentage method also comports with the statutory language of the Private Securities Litigation Reform Act of 1995 ("PSLRA") which specifies that "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...." 15 U.S.C. § 78u-4(a)(6) (emphasis added); *Maley v. Del Global Tech.,* 186 F.Supp.2d 358, 370 (S.D.N.Y.2002) (noting that in amending the PSLRA, Congress "indicated a preference for the use of the percentage method").

***13** Whether the fee is calculated using the lodestar or percentage method, courts consider the following *Goldberger* factors in determining a reasonable award of fees: "(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." *Goldberger,* 209 F.3d at 50. "Even when the percentage method is used, however, the Second Circuit 'encourages the practice of requiring documentation of hours as a 'cross-check' on the reasonableness of the requested percentage.' " *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 520-21 (E.D.N.Y.2003), aff'd *Wal-Mart,* 396 F.3d at 96 (2d Cir.2005) (quoting *Goldberger,* 209 F.3d at 50). In evaluating the lodestar value for "cross-check" purposes, the hours submitted by the attorneys are reviewed but not exhaustively scrutinized. *Goldberger,* 209 F.3d at 50. In determining a reasonable award of attorneys' fees, the Court seeks to balance the "overarching concern for moderation with the concern for avoiding disincentives to early settlements." *In re Elan Sec. Litig.,* 385 F.Supp.2d at 376 (citations and internal quotations omitted). A fee award "should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.' " *Goldberger,* 209 F.3d at 53 (quoting *Grinnell,* 495 F.2d at 469).

The Court will determine attorneys' fees in this case using the percentage method. Each of the *Goldberger* factors will be considered, and the Court then will evaluate the lodestar figure as a "cross-check" on the reasonableness of the percentage requested.

(1) Time and Labor Expended

Counsel has submitted contemporaneous time records showing that considerable time and effort were expended in this case. (*See* Joint Declaration of Jeffrey G. Smith and Jill S. Abrams ("Joint Decl.") and Exhibits attached thereto.) Lead counsel and unappointed counsel acting under their direction expended approximately 9,462 hours, over four years, in litigating these Actions. (Memorandum of Law in Support of Joint Petition for Award of Attorneys' Fees ("Mem.Fees") 16.) These hours, at the hourly rates of the various attorneys and paraprofessionals involved, represent a lodestar of approximately $4,651,891 in billable time. (*Id.*) FN11 Counsel characterize these Actions, in the aggregate, as "a hard fought case with enormous legal and factual issues in dispute." (*Id.* at 17.) As set forth in the Joint Declaration, the work performed by counsel falls into three broad categories: (1) pre-complaint investigation and preparation of the complaints, (2) motion practice, and (3) settlement.

FN11. Wolf Haldenstein performed 6,863 hours of work, for an aggregate lodestar of $3,348,841.75. (Joint Decl. ¶¶ 60, 66.) Abbey Spanier performed 2,249 hours of work for an aggregate lodestar of $1,152,635. (*Id.*) Unappointed counsel performed 349.75 hours of work for an aggregate lodestar of $150,414. (*Id.* ¶ 74.)

Prior to the filing of the complaints, counsel conducted extensive fact investigation of the stocks held by the three Merrill Lynch mutual funds. Investigation included review of analysts' reports on the individual stocks, review of SEC filings for those stocks, research of news articles relating to the NYAG's investigation of Merrill Lynch, interviews with former Merrill Lynch brokers, and legal and fact research relating to other possibly similar mutual fund situations. Subsequently, counsel prepared and filed the complaints and consolidated amended complaints in the three Actions.

***14** Counsel also point to extensive motion practice. Specifically, counsel prepared memoranda for: the application to be appointed lead counsel; the motion for consolidation of claims before the Judicial Panel on Multi-District Litigation; motions in opposition to the defendants' motions to dismiss in all three Actions; a motion for reconsideration in the Global Fund Action; a motion for Judge Pollack's disqualification in the Focus Fund Action; and appellate briefs in the Global Fund and ISF Actions.

Counsel also cite to extensive labor expended in connection with the settlement, including document discovery relating to the alleged damages suffered by the class members. Counsel have obtained and analyzed tens of thousands of pages of documents from a variety of sources, including Merrill Lynch's entire document production in a related Merrill Lynch securities class action litigation. Counsel also point to the extensive, and ultimately successful, settlement negotiations that the parties began to conduct in 2005 and concluded in September 2006. Counsel characterize the settlement negotiations as "protracted and difficult, given defendants' continued denial of liability and the procedural posture of the Actions." (Mem. Fees 11.). Once the Stipulation was executed, counsel worked with the GCG in establishing procedures for disseminating the Notice and analyzing claims, responding to inquiries from potential claimants, and drafting memoranda in support of approval of the settlement.

The Court notes that, although counsel expended considerable time and effort in prosecuting the Actions, no formal discovery was conducted in this case, and the Stipulation was achieved without requiring depositions. In addition, as discussed below, the fact investigation undertaken in these Actions largely involved review of publically available documents and was not particularly difficult. Thus, although counsel should be compensated properly for their extensive work, the expenditure of time and labor in this case is not a particularly significant factor in the *Goldberger* analysis and does not mandate an award of fees substantially in excess of the lodestar.

(2) Magnitude and Complexity

Federal courts have long recognized that securities class litigation " 'is notably difficult and notoriously uncertain.' " *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) (quoting *In re Michael Milken and Assoc. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993)). Counsel contend that the instant Actions were "all highly complex, as plaintiffs accused Merrill Lynch and three of its mutual funds of not disclosing in the Fund prospectuses the significant risks related to false analyst reports, IPO laddering schemes, and over-investment in Merrill Lynch covered securities." (Mem. Fees 17-18.) Counsel argue that the factual complexity of the issues at stake is demonstrated by the fact that "there is even debate as to whether any consequences stem from the alleged conflicts of interest." (*Id.* 17-18.) Counsel further insist that the complexity of the Actions was magnified by the defendants' mounting of "a serious defense that they had no duty to disclose the allegedly omitted information [from prospectuses and registration statements] regarding banking relationships and that even if these allegations were true, the claims were time barred." (Mem. Fees 18.) The difficulty of proving the defendants' liability and the corresponding strength of the defenses asserted in these Actions are born out by the dismissals that the Complaints ultimately suffered in this Court. The Court agrees, therefore, that "this Case is complex with difficult liability issues." *Levitt v. Bear Stearns & Co. (In re Sterling Foster & Co. Sec. Litig.),* MDL No. 1208, 2006 U.S. Dist. LEXIS 80861, at *25 (E.D.N.Y. Oct.31, 2006).

***15** Counsel also contend that the Actions were particularly complex "because the relevant law is unsettled." (Mem. Fees 18.) Counsel are correct in that the law regarding the requirements for pleading loss causation was not entirely settled as of the commencement of the Actions. As the Southern District recently observed in a securities class litigation which commenced at approximately the same time as these Actions, "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 ... where a number of controlling decisions have recently shed new light on the standard for loss causation." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* No. 02 Civ. 5535, 2006 U.S. Dist. LEXIS 17588, at *33 (S.D.N.Y. Apr. 6, 2006) (citing *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), and *Lentell,* 396 F.3d 161). At the time these Actions commenced, the legal principles of loss causation in securities actions "were unsettled in certain respects" and, despite the decisions in *Dura Pharmaceuticals* and *Lentell,* in which the Supreme Court and the Second Circuit, respectively, clarified the requirements for adequate pleading of loss causation, those principles "are still evolving." *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* 2006 U.S. Dist. LEXIS 78101, at *46.

The magnitude and complexity of a case, however, also should be evaluated in comparison with other securities class litigations. *See In re Bristol-Myers Squibb Secs. Litig.,* 361 F.Supp.2d 229, 234 (S.D.N.Y.2005) (evaluating the complexity of the class action relative to other securities actions); *accord FTR Consulting Group, Inc v. Advantage Fund II Ltd.,* No. 02 Civ. 8608, 2005 U.S. Dist. LEXIS 20013, at *15 (S.D.N.Y. Sept. 14, 2005). The magnitude and complexity of these Actions are not remarkable, when compared with other actions within the realm of securities litigation. *Compare In re Visa Check/Mastermoney Litig.,* 297 F.Supp.2d at 523 (finding magnitude and complexities of case "enormous" where the "case involved almost every U.S. bank and more than five million U.S. merchants"); *In re Sumitomo Copper Litigation,* 74 F.Supp.2d 393, 395 (S.D.N.Y.1999) (case involved "almost overwhelming magnitude and complexity"); *In re NASDAO Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 474, 488 (S.D.N.Y.1998) (finding that "liability in this case requires proof of an unusually complex conspiracy involving 37 Defendants and a 'checkerboard' of fact situations and disparate periods for each of 1,659 different securities" and that "the issues were novel and difficult requiring a challenge to a long-standing industry practice and the exercise of skill and imagination"). Although the plaintiffs faced a steep uphill, and ultimately losing, battle in prosecuting their claims, the magnitude of these Actions and the complexity of the factual issues involved in this case were not so enormous as to warrant a determination that this factor weighs significantly in favor of the award of generous attorneys' fees.

***16** Other factors denoting complexity also are absent from this case. Counsel were not required to master a particularly difficult or novel area of law in order to prosecute plaintiffs' claims. *See, e.g., Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317, 352 (S.D.N.Y.2005), aff'd in part, vacat'd in part on other grounds by *Denney v. Deutsche Bank, A.G.,* 443 F.3d 253 (2d Cir.2006) (finding complexity to be a significant factor where "Class Counsel had to expend significant time learning the complicated tax shelter business in order to prosecute plaintiffs' claims"); *Ling v. Cantley & Sedacca, L.L.P.,* No. 04 Civ. 4566, 2006 U.S. Dist. LEXIS 4711, at *4-5 (S.D.N.Y. Feb. 8, 2006) (finding that work performed by class counsel, though extensive, did not include "the use of any particularly novel or complex skill"). In addition, the fact investigation and discovery undertaken by counsel in these Actions were not particularly complex. Here, fact investigation was limited largely to review of public documents readily available to counsel, such as "SEC filings, newspaper articles, internet websites, and previous and current litigations." (Joint Decl. ¶ 19.) Similarly, no formal discovery took place in this case and no witnesses were deposed. Although the confirmatory discovery undertaken by counsel, in the context of settlement negotiations, involved the review of "tens of thousands of documents" (Mem. Fees 10), "discovery did not involve intricate disputes over privilege or other difficult legal issues nor did plaintiffs have to undertake special means to procure evidence that was hard to obtain" *In Re Keyspan Corp. Sec. Litig.,* No.2001-5852, 2005 U.S. Dist. LEXIS 29068, at *30 (E.D.N.Y. Aug. 25, 2005).

Thus, although the Court finds that the difficulty of proving defendants' liability rendered the litigation complicated, the fact that the Actions were not particularly factually complex and not of unusual magnitude cautions against an award of attorneys' fees substantially in excess of counsel's lodestar.

(3) Risk of Litigation

Courts of this Circuit have recognized the risk of litigation to be "perhaps the foremost factor to be considered in determining" the award of appropriate attorneys' fees. *In re Elan Sec. Litig.,* 385 F.Supp.2d at 374 (internal quotations and citation omitted); *accord In re Bristol-Myers Squibb Secs. Litig.,* 361 F.Supp.2d at 233-34. There is generally only a very small risk of non-recovery in securities class litigation. *See In re Dreyfus Aggressive Growth Mutual Fund Litig.,* No. 98 Civ. 4318, 2001 U.S. Dist. LEXIS 8418, at *16 (S.D.N.Y. June 22, 2001) ("What empirical data does exist indicates that all but a small percentage of class actions settle, thereby guaranteeing counsel payment of fees and minimizing the risks associated with contingency fee litigation."). Courts of this Circuit recognize that, where "claims were precipitated by public events," the risk undertaken by class counsel is especially slight. *In re Bristol-Myers Squibb Secs. Litig.,* 361 F.Supp.2d at 234. *See, e.g., Goldberger,* 209 F.3d at 54 (2d Cir.2000) (finding contingency risk to be low where case arose from notorious fraud prosecution); *Karpus v. Borelli (In re Interpublic Secs. Litig.),* No. 03 Civ. 1194, 2004 U.S. Dist. LEXIS 21429, at *35 (S.D.N.Y. Oct. 26, 2004) ("This was not a case in which there was a government investigation that had resulted in disclosure of misconduct and was also driving a settlement."); *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d at 523 (determining litigation to be risky where "Lead Counsel did not benefit from any previous or simultaneous government litigation"); *Rogers v. Sterling Foster & Co. (in Re Sterling Foster & Co.),* 238 F.Supp.2d 480, 488 (S.D.N.Y.2002) (finding contingency risk to be low in light of previous government investigations of defendants); *In re Dreyfus Aggressive Growth Mut. Fund Litig.,* 2001 U.S. Dist. LEXIS 8418, at *20-21 (finding risk to be low "where there was substantial overlap between the government's investigations and the plaintiffs' claims"); *In re Bausch & Lomb, Inc. Sec. Litig.,* 183 F.R.D. 78, 87 (W.D.N.Y.1998) (SEC investigation begun after commencement of securities action "clearly overlapped" and "put additional pressure on [defendant] to settle the case, and would also have given plaintiffs' counsel greater reason to believe that they could prevail").

***17** Here, the prospect of recovery was promising from the outset. These Actions stemmed from the highly publicized

NYAG's investigation into the alleged undisclosed conflict of interest between Merrill Lynch's underwriting and brokerage arms. As Judge Pollack observed, the class actions brought against Merrill Lynch, including the instant Actions, were filed in the context of an "overwhelming and widely dispersed collection of press articles and public speeches by top securities regulatory officials exposing the flaws in the business practices complained of." *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 289 F.Supp.2d at 419. Specifically, the present Actions were commenced after the NYAG had announced to great public fanfare its ongoing investigation into Merrill Lynch's investment banking practices and, shortly thereafter, the unprecedented settlement reached between the NYAG and Merrill Lynch, in which the latter agreed to pay a $100 million civil penalty and reform its investment counseling practices. *See* NYAG Press Release, *Merrill Lynch Stock Rating System Found Biased by Undisclosed Conflicts of Interest,* Apr. 8, 2002, available at http://www.oag.state.ny.us/press/2002/apr/apr08b_02.html; NYAG Press Release, *Spitzer, Merrill Lynch Reach Unprecedented Agreement to Reform Investment Practices,* May 21, 2002, available at http://www.oag.state.ny.us/press/2002/may/may21a_02.html. As a result of the settlement and the enormous public attention it garnered, as the Second Circuit noted in *Lentell,* "[w]ithin weeks, some 140 class-action complaints were filed" against Merrill Lynch and related defendants. *Lentell,* 396 F.3d at 164. Clearly, class counsel undertook these Actions with the expectation of a promising resolution, given the publicity generated by the NYAG's investigation and settlement, and the pressure brought to bear upon the defendants as a result of those events.

At the Fairness Hearing, lead counsel insisted that the NYAG's investigation assisted counsel only "to a very minimal amount." (Tr. Fairness Hearing, at 16.) Counsel attempted to distinguish the instant Actions from the other consolidated class actions pending against the defendants by pointing out that these Actions "don't involve directly the purchase of those securities that the Attorney General was talking about." (*Id.* at 16-17.) It is true that the plaintiffs here are purchasers of mutual funds that contain securities that were the target of the NYAG's investigation, rather than direct purchasers of the securities themselves. However, the fact remains that the Actions and the NYAG's investigation both were based on allegations of similar misconduct, namely the undisclosed "conflict of interest between brokerage firms, investment bankers and research analysts." *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 272 F.Supp.2d at 245. The fact that plaintiffs in these Actions purchased mutual fund shares rather than shares of securities contained in the funds did not create a greater risk of non-recovery in the overall climate of public pressure, generated by the NYAG's investigation and settlement, in which plaintiffs' counsel undertook this litigation.

***18** The lack of risk faced by counsel at the outset of the case is born out by the fact that the defendants settled these Actions after Judge Pollack's with-prejudice dismissal of the complaints in the Global and ISF Actions and after the Circuit's decision in *Lentell.* For the defendants, little was left to do apart from oral argument before the Circuit. Defendants thus faced imminent victory without having to expend significant resources and the plaintiffs were on the verge of being shut out of court. That the Settlement was reached while the case was in such a posture clearly owes much to the pressure placed on the defendants by the government investigation and is indicative of the low level of risk that counsel faced in undertaking this litigation.

Counsel also argue that the prospect of substantial recovery in these Actions was uncertain, "given the dismissal of the Actions by the District Court," (Mem. Fees, at 21.), and that the risk of complete non-recovery was "especially high ... after the dismissal of the Actions by the District Court since the Second Circuit had already upheld Judge Pollack's dismissal of the complaint in *Lentell.*" (*Id.* at 23.) The increased risk of non-recovery that the plaintiffs faced as a result of events that unfolded after the Actions commenced, however, is not relevant to the Court's evaluation of this *Goldberger* factor. "[I]t is well-established that litigation risk must be measured *as of when the case is filed.*" *Goldberger,* 209 F.3d at 55 (emphasis added); *see also See In re Bristol-Myers Squibb,* 361 F.Supp.2d at 234; *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. at 488 ("Risk, of course, must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise)."). Thus, the heightening of risk that resulted from the plaintiffs' defeats in this Court and the unfavorable precedent established by the Second Circuit in *Lentell* is not relevant to the evaluation of the risk undertaken by plaintiffs' counsel in bringing these Actions.

Counsel further argue that the "unsettled state of the law" regarding the defendants' duty to disclose the alleged conflict of interest between Merrill Lynch's investment banking and brokerage operations resulted in greater risk to the plaintiffs. (*Id.* at 22.) The risk that plaintiffs were proceeding under uncertain legal principles certainly was born out by Judge Pollack's dismissal of the Global and ISF Actions on the ground that plaintiffs had failed to allege adequately that defendants had a duty under federal securities law to disclose the purported conflict of interest. However, the risk of non-recovery due to the difficulties of pleading loss causation must be balanced against the context of highly publicized governmental activity in which counsel undertook to litigate these Actions.

The Court also notes that this is not a case where the risk of non-recovery was high due to the defendants' precarious financial condition or status as a foreign corporation. *Compare with Denney,* 230 F.R.D. at 352 (absent class settlement, vast majority of class members would have recovered nothing in light of significant issues regarding defendants' insurance coverage); *In re Indep. Energy Holdings PLC, Inc.,* No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at *26 (S.D.N.Y. Sept. 26, 2003) (finding serious contingency risk where defendant was a foreign company in receivership at outset of litigation); *Berlinsky v. Alcatel Alsthom Compagnie Generale D'Electricite,* 970 F.Supp. 348, 352 (S.D.N.Y.1997) (risk deemed high where defendant was foreign corporation).

***19** In sum, the Court finds that the risk of non-recovery in these Actions was low and does not militate in favor of an award of attorneys' fees substantially in excess of the work counsel actually performed.

(4) Quality of Representation

To evaluate the "quality of the representation," courts review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit. *See In re Global*

Crossing Sec. & ERISA Litig., 225 F.R.D. at 467. "The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work." *In re KeySpan Corp. Sec. Litig.,* 2005 U.S. Dist. LEXIS 29068, at *35 (citing *Warner Communications Sec. Litig.,* 618 F.Supp. 735, 749 (S.D.N.Y.1985)).

Here, as noted above, counsel obtained a recovery for the Class Members of 6.25% of claimed damages, a favorable recovery when compared to other securities class actions in which similarly sized damages were alleged. Given the procedural posture of these Actions and the high likelihood of non-recovery in the event that the litigation continued, the settlement obtained constitutes an excellent result for the Class Members. Nevertheless, the Court notes that the favorable outcome for the plaintiffs in this case appears to owe as much to the pressures exerted upon the defendants by the triggering governmental activity as to the quality of counsels' representation. Nevertheless, it is beyond dispute that plaintiffs' counsel conducted this litigation with great skill and tenacity.

The high quality of representation provided by lead counsel is evident from both the record of this case and the resumes that lead counsel have submitted to the Court. Wolf Haldenstein and Abbey Spanier have tremendous experience in the field of complex securities class litigation. The Court agrees with counsels' statement that "Plaintiffs' counsel have brought their significant experience to bear in achieving this Settlement." (Mem. Fees 23.) Similarly, counsel for the defendants were represented by law firms of national repute, and defense counsel provided skilled and zealous representation. Accordingly, the Court finds that the quality of representation does not militate against an award of a generous fee.

(5) Requested Fee in Relation to the Settlement

Counsel request 28% of the Settlement Fund, or $11,291,845, as of September 22, 2006. Counsel contend that the percentage requested "is within the range of percentages courts in this Circuit have awarded in similar securities class action settlements" and that Southern District courts have "repeatedly recognized" that the fee requested is "well within the range of fees awarded in similar cases." (Mem. Fees 23, 24.)

The Court notes, as an initial matter, that "reference to awards in other cases is of limited usefulness." *In re KeySpan Corp. Sec. Litig.,* 2005 U.S. Dist. LEXIS 29068, at *40 (citing *Goldberger,* 209 F.3d at 53). This is because "fee awards should be assessed based on the unique circumstances of each case." *In re Bristol-Myers Squibb Secs. Litig.,* 361 F.Supp.2d at 236 (citing *Goldberger,* 209 F.3d at 52). Further, the cases cited by counsel are distinguishable. For example, *Kurzweil v. Phillip Morris Cos., Inc.,* No. 94 Civ. 2373, 1999 U.S. Dist. LEXIS 18378 (S.D.N.Y. Nov. 24, 1999), a pre-*Goldberger* securities class action brought against a tobacco company, involved litigation risk that was significantly higher than that confronted by counsel in this case, due to the unprecedented nature of plaintiffs' claims. The court in *Kurzweil* awarded a high-percentage fee in large part because "[t]here had been no large settlements in tobacco litigation generally, and no successful action had yet been brought against a tobacco company based on allegations of addictiveness of nicotine." *Id.* at *3. Further, counsel's efforts in *Kurzweil* involved the undertaking of discovery more extensive than that undertaken in these Actions, including "review [of] documents numbering in the millions and deposition and trial transcripts numbering in the tens of thousands." *Id.* at *4. Similarly, in *In re Lloyd's Am. Trust Fund Litig.,* No. 96 Civ. 1262, 2002 U.S. Dist. LEXIS 22663 (S.D.N.Y. Nov. 26, 2002), the court's award of a 28% fee appeared to be based on the conclusion that counsel faced considerable risk in undertaking the litigation, in noted contrast with *Goldberger,* in which counsel were assisted by governmental investigations and the case presented no risk. Here, as discussed above, risk of non-recovery was very slight.

***20** The other cases cited by counsel also are inapposite. *Warner Communications Sec. Litig.,* 618 F.Supp. at 749, which is cited for the proposition that "courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions," was decided 15 years prior to *Goldberger* and thus "pre-date[s] the *Goldberger* court's admonition that use of a benchmark is not warranted, and that there must be a return to approaching fee awards with an eye toward moderation." *In re Arakis Energy Corp. Sec. Liitg.,* No. 95 Civ. 3431, 2001 U.S. Dist. LEXIS 19873, at *30 (E.D.N.Y. Aug. 17, 2001), report and rec. adopted by 2001 U.S. Dist. LEXIS 19868 (E.D.N.Y. Oct. 31, 2001). In *In re Ashanti Goldfields Sec. Litig.,* No. 00 Civ. 717, 2005 U.S. Dist. LEXIS 28431 (E.D.N.Y. Nov. 15, 2005), the court's award of 28% was a reduction from the 33 1/3% requested, because the court found, after applying the *Goldberger* factors, that counsel was not entitled to an award greater than the lodestar, and a 28% fee equaled the lodestar amount. In this case, by contrast, counsel request a percentage that equates to a multiplier of 2.43 of counsel's lodestar, as discussed below. In the other cases cited, counsel obtained high-percentage fees on the basis of factors that are not present in the instant Actions. *See Hicks,* 2005 U.S. Dist. LEXIS 24890 (30% fee justified by extensive discovery and fact that requested fee represented modest multiplier of less than twice counsels' lodestar); *Maley v. Del Global Technologies, Corp.,* 186 F.Supp.2d at 358 (S.D.N.Y.2002) (fee justified by very high risk of non-recovery); *Steiner v. Williams,* No. 99 Civ. 10186, 2001 U.S. Dist. LEXIS 7097, *19 (S.D.N.Y. May 31, 2001) (awarding high percentage fee after finding that "counsel took a tremendous risk that, in the end, nothing would be recovered").

Counter to counsel's argument that a fee of 28% of the Settlement Fund comports with fee percentages routinely awarded in class action securities settlements, "[s]ince *Goldberger,* courts in the Second Circuit have tended to award attorneys' fees in amounts *considerably less than 30%* of common funds in securities actions, even where there is a substantial contingency risk." *In re KeySpan Corp. Sec. Litig.,* 2005 U.S. Dist. LEXIS 29068, at *36-38 (internal quotations and citation omitted) (emphasis added). *See, e.g., id.* at *68 (recommending an award of 20% instead of 33 1/3%); *In re Indep. Energy Holdings,* 2003 U.S. Dist. LEXIS 17090, at *22 (reducing fees award from 25% to 20% for an award of $ 9,302,340); *In re Arakis Energy,* 2001 U.S. Dist. LEXIS 19873, at *58 (recommending reduction of fees from 33 1/3% to 25% for award of $ 6,000,000); *In re Dreyfus,* 2001 U.S. Dist. LEXIS 8418, at *31 (awarding 15% of $ 18,500,000 and noting that the award "is a reasonable fee [that] tracks the emerging trend within the Circuit of awarding attorneys considerably less than 30% of common funds in securities class actions, even where there is considerable contingency risk"); *In re Health Mgmt. Sys. Sec. Litig.,* 113 F.Supp.2d 613, 614 (S.D.N.Y.2000) (awarding 20% of $4,500,000)).

***21** Courts frequently have awarded reduced fees, often well under 25%, especially where, as here, the parties settled relatively early in the litigation, prior to the undertaking of discovery or trial. *See, e.g., In re Twinlab Corp. Sec. Litig.,* 187 F.Supp.2d at 88 (rejecting 33% request and awarding 12% of $ 26,500,000 where parties did not engage in extensive discovery and action settled shortly after motions to dismiss were decided); *In re Am. Bank Note Holographics, Inc.,* 127 F.Supp.2d 418, 433 (S.D.N.Y.2001) (rejecting a 30% claim and awarding 25% where counsel worked 9500 hours and case was settled in early stage of discovery); *In re Fine Host Corp. Sec. Litig.,* No. MDL 1241, 2000 U.S. Dist. LEXIS 19367, at *21-22 (D.Conn. Nov. 8, 2000) (rejecting 33 1/3% request in favor of 17.5% of $17,750,000 where settlement occurred before ruling on summary judgment motions); *Varljen v. H.J. Meyers & Co., Inc.,* No. 97 Civ. 6742, 2000 U.S. Dist. LEXIS 16205, at *15 (S.D.N.Y. Nov. 8, 2000) (rejecting 30% request and awarding 20% where discovery was not complete).

Thus, mindful of *Goldberger'* s exhortation towards moderation, and considering the prevalent trend within this Circuit, the Court finds that the requested fee of 28% of the Settlement Fund is higher than is warranted by the particular circumstances of this case.

(6) Public Policy

Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation. *See 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."). As Judge Holwell explained in *Hicks,* 2005 U.S. Dist. LEXIS 24890,

> 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. 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. 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. at *26-27 (citation and internal quotations omitted).

Counsel characterize the Class Members in these actions as "generally small, conservative investors who relied on the advice of their Merrill Lynch brokers in making their investment decisions." (Joint Decl. ¶ 11.) Public policy supports an award sufficient to encourage counsel to act on behalf of such investors. *See In re*

Bristol-Myers Squib, 361 F.Supp.2d at 236; *In re VisaCheck/ Mastermoney,* 297 F.Supp.2d at 524 ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."). An award of fees in excess of that required to encourage class litigation, however, does not necessarily serve public policy. As discussed below, an award of 28% of the Settlement Fund would compensate counsel at an exorbitant hourly rate for the legal and paraprofessional work expended on these actions. The Court does not believe that an exceedingly high rate of compensation is required to encourage plaintiffs' counsel to bring securities class actions. Accordingly, the Court finds that public policy does not strongly militate in favor of the award that counsel requests.

Lodestar "Cross-Check"

***22** Even in cases where the court applies the percentage method of fee calculation, documentation of hours remains a useful "cross-check" on the reasonableness of the requested percentage. *Goldberger,* 209 F.3d at 50. Nevertheless, "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.* Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. at 467-68. 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.*

Counsel have provided an account of the hours worked by the partners, associates, and paraprofessionals from the firms of Lead Counsel and outside counsel. Counsel worked approximately 9,462 hours for an aggregate lodestar of $4,651,891. The requested 28% fee equates to the sum of $11,291,845 and represents a multiplier of 2.43 of the lodestar.

The time-sheets provided by counsel reveal that the majority of hours expended in these actions were worked by senior attorneys. Specifically, over 59% of the hours expended were worked by partners or senior associates who billed at $500 or more per hour. For Wolf Haldenstein, for example, the greatest number of hours was worked by Jeff Smith, a partner, who billed 1826.2 hours at an hourly rate of $665. The second highest number of hours worked was by Robert Weintraub, presumably a senior associate, who worked 1183.5 hours at an hourly rate of $515. At Abbey Spanier, the greatest number of hours was worked by partner Jill Abrams, who worked 929.25 hours, at an hourly rate of $650. Partner Arthur Abbey worked the third greatest number of hours, 181.25, at the very high rate of $850 per hour.

The rates charged by counsel, though high, are not inordinate for top-caliber New York law firms. *See Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.,* No. 76 Civ. 2125, 2005 U.S. Dist. LEXIS 5200, at *35 (S.D.N.Y. Mar. 31, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $ 750 per hour and junior partners charge as much as $ 490 per hour") (citing *In Focus: Billing; A Firm-by-Firm Sampling of Billing Rates Nationwide,* Nat'l Law Journal, December 6, 2004, at 22)). Though the hours worked by top-compensated personnel comprise a high percentage of the aggregate hours expended in these Actions, there is no indication that counsel failed to delegate work to junior associates or paraprofessionals where appropriate. *Compare FTR Consulting Group, Inc. v. Advantage Fund II, Ltd.,* 2005 U.S. Dist. LEXIS 20013, at *17-18 ("It would appear that a substantial amount of this work could have been performed by associates or paralegals at significantly lower rates"); *Klein ex rel. SICOR Inc. v. Salvi,* No. 02 Civ. 1862, 2004 U.S. Dist. LEXIS 4844, at *30 (S.D.N.Y. Mar. 26, 2004) (lowering counsel's lodestar because of, inter alia, "inadequate delegation of work to younger lawyers of tasks commonly performed by younger lawyers at lower rates, and too much work being performed at relatively higher hourly rates than should have been the case" where "senior lawyers ... performed the great bulk of the work ... at $ 550 and $ 525 per hour respectively"). It is also evident, from more detailed time records submitted by counsel at the Court's direction, that the majority of the work in this case involved drafting pleadings and memoranda of law on frequently complicated issues and conducting settlement negotiations. These tasks called for the heavy participation of senior personnel. The Court therefore credits counsel's representation that "the litigation of the Actions, by their nature, required the substantial involvement of high level attorneys and did not allow for extensive reliance on the work of junior associates and paralegals." (Mem. Fees 29.)

***23** Nevertheless, an award that equates to a multiplier of 2.43 of the lodestar is excessive. Counsel characterize this multiplier as "modest," (Mem. Fees 30), and cite to several cases from the Second Circuit in which the percentage fee awarded represented multipliers in the range of 2.09 to 4.65. Counsel also cite to this Court's 1985 decision, in *Warner Communications Sec. Litig.,* 618 F.Supp. at 749, decided 15 years before *Goldberger,* for the proposition that multipliers in the range of 3.0 to 4.5 are common. Counsel is correct that courts in the Southern District have approved percentage fee awards that represented multipliers of greater than 2. *See, e.g., In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. at 436 (approving percentage fee request that equated to a "modest" 2.16 multiplier of lodestar and finding that 2.16 multiplier "falls comfortably within the range of lodestar multipliers and implied lodestar multipliers used for cross-check purposes in common fund cases in the Southern District of New York"). However, contrary to counsels' assertion that "[t]he range of multipliers has not changed since ... *Warner Communications."* (Mem. Fees 31), as a rule, "post-*Goldberger* courts ... have generally refused multipliers as high as 2.03." *In re Twinlab Corp. Sec. Litig.,* 187 F.Supp.2d at 87. *See also In re Arakis Energy,* 2001 U.S. Dist. LEXIS 19873, at *51 (stating that an award that was equivalent to a 1.2 multiplier would not "deviate materially from post-*Goldberger* decisions of courts within the Second Circuit as to whether or not to apply a multiplier to a given lodestar").

In cross-checking the requested percentage against the lodestar, the Court must "confirm that the percentage amount does not award counsel an exorbitant hourly rate." *In re Bristol-Meyers Squibb Sec. Litig.,* 361 F.Supp.2d at 233 (citing *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 486, 489 n. 24 (S.D.N.Y.1998) (internal citations omitted)). In this case, if the Court awards counsel the requested 28% fee, the effective rate for the work performed by both lawyers and paraprofessionals in these Actions will be $1,193.51 per hour. This is, quite simply, an exorbitant rate of pay. The Court does not believe that plaintiffs, at the outset of these Actions, would have been prepared to pay counsel such a rate. Nor does the Court find that, in light of the low risk of non-recovery counsel faced at the outset of these Actions, such a rate is necessary to induce counsel to provide adequate representation. *See In re KeySpan Corp. Sec. Litig.,* 2005 U.S. Dist. LEXIS 29068, at *57 (finding that a multiplier of almost one and a half times counsels' lodestar " 'would provide far more than sufficient encouragement to plaintiffs' counsel, indeed, would provide a windfall, where there appears, at the commencement of the litigation, no more than the usual risk of non-recovery" ') (quoting *In re Bristol-Myers Squibb,* 361 F.Supp.2d at 236). Accordingly, after cross-checking the lodestar against the requested fee of 28%, the Court finds that a reduction of the fee is warranted.

Objection to Requested Attorneys' Fees

***24** Daniel Harris filed the sole objection to counsels' request for fees. Mr. Harris' objection to fees was contained in the following single sentence: "Also, the attorney's fee requested seem excessive for a case that was settled on appeal after a successful motion to dismiss." (Objection of Daniel Harris, at 1.) The Court finds this objection to be without merit. Mr. Harris does not state any reasons why the procedural posture of the case renders the requested fee excessive. The Court has applied the relevant factors in determining a reasonable attorneys' fee in this case, and has weighed the procedural posture of the Actions appropriately in its assessment. In any event, the Court's reduction of the percentage requested by counsel renders moot Mr. Harris' objection to the fee request. Accordingly, the objection to fees is overruled.

Reasonable Fee Award

After applying the *Goldberger* factors and considering counsels' lodestar, the Court finds that an award of 22.5% of the Settlement Fund constitutes a reasonable fee. This award will result in a fee of approximately $9,073,804, which equates to a reasonable lodestar multiplier of approximately 1.95. This amount also represents a fee of approximately $959 per hour, a princely rate of pay by any standard.

Reimbursement of Counsels' Expenses

Counsel request reimbursement of $301,642.62 in litigation costs and expenses. Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses. *Miltland Raleigh-Durham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993) (quoting *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.,* 818 F.2d 278, 283 (2d Cir.1987)). Expenses incurred in litigating these Actions, were for "computer research, reproduction/duplication, secretarial overtime, phone/fax/postage, messenger/overnight delivery, local transportation/meals, filing fees and attorney services." (Mem. Fees 32.) Such expenses are reasonable, are less than the maximum amount that counsel stated they would seek in the Notice, and should be reimbursed in full.

D. Reimbursement for Lead Plaintiff Ruth Manton

Counsel seek an award of $8,000 as reimbursement for Ruth Manton ("Manton"), lead plaintiff in the ISF Action. Counsel argue that such an award is warranted because, as lead plaintiff, Manton "kept abreast of the litigation via discussion with counsel, provided counsel with relevant documents and reviewed draft and final court documents and discussed them with Abbey Spanier." (Mem. Fees 32-33.) In support of the application, Manton has submitted two affirmations. In the first affirmation, Manton claims to have spent 16 hours in connection with her duties as lead plaintiff, which included review of various pleadings and legal memoranda filed in the ISF Action, as well as review of her own personal records and relevant investment history, and discussion of these matters with counsel. Manton asserts that, as CEO of a products licensing company in Manhattan, "my time is conservatively valued at $500 per hour." (November 13, 2006, Aff. of Ruth Manton ¶ 2.) In her second affirmation, Manton states that she spent the 16 hours in connection with her duties as lead plaintiff "during my regular business day," and that those hours comprised time she was "unable to spend in my capacity as" CEO of her company. (November 17, 2006 Aff. of Ruth Manton ¶ 2.)

***25** The fund adviser defendants oppose Manton's application. Defendants argue that Manton's request does not comport with the PSLRA, which permits a plaintiff in a securities class action to receive an award beyond her pro rata share of the class recovery only as "an award of reasonable costs and expenses (including lost wages) directly relating to representation of the class." 15 U.S.C.A. §§ 77z-1(a)(4), 78u-4(a)(4). The defendants point out that Manton's affirmations fail "to identify any out-of-pocket expenses, lost wages, lost work time, lost commissions or lost business opportunities she incurred." (Fund Advisor Defs. Reply Mem. in Response to Manton's Request for a Separate Award 2.)

The Court agrees with the defendants. To recover an award under the PLRSA a lead plaintiff must show some actual expense or loss incurred as a result of acting as a class representative. In *In re KeySpan Corp. Sec. Litig.,* 2005 U.S. Dist. LEXIS 29068, at *67, for example, the court recommended denying an award to the lead plaintiff because the plaintiff could not show how the expenditure of time "resulted in actual losses, whether in the form of diminishment in wages, lost sales commissions, missed business opportunities, use of leave or vacation time or actual expenses incurred." Similarly, in *In re AMF Bowling,* 334 F.Supp.2d 462 (S.D.N.Y.2004), the court refused to award the lead plaintiffs any payment under the PLRSA beyond their pro rata share of the class recovery because neither lead plaintiff "claim[ed] any out-of-pocket expense. There is no assertion that either lost time at work or gave up employer-granted vacation time. Neither cites to lost sales commissions nor missed business opportunities." *See also Swack v. Credit Suisse First Boston, LLC,* No. 02 Civ. 11943, 2006 U.S. Dist. LEXIS 75470, at *13 (D.Mass. Oct. 4, 2006) (finding that the refusals to award reimbursement to lead plaintiffs in *KeySpan* and *AMF Bowling* "are compelling because the decisions are rooted in the statutory language and are consistent with the purpose of the PSLRA".)

Although Manton claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead plaintiff. Under the PLRSA, it is simply not enough for Manton to assert that she took time out of her workday and that her time is conservatively valued at $500 per hour. Accordingly, the Court declines to award reimbursement to Manton.

CONCLUSION

For the foregoing reasons, the Court grants certification to the settlement class and approves the Settlement and Plan of Allocation as fair and reasonable. Plaintiffs' remaining claims are dismissed with prejudice. Counsel are awarded attorneys' fees in the amount of 22.5% of the Settlement Fund and reimbursement of reasonable expenses in the amount of $301,642.62. Finally, the Court denies ISF lead plaintiff Ruth Manton's application for an award of $8,000. The Court will enter an Order and Final Judgment, to be submitted by counsel, confirming and finalizing its approval of the Settlement and its award of fees and expenses consistent with all of the proceedings in this case and this Opinion and Order. Attorneys' fees and expenses are to be administered pursuant to the terms of the Order and Final Judgment.

***26** SO ORDERED.

S.D.N.Y.,2007.
In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 313474 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Paul SHAPIRO, on behalf of himself as an individual, and on behalf of all others similarly situated, Plaintiff,
v.
JPMORGAN CHASE & CO., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities, Ltd., Defendants.
Stephen and Leyla Hill, on behalf of themselves as individuals, and on behalf of all others similarly situated, Plaintiffs,
v.
JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities, Ltd., Defendants.

Nos. 11 Civ. 8331(CM)(MHD), 11 Civ. 7961(CM).
Signed March 24, 2014.

AMENDED MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR FINAL CLASS ACTION SETTLEMENT APPROVAL AND ATTORNEYS' FEES

McMAHON, District Judge.

***1** On January 10, 2014, this Court preliminarily approved a settlement agreement [FN1] between plaintiffs Paul Shapiro, Stephen Hill and Leyla Hill, individually, and on behalf of a putative class (the “Plaintiffs”), Intervenor Irving H. Picard, Trustee of the SIPA liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) and the estate of Bernard L. Madoff (the “SIPA Trustee”) and defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities Ltd. (collectively, “JPMorgan”).[FN2] The settlement of this class action is an integral piece of a global resolution of Madoff-related litigation against JPMorgan involving three simultaneous, separately negotiated settlements totaling $2,243,000,000 consisting of: (i) this class action settlement in the amount of $218 million (the “Settlement”); (ii) the SIPA Trustee's Avoidance Action settlement in the amount of $325 million; [FN3] and (iii) a civil forfeiture in the amount of $1.7 billion in connection with a resolution of U.S. government claims against JPMorgan concerning Madoff-related matters. The entire $2,243,000,000 will flow to victims of Madoff's Ponzi scheme.

FN1. A copy of the settlement agreement is attached as Exhibit 2 to the accompanying Joint Declaration of Andrew J. Entwistle and Reed Kathrein in Support of Plaintiffs' Motion for Final Approval of Proposed Settlement with Defendants (the “Joint Final Approval Declaration”)

FN2. *See* January 10, 2014 Order Preliminarily Approving Proposed Settlement and Providing for Notice [ECF No. 52] (“Preliminary Approval Order”), a copy of which is attached as Exhibit 1 to the Joint Final Approval Declaration.

FN3. *See* Exhibit 2 to January 7, 2014 Declaration of Andrew J. Entwistle in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Defendants [ECF No. 51–7] (“Trustee's Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9010 of the Federal Rules of Bankruptcy Procedure Approving Settlement of Common Law Claims by and Between the Trustee and the Class Representatives and JPMorgan") for a discussion and description of the Trustee's settlement.

Since the Preliminary Approval Order, Plaintiffs have provided direct notice of the Settlement to what is reasonably believed to be every member of the settlement class, and published notice in accordance with the Preliminary Approval Order. As further described herein, the notices were also available on numerous websites. The deadline by which settlement class members may opt-out of the class or object to the settlement was Friday, February 28, 2014; there was only one objection—though a group of former Madoff "investors" who are not encompassed within the definition of the preliminarily certified Settlement Class filed a notice of intent to "opt out" of a settlement to which they are not parties.

For all of the reasons set forth in the Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Settlement with Defendants [Docket No. 50] ("Preliminary Approval Memorandum"), and as further discussed herein, the court finds that the Settlement easily meets the standards for final approval in this Circuit and merits the approval of this Court.

BACKGROUND

Subject to the Court's final approval, Plaintiffs have agreed to settle their claims against JPMorgan in exchange for a $218 million cash payment. JPMorgan has also agreed to make a separate payment, in addition to the settlement amount, of up to $18 million for attorneys' fees and expenses to Co–Lead Counsel in connection with the Settlement.

The proposed Settlement, which will resolve all of the Plaintiffs' claims against JPMorgan arising from JPMorgan's conduct as one of Bernard L. Madoff's primary banks, provides a significant benefit to the Settlement Class. The Settlement provides substantial and immediate benefits to the Settlement Class, providing millions of dollars to injured Class members, while avoiding the need for extensive, complex and uncertain litigation against one of the largest banks in the world, represented by highly sophisticated and experienced counsel.

***2** Co–Lead Counsel, who have extensive experience in prosecuting complex class actions, strongly believe the Settlement is in the best interests of the Class, an opinion which is entitled to "great weight." [FN4] Further, on February 5, 2014, Bankruptcy Judge Bernstein, who is overseeing the SIPA Liquidation of BLMIS, on motion of the SIPA Trustee, approved and authorized the Settlement pursuant to Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure.[FN5] Judge Bernstein's intimate familiarity with the Madoff matter causes this court to view his conclusions with particular deference.

FN4. *In re NASDAQ Mkt.-Makers Antitrust Litig.,* 187 F.R.D. 465 at 474 (Courts have consistently given " 'great weight' ... to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."). *See also In re Paine Webber P'ships.* *Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997), *aff'd* 117 F.3d 721 (2d Cir.1992) (class counsel's opinion that the settlement is in the best interest of the class is entitled to "great weight"); *Armstrong v. Bd. of Sch. Dirs.,* 616 F.2d 305, 325 (7th Cir.1980) ("the court is entitled to rely heavily on the opinion of competent counsel").

FN5. *See* Exhibit 4 to the Joint Final Approval Declaration.

I. Factual Background

A. Class Plaintiffs' Allegations Concerning JPMorgan's Role in Madoff

In the Class Complaint, the Class Plaintiffs alleged that JPMorgan played a central role in the Ponzi scheme perpetrated by Bernard L. Madoff and BLMIS. The Class Plaintiffs allege that JPMorgan had actual knowledge of the scheme, was in a position to stop it, but did nothing. From approximately 1986 on, Madoff's primary account through which most, if not all, of the funds of BLMIS flowed, was a depository account at JPMorgan referred to as the "703 Account." FN6 By 2006, and between 2006 and 2008, the 703 Account had billions of dollars in cash deposits. FN7 Every customer opening an account with Madoff received an account number, and was instructed to either wire funds or send funds to the 703 Account. FN8 As the financial markets began a sharp decline in 2008, the balance in the 703 Account began to drop precipitously and dropped to nearly zero on several occasions. FN9 Although the 703 Account was the primary account used by BLMIS, Class Plaintiffs allege that none of the money in the 703 Account was ever used to purchase a single security—a fact that should have been obvious to JPMorgan. FN10 Instead, the funds in the account merely flowed back and forth between Madoff customers in furtherance of the Ponzi scheme. FN11

FN6. Class Complaint, ¶ 4. The "Class Complaint" refers to the January 20, 2012 Consolidated Amended Class Action Complaint. *See* Docket No. 18. The following is only a summary of certain of the Class Plaintiffs' allegations made in the Class Complaint. Class Plaintiffs respectfully refer the Court to the Class Complaint for a more comprehensive presentation of the allegations made against the defendants.

FN7. *Id.,* ¶¶ 5, 8.

FN8. *Id.,* ¶ 6.

FN9. *Id.,* ¶ 8.

FN10. *Id.,* ¶ 9.

FN11. *Id.*

In this regard, Class Plaintiffs' investigations focused on, among other transactions, numerous round trip transactions involving Madoff friend and insider Norman Levy, internal documents that commented on these questionable transactions very early in the relevant period, and the fees received by JPMorgan in connection with Madoff, including those related to the 703 Account.

In addition to the knowledge that Class Plaintiffs allege JPMorgan had by virtue of the 703 Account, Class Plaintiffs allege that JPMorgan acquired knowledge of the Ponzi scheme in connection with transactions in which JPMorgan was involved during the relevant time period. For example, in 2005 and 2006, JPMorgan was involved in various lending activities with Madoff. In 2006 and 2007, JPMorgan began considering the structuring and issuing of certain financial products that would be based on feeder funds tied to Madoff. FN12 In connection with those transactions, JPMorgan performed due diligence on the feeder funds, and since these funds were invested with Madoff, attempted unsuccessfully to perform due diligence on BLMIS itself.

FN12. *Id.,* ¶ 93.

***3** We now know that, in the process of conducting due diligence, JPMorgan even spoke directly to Madoff, and Madoff stated he would not permit due diligence on his operations.[FN13] In addition, JPMorgan's due diligence raised questions about BLMIS' auditor, noting, among other things, that the auditor was not registered with the Public Company Accounting Oversight Board, or subject to peer reviews from the American Institute of Certified Public Accountants.[FN14] Finally, the feeder funds themselves often did not permit access to the agreements they had with Madoff, preventing JPMorgan from understanding the relationship between such funds and Madoff.[FN15] Internally, at JPMorgan, during the due diligence with regard to these investments, certain JPMorgan employees unsuccessfully attempted to recreate Madoff results, and raised various other concerns at Underwriting Committee Meetings and in various other contexts and "health checks," with one employee even going so far as to state that there "is a well-known cloud over the head of Madoff and that his returns are speculated to be part of a Ponzi scheme." [FN16] Notwithstanding these obvious red flags, JPMorgan allowed the scheme to continue without any reporting to U.S. authorities, despite the fact that it filed a SAR report in the UK, and, despite its AML obligations, failed to follow up and take appropriate action in connection with warnings from other banks related to Madoff, and failed to follow through on internal "alerts" or to otherwise heed "triggers" that related to the 703 Account and other Madoff-related activities.

FN13. *Id.,* ¶ 107.

FN14. *Id.,* ¶ 98.

FN15. *Id.,* ¶ 95.

FN16. *Id.,* ¶ 121.

Despite the above and without any reporting to U.S. regulators, JPMorgan redeemed over a quarter billion dollars of its own interests in BMIS feeder funds—managing to redeem all but $80 million in Madoff-related investments before Madoff's December 2008 arrest. BLMIS customers, on the other hand, lost their investment capital of approximately $19 billion.

B. Factual and Procedural Background

As is now well documented, in December 2008, it was revealed that Madoff and BLMIS, perpetrated the largest Ponzi scheme in history. Shortly following this revelation, the Securities Investor Corporation ("SIPC") filed an application in the United States District Court for the Southern District of New York under § 78eee (a)(3) of the Securities Investor Protection Act of 1970 ("SIPA") alleging, *inter alia,* that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA.[FN17] On December 15, 2008, the District Court granted the SIPC application and entered an order under SIPA, which, in pertinent part, appointed Irving H. Picard as Trustee for the liquidation of the business of BLMIS under the SIPA, and removed the case to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under section 78eee(b)(4) of SIPA, where it is currently pending as *SIPC v. BLMIS,* No. 08–01789(BRL) (the "SIPA proceeding"). Bernard Madoff's Chapter 7 case was later substantively consolidated into the SIPA proceeding.

FN17. *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC,* 08–CV–10791 (S.D.N.Y.).

***4** On December 2, 2010, the Trustee filed a complaint commencing an adversary proceeding captioned *Picard v. JPMorgan Chase & Co, et al.,* No. 10–4932(BRL) (the "JPMorgan Adversary Proceeding") against JPMorgan seeking to avoid and recover under 11 U.S.C. §§ 544(b), 547, 548 and 550 and the

New York Uniform Fraudulent Conveyance Act (New York Debtor and Creditor Law §§ 270 – 281) (collectively, the "Avoidance Claims") approximately $425 million of transfers or other payments (the "Transfers") received by JPMorgan prior to the collapse of BLMIS. The Trustee also asserted common law claims (the "Common Law Claims") against JPMorgan, including aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conversion, unjust enrichment, and contribution. On February 8, 2011, JPMorgan moved to withdraw the reference from the Bankruptcy Court, which was granted by this Court on May 23, 2011.

On June 24, 2011, the Trustee filed an amended complaint (the "Trustee Amended Complaint"). On August 1, 2011, JPMorgan moved to dismiss the Common Law Claims and certain of the Avoidance Claims in the Trustee Amended Complaint. On November 1, 2011, the District Court granted JPMorgan's motion to dismiss the Trustee's Common Law Claims and returned all the Avoidance Claims to the Bankruptcy Court for further proceedings. *Picard v. JPMorgan Chase & Co.,* 460 B.R. 84 (S.D.N.Y.2011). That decision was subsequently affirmed by the Second Circuit.

Shortly after the District Court dismissed the Trustee's Common Law Claims, two class action complaints were filed in the District Court against JPMorgan in the names of the Class Plaintiffs, Stephen and Leyla Hill, captioned *Hill v. JPMorgan Chase & Co.,* 11 Civ. 7961(CM); and Paul Shapiro, *Shapiro v. JPMorgan Chase & Co.,* 11 Civ. 8331(CM), based upon their ongoing investigation and that of the Trustee. These complaints asserted various claims against JPMorgan on behalf of BLMIS customers who directly had capital invested with BLMIS as of December 2008, *i.e.,* BLMIS customers who were Net Losers (as defined below). Specifically, the complaints contained several common law causes of action based on alleged breaches of fiduciary duties, embezzlement, conversion, unjust enrichment, and gross negligence.

On December 5, 2011, the District Court consolidated these two actions into the Consolidated Class Action. On January 20, 2012, the Class Plaintiffs filed their Consolidated Amended Class Action Complaint ("Class Complaint") against JPMorgan, again asserting on behalf of the proposed class various claims against JPMorgan arising out of its relationship to Madoff (the claims set forth in the Class Complaint together with the dismissed Common Law Claims are collectively referred to hereafter as the "Class Claims").

On March 9, 2012, JPMorgan filed a motion to dismiss the Class Complaint. One of JPMorgan's primary arguments in support of their motion to dismiss was that the Class Claims (which were common law claims), were all precluded under the Securities Litigation Uniform Standards Act ("SLUSA"). In support of their SLUSA arguments, JPMorgan cited numerous Madoff-related cases from this District, including cases from this Court, which dismissed Madoff claims under SLUSA. FN18 JPMorgan also moved to dismiss on the basis that the Class Complaint failed to state a claim for relief, contending, among other things, that the complaint does not show JPMorgan's actual knowledge of or participation in Madoff's fraud. The Class Plaintiffs opposed the motion to dismiss and continued their ongoing investigation of the facts and circumstances related to Madoff generally and JPMorgan's involvement in Madoff specifically.

FN18. *See, e.g., In re Jeanneret Assocs., Inc.,* 769 F.Supp.2d 340 (S.D.N.Y.2011) (McMahon, J.). *See also, In re Herald,* 730 F.3d 112, 118 (2d Cir.2013), decided while JPMorgan's motion to dismiss was *sub judice.*

***5** In addition to JPMorgan's motion to dismiss the Class Complaint, the Trustee filed a motion seeking limited intervention pursuant to Fed.R.Civ.P. 24(a)(2) in the Consolidated Class Action, which was granted by this Court on October 16, 2012. On September 26, 2013, this Court placed the Consolidated Class Action on the suspense calendar pending a decision from the United States Supreme Court in *Roland v. Green,* 675 F.3d 503 (5th Cir.2012), *cert. granted sub nom. Chadbourne & Parke LLP v. Troice,* ––– U.S. ––––, 133 S.Ct. 977, 184 L.Ed.2d 757 (U.S. Jan. 18, 2013) (No. 12–79), eases concerning the fraud perpetrated by Allan Stanford and which raised certain issues concerning the interpretation of SLUSA. The parties submitted various letter briefs regarding *Chadbourne* and related issues with the result that the matter remains on the suspense calendar. Throughout that period, counsel for the Class Plaintiffs, Representatives continued to investigate the claims here and to prosecute other Madoff-related litigations.

II. Reasons for the Settlement

The Settlement represents the culmination of extensive investigations by the Class Plaintiffs and the Trustee into JPMorgan's potential liability to BLMIS and the customers.

Settlement Class Counsel conducted an independent and exhaustive investigation of the relationship between BLMIS and JPMorgan, including JPMorgan's activities as BLMIS's bank; reviewed and analyzed document productions by JPMorgan and the Trustee totaling more than a million pages; reviewed and analyzed Bankruptcy Rule 2004 examination, trial and other Madoff related testimony; reviewed numerous related Madoff documents, including materials developed in related investigations by regulators and others; developed expert testimony on related issues and conducted their own interviews of numerous JPMorgan senior executive witnesses. Settlement Class counsel and their consultants also independently analyzed the Class' potential claims and damages against JPMorgan.

The Trustee's professionals also conducted an exhaustive review of JPMorgan's documents, interviewed numerous JPMorgan witnesses, deposed several former and current employees of JPMorgan, and reviewed related BLMIS documents which were shared with Class Counsel during the period after the motions to dismiss were filed as part of Lead Counsel's ongoing investigation and effort to maximize recoveries on behalf of Madoff victims.

JPMorgan voluntarily cooperated with both the Trustee and counsel for the Class Plaintiffs during the course of these investigations.

The Trustee and Class Plaintiffs believe the Settlement represents an excellent resolution to what would otherwise be a costly and protracted legal battle, the outcome of which is uncertain. While the various potential claims against JPMorgan may be colorable, the independent and collaborative investigations by the Trustee and Class Plaintiffs—including discussions with JPMorgan's skilled counsel—have caused counsel to conclude that the Trustee and Class Plaintiffs face substantial challenges in litigation of common law damages claims against JPMorgan and that JPMorgan has substantial defenses. Most notable, is the fact that Class Plaintiffs faced a substantial risk of their claims being adversely impacted by developing law interpreting SLUSA.

***6** In contrast to the difficulty and cost of protracted litigation of the potential claims against JPMorgan, the Settlement will provide timely increased recovery to customers and certainty to the Madoff estate, and permit the Trustee to make substantial progress toward completion of the SIPA Liquidation of Madoff.

The Class Claims *i.e.* the common law damages claims asserted on behalf of the class of net-loser Madoff customers—are being settled for $218 million. The combined settlement of the Class Claims and the Trustee's Avoidance claims is $543 million. The Class and Trustee settlements, combined with the contemporaneous Government resolution, will result in a total recovery of $2.243 billion for Madoff victims.

III. The Terms of the Class Action Settlement

The key terms of the Settlement of the Class Claims are as follows:

(a) In connection with the Class Claims, within 14 days following orders by this Court preliminarily approving the Settlement and by the Bankruptcy Court approving the Settlement (in connection with the Trustee's settlement of his Common Law Claims), JPMorgan has agreed to pay $218 million into an escrow account managed by City National Bank ("Class Settlement Funds"). As further described below, in exchange for these settlement payments, members of the Settlement Class will release JPMorgan from all claims related to Madoff or BLMIS or that were alleged in the Class Complaint.

(b) In addition to the $218 million settlement amount, within 14 days following the Court's ruling on Class Plaintiffs' application for attorneys' fees and expenses, JPMorgan has agreed to pay up to $18 million to Plaintiffs' Counsel as attorneys' fees and expenses.

The Settlement Agreement provides that the Class Settlement Funds will be distributed to members of the Settlement Class following the Effective Date of the Settlement Agreement.[FN19] Settlement Class members will be able to make a claim on the Class Settlement Funds regardless of whether they have submitted a claim in the SIPA proceeding. For purposes of distributions from the Class Settlement Fund, a claim filed with the Trustee in the SIPA proceeding will be deemed a claim against the Class Settlement Fund.[FN20] If a Settlement Class member did not file a claim in the SIPA proceeding, that Class member will need to file a claim against the Class Settlement Fund.[FN21] Members of the Settlement Class, including those Net Losers that are defendants in avoidance actions by the Trustee, shall receive their *pro rata* shares of the Class Settlement Fund based on their Net Losses as of December 11, 2008.[FN22]

FN19. Settlement Agreement, ¶ 9.

FN20. *Id.*

FN21. *Id.*

FN22. *Id.*

DISCUSSION

I. THE STANDARDS FOR ASSESSING WHETHER THE CLASS SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

Federal courts have long expressed a preference for the negotiated resolution of litigation.[FN23] While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, there is a general policy favoring settlement, especially with respect to class actions.[FN24]

FN23. *See, e.g., Williams v. First Nat'l Bank,* 216 U.S. 582, 595, 30 S.Ct. 441, 54 L.Ed. 625 (1910) ("Compromises of disputed claims are favored by the courts.").

FN24. *See, e.g., Wal–Mart Stores, Inc. v. Visa USA, Inc.,* 396 F.3d 96, 116 (2d Cir.2005) ("We are mindful of the 'strong judicial policy in favor of' settlements, particularly in the class action context.") (citation omitted); *Weinber-*

ger v. Kendrick, 698 F.2d 61, 73 (2d Cir.1982) ("There are weighty justifications, such as reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing 3 Newberg, *Class Actions* § 5570c, at 479–80 (1977)): *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999) ("Indeed, there is a 'general policy favoring the settlement of litigation.'... This is particularly true of class actions.") (quoting *Weinberger,* 698 F.2d 61 at 73).

***7** The standard for reviewing the proposed settlement of a class action in the Second Circuit, as in other circuits, is whether the proposed settlement is "fair, reasonable, and adequate." FN25 In assessing a settlement, the Court should neither substitute its judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the merits of the action. FN26 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 settlement, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." FN27 In any case, "there is a range of reasonableness with respect to a settlement." FN28

FN25. *In re Luxottica Group S.p.A. Sec. Litig.,* 233 F.R.D. 306, 310 (E.D.N.Y.2006); *In re Indep. Energy Holdings PLC Sec. Litig.,* No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at *9, 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003); *In re Currency Conversion Fee Antitrust Litig. ("CCF"),* 263 F.R.D. 110, 122 (S.D.N.Y.2009).

FN26. *Weinberger,* 698 F.2d at 74; *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993).

FN27. *Grinnell,* 495 F.2d at 462.

FN28. *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972).

Where, as here, a $218 million settlement was agreed to by experienced counsel, who are most closely acquainted with the facts of the underlying litigation, after extensive arm's-length negotiations, a strong initial presumption of fairness attaches to the proposed settlement. FN29

FN29. *Luxottica,* 233 F.R.D. at 315; *see also In re Alloy, Inc. Sec. Litig.,* 03 Civ. 1597, 2004 U.S. Dist. LEXIS 24129, at *5, 2004 WL 2750089 (S.D .N.Y. Dec. 2, 2004); *In re Automotive Refinishing Paint Antitrust Litig.,* No. 1426, 2007 WL 4570918, at *3 (E.D.Pa. Dec.28, 2007).

In addition to the presumption of fairness, the Second Circuit in *Grinnell* has identified nine factors to be utilized in assessing a proposed 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. FN30

FN30. *Grinnell,* 495 F.2d at 463; *see also D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001); *In re AMF Bowling Sec. Litig.,* 334 F.Supp.2d 462, 464 (S.D.N.Y.2004).

All of the *Grinnell* factors need not be satisfied.[FN31] Instead, the Court should look at the totality of these factors in light of the circumstances.[FN32]

FN31. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y.2004) (citation omitted).

FN32. *See CCF,* 263 F.R.D. at 123; *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003).

II. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS BECAUSE IT IS THE RESULT OF EXTENSIVE ARM'S–LENGTH NEGOTIATIONS CONDUCTED BY HIGHLY EXPERIENCED COUNSEL.

A class action settlement is entitled to a presumption of fairness when it is the product of extensive arm's-length negotiations.[FN33] “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.”[FN34] The Court may presume that a settlement negotiated at arm's-length by experienced counsel is fair and reasonable.[FN35]

FN33. *See* 4 Alba Conte, Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed.2002).

FN34. *NASDAQ,* 187 F.R.D. at 474 (S.D.N.Y.1998). *See also Wal–Mart Stores,* 396 F.3d at 116; *Teachers' Ret. Sys. of La. v. A.C.N.U., Ltd.,* No. 01–CV–11814, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004) (“A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if ... it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation ... and if it occurred after meaningful discovery.”).

FN35. *See In re IMAX Secs. Litig.,* 283 F.R.D. 178 at 189; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695, 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).

Here, highly experienced counsel on both sides, all with a strong understanding of the strengths and weaknesses of each party's respective potential claims and defenses, vigorously negotiated the Settlement at arm's-length. The settlement process was initiated by Plaintiffs' Co–Lead Counsel who negotiated the Settlement following significant investigation and informal discovery and analysis in this matter, as well as extensive efforts in connection with the investigation and prosecution of other Madoff-related litigation, and helped to facilitate these global resolutions. The hard-fought arm's-length settlement negotiations took place over the course of almost one year, amid a myriad of complicated issues, including the simultaneous settlements of the Trustee's avoidance claims and the civil forfeiture with the United States government, and included numerous in-person and telephonic meetings.[FN36] During the course of the negotiations, the parties debated the merits of their respective potential claims and defenses. Plaintiffs' Co–Lead Counsel zealously and knowledgeably advanced the Settlement Class' positions and were fully prepared to pursue litigation against JPMorgan rather than accept a settlement that was not in the best interest of the Settlement Class.

FN36. *See* Joint Final Approval Declaration at ¶¶ 33–39 for a detailed discussion of the settlement negotiations.

***8** By the time of the Settlement, Plaintiffs' Co–Lead Counsel were well-positioned, following an extensive investigation, to critically evaluate the propriety of settlement.FN37 And while counsel were undoubtedly interested in their compensation, the separate $18 million payment of attorneys' fees and expenses by JPMorgan was negotiated with JPMorgan only *after* the parties had structured and agreed to the terms of the Settlement.

FN37. *See In re Elec. Carbon Prods. Antitrust Litig.,* 447 F.Supp.2d 389, 400 (D.N.J.2006) ("Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.") (citing *In re Linerboard Antitrust Litig.,* 292 F.Supp.2d 631, 640 (E.D.Pa.2003)).

The hard-fought and arduous settlement negotiations demonstrate that the Settlement is the result of fair and honest negotiations. Further, Plaintiffs' Co–Lead Counsel, who have extensive experience in the prosecution of complex class action litigation, with particular expertise in complex commercial and financial litigation, have made a considered judgment that the Settlement is not only fair, reasonable and adequate, but an excellent result for the Settlement Class.FN38

FN38. *See D'Amato,* 236 F.3d at 85 ("the settlement resulted from arm's-length negotiations and [ ] plaintiffs' counsel have possessed the experience and ability ... necessary to [the] effective representation of the class's interest").

As a result, the court gives the Settlement a strong presumption of fairness.

III. THE *GRINNELL* FACTORS CONFIRM THAT THE CLASS SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

A presumption is, of course, only a presumption—it can be rebutted. Here, however, independent analysis of the terms of the settlement, using the Grinnell factors, confirms the propriety of the presumption.

A. Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement.

This factor captures the probable costs, in both time and money, of continued litigation.FN39 "Class 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."FN40

FN39. *See In re Bears Stearns Cos., Inc. Secs., Derivative, and ERISA Litig.,* 909 F.Supp.2d 259, 265 (S.D.N.Y.2012); *CCF,* 263 F.R.D. at 123.

FN40. *Luxottica,* 233 F.R.D. at 310 (citations omitted).

Absent this Settlement, JPMorgan would likely litigate against Class Plaintiffs for years to come, consuming thousands of hours of professional time and substantial expense, assuming plaintiff's claims were able to survive a dispositive motion. Given the lengthy time period at issue in this case, this litigation would also likely involve massive discovery—far more than the discovery already taken in aid of the settlement negotiations—millions of pages of documents, and scores of depositions. In addition, any litigation here would involve extensive and contested motion practice, and, assuming the success of the Class Plaintiffs at each of these stages, a complex and costly trial, followed by likely appeals. FN41 Throughout this process, the Class Plaintiffs would face numerous hurdles to establishing JPMorgan's liability. Moreover, even if the Plaintiffs were to prevail at all stages of such litigation, any potential recovery (in the absence of a settlement) would occur years from now, substantially delaying payment and other relief to the Settlement Class.

FN41. *See New York v. Nintendo, Inc.,* 775 F.Supp. 676, 681 (S.D.N.Y.1991) (approving settlement in complex litigation where court held: "If the litigation proceeds to trial, it no doubt will be complex, protracted and costly. Even if [plaintiffs] ultimately prevail, it could be years before consumers received any meaningful restitution."); *Hicks v. Morgan Stanley,* 01 Civ. 10071, 2005 WL 2757792, at *6 ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

In contrast, the Settlement, if approved, would provide for an immediate cash payment of $218 million to the Settlement Class. In addition, in connection with the Class Settlement, JPMorgan has agreed to pay $325 million to the Trustee in connection with the Trustee's avoidance claims against JPMorgan. Finally, JPMorgan has also agreed to a civil forfeiture of $1.7 billion to the United States Department of Justice. In total, therefore, JPMorgan has agreed to make a payment of $2,243,000,000—all of which will be distributed to Madoff victims. The proposed distributions represent an immediate and substantial benefit to the Settlement Class, free of the risk of many years of complex litigation.

B. Reaction of the Class Supports Approval of the Settlement.

***9** A favorable reception by the Settlement Class constitutes "strong evidence" of the fairness of a proposed settlement and supports judicial approval.FN42 A small number of objections are convincing evidence of strong support by class members.FN43 Indeed, "In litigation involving a large class it would be 'extremely unusual' not to encounter objections.' " FN44 In *Stoetzner v. U.S. Steel Corp.,* FN45 the Third Circuit held that the fact that "only" 29 members of a 281 member class (*i.e.,* 10% of the class) had objected "strongly favors settlement." Likewise, in *Boyd v. Bechtel Corp.,* FN46 the fact that only 16% of the class objected was deemed "persuasive" of the adequacy of the settlement.

FN42. *Grinnell,* 495 F.2d at 462; *see also Wal–Mart,* 396 F.3d at 119 ("the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry").

FN43. *Id.* ("Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that ... [o]nly ***twenty*** objectors appeared from the group of 14,156 claimants.") (emphasis added).

FN44. *NASDAQ,* 187 F.R.D. at 478 (citation omitted).

FN45. 897 F.2d 115, 118–19 (3d Cir.1990).

FN46. 485 F.Supp. 610, 624 (N.D.Cal.1979).

The Settlement has received overwhelming support. Nearly 2,800 notices were mailed to Class members.FN47 Only ten opt-out requests were filed. FN48 One of those was filed by attorney Helen Davis Chaitman, Esq. on behalf of a group of so-called "net winner" BLMIS customers (the "Net Winner Customer Group").FN49 The "net winners," in brief, are Madoff investors who were deemed ineligible for SIPA recovery or recovery in the Bankruptcy Court because, over time, they withdrew more money from their Madoff Investment Accounts than they invested with BLMIS, which meant that they had not really lost any money. Their theory—that they should have been allowed to recover some or all of the money they thought they had earned from their BMLIS investments—was not adopted by the Trustee or the Bankruptcy Court, which decision was affirmed by the United States Court of Appeals for the Second Circuit.FN50 As a result, a decision was made not to include them in the definition of the Settlement Class. There is nothing for them to "opt out" of, because any claims they might have against JPMorgan are by definition not compromised by the settlement. I can and do, therefore, treat the Chaitman "opt out" as a nullity.FN51 In addition to the Chaitman "opt out," AlixPartners received opt-out requests from five other "Net Winner" accounts, as determined by the Trustee, which are also excluded from the definition of the Settlement Class, and which, for this court's purposes, are of no interest.

FN47. *See* Declaration of Vineet Sehgal of Alix Partners, LLP [ECF No. 64].

FN48. The SIPA Trustee entered a default judgment against the main opt-out, in a far greater sum than the value of its claim against the settlement fund. *See* Account 1 of Exhibit G to the Declaration of Vineet Sehgal of Alix Partners, LLP [ECF No. 64]. The main opt-out is a foreign entity that may not wish to subject itself to the jurisdiction of this Court.

FN49. *See Notice of Intention to Opt Out of the Proposed Settlement Agreement Among the Trustee, The Class Action Plaintiffs and JPMorgan Chase,* ECF No. 19 (Case No. 11–cv–07961), ECF No. 55 (Case No. 11–cv–08331), Exhibit A.

FN50. *See In re Bernard L. Madoff Inv. Sec. LLC,* 654 F.3d 229, 242 (2d Cir.2011).

FN51. The parties to the settlement argued that such group opt-outs are not permitted. *See* NEWBERG on Class Actions § 9:49 (5th ed.) ("The right to opt out in a Rule 23(b)(3) class action is considered an individual right.... [A] plaintiff ... may not also opt out a group en masse without the express consent of each individual."); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1024 (9th Cir.1998). From this I erroneously concluded that Attorney Chaitman was part of the group that was purporting to opt out. I now appreciate that Attorney Chaitman was appearing on behalf of a group of 193 of her clients. I am filing an amended decision to correct the record. The fact remains that Attorney Chaitman's clients are not members of the Settlement Class, so there is no basis on which they could "opt out" of the settlement.

In sum, there appear to be nine valid opt outs from a Settlement Class of nearly 2,800 members. Support for the settlement is indeed overwhelming.

The only objection to the Settlement was filed by Philip ‘loop, Elizabeth Scott and the Elizabeth F. Scott Family GST Exempt Trust UA (collectively referred to as the “Loop Objection”).FN52 It will be discussed below.

FN52. This objection, focused predominately on the business judgment of the SIPA Trustee, should have more appropriately been filed in the Bankruptcy Court in which the SIPA liquidation of BLMIS is pending. However, the time to file objections in the Bankruptcy Court to the Trustee's settlements with JPMorgan Chase expired on January 28, 2014 and no objections were filed in that proceeding. Moreover, the Bankruptcy Court approved the Trustee's settlements with JPMorgan on February 5, 2014 and the time for appeal has since passed. As such, the arguments in the Toop Objection are misplaced and untimely, and should not be considered by this Court.

C. The Stage of the Proceedings and the Extent of the Investigation Support Approval of the Class Settlement.

In determining whether a class action settlement is fair, reasonable and adequate, courts consider the stage of the proceedings and the amount of discovery completed to ensure that plaintiffs had access to sufficient information to evaluate their case properly and to assess the adequacy of any settlement proposal.FN53 Here, Plaintiffs and their counsel had ample information to evaluate the strengths and weaknesses of their claims and the defenses that could be asserted by JPMorgan, as well as the propriety of settlement.

FN53. *See Weinberger,* 698 F.2d at 74; *Chatelain v. Prudential–Bache Sec.,* 805 F.Supp. 209, 213–14 (S.D.N.Y.1992).

***10** By the time the Settlement was reached. Plaintiffs' Co–Lead Counsel had thoroughly analyzed the possible legal claims against JPMorgan and the substantial legal and factual defenses raised by JPMorgan. In addition, as further described at ¶¶ 34–36 of the Joint Final Approval Declaration, Plaintiffs' Co–Lead Counsel reviewed and analyzed over a million pages of documents produced by JPMorgan and interviewed numerous JPMorgan senior executives, in order to fully understand and evaluate the relationship between JPMorgan and Madoff, and the quantum of evidence that exists concerning JPMorgan's alleged role in Madoff's Ponzi scheme. Co–Lead Counsel also had the benefit of the discovery record generated in the Trustee's proceeding related to Madoff, and held detailed collaborative discussions with the Trustee's professionals who had conducted their own exhaustive investigation of potential claims against JPMorgan. Furthermore, Co–Lead Counsel, themselves, conducted detailed interviews with numerous important JPMorgan senior executives who had not previously been examined by the Trustee. As a result, the court is satisfied that plaintiffs have a full understanding of the strengths and weaknesses of possible claims against JPMorgan and the difficulties they would encounter in this litigation.

D. The Risks of Establishing Liability Support Approval of the Settlement.

It has long been recognized that complex class actions are difficult to litigate.FN54 “The legal and factual issues involved are always numerous and uncertain in outcome.” FN55 Thus, in assessing this factor, the Court is not required to “decide the merits of the case or resolve unsettled legal questions,” FN56 or to “foresee with absolute certainty the outcome of the case.” FN57 “[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.” FN58 This litigation is no exception; as this Court has already opined, Madoff investor cases against third parties like JPMorgan would involve numerous complex and novel issues of fact and law.FN59

FN54. *See* *CCF,* 263 F.R.D. at 123 ("The complexity of Plaintiffs claims *ipso facto* creates uncertainty.") (citations omitted); *In re Art Materials Antitrust Litig.,* 100 F.R.D. 367, 372 (N.D.Ohio 1983).

FN55. *In re Motorsports Merch. Antitrust Litig.,* 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000).

FN56. *Carson v. Am. Brands. Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981).

FN57. *In re Austrian & German Dank Holocaust Litig.,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000).

FN58. *Global Crossing,* 225 F.R.D. at 459.

FN59. *See, e.g.,* *Picard v. JPMorgan Chase & Co.,* 460 B.R. 84, 92 (S.D.N.Y.2011), *aff'd sub nom.* *In re Bernard L. Madoff Inv. Sec. LLC.,* 721 F.3d 54 (2d Cir.2013); *Picard v. HSBC Bank PLC,* 454 B.R. 25 (S.D.N.Y.2011), *amended sub nom. In re Bernard L. Madoff Inv. Sec. LLC,* ADV. 08–1789 BRL, 2011 WL 3477177 (S.D.N.Y. Aug.8, 2011), *aff'd sub nom.* *In re Bernard L. Madoff Inv. Sec. LLC.,* 721 F.3d 54 (2d Cir.2013).

For example, Class Plaintiffs faced a substantial risk of their claims being adversely impacted by developing law interpreting SLUSA. In addition, Class Plaintiffs' aiding and abetting theories require proof of *substantial knowledge* and participation in the primary wrongdoing. Although JPMorgan has elected to settle, including with the Government, for a substantial payment, it continues to maintain that its employees did nothing wrong, and there is no "smoking gun" in the evidence reviewed during Plaintiffs' investigation. Finally, substantial legal questions exist concerning discovery into, and JPMorgan's liability with respect to, key submissions JPMorgan made to regulators concerning Madoff. While Plaintiffs' Co–Lead Counsel believe that Class Plaintiffs can bring a strong case against JPMorgan, they recognize that a favorable verdict is never assured—especially where, as here, the issues are novel and the theories are untested.

E. The Risks of Proving Damages Support Approval of the Class Settlement.

***11** Should Class Plaintiffs in a case against JPMorgan overcome any dispositive motions and ultimately prove JPMorgan's liability, they would still face the risks of proving damages. Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.FN60

FN60. *See* *Am. Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F.Supp.2d 1031, 1042 (N.D.Cal.2001) ("Plaintiffs cannot prove causation of actual [antitrust] injury without ... expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors.").

F. The Risks of Maintaining the Class Action Through Trial Support Approval of the Class Settlement.

"This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial." FN61 Settlement permits the parties to ensure that class status will not be lost. Courts may always exercise their discretion to re-evaluate the appropriateness of class certification at any time, and no one can deny that developments in class action law, including multiple decisions from the United States Supreme Court, have altered the landscape in which class status is determined.FN62 The possibility of decertification thus favors settlement.

FN61. *Meijer. Inc. v. 3M,* No. 04–5871, 2006 U.S. Dist. LEXIS 56744, at *50, 2006 WL 2382718 (E.D.Pa.2006).

FN62. *See Chatelain,* 805 F.Supp. at 214 ("Even if certified, the class would face the risk of decertification."); *see also, e.g., Comcast Corp. v. Behrend,* 133 S. Cl. 1426 (2013); *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

G. The Reasonableness of the Class Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation Supports Approval.

The reasonableness of the Settlement 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." FN63 The issue for the Court is not whether the Settlement represents the "best possible recovery," but how it relates to the strengths and weakness of plaintiffs' claims and the risks of continued litigation. In making this determination, the Court should recognize that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.' " FN64

FN63. *In re "Agent Orange" Prod Liab. Litig.,* 597 F.Supp. 740, 762 (E.D.N.Y.1984).

FN64. *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 624 (9th Cir.1982) (citations omitted).

As discussed above, approval of the $218 million Settlement will result in an immediate distribution to the Settlement Class, rather than a speculative payment many years down the road.FN65 All told, the Settlement, along with JPMorgan's $325 million payment to the Trustee, and $1.7 billion forfeiture to the United States, will ultimately enable Madoff victims to receive over $2 billion from JPMorgan, to the benefit of the Settlement Class. The Settlement represents a substantial recovery for the Settlement Class, and, as such, may well be the best possible recovery in light of the circumstances of a possible lawsuit against JPMorgan.FN66

FN65. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *44, 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) (where settlement amount has been paid, "the benefit of the Settlement will ... be realized far earlier than a hypothetical post-trial recovery").

FN66. *See Indep. Energy,* 2003 U.S. Dist. LEXIS 17090, at *13, 2003 WL 22244676 (noting few cases tried before a jury result in the full amount of damages claimed).

H. The Ability of JPMorgan to Withstand a Greater Judgment.

JPMorgan can withstand a judgment greater than that secured by the Settlement. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." FN67 JP Morgan's financial circumstances do not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate.

FN67. *In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173, 2008 U.S. Dist. LEXIS 36093, at *23, 2008 WL 1956267 (S.D

.N.Y. May 1, 2008) (*quoting McBean v. City of New York,* 233 F.R.D. 377, 388 (S.D.N.Y.2006)); *see also IMAX,* 283 F.R.D. at 189 (same).

I. The Toop Objection Does Not Counsel Against the Result Suggested by the Grinnell Factors.

The Toop Objection acknowledges that "any test of reasonableness must weigh the benefits of the settlement ... against the consequences of not settling at this time for this amount." Nonetheless, it argues that reasonableness should not require them to "defer to the judgments of the Lead Plaintiffs and the S1PA Trustee." FN68 However, courts have long recognized that complex class actions, such as the present case, are notoriously difficult to litigate. FN69 Thus, the Court is not required to "decide the merits of the case or resolve unsettled legal questions." FN70 "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the settlement." FN71

FN68. Toop Objection ¶ 2.2.1.

FN69. *See In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 123 (S.D.N.Y.2009) ("The complexity of Plaintiff's claims *ipso facto* creates uncertainty"), *aff'd sub nom. Priceline.com, Inc. v. Silberman,* 405 F. App'x 532 (2d Cir.2010); *In re Art Mat. Antitrust Litig.,* 100 F.R.D. 367, 372 (N.D.Ohio 1983).

FN70. *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981).

FN71. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004).

***12** The Toop Objection contends that the Settlement is unreasonable because it does not consider the continued litigation costs stemming from separate actions brought by the SIPA Trustee against other financial institutions. It is wrong. In determining reasonableness under *Grinned,* courts have consistently looked to the continued litigation of the case at issue, not of separate actions. FN72 The issue for the Court is how the Settlement relates to the strengths and weaknesses of Plaintiffs' claims in this particular action and the risks of continued litigation. In making this determination, the Court should recognize that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.' " FN73 Approval of the $218 million Settlement will result in an immediate distribution to the Settlement Class, rather than a speculative payment many years down the road. Consequently, the Settlement represents a substantial recovery for the Settlement Class, and, as such, may well be the best possible recovery in light of the circumstances of a possible lawsuit against JPMorgan.

FN72. *See In re Pfizer Inc. S'holder Derivative Litig.,* 780 F.Supp.2d 336, 342 (S.D.N.Y.2011) ("Given the daunting legal standard ... plaintiffs would have faced very substantial risks in continuing to prosecute *this action."*) (emphasis added); *Odom v. Hazen Transp., Inc.,* 275 F.R.D. 400, 412 (W.D.N.Y.2011) ("The Settlement Agreement ... represents ... a reasonable compromise that accounts for the risks and rewards posed by this litigation.").

FN73. *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 624 (9th Cir.1982).

The Toop Objection contends that the $218 million Settlement is unreasonable because it "ignores the consequences of JPMorgan's deferred prosecution agreement" with the United

States Government and "falls outside the bounds of any likely finding of damage given the scale of the losses sustained by customers...." FN74 This contention is misguided. First, the Settlement is an integral part of a global resolution of Madoff-related litigation against JPMorgan involving three simultaneous, separately negotiated settlements, totaling over $2 billion from JPMorgan, all of which will flow to victims of Madoff's Ponzi scheme.

FN74. Toop Objection ¶ 2.2.2, Reason 2.

Second, the reasonableness of the Settlement 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.*" FN75 Despite the loop Objection's contention that the Settlement ignores information gleaned from JPMorgan's deferred prosecution agreement with the U.S. Government, Co–Lead Counsel reviewed and analyzed the deferred prosecution agreement before finalizing the Settlement, with the express purpose of ensuring there was no materially new information beyond the facts previously reviewed by Co–Lead Counsel through extensive and informal discovery provided by JPMorgan. In any event, Plaintiffs face several significant obstacles in surviving dispositive motions. While Co–Lead Counsel believes Plaintiffs' claims against JPMorgan are strong, a favorable verdict is never assured, especially where, as here, JPMorgan has valid defenses that could absolve it of liability. FN76

FN75. *In re "Agent Orange" Prod. Liab. Litig.,* 597 F.Supp. 740, 762 (E.D.N.Y.1984), *aff'd,* 818 F.2d 145 (2d Cir.1987).

FN76. *Taft v. Ackermans,* No. 02 Civ. 7951(PKL), 2007 WL 414493, at *6 (S.D.N.Y. Jan.31, 2007) ("... [T]he Court's inquiry is into whether the plaintiffs have sufficient information to evaluate the adequacy of the proposed settlement, not whether they have availed themselves of all possible information.' ")

IV. THE PROPOSED PLAN OF ALLOCATION IS APPROVED.

The proposed Plan of Allocation is set forth in the Notice at pages 13–14 [ECF No. 57, pp. 20–21]. FN77 It is fair and adequate, and should be approved.

FN77. A copy of the Notice is Exhibit A to the Alix Partners Declaration, Exhibit 5 to the Joint Final Approval Declaration.

***13** "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.... An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." FN78

FN78. *Bear Stearns,* 909 F.Supp.2d at 270 (quoting *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 344 (S.D.N.Y.2005) (internal citations and quotation marks omitted); *see also In re Am. Int'l. Grp., Inc. Secs. Litig.,* No. 04 Civ. 8141, 2013 WL 1499412, at *6 (S.D.N.Y. April 11, 2013).

As noted above, JPMorgan will pay $218 million to settle the claims advanced in the Action. The Notice, including the Plan of Allocation at pp. 13–14, was mailed to all class members. Alix Partners Declaration. ¶ 10. The $218 million settlement amount, less any costs in connection with the administration of the Settlement by the Claims Administrator, will be distributed to all members of the Settlement Class who file a timely Proof of Claim

("POC"), on a *pro rata* basis, based on a Settlement Class Member's "Net Losses" as of December 11, 2008.FN79 If a Settlement Class Member has already filed a POC in connection with the S1PA Proceeding, that Class Member will not be required to file another POC. and their POC filed in the SIPA proceeding will be used in this proceeding.FN80 A Class Member's Net Losses are calculated by taking the amount of money a Class Member deposited into their Madoff account, and subtracting any withdrawals.FN81 This calculation of Net losses is intended to be coextensive with the Trustee's "net investment method," the method of loss calculation that has been upheld by the Second Circuit.FN82

FN79. *See* pages 13–14 of the Notice, ¶ 9 and Section D, "Plan of Allocation." [ECF 57, pp. 20–21]

FN80. *Id.*

FN81. *Id.*

FN82. *See generally In re Bernard L. Madoff Inv. Sec., LLC,* 654 F.3d 229 (2d Cir.2011).

The Plan of Allocation is designed to fairly allocate funds to members of the Settlement Class. It is approved.

V. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE.

The Court hereby certifies the Settlement Class for purposes of the Settlement under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The proposed Settlement Class here is defined as all BLMIS customers or their successors, transferees or assignees, who directly had capital invested with BLMIS as of December 11, 2008.FN83 This class definition is intended to include only "Net Losers." The Settlement Class does not include: (i) BLMIS insiders and their families; (ii) defendants in any criminal Madoff-related proceeding; (iii) BLMIS accountholders whose claims against the BLMIS estate were extinguished by virtue of three separate settlements with the Trustee, the estate of Jeffry Picower, *Picard v. Picower,* 09–1197(BRL) (Bankr.S.D.N.Y.) (ECF No. 43), the Carl Shapiro Family, *SIPC v. BLMIS,* 08–1789 (Bankr.S.D.N.Y.) (LCF No. 3551), and Jeanne Levy–Church and Francis N. Levy, *SIPC v. BLMIS,* 08–1789 (Bankr.S.D.N.Y.) (ECF No.1964); or (iv) any persons or entities that exclude themselves from the Selllemenl Class by filing a request for exclusion that is accepted by the Court. FN84

FN83. Settlement Agreement [ECF No. 51–1], ¶ 6.

FN84. *Id.*

Pursuant to the Settlement Agreement, the parties agreed, for settlement purposes only, to request certification under Federal Rules of Civil Procedure Rules 23(a) and (b)(3) of the Plaintiffs' claims against JPMorgan, and that the Judgment would provide for the releases of JPMorgan and any parents, subsidiaries, affiliates and employees.FN85

FN85. *See* Settlement Agreement [ECF No. 51–1], ¶ 13.

***14** The Second Circuit recognizes the propriety of certifying a class solely for purposes of a class action settlement.FN86 I hereby conclude that the proposed Settlement Class satisfies Rule 23(a) and Rule 23(b), certify the Settlement Class, appoint the Plaintiffs to lead the Settlement Class, and appoint Entwistle and Cappucci and Hagens Berman Sobol Shapiro as Settlement Class Counsel.

FN86. *See In re Am. Int'l Grp. Inc. Sec. Litig.,* 689 F.3d 229, 238–39 (2d

Cir.2012).

A. The Settlement Class Satisfies the Requirements of Rule 23(a).

Certification is appropriate because the proposed Settlement Class readily meets each of the four requirements of Rule 23(a).

1. The Settlement Class Members Are Too Numerous to Be Joined.

Plaintiffs meet the first requirement of Rule 23(a) because the proposed Class is so numerous that joinder of all members is impracticable.[FN87] To satisfy the numerosity requirement, "a plaintiff need not show that joinder is impossible. Nor need the plaintiff know the exact number of class members."[FN88] Rather, while "[t]here is no strict numerical test for determining impracticability of joinder[,] .... [w]hen class size reaches substantial proportions ... the impracticability requirement is usually satisfied by the numbers alone."[FN89] Judicial consensus is that a class with as few as 40 members satisfies the requirement.[FN90] Here, the Settlement Class consists of over 2,000 individuals and entities throughout the world. The number of potential Settlement Class members, coupled with their widely-dispersed locations in the United States and around the world, makes joinder impracticable and class treatment appropriate.

FN87. *See* Fed.R.Civ.P. 23(a)(1).

FN88. *Saddle Rock Partners Ltd. v. Hiatt,* No. 96 Civ. 9474, 2000 WL 1182793, at *2 (S.D.N.Y. Aug.21, 2000) (citations omitted).

FN89. *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996) (citations omitted).

FN90. *See, e.g., Consul. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995); *In re NTL, Inc. Sec. Litig.,* No. 02 Civ. 3013, 2006 WL 330113, at *5 (S.D.N.Y. Feb.14, 2006).

2. There Are Common Questions of Law and Fact.

Rule 23(a)(2) requires that there must be questions of law or fact common to the class. The commonality requirement of Rule 23(a) is met if the claims involve questions of law or fact that are common to the class.[FN91] The commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law in common with the purported class.[FN92]

FN91. *See Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 155 (2d Cir.2001).

FN92. *See Marisol A. by Forbes v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997).

The Plaintiffs and members of the proposed Class have numerous issues of law and fact in common, including:

(a) Whether JPMorgan violated duties owed to Plaintiffs and members of the Class;

(b) Whether JPMorgan aided and abetted BLMIS' theft from Plaintiffs and members of the Class; and

(c) The extent to which Plaintiffs have suffered damages and the measure of such damages.

These common issues are more than sufficient to satisfy Rule 23(a) (2).

3. The Class Representatives' Claims Are Typical.

Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[FN93] Like the test for commonality, "[t]he typicality requirement is 'not demanding.' " FN94 The typicality requirement is readily met where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." FN95 There is no requirement, however, that the claims of all members of a proposed class be identical.FN96

FN93. Fed.R.Civ.P. 23(a)(3).

FN94. *In re Initial Pub. Offering Sec. Litig. (IPO II),* 227 F.R.D. 65, 87 (S.D.N.Y.2004) vacated on other grounds. 471 F.3d 24 (2d Cir.2006) (citations omitted).

FN95. *In re Vivendi Universal S. A.,* 242 F.R.D. 76, 85 (S.D.N.Y.2007) (internal quotation and citation omitted).

FN96. *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144, 2009 WL 5178546, at *10, (S.D.N.Y. Dec. 23, 2009).

***15** The Plaintiffs' claims are typical of the claims of other members of the Settlement Class because their losses all derive from the same course of JPMorgan's conduct. The facts necessary to advance Plaintiffs' potential claims are the same as those necessary for absent Class members to establish theirs; thus, typicality is established.

4. The Class Representatives Fairly and Adequately Protect the Interests of the Settlement Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." This requirement is met if it appears that: (1) the named plaintiffs' interests are not antagonistic to the class' interests; and (2) the plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation.FN97

FN97. *See In re Drexel Burnham Lambert Grp.,* 960 F.2d 285, 291 (2d Cir.1992); *In re Marsh,* 2009 WL 5178546, at *10.

Here, Plaintiffs and members of the Class are similarly situated because they share the same claims and have the same interest in maximizing the recovery from JPMorgan. FN98 The Plaintiffs have thus far protected the interests of the proposed Settlement Class vigorously and without conflict, and they will continue to do so throughout the litigation. Plaintiffs are individuals who, as customers of Bernard L. Madoff Investment Securities LLC ("BLMIS"), deposited funds with BLMIS and are "Net Losers." Each has the same interest as members of the Class in establishing that JPMorgan's conduct caused or contributed to their damages; therefore, their incentives align perfectly.

FN98. *See Drexel,* 960 F.2d at 291; *In re Polaroid ERISA Litig.,* 240 F.R.D. 65, 77 (S.D.N.Y.2006) (no conflict of interest between class representatives and absent class members where they share the common goal of maximizing recovery).

Co–Lead Counsel—Entwistle & Cappucci and Hagens Berman Sobol Shapiro—have extensive experience and expertise in complex litigation and class action proceedings throughout the United States, and are uniquely qualified to conduct this litigation by virtue of their extensive experience in successfully prosecuting other Madoff-related litigation against third parties and by virtue of their experience in working with SIPA trustees and in prosecuting similar litigation against JPMorgan. Thus, the requirements of Rule 23(a)(4) are satisfied.

B. The Predominance Requirement of Rule

23(b)(3) is Satisfied .

Rule 23(b)(3) requires that the common questions of law or fact predominate over any questions affecting only individual class members and that a class action is superior to other available methods of adjudication. Both of these requirements are met.

1. Common Questions Predominate.

Rule 23(b)(3) does not require a complete absence of any individual issues. FN99 Rather, it requires predominance, which entails that "some of the legal or factual questions" can be resolved through "generalized proof" and that "these particular issues are more substantial than the issues subject only to individualized proof." FN100 The Supreme Court has defined this inquiry as establishing "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." FN101 This inquiry is "similar" to Rule 23(a)(3)*s typicality requirement. FN102 The Court added that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." FN103

FN99. *See Dura–Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 99 (S.D.N.Y.1981) ("To be sure, individual issues will likely arise in this as in all class action cases.").

FN100. *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002).

FN101. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

FN102. *Id.* at 623 n. 18.

FN103. *Id.* at 625.

***16** This case involves the type of "common nucleus of operative facts and issues 'with which the predominance inquiry is concerned.' " FN104 The proof of any liability on the part of JPMorgan in this case, if such claims were to be brought by Plaintiffs, would be common to the Class as a whole, and because such class-wide proof will be the overriding focus of any trial of this case, Rule 23(b) (3)'s predominance requirement is thus satisfied, and the proposed Class should be certified.

FN104. *In re Nassau Cnty. Strip Search Cases,* 461 F.3d 219, 228 (2d Cir.2006) .

2. A Class Action Is the Superior Method of Adjudication.

Rule 23(b)(3) also sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution ... of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by ... class members ... and (D) the likely difficulties in managing a class action." FN105 Considering these factors, proceeding by means of a class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the potential claims against JPMorgan.

FN105. Fed.R.Civ.P. 23(b)(3).

a. Any Individual Interest in Controlling the Prosecution of Separate Actions Is Limited.

The scope and complexity of Class Plaintiffs' potential claims against JPMorgan, together with the high cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class members would be able to pursue their own potential claims and obtain relief without class certification. Separate actions would also "risk disparate results among those seeking redress, ... exponentially increase the costs of litigation for all, and [ ] be a particularly inefficient use of judicial resources ." FN106

FN106. *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 133 (S.D.N.Y.2001) (footnote omitted).

b. Settlement–Only Class Certification Moots Manageability.

The final factor asks the Court to consider "the difficulties likely to be encountered in the management of a class action." FN107 Although management of this case as a class action would not render individual actions a better alternative, the factor is moot because when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." FN108 Accordingly, the requirements of Rule 23(b)(3) are satisfied.

FN107. Fed.R.Civ.P. 23(b)(3)(D).

FN108. *Amchem,* 521 U.S. at 620; *In re Am. Int'l Group Secs. Litig.,* 689 F.3d at 239–40 (2d Cir.2012) (internal citation omitted).

C. The Proposed Method of Class Notice Is Appropriate and Satisfies Due Process.

Rule 23(e)(1) requires that a "court must direct notice in a reasonable manner to all class members who would be bound by the proposal" to settle a class action. "Due Process requires that the notice to class members 'fairly apprise the ... 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.' " FN109 The Second Circuit has held that the adequacy of a class action settlement notice is "measured by reasonableness" and 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. Notice is adequate if it may be understood by the average class member." FN110 "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FN111

FN109. *Consol. Edison, Inc. v. Northeast Utils.,* 332 F.Supp.2d 639, 652 (S.D.N.Y.2004) (citation omitted); *see also* *Weinberger* 698 F.2d 61 at 70.

FN110. *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007).

FN111. Fed.R.Civ.P. Rule 23(c)(2)(B).

***17** Where, as here, "the parties seek simultaneously to certify a settlement class and to settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement or dismissal)." FN112 Rule 23(c)(2) requires the "best practicable notice," while Rule 23(e) requires notice that is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." FN113 Neither Rule 23 nor due process requires actual notice to each possible class member, FN114 although here, Plaintiffs reasonably believe that actual notice has been provided to each and every potential member of the class.

FN112. *Global Crossing,* 225 F.R.D. at 448 (S.D.N.Y.2004).

FN113. *In re Prudential Ins. Co. of Am.*

Sales Practices Litig., 962 F.Supp. 450, 527 (D.N.J.1997), *affd,* 148 F.3d 283 (3d Cir.1998).

FN114. *See In re Marsh,* 2009 WF 5178546, at *23–24; *Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 80–81 (S.D.N.Y.2003).

Pursuant to the Court's Preliminary Approval Order, two types of notice were provided to potential members of the class: (1) a notice of the settlement which was sent by first-class mail to all identifiable members of the class, along with a proof of claim form ("Mailed Notice"); and (2) a summary notice was published ("Summary Notice"). The Mailed Notice was mailed to all identifiable Settlement Class members who filed claims in the S1PA Proceeding, and the Mailed Notice also informed Settlement Class members that if they previously filed a claim in the SIPA proceeding, they need not file another proof of claim and will automatically participate in the settlement, unless they elect to opt-out of the Settlement Class. These notices were mailed to the address Settlement Class members provided in their S1PA claim form and, where appropriate, to the transferee of any such claim.[FN115] The Summary Notice was published in four separate locations: (1) *Bloomberg;*[FN116] (2) the website of the S1PA Trustee;[FN117] and (3) the two websites of each of the two Co–Lead Counsel.[FN118] In addition, the Claims Administrator established and maintains a website—www.shapiro-hillclasssettlement.com—on which anyone can obtain a copy of the Mailed Notice, or other pleadings and documents related to the case.[FN119]

FN115. *See* ¶¶ 9–10 of the February 12, 2014 Declaration of John Franks of Alix Partners LLP (ECF No. 57) ("Alix Partners Declaration"), a copy of which is attached as Exhibit 5 to the Joint Final Approval Declaration.

FN116. Alix Partners Declaration, ¶ 15.

FN117. http://www.madofftrustee.com/class–action–09.html.

FN118. *See* Joint Final Approval Declaration, ¶ 72 (attesting to posting of Summary Notice on http://www.entwistle-law.com/index and www.hbsslaw.com).

FN119. Alix Partners Declaration, ¶ 17.

These Notices, consistent with Rule 23(c)(2), Rule 23(e) and Rule 23(h), as well as paragraph 8 of the Preliminary Approval Order, included the following information: (1) a description of the class action; (2) a definition of the Settlement Class; (3) notification that the Court will exclude a class member upon request by a certain date; (4) notification that the judgment will include all members of the class who do not request exclusion; (5) notification that any class member who does not request exclusion may enter an appearance through counsel; (6) a description of the potential claims and defenses as well as the issues on which the parties disagree; (7) the general terms of the Class Settlement; (8) a clear explanation of the binding nature of the Class Settlement; (9) the Plan of Allocation pursuant to which the settlement proceeds would be allocated; (10) notification that complete information is available from the court files; (11) notification that any class member may appear and be heard at the Fairness Hearing; and (12) notice of the application for fees and expenses.

***18** The content of the Mailed Notice and the Summary Notice, as well as the method of notification, each satisfy the requirements under Rules 23(c), 23(e) and 23(h) as those rules have been interpreted in this District.

VI. CO–LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES IS GRANTED.

A. Co–Lead Counsel Is Entitled To An Award Of Attorneys' Fees And Expenses In Connection With The Settlement.

The Supreme Court has long recognized that "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." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *see also Goldberger,* 209 F.3d at 47; *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999).[FN120] The purpose of the common fund doctrine is to fairly and adequately compensate counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger,* 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov.7, 2007). Moreover, the Second Circuit Court of Appeals has confirmed that fees in common fund cases 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." *Wal–Mart Stores Inc. v. Visa U.S.A.,* 396 F.3d 96, 121 (2d Cir.2005).

FN120. Although the fee in this action was separately negotiated with JPMorgan, the common fund principles are applicable in that counsel here is entitled to a reasonable fee for the substantial benefit achieved on behalf of the Class.

In addition, courts have recognized that awards of reasonable attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See, e.g., Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002).

Here, the proposed Attorneys' Fees Payment is not derived from the $218 million Class Settlement Fund, and it will not reduce the award to the Settlement Class in any way. Rather, JPMorgan has agreed to pay a separate Attorneys' Fees Payment to Co–Lead Counsel, as a result of arms-length negotiations, conducted separate from and subsequent to the Class Settlement Amount agreement. The structure of the Attorneys' Fees Payment was designed intentionally by the Parties "to preserve as much of the settlement as possible for the Settlement Class." Settlement at ¶ P. *Cf., Thompson,* 216 F.R.D. at 67 ("[U]nlike common fund cases, where attorneys' fees can erase a considerable portion of the funds allocated for settlement, the fees were negotiated separately and after the settlement amount had been decided, thus considerably removing the danger that attorneys' fees would unfairly swallow the proceeds that should go to class members.")

B. The Percentage–Of–The–Fund Method

The Supreme Court has consistently held that it is appropriate for a fee to be analyzed as a percentage of the fund recovered. *See Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("under the 'common fund doctrine.' ... a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Trustees v. Greenough,* 105 U.S. 527, 532, 26 L.Ed. 1157 (1881); *Central R.R. & Banking Co. of Ga. v. Pettus,* 113 U.S. 116, 124–25, 5 S.Ct. 387, 28 L.Ed. 915 (1885); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 165–66, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). The percentage-of-the-fund method is preferred, in part, because of its "ease of administration, permitting the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from the lawyers' efforts' .... rather than collateral disputes over billing." *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 485 (S.D.N.Y.1998) (citation omitted).

***19** The Second Circuit authorizes district courts to employ the "percentage-of-the-fund method" when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used). Indeed, in *Wal–Mart,* 396 F.3d at 121, the Second Circuit recognized that the trend in determining the amount of a common fund fee in this Circuit is toward the percentage-of-the-fund method.FN121

FN121. *See also* *Clark v. Ecolab Inc.,* No. 07 Civ. 8623(PAC), 2010 WL 1948198, at *8 (S.D.N.Y. May 11, 2010) ("In this Circuit, the 'percentage-of-recovery' method is the 'trend.' ") (citation omitted); *Hicks v. Morgan Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *8 (S.D.N.Y. Oct.24, 2005) ("The trend in the Second Circuit recently has been to use the percentage method."); *In re WorldCom, Inc. Sec. Litig.,* No. 02 CIV 3288(DLC), 2004 WL 2591402, at *21 (S.D.N.Y. Nov.12, 2004); *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 520 (E.D.N.Y.2003).

Here, the requested Attorneys' Fee Payment is not being paid from the Class Settlement Fund. *Cf., Thompson,* 216 F.R.D. at 67. *See also, McBean v. City of New York,* 233 F.R.D. 377, 392 (S.D.N.Y.2006) ("If, however, 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 .").

But even if, *arguendo,* the Class Settlement Amount were to be constructively "pooled" together with the requested Attorneys' Fee Payment (for a total of $236 million), the Attorneys' Fee Payment would only represent approximately 7.6% of the total. By way of example, a review of district court decisions in this Circuit applying the *Goldberger* factors place a reasonable percentage-of-the-fund range between 10% and 30%. *See Farinella v. Paypal, Inc.,* 611 F.Supp.2d 250, 272–73 (L.D.N.Y.2009) (finding that a survey of 2008 district court decisions in this Circuit cases applying the *Goldherger* factors shows a percentage-of-the-fund range between 10% and 25% to be reasonable); *see also In re Excess Value Ins. Coverage Litig.,* 598 F.Supp.2d 380, 385–387, 391 (S.D.N.Y.2005) (approving a fee of 30% of the constructive value of the "total fund"). An Attorneys' Fee Payment of approximately 7.6% falls well within the standard of reasonableness articulated in this Circuit.

C. The Requested Attorneys' Fee Payment Is Fair And Reasonable Based On All Six *Goldberger* Factors.

In *Goldberger,* the Second Circuit held that:

> [N]o matter which method is chosen, 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 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).

As set forth below, the $18 million fee award sought by Co–Lead Counsel is fair and reasonable based on all six *Goldberger* factors.

1. The Time and Labor Expended by Counsel

The first factor for determining whether a fee is reasonable is " 'the time and labor expended by counsel.' " *Id.* As of February 8, 2014, Co–Lead Counsel and their staffs have spent more than 9,964 hours of professional time representing the interests of the Class, at a time value of $5,853,767 plus expenses of $52,812, for a total of $5,906,579.

Firm	Hours	Lodestar
Entwistle & Cappucci LLP	7,397.9	4,015,276.00
Hagens Berman Sobol Shapiro LLP	2,566.3	$ 1,848,491.75
Total	**9,964.2**	$ 5,863,767.75

***20** *See* Joint Attorneys' Fee Declaration, ¶¶ 7–10.

The work performed by counsel to date has been complex and wide ranging. Settlement ¶ L–M. Co–Lead Counsel conducted an independent and exhaustive investigation of the relationship between BLMIS and JPMorgan, including JPMorgan's activities as BLMIS's bank; reviewed and analyzed document productions by JPMorgan and the SIPA Trustee totaling more than a million pages; reviewed and analyzed Bankruptcy Rule 2004 examinations, trial and other Madoff related testimony; reviewed numerous related Madoff documents, including materials developed in related investigations by regulators and others; developed expert testimony on related issues and conducted their own interviews of numerous JPMorgan senior executive witnesses.

Accordingly, the time and effort devoted by Co–Lead Counsel to obtain $218 million on behalf of the Settlement Class well justifies the requested Attorneys' Fee Payment.

2. The Magnitude and Complexities of the Litigation

The Attorneys' Fee Payment is reasonable in light of the magnitude and complexity of the Class Action. As is now well documented, in December 2008, it was revealed that Madoff and BLMIS perpetrated the largest Ponzi scheme in history. Plaintiffs allege that JPMorgan played a central role in the Ponzi scheme perpetrated by Bernard L. Madoff and BLMIS. Plaintiffs contend that JPMorgan had actual knowledge of the scheme, was in a position to stop it, but did nothing. From approximately 1986 on, Madoff's primary account through which most, if not all, of the funds of BLMIS flowed, was a depository account at JPMorgan referred to as the "703 Account." In addition, Plaintiffs allege that JPMorgan acquired knowledge of the Ponzi scheme in connection with the structuring and issuing of certain financial products that would be based on feeder funds tied to Madoff. In connection with those transactions, JPMorgan performed due diligence on the feeder funds, and since these funds were invested with Madoff, attempted unsuccessfully to perform due diligence on BLMIS itself.

Plaintiffs' investigations into JPMorgan's involvement with Madoff focused on, *inter alia,* numerous round trip transactions involving Madoff's friend and insider Norman Levy, structured products very early in the relevant period, and the fees received by JPMorgan in connection with Madoff, including those related to the 703 Account.

On March 9, 2012, JPMorgan moved to dismiss the Class Complaint. One of JPMorgan's primary arguments in support of their motion to dismiss was that the Class Claims (which were common law claims), were all precluded under the Securities Litigation Uniform Standards Act ("SLUSA"). In support of their SLUSA arguments, JPMorgan cited numerous Madoff-related cases from this District, including from this very Court, which dismissed Madoff-related common law claims under SLUSA.FN122 JPMorgan also moved to dismiss on the basis that the Class Complaint failed to state a claim for relief, contending, among other things, that the complaint does not show JPMorgan's actual knowledge of or participation in Madoff's fraud. Co–Lead Counsel opposed the motion to dismiss and continued their ongoing investigation of the facts and circumstances related to Madoff generally and JPMorgan's involvement in Madoff specifically.

FN122. *See, e.g., In re J.P. Jeanneret Assocs., Inc.,* 769 F.Supp.2d 340 (S.D.N.Y.2011) (McMahon, J.); *See also, In re Herald,* 730 F.3d 112, 118 (2d Cir.2013), decided while JPMorgan's motion to dismiss was *sub judice.*

***21** As a threshold matter, the issues in the case are novel and complex given that the case involves the largest Ponzi scheme in U.S. history. Co–Lead Counsel has researched and evaluated novel and complex claims and areas of law arising from the unprecedented fraud. In sum, through the combined efforts of Co–Lead Counsel and the S1PA Trustee, Customer Class members who have waited over 5 years to recover their losses will be able to partake in the $218 million dollar settlement.

3. The Risks of Litigation

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining" a reasonable fee award. *Goldberger,* 209 L.3d at 54 (citation omitted).

a. Risks of Establishing Liability

It is well settled that class actions are notoriously complex and difficult to litigate. *See, e.g., Teachers' Ret. Sys. of La. v. A .C.L.N., Ltd.,* No. 01–CV–11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation"). "The legal and factual issues involved are always numerous and uncertain in outcome." *In re Motorsports Merch. Antitrust Litig.,* 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000).

This litigation is no exception. It involves numerous complex and novel issues of fact and law, and JPMorgan asserted numerous factual and legal defenses to any potential liability.

Moreover, even if JPMorgan was ultimately found liable—a matter JPMorgan vigorously disputes and which is subject to significant uncertainty both factually and legally—additional substantial distributions to Net Losers would be delayed for a number of years.

Assuming the potential claims that Plaintiffs may have brought against JPMorgan would have survived dispositive motion practice, Co–Lead Counsel could not be certain that they would ultimately succeed in achieving a determination of liability against JPMorgan.

b. Risks of Establishing Damages

Even if Plaintiffs were able to defeat dispositive motions and to overcome the risks in proving liability, they would still face the risks of proving damages. Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.[FN123] Here, even if Co–Lead Counsel could prove liability, JPMorgan has asserted substantial arguments in defense that any alleged shortfall was not legally or factually attributable to its conduct and that the shortfall should properly be made up in whole or part through recoveries from other parties.

FN123. *See Am. Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F.Supp.2d 1031, 1041–43 (N.D.Cal.2001) ("Plaintiffs cannot prove causation of actual [antitrust] injury without ... expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors.").

c. Risks to Counsel

The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis. *See City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir.1974), abrogated on other grounds by *Goldberger,* 209 F.3d at 39. Districts courts within this circuit have also recognized this risk.[FN124]

FN124. *See, e.g., Teachers' Ret. Sys.,* 2004 WL 1087261, at *3; *In re Am. Bank Note Holographics, Inc.,* 127 F.Supp.2d 418. 433 (S.D.N.Y.2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award") (emphasis omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 985 F.Supp. 410, 417 (S.D.N.Y.1997) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

***22** Here, Co–Lead Counsel undertook to represent Plaintiffs and the Customer-victims on a wholly contingent-fee basis. For years, Co–Lead Counsel have invested thousands of hours of time without any guarantee of compensation or even a recovery of out-of-pocket expenses. As this Court stated:

> 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.

In re Flag Telecom Holdings, Ltd. See. Litig., No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quotation omitted).

In undertaking to represent Plaintiffs and Customers, Co–Lead Counsel knew that the litigation and related Liquidation Proceedings would be lengthy, complex and labor intensive with no guarantee of compensation for the enormous investment of time and money. To date, counsel has spent 9,964.2 hours representing Customers at a total lodestar of $5,853,767. *See* Joint Attorneys' Fee Declaration, ¶ 7–10. Additionally, Co–Lead Counsel's total out-of-pocket expenses are $52,812. *Id.* Clearly, Co–Lead Counsel undertook enormous financial risks in representing Customers on a contingency basis.

4. The Quality of Representation

The fourth factor cited by the Second Circuit is the "quality of representation" delivered by counsel. *Goldberger,* 209 F.3d at 50. To evaluate this factor, courts in the Second Circuit "review the recovery obtained and the background of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 141 (S.D.N.Y.2008).

FN125

FN125. Moreover, an "indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [victims] expeditiously." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 467 (S.D.N.Y.2004).

a. Entwistle & Cappucci LLPFN126

FN126. *See* Joint Attorneys' Fee Declaration, ¶¶ 14–15.

Kntwistlc & Cappucci possesses extensive experience in complex litigation, including class actions, having successfully prosecuted some of the largest and highest-profile class actions in history. As sole or co-lead counsel in class actions, Entwistle & Cappucci has obtained billions of dollars in recoveries on behalf of defrauded class members. *See, e.g., In re Royal Ahold, N.V. Sec. & ERISA Litig.,* No. 03–md–01539–CCB (D. Md. June 16, 2006) (order re-formatted on June 21, 2006) (served as sole lead counsel and obtained a $1.1 billion recovery for the Class); *In re BankAmerica Sec. Litig.,* No. 99–md–1264–CEJ (E.D.Mo. Oct. 18, 2002) ($490 million recovery); *In re DaimlerChiysler AG Sec. Litig.,* No. 00–CV–00993–LPS (D.Del. Feb. 5, 2004) ($300 million recovery).

In addition to its extensive experience leading complex national class actions, Entwistle & Cappucci possesses extensive experience in cases with a liquidation or bankruptcy component. For example, acting as one of the lead counsel in the Tremont Fund Litigation (arising out of the Madoff Ponzi scheme), Entwistle & Cappucci has recovered more than $100 million from third parties, preserved the customers' rights to certain fidelity bond proceeds, and worked with defendants and the SIPA Trustee to negotiate a resolution of certain SIPC claims and related litigation which will result in customers recovering in excess of a billion dollars on those claims. Additionally, Entwistle & Cappucci acted as Special Litigation Counsel to the estate of Global Crossing, Ltd. in prosecuting claims of the estate for the benefit of unsatisfied creditors and was appointed to act as Special Counsel for the Receiver in "clawback" actions on behalf of victims in the Ponzi scheme of Edward T. Stein.

b. Hagens Berman Sobol Shapiro LLP FN127

FN127. *See* Joint Attorneys' Fee Declaration, ¶¶ 17–18.

***23** Hagens Berman is one of the premier law firms in the United States dedicated to the representation of plaintiffs in complex litigation. Hagens Berman collectively possesses hundreds of years of experience in complex litigation of all sorts, including class actions, having successfully prosecuted some of the largest and highest-profile class actions in history. As sole or co-lead counsel in class actions, Hagens Berman has obtained billions of dollars in recoveries on behalf of defrauded class members. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices, & Prods. Liab. Litig.,* No. 8:10–ML–2151 JVS (FMOx) (C.D.Cal.) (co-lead counsel; $1.6 billion recovered); *In re Elec. Books Antitrust Litig.,* No. 11–MD–2293 (S.D.N.Y.) (co-lead counsel; litigation still pending; over $100 million recovered to date); *In re Charles Schwab Sec. Litig.,* No. 08–CV–1510 (N.D.Cal.) (sole lead counsel; $235 million recovered); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.,* MDL No. 1446 (S.D.Tex.) (co-lead counsel; over $250 million recovered); *In re Visa Check/ MasterCard Antitrust Litig.,* 96–CV–5238 (E.D.N.Y.) (co-lead counsel; $3.25 billion recovered).

In addition to its extensive experience leading complex national class actions. Hagens Berman possesses extensive experience in cases with a liquidation or bankruptcy component. For example, along with co-lead counsel in this case (Entwistle & Cappucci) acting as one of the lead counsel in the Tremont Fund Litigation (arising out of the Madoff Ponzi scheme), Hagens Berman has recovered more than $100 million from third parties, preserved the customers' rights to certain fidelity bond proceeds, and worked with defendants and the SIPA Trustee to negotiate a resolution of certain SIPC claims and related litigation which will result in customers recovering in excess of a billion dollars on those claims.

5. The Requested Fee in Relation to the Settlement

As discussed above, Co–Lead Counsel has expended many thousands of hours representing the interests of the Class and, in conjunction with the SIPA Trustee, has achieved the Settlement that will result in a total $218 million cash payment to the Class. Accordingly, the requested Attorneys' Fee Payment, which comprises only approximately 7.6% of the total combined payments by JPMorgan, is well within the range of reasonableness compared to similar settlements in this district.[FN128]

FN128. *See, e.g., Fogarazzo v. Lehman Bros., Inc.,* No. 03 Civ. 5194(SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb.23, 2011) (one-third of $2.25 million settlement); *Flag Telecom,* 2010 WL 4537550, at *31 (30% of $24.4 million settlement, less expenses); *In re Bisys Sec. Litig.,* No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *2–3 (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. July 20, 2007) (30% of $80 million settlement); *Hicks,* 2005 WL 2757792, at *9 (30% of $10 million settlement); *In re Warnaco Grp., 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); *In re Blech Sec. Litig.,* No. 94 Civ. 7696(RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec.4, 2002) (33.3% of settlement); *Kurzweil v. Philip Morris Cos., Inc.,* No. 94 Civ. 2373(MBM), 1999 WL 1076105, at *1 (S.D.N.Y. Nov.30, 1999) (30% of $123.82 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 Med. X–Ray Film Antitrust Litig.,* No. CV–93–5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug.7, 1998) (awarding 33.3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

6. Public Policy Considerations

Congress viewed private lawsuits as "critical to protecting the public and fundamental to maintaining the credibility of the futures market." *Cange v. Slotler & Co.,* 826 F.2d 581, 594–595 (7th Cir.1987) *citing* to H.R.Rep. No. 97–565(II), pt. 1, at 56–7 (1982), *reprinted* in 1982 U.S.C.C.A.N. 4022, 1982 WL 25140.

In *In re Initial Public Offering Securities Litigation,* 671 F.Supp.2d 467, 515–16 (S.D.N.Y.2009), this Court recognized the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis:

***24** [C]lass actions serve as private enforce-

> ment tools when ... regulatory entities fail to adequately protect investors ... plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences ... awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

See also *Maley,* 186 F.Supp.2d at 374 ("Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities").

Public policy considerations here strongly support the requested Attorneys' Fee Payment. Skilled counsel must be incentivized to pursue complex and risky claims such as those at issue here.

D. The Requested Attorneys' Fees Are Also Reasonable Under The Lodestar Cross–Check With A Reasonable Multiplier.

The Second Circuit has approved district courts' use of counsel's lodestar as a "cross check" to ensure the reasonableness of a fee awarded under the percentage-of-the-fund method. *See Goldberger,* 209 F.3d at 50. Where counsel's lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* Instead, "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

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." *Prudential,* 985 F.Supp. at 414.

Additionally, "[u]nder 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,* 166 F.3d at 460.

"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." *In re Comverse Tech., Inc. Sec. Litig.,* No. 06 CV 1825(NGG), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (multiplier of 2.78 was "well within the range awarded in comparable settlements.").

"Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Career Colls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240(CM), 2007 WL 2230177, at *56 n. 7 (S.D.N.Y. July 27, 2007); *accord Wal–Mart,* 396 F.3d at 123 (finding as reasonable a lodestar multiplier of 3.5) (citing *NASDAQ,* 187 F.R.D. at 489 (holding that " 'multipliers of between 3 and 4.5 have become common' ")); *see also, In re Worldcom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 354–59 (S.D.N.Y.2005) (approving $194.6 million fee, for a lodestar multiplier of 4.0). Under these circumstances, a lodestar multiplier of approximately 3.05 is reasonable and appropriate.

E. The Requested Attorneys' Fees Are Reasonable Under Either The Percentage–Of–The–Fund Method Or Lodestar Analysis.

***25** Under either analysis—percentage-of-the-fund or lodestar—the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47. The Attorneys' Fee Payment requested is well within the range of fees awarded by courts in this Circuit, whether considered as a percentage-of-the-fund or as a reasonable multiple of counsel's lodestar.

F. Courts Favorably View Fees Negotiated By Settling Parties.

Although the fee in this action was separately negotiated by JPMorgan subsequent to the Settlement, common fund principles are applicable. Co–Lead Counsel are entitled to a reasonable fee for the substantial benefit achieved on behalf of the Class. That the Attorneys' Fee Payment was later separately negotiated weighs in favor of its reasonableness. *See, e.g., Dupler v. Costco Wholesale Corp.,* 705 F.Supp.2d 231, 244 (E.D.N.Y.2010) ("the fact that the parties did not negotiate the issue of attorneys' fees until after deciding on the benefit to the class weighs in favor of the reasonableness of the fees") (internal citation omitted); *In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *15 (S.D.N.Y. May 1, 2008) ("[T]he fee was negotiated only *after* agreement had been reached on the substantive terms of the Settlement benefitting the class. This tends to eliminate any danger of the amount of attorneys' fees affecting the amount of the class recovery.") (internal citation omitted).

G. Co–Lead Counsel's Expenses Were Reasonable And Necessary.

"Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis Energy Corp. Sec. Litig.,* No. 95–CV–3431(ARR), 2001 WL 1590512, at *17 n. 12 (E.D.N.Y. Oct.31, 2001).

Here, the expenses of Co–Lead Counsel totaled a relatively modest $52,812. No separate payment is requested for such expenses, which are included in the requested Attorneys' Fee Payment.

CONCLUSION

For the foregoing reasons, the Court hereby: (1) certifies the proposed Class for purposes of this Settlement; (2) finds that the Class notice was fair, adequate and reasonable and in compliance with due process, Rule 23 and the Court's prior orders; (3) appoints Entwistle and Cappucci and Hagens Berman Sobol Shapiro as Settlement Class Counsel; (4) grants final approval of the Settlement Agreement and Plan of Allocation; (5) authorizes Settlement Class Counsel to make disbursements to Class members; and (6) awards attorneys' fees and expenses in the amount of $18,000,000. The Clerk of the Court is directed to remove Docket Nos. 58 and 61 in Case No. 11–cv–8331 and Docket Nos. 22 and 25 in Case No. 11–cv–7961 from the Court's list of pending motions and to close the files.

S.D.N.Y.,2014.
Shapiro v. JPMorgan Chase & Co.
Slip Copy, 2014 WL 1224666 (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 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 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 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 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 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 aftermarket 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:

> (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 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.

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 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 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.

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 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 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* 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 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 unreimbursed 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.)

END OF DOCUMENT

Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

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United States Court of Appeals,
Second Circuit.
Ibelka VARGAS, and the Class of those Persons Similarly Situated,
Plaintiff–Appellant,
v.
CAPITAL ONE FINANCIAL ADVISORS, aka GreenPoint Savings Bank, aka GreenPoint Mortgage Funding, Countrywide Bank, Countrywide Financial Corporation, aka Countrywide Home Loans, Inc., IBM Lender Business Process Services, Inc., Seterus, Bank of America, NA, Defendants–Appellees.[FN**]

No. 13–3262.
March 13, 2014.

Background: Hispanic female mortgagor filed putative class action against lenders, claiming discriminatory residential mortgage loan practices in violation of Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA). The United States District Court for the Southern District of New York, Laura Taylor Swain, J., 2013 WL 4407094, dismissed for failure to state claims that were barred by res judicata and release under prior class settlement agreement. Mortgagor appealed.

Holdings: The Court of Appeals held that:
(1) class counsel in prior class action was adequate;
(2) notice of prior class settlement was adequate; and
(3) mortgage reformation claim was barred by res judicata and prior release.

Affirmed.

West Headnotes

[1] Judgment 228 ⚷677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons Represented by Parties. Most Cited Cases

Class counsel in prior class action by minority mortgagors against mortgagee, for allegedly discriminatory residential mortgage loan practices under Federal Housing Act (FHA) and ECOA, was adequate, thus foreclosing Hispanic female mortgagor's due process claim on collateral attack of prior class action judgment in order to establish that she was not bound to class settlement under res judicata principles, since counsel was qualified, experienced, and generally able to conduct litigation.

U.S.C.A. Const.Amend. 5; Equal Credit Opportunity Act, § 701, 15 U.S.C.A. § 1691; 42 U.S.C.A. § 3601 et seq.

[2] Compromise and Settlement 89 ⚷ 68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

Constitutional Law 92 ⚷3983

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3980 Class Actions
92k3983 k. Compromise and Settlement. Most Cited Cases

Federal Civil Procedure 170A ⚷179

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak179 k. Sufficiency. Most Cited Cases

Judgment 228 ⚷677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons Represented by Parties. Most Cited Cases

Notice of prior class settlement agreement between minority mortgagors and mortgagee, resolving discriminatory residential mortgage loan claims under Federal Housing Act (FHA) and ECOA, was procedurally and substantively adequate, thus foreclosing Hispanic female mortgagor's due process claim on collateral attack of prior judgment in order to establish that she was not bound by settlement under res judicata principles; notice was reasonably sent by first class mail to every prospective member of settlement class at addresses derived from mortgagee's records, notice mailed by mortgagee to mortgagor's correct address was not returned as undeliverable, and notice was not required to give legal advice to class members or to provide speculative calculations of mortgagee's potential exposure. U.S.C.A. Const.Amend. 5 ; Equal Credit Opportunity Act, § 701, 15 U.S.C.A. § 1691; 42 U.S.C.A. § 3601 et seq.

[3] Judgment 228 ⚷588

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k588 k. Grounds of Action or Recovery. Most Cited Cases

Judgment 228 ⚷677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons Represented by Parties. Most Cited Cases

Hispanic female mortgagor's class action claim that lenders engaged in discriminatory residential mortgage loan practices in violation of Federal Housing Act (FHA) and ECOA, by declining to reform her mortgage, was barred by res judicata principles and release under prior class settlement agreement resolving minority mortgagors' FHA and ECOA discriminatory home mortgage loan claims against mortgagee that was predecessor to lender in subsequent class action, since mortgagor was party to prior class settlement, all allegedly discriminatory events were same in both class actions, and all facts necessary to support claims were pleaded or could have been pleaded in prior action. Equal Credit Opportunity Act, § 701, 15 U.S.C.A. § 1691; 42 U.S.C.A. § 3601 et seq.

Appeal from an August 16, 2013 judgment of the United States District Court for the Southern District of New York (Swain, J.).
Phillip Jaffe, New York, NY, for Plaintiff–Appellant.

Anand S. Raman, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC, for Capital One Financial Advisors.

Christine Burke Cesare and Scott Harris Kaiser, Bryan Cave LLP, New York, NY, for Countrywide Bank, Countrywide Financial Corporation, AKA Countrywide Home Loans, Inc., and Bank of America, NA.

Allison J. Schoenthal and Courtney Colligan, Hogan Lovells U.S. LLP, New York, NY, for IBM Lender Business Process Services, Inc. and Seterus.

Present PIERRE N. LEVAL, SUSAN L. CARNEY, Circuit Judges, KATHERINE POLK FAILLA, District Judge.[FN*]

SUMMARY ORDER

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court is **AFFIRMED.**

Ibelka Vargas appeals from the judgment of the District Court dismissing her complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). In 2012, Vargas brought this putative class action against Defendants–Appellees Capital One Financial Advisors ("Capital One"); Countrywide Bank; Countrywide Financial Corporation; Bank of America, NA; IBM Lender Business Process Services, Inc.; and Seterus (collectively, the "Lenders"). She alleged that the Lenders engaged in discriminatory residential mortgage loan practices in violation of the Fair Housing Act, 42 U.S .C. § 3601, *et seq.;* the Equal Credit Opportunity Act, 15 U.S.C. § 1691; and 42 U.S.C. §§ 1981 and 1982.

The District Court's dismissal rested on its determination that *res judicata* and a class settlement agreement barred Vargas's claims. Vargas is a member of the settlement class approved by the United States District Court for the Northern District of California in *Ramirez v. GreenPoint Mortgage Funding, Inc.,* No. 08–cv–00369 (TEH) (N.D.Cal. Apr. 12, 2011) ("*Ramirez*"). The *Ramirez* settlement class is party to a Settlement Agreement entered into in 2011 with GreenPoint Mortgage Funding ("GreenPoint"), the named defendant in the *Ramirez* litigation. GreenPoint was in 2006 acquired by Capital One, which succeeded to GreenPoint's interests in Vargas's first and second mortgage loans. As alleged in her complaint in the district court here, Vargas's first mortgage was thereafter successively acquired by the remaining Lenders, and her claims against those Lenders are derivative of her claim against Capital One. Vargas did not opt out of the *Ramirez* settlement class. The district court ruled, accordingly, that Vargas's claims against Capital One and the other Lenders were covered by *res judicata* and the release effected by the Settlement Agreement approved by the *Ramirez* court.[FN1]

On appeal, Vargas argues that the district court erred in applying *res judicata* principles to her claims, principally because of deficiencies Vargas perceives (1) in the delivery and substance of the *Ramirez* settlement class notice, and (2) in the representation provided by *Ramirez* class counsel. She also contends that *res judicata* does not bar the injunctive relief that she sought in the district court, under which her loan would be modified and the principal owed would be reduced. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review, to which we refer only as necessary to explain our decision to affirm.

"We review a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Fait v. Regions Financial Corp.,* 655 F.3d 105, 109 (2d Cir.2011). To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). Most relevant here, we will "affirm the dismissal of a complaint for failure to state a claim based on the affirmative defense of res judicata if all relevant facts are shown by the court's own records, of which we can take judicial notice." *AmBase Corp. v. City Investing Co. Liquidating Trust,* 326 F.3d 63, 72 (2d Cir.2003) (internal quotation marks omitted).

***2** In *Ramirez,* class representatives alleged that GreenPoint used a pricing policy for residential mortgages that had a "widespread discriminatory impact on minority applicants for home mortgage loans, in violation of the [Equal Credit Opportunity Act] and the [Fair Housing Act]." After three years of pretrial proceedings, *Ramirez* was resolved by a court-approved Settlement Agreement under which GreenPoint created a settlement fund of $14,750,000 for the benefit of the plaintiff class. Of that amount, $3,687,500 (or 25%) was designated for class counsel's fees, and an additional $425,412.04 for costs actually incurred by counsel. Pursuant to the release contained in the Agreement, members of the *Ramirez* plaintiff class were "deemed to have fully, finally and forever released all claims, causes of action, or liabilities ... whether known or unknown ... as alleged or as could have been alleged based upon the facts asserted in the Amended Complaint as to the Released Party." D. Ct. Dkt. No. 24–3 at 9–10. Section 2 .23 of the Agreement defined the "Released Party" to include GreenPoint "as well as its current, former and future direct and indirect parent companies, affiliates, subsidiaries, agents, representatives, successors, ... and assigns and all persons acting for or on their behalf." *Id.* at 4.

Notice of the proposed settlement was sent by first class mail to GreenPoint residential mortgage borrowers at the addresses listed in GreenPoint's records, which were updated using a national database of address changes compiled by the United States Postal Service. On April 11, 2011, the district court issued its final approval of the settlement and dismissed the *Ramirez* action with prejudice.

Over one year later, in August 2012, Vargas filed the complaint at issue here, naming Capital One and the other Lenders as defendants, and alleging primarily violations of the Equal Opportunity Act and the Fair Housing Act. In 2013, the District Court dismissed her complaint, as described above.

Vargas, a Hispanic woman, obtained first and second mortgage loans on her New Jersey residence from GreenPoint in 2007. She does not dispute, accordingly, that she was a member of the *Ramirez* settlement class, or that with respect to her current claims regarding the Lenders' allegedly discriminatory conduct in making her mortgage loans, the *Ramirez* judgment satisfies the elements of *res judicata:* it was a final judgment on the merits, by a court of competent jurisdiction, in a case involving the same parties or their privies, and involving the same causes of action. *See EDP Med. Computer Sys. Inc. v. United States,* 480 F.3d 621, 624 (2d Cir.2007).

Instead, she invokes the Due Process Clause of the Constitution in an attempt to free herself of *res judicata* and the binding elements of the settlement. Vargas argues that the *Ramirez* judgment should not preclude her from prosecuting this suit because, in her view, the class representatives were conflicted, and class counsel's services and the notice provided to settlement class members were inadequate. *See Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.,* 439 F.3d 165, 171 (2d Cir.2006) ("[A]n absent party denied [adequate] representation [can] collaterally attack [a] class action judgment."); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (holding that a class action judgment awarding money damages will not bind an absent plaintiff without adequate notice).

***3** [1] Vargas argues that class counsel in *Ramirez* was inadequate because (as she alleges) they colluded with GreenPoint, accepting a grossly insufficient settlement award in exchange for exorbitant attorneys' fees. Vargas did not raise her claim of collusion in the District Court proceedings, however. "[P]erceiving that no miscarriage of justice will result," *Burnette v. Carothers,* 192 F.3d 52, 58 (2d Cir.1999), we conclude that Vargas has waived her argument claiming collusion. Treating the broader issue of counsel's adequacy as preserved, we are not persuaded by Vargas's argument. A settlement award that might seem low in comparison to an award of attorneys' fees and costs—and this one, with fees amounting to 25% of the total award, does not strike us as particularly disproportionate—does not on its own establish any inadequacy of class counsel. Neither does an award that seems low in comparison to the amount of damages that a plaintiff speculates a class may suffer. We assess the adequacy of class counsel not by the results counsel achieves, but rather by determining whether they are "qualified, experienced and generally able to conduct the litigation." *In re Joint Eastern and Southern Dist. Asbestos Litig.,* 78 F.3d 764, 778 (2d Cir.1996) (internal quotation marks omitted). Vargas has made no showing that class counsel failed to meet this standard. Thus, for these reasons and for those articulated by the District Court in its Memorandum Order, we comfortably conclude that class counsel in *Ramirez* was adequate, and we reject this aspect of Vargas's collateral attack.

Vargas also challenges the *Ramirez* settlement by claiming that she received inadequate notice of it and its terms, both because of the method used to deliver the notice and the notice's substance. When a class settlement is proposed, the court "must direct to class members the best notice that is practicable under the circumstances." Fed.R.Civ.P. 23(c)(2)(B); *see also* Rule 23(e)(1). In addition to being sent by an adequate physical delivery method, *Phillips Petroleum Co.,* 472 U.S. at 798, a settlement notice "must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings," *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 114 (2d Cir.2005) (internal quotation marks omitted).

[2] The *Ramirez* court directed that class notice be sent by first class mail to every prospective member of the settlement class at addresses (as noted above) derived from GreenPoint's records. While Vargas denies actually receiving the notice, she does not dispute that notice was mailed to the correct address and that, as GreenPoint avers, it was not returned to the sender as undeliverable. Here, the District Court concluded that the delivery method approved by the *Ramirez* court was reasonable, and Vargas has not advanced a credible argument that the method was not reasonable. Nor does she claim that she opted out of the settlement, as the notice advised was her right.

***4** Rather, Vargas presses her charge that the notice was substantively inadequate because it failed, *inter alia,* to affirmatively advise members who are not satisfied with the settlement to opt-out of the settlement and hire an attorney to pursue their "true damages." Appellant's Br. at 21. It was further inadequate, Vargas maintains, because it did not set forth what Vargas calculates to be the damages sustained by each class member over the full term of his or her mortgage. But Vargas cites no authority for the propositions that a class notice need give legal advice to class members or provide speculative calculations of defendants' potential exposure to be sufficient under Rule 23. For these reasons and for those articulated by the District Court in its Memorandum Order, therefore, we easily reject Vargas's contention regarding the substantive adequacy of the class notice.

[3] Finally, Vargas contends that the District Court erred in dismissing her fourth cause of action, which she claims was unaffected by *Ramirez* as a matter of either *res judicata* or the settlement release. In this claim, Vargas appears to have sought reformation of at least one of her mortgages to reduce the principal amount due, in line with an offer allegedly made by Bank of America. Because the "events constituting the asserted injury are the same in this case as in its predecessor[ ]," and "all the facts necessary to support the claims before us now were pleaded, or could have been pleaded, in the first action," *In re Teltronics Services, Inc.,* 762 F.2d 185, 193 (2d Cir.1985), we find no error in the District Court's dismissal of the fourth cause of action, too, on the basis of the settlement release and *res judicata.*

CONCLUSION

We have reviewed Vargas's remaining arguments on appeal, and find them to be without merit. For the reasons set forth above, we **AFFIRM** the August 16, 2013 judgment of the District Court.

FN** The Clerk of Court is directed to amend the official caption in this case to conform to the above listing of the parties.

FN* The Honorable Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

FN1. Of the Defendants–Appellees, only Capital One Financial Advisors filed a brief in this appeal. To the extent that the claims against Capital One were correctly resolved by the district court's dismissal—as we hold they were—the claims against the remaining Lenders were also correctly dismissed.

C.A.2 (N.Y.),2014.
Vargas v. Capital One Financial Advisors
--- Fed.Appx. ----, 2014 WL 960935 (C.A.2 (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 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 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.

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 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;

(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 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 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 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 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. *Repub-*

lic 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 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 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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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 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. 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 (S.D.N.Y.)

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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.

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 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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