UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION; AND (II) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Plaintiffs respectfully submit this reply memorandum in further support of: (i) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (ECF No. 250) and (ii) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (ECF No. 252).[1]

I. INTRODUCTION

In accordance with the Court's April 1, 2014 Notice Order, the Court-appointed claims administrator, The Garden City Group, Inc. ("GCG"), has disseminated nearly one million Notices to potential Settlement Class Members and nominees.[2] In addition, the Summary Notice was published in the national edition of *The Wall Street Journal* and *Investor's Business Daily* and over *PR Newswire*, and both the Notice and Summary Notice were made available on the settlement website, www.weatherfordsecuritieslitigationsettlement.com. The Notice informed recipients of, *inter alia*, the terms of the Settlement and Plan of Allocation and Lead Counsel's

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[1] Capitalized terms used herein shall have those meanings contained in the Stipulation of Settlement and Release dated January 28, 2014 (ECF No. 240-1) 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 (ECF No. 254). Unless otherwise noted, all emphasis is added and internal citations and footnotes are omitted. All "Ex." references are to the exhibits attached to the Declaration of Eli R. Greenstein in Support of Plaintiffs' Reply Memorandum in Further Support of (I) Motion for Final Approval of Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses, filed concurrently herewith.

[2] *See* Supplemental Affidavit of Jose C. Fraga (the "Supplemental Fraga Aff."), submitted on behalf of GCG, Ex. A, at ¶4. As described in a separate letter being submitted to the Court today, due to belated initial requests for Notices made by four nominees (including two nominees with a large number of clients who are potential Settlement Class Members) in violation of the Court's Notice Order, a substantial number of additional Notices were recently mailed to potential Settlement Class Members. In order to allow these potential Settlement Class Members to exercise their rights, Lead Counsel has requested the Court's endorsement of the following deadline extensions for these potential Settlement Class Members as follows: (i) July 28, 2014 as the deadline to request exclusion or object to any aspect of the Settlement, and (ii) October 6, 2014 as the deadline to submit a Claim Form in order to be potentially eligible to receive a distribution from the Net Settlement Fund.

intention to apply to the Court for attorneys' fees not to exceed $12.6 million and reimbursement of expenses up to $1.5 million, which amount includes up to $25,000 in reimbursement to Plaintiffs. The deadlines to request exclusion from the Settlement Class or to file an objection to the Settlement, or any aspect thereof, have now passed.

The Settlement Class's response to the Settlement to date has been overwhelmingly positive. Not a single institutional investor has objected to any portion of the Settlement. Indeed, Lead Counsel has received only two objections to date, both of which are meritless and should be rejected.[3] The first objection, submitted by Stephen Schoeman (the "Schoeman Objection") fails to provide any documentation or supporting evidence to establish membership in the Settlement Class—a threshold standing requirement to object.[4] The Schoeman Objection is also premised on material inaccuracies, such as the assertion that Lead Counsel is requesting "fees totaling $52,600,000" an amount greater than the entire $52.5 million settlement. Exs. C & D, Schoeman Obj. at 1. Accordingly, the Schoeman Objection is both procedurally and substantively defective and should be overruled.

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[3] *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118, 119 (2d Cir. 2005) ("the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry"). *See also Sewell v. Bovis Lend Lease LMB, Inc.*, No. 09 Civ. 6548 (RLE), 2012 WL 1320124, at *7 (S.D.N.Y. Apr. 16, 2012) ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 457-58 (S.D.N.Y. 2004) (six objections out of a class of approximately one million was "vanishingly small" and "constitutes a ringing endorsement of the settlement by class members"). In addition, a total of fourteen requests for exclusion from the Settlement Class have been received to date, representing a minuscule fraction of the nearly one million Notices mailed to potential Settlement Class Members and nominees and further underscoring the positive reaction by the Settlement Class to date. *See* Supplemental Fraga Aff., Ex. A, at ¶15. These exclusion requests (based upon the information provided) represent less than 2,000 shares of Weatherford common stock in the aggregate.

[4] Attached as Exs. B, C and D are letters received from Mr. Schoeman dated April 25, 2014, May 29, 2014 and May 30, 2014, respectively.

The second objection was submitted by Jeff M. Brown (the "Brown Objection") (attached as Ex. E), a Boca Raton attorney and serial "professional" objector who routinely seeks out class action settlements and fee requests for the purpose of lodging unsupported objections—only to later withdraw those objections or fail to defend them at final approval hearings. *See* §II(B), *infra*. Notably, Mr. Brown failed to comply with the Court's Notice Order which requires objectors to provide a "*list of other cases* in which the objector or the objector's counsel have appeared either as settlement objectors or as counsel for objectors in the preceding five years." ECF No. 249 at ¶13. As an attorney and seasoned professional objector, Mr. Brown cannot claim ignorance regarding the express requirements of the Court's Notice Order.

In addition to procedural infirmities, the Brown Objection is also substantively meritless. Mr. Brown makes boilerplate arguments that are either inapplicable to the Settlement record here, or directly contradicted by arguments made in his prior (rejected) settlement objections. *See* §II(B), *infra*. This type of assembly-line objection adds nothing to the Court's consideration of the fairness, adequacy or reasonableness of the proposed Settlement.

Accordingly, and for all the reasons set forth in Plaintiffs' opening briefs filed with the Court on May 27, 2014 (the "Opening Papers"), the two objections should be overruled, and the Settlement, Plan of Allocation and request for fees and expenses should be approved.

II. ARGUMENT

A. The Schoeman Objection Should be Overruled

As a threshold matter, Mr. Schoeman—a retired attorney—fails to provide documentation establishing his membership in the Settlement Class and, thus, his standing to object. *See In re Am. Int'l Grp., Inc. Sec. Litig.*, 916 F. Supp. 2d 454, 459 (S.D.N.Y. 2013) (it is "uncontested that [an objector who is not a class member] does not have standing under Rule 23

to object to the Settlement"). Bare assertions of class membership do not establish standing. *See Feder v. Elec. Data Sys. Corp.*, 248 F. App'x 579, 581 (5th Cir. 2007) (holding that an objector who produced no evidence to prove his class membership lacked standing to object to settlement, and stating that "[a]llowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process"); *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 379 (S.D.N.Y. 2013) (excluding objections "from individuals who did not provide the required evidence of class membership or who provided evidence indicating they were not class members"). For this reason alone, Mr. Schoeman's objection should be rejected.

Even if Mr. Schoeman could establish standing, his objection is baseless. Mr. Schoeman's primary objection appears to be that the Notice did not set forth in detail the amount of attorneys' fees and expenses requested by Lead Counsel. *See, e.g.*, Ex. B, Schoeman Obj. at 1 ("The 'Notice' does not detail the alleged plaintiffs' counsel's fee nor does it detail the 'Litigation Expenses'!"). Had Mr. Schoeman simply read the Notice Order and waited for Plaintiffs' settlement briefing filed only weeks after his letter, however, he would have had the benefit of supporting materials for Lead Counsel's fee and expense request, which were also made available to Settlement Class Members on the public docket and settlement website.[5] Lead Counsel also personally served the Opening Papers on Mr. Schoeman. *See* ECF Nos. 250-254.[6]

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[5] Moreover, the Notice contains all of the information required by due process and Federal Rule of Civil Procedure 23. *See* ECF No. 249 at ¶8 (finding form and manner of publication, mailing and distribution of Notices to "meet requirements of Rule 23 [], Section 21D(a)(7) of the Securities Exchange Act of 1934 [], as amended by the Private Securities Litigation Reform Act of 1995 [], 15 U.S.C. § 78u-4(a)(7), the Constitution of the United States, and any other applicable law, and constitute the best notice practicable under the circumstances").

[6] It appears that Mr. Schoeman's overall objection lies not with the present Settlement, but with class actions generally. Ex. C., Schoeman Obj. at 2 ("This is a matter now for the Congress to consider. That is, the bringing of class action lawsuits that may or may not serve any public

Lead Counsel's submission sets forth ample support for the fee request, including extensive detail regarding the work performed by Lead and Liaison Counsel on behalf of the Settlement Class, as well as the request for reimbursement of expenses incurred in prosecuting and resolving the Action. Lead Counsel's submission also demonstrates that the fees and expenses requested are appropriate given the quality and amount of work performed, the favorable result for the Settlement Class, and the applicable fee and expense jurisprudence.

Given Mr. Schoeman's lack of standing and his failure to substantiate his generalized complaints, his objection should be overruled.

B. The Brown Objection Should be Rejected

Mr. Brown objects to: (i) Lead Counsel's request for attorneys' fees; (ii) the *cy pres* provision contained in the Notice; and (iii) the overall fairness of the Settlement to the Settlement Class. Ex. E, Brown Obj. at 1. For the reasons discussed below, Mr. Brown's objections are meritless and should be overruled.

As an initial matter, it is worth noting that Mr. Brown is a known "professional" objector and has submitted similar unsubstantiated objections in several recent class actions. *See* Ex. F, *In re Verifone Holdings, Inc. Sec. Litig.*, Case No. 3:07-cv-06140-EMC (N.D. Cal. Dec. 30, 2013) (ECF No. 334) (Ex. F) (objection overruled and noting "the intransigence of counsel for Mr. Brown to produce evidence of standing and counsel's last-minute decision to appear at the final fairness hearing even telephonically" (ECF No. 359) (Ex. G)); *In re Sanofi-Aventis Sec. Litig.*, Civil Action No. 1:07-cv-10279-GBD (S.D.N.Y. Dec. 16, 2013) (ECF No. 273) (Ex. H) (objection overruled (ECF Nos. 281 and 282) (Exs. I and J, respectively)); *In re SunPower Sec.*

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purpose…."); Ex. D, Schoeman Obj. at 1 ("I have repeatedly received notices of this or that class action and have the same problem. The matter is unintelligible and insufficient information is supplied..."). These abstract objections to well-established Rule 23 procedures are insufficient to undermine the fairness and reasonableness of the specific Settlement and fee request here.

Litig., Case No. 09-CV-5473-RS (JSC) (N.D. Cal. June 12, 2013) (ECF No. 264) (Ex. K) (objection voluntarily withdrawn for lack of standing (ECF No. 265) (Ex. L)). "Federal courts are increasingly weary of professional objectors". *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003); *see also In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) ("professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients").

Given Mr. Brown's history of filing unsubstantiated objections to class actions, it is not surprising that he failed to provide the information mandated by the Court's Notice Order regarding his prior objections to class action settlements over the past five years. As set forth above, this history undermines the merit of his objection here.[7] Even if Mr. Brown had complied with the Court's Notice Order, in light of his clear record as a professional objector, Plaintiffs respectfully submit that the Court should view his objection with appropriate skepticism. As summed up by the Court in *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 WL 6916834 (D. Mass. Aug. 22, 2006):

> [P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Id. at *1.

[7] Under the express terms of the Notice Order, therefore, Mr. Brown has "waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Settlement as reflected in the Stipulation, to the Plan of Allocation or to the application by Lead Counsel for an award of attorneys' fees and reimbursement of Litigation Expenses." *See* ECF No. 249 at ¶13.

1. The Requested Fee is Fair, Reasonable and Supported by the *Goldberger* Factors, the Settlement Class and Sophisticated Institutional Investor Plaintiffs

As set forth in Plaintiffs' Opening Papers, the $52.5 million Settlement was only achieved through Lead Counsel's extensive efforts over the course of nearly three years of hard-fought litigation. The Settlement was reached after the substantial completion of fact discovery and just prior to the parties' exchange of expert reports. ECF No. 254 at ¶¶18-76. In reaching this point in the litigation, Lead Counsel devoted substantial resources to investigating, prosecuting and ultimately resolving Plaintiffs' claims on a wholly contingent basis. The requested fee ($12.6 million) is less than Plaintiffs' Counsel's aggregate lodestar of $12,912,708.50 and corresponds with the amount permitted under Lead Counsel's retainer agreement with Lead Plaintiff, negotiated at the outset of this Action. Additionally, the fee request is fully supported by the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43 (2d Cir. 2000), and under the lodestar approach permitted by the Second Circuit. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). Mr. Brown's cookie-cutter objection to Lead Counsel's fee request is based on unsupported assertions−many of which were raised by Mr. Brown prior (overruled) objections.

a. Plaintiffs Faced Substantial Risks in this Action

Ignoring the extensive discussion of the results achieved and the risks attendant to this Action as provided in the Opening Papers (*see, e.g.*, ECF No. 254 at ¶¶88-96), Mr. Brown generally asserts that Lead Counsel "overstates the quality of the legal representation and complexity of the issues." Ex. E, Brown Obj. at 2. He further contends that "much of the investigative work [in this Action] was done by the [SEC and DOJ] before Lead Counsel became

involved" and that "Weatherford's restatements provided the information needed to make many of the allegations." *Id*. These assertions are meritless.

First, contrary to Mr. Brown's suggestion, the accounting and restatement claims here were especially complex—involving (i) technical tax accounting misstatements over the course of four fiscal years; (ii) complicated accounting for and tax treatment of "intercompany" dividends between dozens of foreign subsidiaries; (iii) varying degrees of "deficiencies" in tax controls under Sarbanes-Oxley (some of which may not require disclosure); (iv) the uncertain interplay between GAAP and tax reporting; and (v) a labyrinthine corporate tax structure based in Switzerland underlying all of the accounting and internal control issues in the case.

Second, the mere fact that a restatement occurred was no guarantee that Plaintiffs would succeed in proving (or even pleading) scienter—*i.e.* that the accounting corrections were the result of fraudulent intent, as opposed to negligence or mistaken accounting. Indeed, many cases involving restatements are dismissed at the pleading stage. *See, e.g.*, *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Fin. Holdings Ltd.*, 886 F. Supp. 2d 328 (S.D.N.Y. 2012); *Caiafa v. Sea Containers Ltd.*, 525 F. Supp. 2d 398 (S.D.N.Y. 2007). Most importantly, this Court dismissed Plaintiffs' accounting and restatement claims in their entirety for failure to adequately allege scienter and rejected several attempts by Plaintiffs to revive those allegations. ECF Nos. 88, 103. Thus, the only surviving claims in the case were limited to Defendants' Internal Control Misstatements made by a single individual defendant, CFO Andrew P. Becnel. ECF No. 254 at ¶29. Mr. Brown's objection fails to even acknowledge the actual facts in this case, let alone explain why that record does not support approval of the Settlement.

Third, Mr. Brown's suggestion that Lead Counsel "relied heavily on work done by government attorneys" is unfounded. Mr. Brown does not provide any explanation of what

"investigatory work" was provided to Plaintiffs by the government. Indeed, despite investigating Defendants' alleged conduct for over three years, neither the SEC or DOJ has brought a single charge or claim against Defendants based on the same restatement that Mr. Brown now submits "provided the information needed to make many of the [fraud] allegations." Ex. E.,m Brown Obj. at 2. Moreover, the mere fact that the SEC wrote Weatherford a letter asking questions about the restatement in March 2011—and failed to take action in the three years since—did not provide any meaningful advantage for Plaintiffs in alleging or proving fraud claims.

Lead Counsel's success here was achieved through three years of rigorous litigation, including seven motions to compel (all of which were granted in part) and the development and review of approximately 2.3 million pages of documentary evidence. This evidence included materials and interview memos obtained only as a result of Plaintiffs' success establishing Defendants' waiver of privilege and work product protection—a result vigorously contested by two separate law firms representing Weatherford and its Audit Committee. Simply put, Plaintiffs' success was not achieved because of the SEC's "investigative work," but rather, the Settlement represents the only current recovery for shareholders in light of the SEC's inaction. *See Goldberger*, 209 F.3d at 55 ("the quality of representation is best measured by the results").[8]

Finally, Mr. Brown's attempt to downplay the risk and complexity of this Action, and his conclusory assertion that the "risk of non-settlement" is "extremely low," is speculation based entirely on hindsight bias. When Lead Counsel began prosecuting this Action, there was no guarantee that a successful result would be achieved; yet Lead Counsel invested significant time,

[8] Mr. Brown made this same argument in *Verifone*, which was overruled. *See* Ex. F, *Verifone* Obj. (ECF No. 334) at 2 ("Contrary to Class Counsel's assertions, proving the financial improprieties which resulted in artificially inflated stock prices and the later precipitous decline would not be difficult. Most information related to the price decline was publicly available and much of Class Counsel's hard work was devoted to reviewing documents provided by the Securities and Exchange Commission and the company's public filings.").

effort and out-of-pocket expenses to pursue the Settlement Class's claims and obtain a favorable recovery. Accordingly, Mr. Brown's unsupported generalizations regarding the risks in this case do not substantiate his Objection and should be rejected.

b. The Allocation of Work Performed by Lead Counsel in this Action is Reasonable

Mr. Brown's attempt to trivialize the work performed by Lead Counsel's team of full-time staff attorneys is meritless and ignores the crucial and substantive work performed by those attorneys. Ex. E, Brown Obj. at 3-4. Here, the staff attorneys were integral members of the team that prosecuted this Action and contributed substantially to the outcome of the case, directly benefitting the Settlement Class. For example, Lead Counsel's staff attorneys, among other tasks: (i) reviewed and analyzed documents for varying degrees of relevance, participated in the preparation of weekly memoranda that summarized highly relevant documents, and typically attended weekly conference calls to discuss the status of the document review, deposition preparation, and other tasks; (ii) drafted legal and factual memoranda that were essential to analyzing the evidence and preparing for depositions and motion practice; (iii) discovered and addressed technical issues and substantive deficiencies in document productions; (iv) drafted factual memoranda summarizing the information gleaned from the highly technical and comprehensive internal investigation materials that Lead Counsel only received in full approximately a month before the close of fact discovery; and (v) assisted more senior attorneys in analyzing and determining which witnesses should be deposed and which documents should be utilized in connection with such depositions. *See* ECF No. 254 at ¶¶115-116. Further, the staff attorneys' review and analysis of the approximately 2.3 million pages of documents produced in this case was an enormous undertaking that was essential to Plaintiffs' ability to develop the evidence necessary to prosecute the complex claims asserted in the Action. Thus,

the staff attorneys' work significantly contributed to Plaintiffs' ability to obtain the proposed Settlement in this case. Mr. Brown does not advance a single argument that shows otherwise, and his speculation that anonymous "staff attorneys at the SEC" did the "bulk of the serious investigative and legal work" (Ex. E, Brown Obj. at 3-4) is not supported by any facts in the record. *See* Section II(B)(1)(b), *supra*. Nor does he provide any evidence supporting his assertion that Lead Counsel "relied heavily on that work in formulating the causes of action alleged, and used contract attorneys to inflate the fees charged in this manner." Indeed, the SEC has spent three years investigating the conduct at issue here and has not "formulat[ed]" a single "cause of action" for negligence, fraud or otherwise.

Mr. Brown's attack on the allocation of work performed by Lead Counsel to its team of staff attorneys in this Action is also unpersuasive. Ex. E, Brown Obj. at 3 (asserting that "most work was delegated to lower level attorneys" and that Lead Counsel "reli[ed] on staff attorneys for the bulk of the work."). Notably, Mr. Brown asserted precisely the opposite position in his recent objection in *Verifone*, suggesting that counsel's lodestar there was unreasonable because most of the billable time was incurred by ***senior-level*** lawyers rather than junior and staff-level attorneys. *See* Ex. F, *Verifone* Obj. at 8 ("Oddly, partner hours expended vastly exceed that of associates and other more junior attorneys. Seven partners billed 4,202.5 hours, for total billion of $2,784,730, while Associates only billed 419.05 hours – or less than ten percent of the total hours spent."). Mr. Brown's inconsistent and unprincipled position on this issue depending on which case he is objecting to illustrates that he would have objected to this Settlement regardless of the allocation of attorney hours. In any event, Lead Counsel believes its division of work was entirely reasonable and appropriate, especially for a case that proceeded deep into discovery and which was only a few weeks shy of the merits discovery deadline when it was resolved.

c. Lead Counsel's Staff Attorney Billing Rates in this Action are Reasonable

Given the extensive tasks performed, as described above, it is not surprising that the work performed by Lead Counsel's staff attorneys accounts for roughly 41% of Lead Counsel's total lodestar.[9] However, Mr. Brown presumes that simply because the work was performed by staff attorneys, it must all have consisted of low-level, coding-type document review and thus, the billing rate for such work is inappropriately high. In attempting to support his objection, Mr. Brown equates it to the situation in *In re Citigroup Inc. Securities Litigation*, 965 F. Supp. 2d 369 (2013), where, unlike here, no less than 30 contract attorneys were retained ***after*** the settlement was reached to engage in "confirmatory" document review. *Id.* at 389-91.[10]

Furthermore, unlike in *Citigroup*, the attorneys at issue here are full-time staff attorneys, ***not*** contract attorneys. Kessler Topaz's staff attorneys are W-2 employees, meaning that the firm pays FICA and Medicare taxes on their behalf, along with state and federal unemployment taxes and malpractice insurance. In addition, Kessler Topaz's staff attorneys have access to the firm's benefits program, which provides for worker's compensation, health insurance, disability insurance, life insurance and a 401(k) matching program. All staff attorneys working on this matter did so out of Kessler Topaz's main office and all of these attorneys have full access to secretarial and paralegal support, and participate in CLE programs and firm events offered by

[9] To dramatize his position, Mr. Brown improperly suggests that 50% of the overall lodestar was spent on document review by including paralegals, investigators and other non-lawyer professionals along with staff attorneys in his calculation. Ex. E, Brown Obj. at 3.

[10] Mr. Brown's unsubstantiated assumptions and improper comparisons border on the frivolous. Lead Counsel's staff attorneys have been an integral component of its team working on this matter since the outset of discovery and not a single hour of staff attorney time was included in the fee submission after the agreement-in-principle was reached. ECF No. 254-5 at ¶6. Thus, there was no confirmatory discovery whatsoever. As a result, to suggest that there is a comparison to be made from a value creation standpoint between the staff attorneys here and the contract attorneys in the *Citigroup* matter is not well-reasoned.

Kessler Topaz. Thus, the hourly rates charged for such staff attorneys include substantially more overhead and justify higher rates than for contract attorneys.[11]

Mr. Brown's further assumption that all of the work performed by the staff attorneys consisted of low-level document review is also baseless. In this regard, Lead Counsel estimates that of the 13,480 total hours incurred by its team of staff attorneys approximately 40% of their time consisted solely of document review, ECF No. 254 at ¶118, whereas the remaining 60% of their hours consisted of the tasks described above, including identifying documents to utilize with particular witnesses at deposition, understanding and explaining the complicated intercompany tax system utilized by defendants to the attorneys taking the depositions.[12]

Putting aside Mr. Brown's assumptions about the degree or implied quality of work performed by the staff attorneys in this matter, his analysis of what impact this should have on the overall fee to be awarded by the Court also falls flat in light of previous multipliers approved by the Court. In this respect, staff attorneys are billed by Lead Counsel at between $375-$395 per hour based upon their respective levels of experience (0-6 years at $375, 6+ years at $395). These rates have been accepted by this Court and numerous others in the district.[13]

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[11] It is also entirely appropriate to utilize contract attorneys in certain situations rather than staff attorneys, so long as they are billed appropriately to reflect the lower overhead accompanied by such retention or the reduced risk involved if they are only retained after a settlement in principle is reached, when confirmatory discovery is appropriate.

[12] This is not meant to suggest that even pure document review is a low-level task in this type of litigation. Given the limitations on depositions provided by the federal rules and the inability to have the same unfettered access to witnesses that defendants typically have, these cases are usually proven through these very same documents that objectors like Mr. Brown suggest should be given a low level of import by counsel. In this case in particular, the documents themselves were instrumental to the critical motions to compel and thus, the document review in this matter was crucial to the overall success of the litigation.

[13] Courts in this District and across the country have routinely granted fee awards to Lead Counsel based on lodestars which include a significant amount of staff attorney time at the same rates Lead Counsel has submitted here. *See, e.g.,* Ex. M, Declaration of David Kessler, *In re Bank of America Corp. Sec., Derivative, & ERISA Litig.*, Master File No. 09-MDL-2058 (PKC)

Nevertheless, Lead Counsel submits that even at staff attorney rates of less than $375-$395 per hour,[14] the present fee request would still warrant approval. For example, even if Lead Counsel was to charge an hourly rate as low as $200 per hour for the document review performed by staff attorneys, its resulting lodestar would be $11,887,878 (resulting in a multiplier of approximately 1.06 if the fee request was granted). *See* Ex. P (chart of hypothetical staff attorney rates). In fact, even if Lead Counsel eliminated entirely the 40% of its staff attorneys' total lodestar incurred for document review, its resulting lodestar would still be $10,790,368 (resulting in a multiplier of approximately 1.17 if the fee request was granted). *Id.* In other words, even under unwarranted hypothetical scenarios for discounting or eliminating staff attorneys' document review lodestar, Lead Counsel's requested fee would still be well within the Circuit's accepted range of multipliers and in accord with this Court's most recent precedents approving multipliers ranging from 1.5 and 1.28 in various fee awards granted in connection with the *Lehman* director, officer and underwriter settlements (*see* Ex. Q, *Lehman* (ECF No. 970)) and the structured note settlement (Ex. R, *Lehman* (ECF No. 1393)), cases which involved extensive document review, but for which no hourly rate reduction was required.[15]

(S.D.N.Y. Feb. 15, 2013), ECF No. 829-13; Ex. N, Declaration of David Kessler, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-MD-2017 (LAK) (S.D.N.Y. Mar. 8, 2012) ("*Lehman*"), ECF No. 807-13; Ex. O, Declaration of David Kessler, *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, Master File No. 09 Civ. 6351 (RJS) (S.D.N.Y. Oct. 7, 2011), ECF No. 148-8.

[14] Mr. Brown's assertion that "billing rates should be based on the billing rates when [the] work was done" runs contrary to precedent. Ex. E, Brown Obj. at 4. *See In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007); *Missouri v. Jenkins*, 491 U.S. 274, 284, 109 S. Ct. 2463, 2469 (1989). It is also irrelevant as Lead Counsel's staff attorney rates have remained constant for several years now.

[15] *See, e.g., VISA*, 396 F.3d 96 at 123 (upholding multiplier of 3.5 as reasonable on appeal); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding fee representing 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier as "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re NASDAQ*

Simply put, Mr. Brown has selected the wrong case to trot out his well-tread argument about document review rates as it is unwarranted in these circumstances and largely irrelevant to the Court's overall analysis of an appropriate fee for the work performed in this matter.

2. The *Cy Pres* Provision Contained in the Plan of Allocation is Supported by Second Circuit Law and Prior Orders of This Court

Although there is no evidence that any material *cy pres* issue will arise after distribution of the Settlement proceeds to the Settlement Class, Mr. Brown nevertheless objects to the *cy pres* provision contained in the Plan of Allocation as "impermissibly vague" because it does not precisely identify the potential *cy pres* recipients. Ex. E, Brown Obj. at 5.[16] This objection is unfounded. The relevant provision (*see* Weatherford Notice at p. 11, ¶19) is substantial similar to *cy pres* provisions previously approved by this Court in *Lehman* (*see* ECF Nos. 1291 and 1350).[17]

Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier, and finding fee awards of 3 to 4.5 to be "common").

[16] Mr. Brown's reliance on two decisions outside of this Circuit is misplaced. Ex. E, Brown Obj. at 5. In *Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2011), a consumer class action, the Court reversed a decision approving settlement−comprised of a $2.75 million settlement fund and $5.5 million in food to a charity which had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved [*i.e.*, cereal consumers]." In *Dennis*, unlike here, the identity of the *cy pres* recipients was material because the *cy pres* distribution was a substantive term of the settlement and not just a mechanism to distribute residual funds. In *In re Airline Ticket Commission Antitrust Litigation*, 268 F. 3d 619, 626 (8th Cir. 2001), an antitrust case, the Court reversed a lower court's decision approving a *cy pres* distribution to Minnesota law schools and charities and remanded "to make a distribution or distributions more closely related to the origin of this nation-wide class action case concerning caps on commissions paid to travel agencies." It is also worth noting that in *Dennis*, as is being proposed here, the settlement was approved without identification of potential *cy pres* recipients; *Dennis* concerned approval of a distribution motion.

[17] In any event, there may be no need for a *cy pres* distribution in the first instance. Even if one ultimately is made, moreover, there is no requirement that a plan of allocation or notice identify specific potential *cy pres* recipients at this time. To the contrary, it would be unwise and impractical to attempt to identify an appropriate charitable organization now, when any potential *cy pres* distribution may not occur for several years, which is why it is standard practice in

As the Court in *In re American International Group., Inc. Securities Litigation*, 293 F.R.D. 459, 463 (S.D.N.Y. 2013) recently held in rejecting an identical objection to a securities class action settlement, "there [is] no legal authority to support the [objector's] argument; [and] no Court in this Circuit has ever made identifying the organization to receive the residual funds a condition precedent to a Settlement approval." *Id.* at *3. To the extent any *cy pres* distribution is ultimately necessary, the recipient will be approved by the Court at that time, as is standard procedure in this Circuit.[18]

3. Mr. Brown's Contention That the Settlement Improperly Favors Lead Counsel and the Settlement Class Representatives Over the Settlement Class Is Unsupported and Should Be Rejected

As set forth in Plaintiffs' Opening Papers, the Settlement provides a highly favorable result for the Settlement Class in light of the substantial risks to further litigation. ECF No. 254 at ¶¶88-96. Mr. Brown erroneously asserts that simply because there is what he calls a "quick pay" provision and a request for a PSLRA award for reimbursement of costs and expenses for the Settlement Class Representatives, the Settlement improperly favors Lead Counsel and the Settlement Class Representatives. This argument lacks any evidentiary support and is wholly conclusory. To the contrary, the protracted arm's-length negotiations; the role of Judge

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securities class actions for lead counsel to propose *cy pres* recipients for the court's approval when (and if) they move for a *cy pres* distribution.

[18] In connection with his objection to the *cy pres* provision, Mr. Brown also implies that the $10.00 *de minimis* payout provision contained in the Plan of Allocation is somehow improper. Ex. E, Brown Obj. at 4. A minimum payment threshold is a common and beneficial feature of allocation plans. The threshold benefits the class as a whole by eliminating payments to claimants for whom the cost of processing claims, printing and mailing checks and related follow up would be disproportionate in relation to the size of their claim. *See Global Crossing*, 225 F.R.D. at 463 ("[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief"); *see also* Ex. S, *Lehman* (ECF No. 1227) (approving $10.00 threshold).

Weinstein, a respected mediator; the approval of two sophisticated institutional Plaintiffs; and the proceedings before this Court all demonstrate the absence of any collusion or fraud.[19] *See, e.g.*, *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576-77 (S.D.N.Y. 2008); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *5 (S.D.N.Y. Nov. 7, 2007) ("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.'").[20]

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[19] Again, Mr. Brown's reliance on a Ninth Circuit case, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) is misplaced. Ex. E, Brown Obj, at 5. *Bluetooth* involved neither a securities class action nor a common settlement fund. Rather, the proposed settlement of the product liability claims provided for additional disclosures of safety information, a *cy pres* payment to non-profit organizations, and a payment of $800,000 in attorneys' fees to plaintiffs' counsel, which, if not approved by the Court, would ***revert to defendants***. Here, Lead Counsel recovered a $52.5 million common fund for the benefit of the Settlement Class and there is no possible reversion to Defendants. Thus, the Ninth Circuit's concern that the class received ***no monetary distribution*** while counsel would "receive a disproportionate distribution of the settlement," simply does not exist here. *Id*. at 947. Finally, in *Bluetooth*, the Court was unable to perform a lodestar evaluation because the record failed to disclose information about counsel's hours and rates. *Id*. at 943. Here, detailed lodestar information was provided.

[20] Mr. Brown's suggestion that the Settlement is unfair because Plaintiffs are "seeking an excessive payment of $25,000, besides any amounts they may recover based on the size of their claims" is unjustified. Ex. E, Brown Obj. at 6. Whether or not this Court ultimately approves the requested amounts to Plaintiffs here, the PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be granted to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). Here, Plaintiffs−two sophisticated institutional investors−were actively involved in the prosecution and resolution of this Action. Each of the Plaintiffs, among other things, reviewed material pleadings and briefs, gathered and reviewed documents in response to discovery requests and prepared and sat for Rule 30(b)(6) depositions. *See* ECF No. 253 at §IV; *see also* ECF No. 254 at ¶¶139-140. Lead Plaintiff AFME also appeared at the hearing on Defendants' motions to dismiss. *Id*. Accordingly, and as more fully addressed in the Opening Papers, Plaintiffs' modest request for reimbursement (totaling $19,935.69 in the aggregate) is fully justified. *See, e.g., In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012 (awarding an aggregate amount of $71,910.00 to lead plaintiffs); Ex. S, *In re Satyam Computer Servs. Ltd. Sec. Litig.*, No. 09-MD-2027-BSJ, slip. op.

a. The Timing of Payment of Attorneys' Fees Is a Standard Term Approved by Numerous Courts, Including This Court

As part of his contention that "Lead Counsel [] structured this settlement to elevate their interest over those of the class," in his zeal to claim that the Settlement is unfair to the Settlement Class, Mr. Brown characterizes the payment provision for attorneys' fees set forth at paragraph 16 of the Stipulation as a "quick pay" and claims that it is improper. Ex. E, Brown Obj. at 6. Mr. Brown completely overlooks the fact that the Court had already addressed this concern at the preliminary stage of the settlement proceedings by confirming that the language "or at such later date as required by the Court" was included in the provision so as to give the Court complete discretion to delay the fee if necessary, in whole or in part, upon the Court's review of the validity of the fee objections. As addressed by Lead Counsel in a conference call with this Court on February 19, 2014, this was the same language the Court previously approved in the *Lehman* case. *See* Ex. Q, *Lehman* at ECF No. 970.

Secondly, while Mr. Brown uses the derogatory term "quick pay" to describe the payment of fees and expenses after entry of judgment, the term is a misnomer. Lead Counsel has been vigorously litigating this action since 2011 without any compensation, while advancing the significant expenses necessary to achieve the substantial Settlement obtained through Lead Counsel's efforts. Courts across the country, including this Court, have approved similar provisions regarding the timing of payments of fees. *See* Ex. Q, *Lehman* (ECF No. 970). *See also*, *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479 (S.D.N.Y. 1998) ("Numerous courts have directed that the entire fee award be disbursed immediately upon entry of the award, or within a few days thereafter."); *In re Livingsocial Mktg. & Sales Practice Litig.*,

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at 3-4 (S.D.N.Y. Sept. 13, 2011), ECF No. 365 (awarding an aggregate amount of $195,111 to the class representatives).

No. 11-cv-0745, 2013 WL 1181489, at *21 n.25 (D.D.C. Mar. 22, 2013) ("There is ample authority for the 'quick pay' provision.") (collecting cases).

b. Mr. Brown's Reliance on *Eubank* to Assert that the Settlement is Unfair is Misguided

The Seventh Circuit's recent opinion in *Eubank v. Pella Corp*, 2014 WL 2444388 (7th Cir. June 2, 2014) is easily distinguishable from the instant Action. First, unlike in *Eubank*, where the product liability settlement was "claims made" (*i.e.*, the value of the settlement depended on the number and value of claims actually submitted) and subject to certain warranty and coupon provisions (the value of which was questionable), the Settlement Class here is entitled to the entire $52.5 million cash Settlement Amount plus income or interest thereon. Indeed, regardless of the number of claims submitted, the Settlement Class here is guaranteed to receive distribution of the entire Settlement Fund, less any Court-awarded fees and reimbursed expenses. Lead Counsel has requested $12.6 million in attorneys' fees, reimbursement of $1,401,660.28 in expenses (which includes the amount requested by the Settlement Class Representatives), and approval of claims administration costs (currently incurred administration costs total approximately $1.1 million),[21] as well as minimal tax return preparation fees and taxes owed for interest earned on the Settlement Fund. Further, under no circumstances will any amount of the $52.5 million cash Settlement Amount revert or be returned to Defendants. *See* ECF No. 240-1 at ¶11.

Second, the settlement in *Eubank* suffered from facially troubling conflicts regarding adequate representation that simply do not exist here. *Eubank*, 2014 WL 2444388, at *6-7.

[21] The vast majority of GCG's costs to date reflect printing and postage expenses for the mailing of approximately one million Notices. GCG was retained after a competitive bidding process involving three competing firms, and the fees and expenses incurred by GCG are being billed pursuant to terms provided at the outset of GCG's retention.

There, the lead class representative was lead counsel's father-in-law, and lead counsel replaced four additional class representatives when those non-familial class representatives disagreed with the proposed settlement. Those defrocked class representatives were the same parties that ultimately objected to the settlement, resulting in the Seventh Circuit's reversal of the district court's approval of settlement. Here, no such conflicts or adequacy issues exist and the original Court-appointed Lead Plaintiff (AFME) and additional named plaintiff and proposed Settlement Class Representative (Georgia Firefighters) have affirmatively endorsed the Settlement. *See* ECF No. 250. These sophisticated institutional investors are precisely the type of plaintiff representatives envisioned by Congress to lead, monitor and ultimately resolve, if appropriate, securities litigation under the PSLRA.

III. CONCLUSION

For the foregoing reasons and those set forth in the Opening Papers, Plaintiffs respectfully request that the Court overrule all Objections and: (1) approve the Settlement and Plan of Allocation; and (2) grant Lead Counsel's Fee and Expense Application.

Dated: June 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 20th day of June, 2014, I hereby caused a true and correct copy of the foregoing document to be served via Overnight Mail upon:

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/s/ Eli R. Greenstein
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ADDENDUM OF UNPUBLISHED AUTHORITIES

In re American International Group, Inc. Sec. Litig.,
No. 04 Civ. 8141 (DAB), 2012 WL 345509 (S.D.N.Y. Feb. 2, 2012)

Barnes v. FleetBoston Fin. Corp.,
No. 01-10395-NG, 2006 WL 6916834 (D. Mass. Aug. 22, 2006)

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

Eubank v. Pella Corp,
Nos. 13-2091, *et al*., 2014 WL 2444388 (7th Cir. June 2, 2014)

In re Livingsocial Mktg. & Sales Practice Litig.,
No. 11-cv-0745, 2013 WL 1181489 (D.D.C. Mar. 22, 2013)

In re Satyam Computer Servs. Ltd. Sec. Litig.,
No. 09-MD-2027-BSJ, slip. op. (S.D.N.Y. Sept. 13, 2011), ECF No. 365

Sewell v. Bovis Lend Lease LMB, Inc.,
No. 09 Civ. 6548 (RLE), 2012 WL 1320124 (S.D.N.Y. Apr. 20, 2012)

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

Not Reported in F.Supp.2d, 2012 WL 345509 (S.D.N.Y.)
(Cite as: 2012 WL 345509 (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 AMERICAN INTERNATIONAL GROUP, INC. SECURITIES LITIGATION.
This Document Relates To: All Actions.

No. 04 CIV. 8141(DAB).
Feb. 2, 2012.

MEMORANDUM & ORDER

DEBORAH A. BATTS, District Judge.

***1** On January 31, 2012, the Court held a Fairness Hearing in this matter to consider Motion for Approval of the Settlement with Defendant American International Group, Inc. ("AIG"), and the Motion for Attorney's Fees and Reimbursement of Expenses. The Court's findings and rulings with regard to these Motions are set forth in this Order, the Transcript of the January 31, 2012 Hearing, the Order and Final Judgment as to American International Group, Inc ., the Order Approving Plan of Allocation, and the Order Approving Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses and Lead Plaintiff's Request for Reimbursement of Expenses.

I. INTRODUCTION

A. Factual Background and Litigation History

This action, which was filed in 2004, arises from material misstatements and omissions allegedly made by Defendants in connection with disclosures of (1) AIG's alleged involvement in a scheme that included steering contingent commissions to, and rigging certain insurance bids with. Marsh & McLennan Companies, Inc.; and (2) an alleged accounting fraud at AIG that resulted in the Company restating nearly four years of earnings and adjusting earnings for a fifth year. Lead Plaintiff also alleged that AIG and Defendant Greenberg manipulated the market through the purchase of millions of shares of AIG stock.

During the more than seven years this action has been pending, this matter has been litigated vigorously. The litigation has involved: (1) fully-briefed motion practice, on two separate occasions, to determine the Lead Plaintiff; (2) Motions to Dismiss filed by 23 Defendants; (3) fact and expert discovery related to class certification, followed by a contested Motion for Class Certification involving four days of legal argument and hearings; (4) the review and analysis of more than 53.3 million pages of documents, including more than 12 million pages produced by Defendant AIG; and (5) 97 depositions of fact and expert witnesses.

The Settlement, which was negotiated at arm's length over many years with the help of several mediators, including the Hon. Layn R. Phillips (Ret.), creates a Settlement Fund of $725,000,000.00, The Distribution Amount, which is the Settlement Fund plus interest and less any expenses related to taxes, notice, and Settlement administration, and any attorneys' fees and expenses award or Lead Plaintiff's award approved by the Court, is to be distributed pursuant to the Plan of Allocation, which is set forth in pages ten through seventeen of the Notice distributed to Class Members.

The Settlement Class consists of: all persons and entities who purchased or otherwise acquired AIG Securities during the period from October 28, 1999 through April 1, 2005, inclusive, as well as all persons and entities who held the common stock of HSB Group, Inc. ("HSB") at the time HSB was acquired by AIG in a stock for stock transaction, and all persons and entities who held the common stock of American General Corporation ("AGC") at the time AGC was acquired by AIG in a stock for stock transaction, and who were damaged thereby, excluding persons who made timely and valid requests for exclusion from the Class. Named Defendants, members of the immediate families of Named Defendants, parents, subsidiaries, affiliates, officers, or directors of AIG, any entity in which any of the foregoing has a controlling interest, or

the legal representative, heirs, successors, and assigns of any of the foregoing, are precluded from making claims under the Settlement.

***2** In an Order dated October 5, 2011, this Court preliminarily approved the Settlement. The Court also approved the Notice for dissemination to Class Members. The Order set a Fairness Hearing for January 31, 2012, to consider the fairness, reasonableness and adequacy of the Settlement and Plan of Allocation.

B. Fairness Hearing and Consideration of Objections

A Fairness Hearing in this matter was held at 11:00 a.m. in Courtroom 24B on January 31, 2012. Steve A. Miller appeared on behalf of Objector Steve A. Miller, P.C. Profit Sharing Plan.[FN1] (*See* Docket # 607.) Mr. Miller objected that the claims procedure in this case was needlessly complicated, but conceded that in his particular case he had no trouble meeting the requirements for filing a claim. Lead Counsel confirmed that no complaints had been received from Class Members regarding the claims procedure. Accordingly, the Court overruled this objection as speculative.

> FN1. An additional objection from Rinis Travel Service Inc. Profit Sharing Trust (PST) U/A 06/01/89; Rinis Travel Service Inc. Profit Sharing Plan (PSP) U/A 06/01/89, Alan Rothstein, and Mollye Rothstein, was overruled prior to the Fairness Hearing by Order of this Court dated January 18, 2012 (Docket # 612).

Mr. Miller also objected that a 13.25% award of attorneys' fees was excessive. As set forth below, however, this Court found that a 13.25% attorneys' fee award was in line with awards in similar cases, reflected the complexity of this case and Lead Counsel's efforts, and actually resulted in a slightly negative lodestar. This objection was overruled.

In his written objection, Mr. Miller opined that any remaining amount in the Settlement Fund after all distributions have been made should not be returned to Defendant AIG. This Court agrees with Mr. Miller and directs that any funds remaining after all distributions have been made shall be distributed via cy pres distribution to a nonprofit chosen by the mediator. This objection was therefore SUSTAINED.

II. DISCUSSION

A. Class Certification

In order to certify finally the Class as defined by the Court's October 5, 2011 Order, the Court will consider the criteria of Federal Rule of Civil Procedure 23(a) and (b). The four prerequisites of Rule 23(a) are that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The Court finds that the Class is so numerous that joinder of all members is impracticable. Claims Administrator Rust Consulting, Inc. (“Rust”) mailed more than 2 million Notice Packets, including 1,756,227 to individual names and addresses and 1,925 to nominee names and addresses. (Miller Aff. Nov. 30, 2011 (Ex. 3 to Dubbs Decl. Dec. 2, 2011), ¶ 10; Miller Aff. Jan. 12, 2012 (Ex. 1 to Dubbs Reply Decl. Jan. 13, 2012), ¶ 3.)

The Court finds that there are questions of law or fact common to the Class. The Court also finds that under Rule 23(b)(3), these questions predominate over any questions affecting only individual Class Members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The central questions of whether Defendants made false and misleading statements in documents including periodic reports filed with the Securities and Exchange Commission, and whether those alleged misstatements caused AIG Securities to trade at artificially inflated prices during the Class Period, are common to the Class and predominate over questions affect-

ing only individual members. (*See* Dubbs Decl. Dec. 2, 2011, ¶¶ 40–41.)

***3** The Court finds that the claims and defenses of the representative parties are typical of the claims and defenses of the Class. Lead Plaintiff, like all Class Members, purchased AIG Securities at allegedly artificially inflated prices during the Class Period and claims to have suffered damages because of AIG's alleged material misconduct. Accordingly, the legal theories and evidence Lead Plaintiff would advance to prove its claims would simultaneously advance the claims of other Class Members. (Mem.L.Supp.Mot, Prelim.Approval, p. 17.)

The Court finds that the representative parties will fairly and adequately protect the interests of the Class. Labaton Sucharow and Hahn Loeser, Court-appointed Lead Counsel for Lead Plaintiff the Ohio State Funds, have zealously and ably represented Lead Plaintiff on behalf of the proposed Class, having expended nearly 260,000 hours in prosecution and investigation of the claims against the settling Defendants, (Dubbs Decl. Dec. 2, 2011, ¶ 183.) There is no conflict or antagonism between the claims of the Ohio State Funds and the other members of the proposed Class.

Finding all criteria of Rule 23 satisfied, this Court finally certifies the Settlement Class for settlement purposes and appoints Lead Plaintiff as Settlement Class Representative and Lead Counsel as Settlement Class Counsel.

B. Fairness of the Settlement

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

Procedural Fairness: The Court finds that the Settlement resulted from "arm's length negotiations." Class Counsel possessed the requisite amount of experience and ability, and the parties engaged in the discovery necessary for effective representation of the Class's interests. See *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001), citing *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1982).

By the time the Settling Parties reached the Settlement, Lead Plaintiff, through able and experienced Lead Counsel, had (i) opposed Motions to Dismiss by 23 Defendants, including AIG; (ii) completed class discovery, involving many depositions; (iii) moved for class certification; and (iv) completed all fact discovery, including the review and analysis of many millions of pages of documents. (Dubbs Decl, Dec. 2, 2011, ¶¶ 71–139.) Over the course of the case, the Parties engaged in numerous discussions, both formal and informal, culminating in a mediation session with the Honorable Layn R. Phillips in June of 2010. (*Id.,* Ex. 7.)

***4** *Grinnell Factor 1:* The Court finds that the litigation is complex, and would likely be costly and lengthy in duration. Had the Parties not reached a Settlement, this case would have likely continued for many more years and would have involved continued discovery, summary judgment motions, and a lengthy and complex trial, all of which would involve considerable expense, and after which the Settlement Class might have obtained a result far less beneficial than the one provided by the Settlement. (Mem.L.Supp.Mot.Approval, p. 10.)

Grinnell Factor 2: The Court finds that the reaction of the Class to the Settlement has been positive. With more than 2 million Notice Packets

mailed to potential members of the Settlement Class and nominees, there were only 70 requests for exclusion, of which 26 were timely and valid, and only two objections. (*See* Miller Aff. Jan. 12, 2012; Docket605, 607.)

Grinnell Factor 3: The Court finds that proceedings have progressed and sufficient discovery has been completed to understand Plaintiffs' claims and negotiate Settlement terms. As noted above, this litigation has taken years and has involved extensive discovery and briefing on Motions to Dismiss and class certification issues.

Grinnell Factors 4 and 5: The Court finds that the risks of establishing liability and damages are significant. One of the frauds alleged involved hundreds of separate insurance transactions. Proof of wrongdoing would have to be established for each allegedly improper transaction separately. Moreover, the case involves violations of complex accounting rules that might not be understood easily by a jury. (Mem.L.Supp.Approval, p. 14.)

Grinnell Factor 6: The Court finds that the risk of maintaining the class action through the trial neither weighs for nor against approving the Settlement in this case.

Grinnell Factor 7: The Court finds that Defendants' ability to withstand a judgment greater than the Settlement weighs in favor of approval. Over the course of this case, AIG was teetering on the brink of insolvency, and required a Government bailout in September 2008, (Dubbs Decl. Dec. 2, 2011, ¶¶ 58–70.)

Grinnell Factors 8 and 9: The Court finds that the Settlement is reasonable in light of: (a) Plaintiffs' best possible recovery, and (b) the attendant risks of litigation. The $725 million Settlement represents a recovery of 13.18% of the $5.5 billion in "maximum recoverable damages" in this case. (Coffee Decl. Nov. 30, 2011 (Dubbs Decl. Dec. 2, 2011, Ex. 8), ¶ 22.) In light of the significant risks involved in the litigation, the recovery is an excellent result for the Settlement Class.

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

C. Reasonablenss of the Plan of Allocation

"When formulated by competent and experienced class counsel," a plan of allocation of net settlement proceeds "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). Here, the Plan of Allocation, which is described in the Notice, apportions the recovery among Settlement Class Members. Those who purchased common stock and options will recover a larger portion of the Settlement than those who purchased the bonds, in recognition of the particular risks involved in establishing loss causation and market efficiency for the bonds. The Plan also apportions recovery to take into account the strength of potential claims relative to the time of the purchase or sale of AIG Securities, and to account for distributions from the Fair Fund created in *SEC v. American International Group, Inc.*, 06 Civ. 1000 (S.D.N.Y.) (LAP).

***5** As discussed above, the Plan of Allocation as set forth in the Notice allows for the possibility that unclaimed funds will be returned to Defendant AIG. The Court hereby directs that those funds shall instead be distributed via cy pres distribution to a nonprofit organization chosen by the mediator, Judge Layn R. Phillips.

In all other respects, the Plan of Allocation represents a fair and equitable method for allocating the Distribution Amount among Authorized Claimants and is HEREBY APPROVED.

D. Attorneys' Fees and Expenses

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

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

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

Goldberqer Factor 4: The Court finds that the representation of Class Counsel is of high quality. Lead Counsel have extensive experience in complex litigation and are nationally known leaders in the field of securities class actions. (Dubbs Decl. Dec. 2, 2011, ¶¶ 185–86.)

Goldberger Factor 5: The Court finds that in relation to the Parties' Settlement, the requested attorneys' fees of 13.25% are reasonable. As John C. Coffee points out in his Declaration to this Court, this Settlement is unique in that "it appears to have recovered a much higher percentage of the maximum estimated damages than characteristically occurs in securities class actions; and Lead Counsel is seeking to recover slightly less than its lodestar...." (Coffee Decl. Nov. 30, 2011, ¶ 2.)

The requested fee award in this case is well in line with fee awards in cases with similar settlement amounts. *See, e.g., In re Initial Pub. Offering Sec. Litiq.*, 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding 33.30% on a Settlement Fund of $586 million); *Carlson v. Xerox Corp.*, 596 F.Supp.2d 400 (D.Conn.2009) (awarding 16% on a Settlement Fund of $750 million). Furthermore, Lead Counsel obtained a Settlement that reflects as much as 13.18% of the maximum recoverable damages in this case, while the typical recovery in class actions involving between $1 billion and $5 billion of investor losses is 1–2%. (Coffee Decl., ¶¶ 21–22.)

Goldberger Factor 6: The Court finds that public policy supports granting attorneys' fees "that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers Squibb Sec. Litig.*, 361 F.Supp.2d 229, 236 (S.D.N.Y.2005). This Court finds that an award of 13.25% of the Settlement Fund promotes the valuable public policy interests at stake.

***6** *Expenses:* "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients." *In re Independent Energy Holdings PLC Sec. Litig.*, 302 F.Supp.2d 180, 183 (S.D.N.Y.2003). This Court finds that expenses in the amount of $8,257,111.29 were reasonable and necessary to the prosecution of this Action. The categories of expenses for which Counsel seek reimbursement are the types of expenses routinely charged to hourly paying clients including, *inter alia*, fees for experts and consultants, filing fees, and discovery expenses. (Dubbs Decl. Dec. 2, 2011, ¶¶ 128–32, 189–95.) Having conducted the *Goldberger* analysis, the Court finds attorneys' fees of 13.25% of the Settlement Fund to be reasonable and those attorneys' fees are HEREBY APPROVED. Likewise, the Court finds attorneys' expenses of $8,257,111.29 reasonable and those expenses are HEREBY APPROVED.

Class Representative Compensation: "Courts in this Circuit routinely award ... costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Stanley*, No. 01 Civ. 10071, 2005 WL 2757792, at *10 (S.D.N.Y. Oct.24, 2005); *see also In re Marsh & McLennan Cos., Inc. Sec. Litig.*, NO. 04 Civ. 8144, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), at *21. Here, the request of OPERS and STRS Ohio for reimbursement of $71,910.00 in lost wages related to their active participation in this action is reasonable, and those expenses are HEREBY APPROVED.

SO ORDERED.

S.D.N.Y.,2012.
In re American Intern. Group, Inc. Securities Litigation
Not Reported in F.Supp.2d, 2012 WL 345509 (S.D.N.Y.)

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Not Reported in F.Supp.2d, 2006 WL 6916834 (D.Mass.)
(Cite as: 2006 WL 6916834 (D.Mass.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Massachusetts.
Deborah J. **BARNES**, Plaintiff,
v.
FLEETBOSTON FINANCIAL CORP., and Fleet National Bank, N.A., Defendants.

C.A. No. 01–10395–NG.
Aug. 22, 2006.

Alexander H. Burke, Cathleen M. Coombs, Daniel A. Edelman, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL, Yvonne W. Rosmarin, Law Office of Yvonne W. Rosmarin, Arlington, MA, for Plaintiff.

Alan S. Kaplinsky, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA, Jon E. Hayden, Fleetboston Financial Corporation, Corporate Law Dept., Joseph L. Kociubes, Rheba Rutkowski, Bingham McCutchen LLP, Boston, MA, for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO REQUIRE OBJECTOR FELDMAN TO POST APPEAL BOND

GERTNER, District Judge.

***1** (This Memorandum replaces the one issued yesterday in that typographical errors have been corrected.)

Plaintiffs have filed a motion for bond pursuant to Fed. R.App. P. 7, which states "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." First Circuit case law indicates that "costs," as contemplated in Rule 7, include the costs attendant to the delay associated with an appeal, and attorneys' fees, as well as double costs under Fed. R.App. 38, and other costs as delineated in Fed. R.App. P. 39. *See Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir.1987); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 2003 WL 22417252, at *3 (D.Me.2003). Here plaintiffs seek a bond of $675,111.60 alleging that the appeal of objector Nancy Feldman is frivolous and vexatious, and further, that the delay occasioned by this appeal will harm class members.

Plaintiffs note that part of the difficulty in arriving at and executing this settlement was the difficulty in obtaining addresses for potential class members. The longer the settlement distribution was delayed, the more likely it was that a substantial number of class members would change residences during the appeal. Thus, delay means more than simply loss of use, or the devaluation of the settlement fund, which are compensable by interest. Here, delay means that certain class members would lose the benefit to which they are entitled under the settlement, even if the appeal fails. Plaintiffs further note that Ms. Feldman and her counsel are professional objectors, bringing this appeal not in the interests of the class, but in their own interest.

These concerns are well taken. Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Under these circumstances, Fed. R.App. P. 7 makes perfect sense: by requiring objectors to post a bond that would cover the costs of losing the ap-

peal, the burden of litigating frivolous appeals shifts to them instead of to the class. Posting a bond sufficient to ensure that the class can recoup the costs of appeal provides the class with an appropriate incentive to litigate the appeals and establish their lack of merit. And if the appeal turns out not to be frivolous despite initially appearing so, the objectors will get almost the entirety of their bond back.

***2** Feldman and her attorney, John Pentz (who is also her son-in-law) are professional objectors, not unlike the plaintiff in *Sckolnick*, whom the First Circuit described as a "litigious pro se who has filed numerous lawsuits in state court." *Sckolnick*, 820 F.2d at 15. In *In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *3 (D.Me. Oct.7, 2003), the court required Hannah Feldman,[FN1] also represented by Mr. Pentz, to post a bond because that appeal "might be frivolous," and because imposition of sanctions on appeal pursuant to Rule 38 was "a real probability." The court noted that a bond for "damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond." *Id.* Ms. Feldman voluntarily dismissed her appeal several days later.

FN1. Hannah Feldman is John Pentz's wife.

Two questions remain: First, are Feldman's grounds for appeal frivolous? Second, is the amount of the bond requested too high? With respect to the latter question, the bond could presumably be set at such a high point that objectors would be totally precluded from raising an appeal, thereby raising due process concerns. However, objectors have made no arguments about their inability to pay the proposed bond thus far. In any event, if the bond were beyond their ability to pay, they could well move for reconsideration.

On the frivolousness of the appeal: Feldman challenges the computation of attorneys' fees on a "percentage-of-fund" method of settlement rather than a lodestar approach. Feldman and her counsel made the same objection in *In re Relafen*, case no. 01–12239 (D. Mass 2006), appeal docketed and dismissed May 5, 2006, *sub nom Direct Radiography Purchaser v. Smithkline*, appeal no. 05–2846 (1st Cir.). The court in *Relafen* stated "in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 77 (D.Mass.2005). Indeed, *Relafen* dramatizes the point made above: The objectors settled the appeal relating to excessive attorneys' fees for $500.00 for each of the five objectors and $97,500.00 in attorneys' fees. The settlement otherwise remained unchanged and the class received no additional benefit of any kind. Plaintiffs represent that the settlement was entered into by class counsel in *Relafen* to "short-circuit the potential damage to the class that an appeal would cause." Pl. Reply at 5.

Feldman next challenges whether "a court must first make a threshold finding that it is impracticable to distribute settlement funds to the class members before a *cy pres* distribution may be made." Feldman did not raise this issue in her objection papers; therefore, the issue has been waived.

Finally, Feldman suggests that the Court should redistribute the *cy pres* award to the class members based on an interpretation of a decision rendered by the Massachusetts Supreme Judicial Court after the settlement in the instant case had been executed. In *Hershenow v. Enterprise Rent–A–Car Co. of Boston*, 445 Mass. 790, 840 N.E.2d 526 (2006), the court held that a "plaintiff seeking a remedy under G.L. c. 93A § 9, must demonstrate that even a *per se* deception caused a loss." 445 Mass. at 799, 840 N.E.2d 526. Since no class member is entitled to statutory damages, Feldman argues, "payment of any amounts to class members must be regarded as a distribution of cy pres funds." Obj. Reply at 6. The argument is ex-

traordinary: First, there is no precedent for restructuring a settlement agreement based on legal developments that happened later. Second, if a later case could be used to restructure a settlement, *Hershenow* could provide the basis for defendants' repudiation of the existing agreement. Paragraph 15 of the Agreement provides that if any portion of the settlement (other than attorney's fees) is invalidated, the parties may repudiate the settlement in its entirety. Under *Hershenow*, the defendants might well have argued that the hundreds of thousands of class members should split $500,000.00 under the Truth in Savings Act, 12 U.S.C. § 4301, et seq ., rather than the $12.5 million they obtained in the settlement.

***3** With respect to the amount of the bond: The bond the plaintiffs seek is calculated as follows: 5.15% interest on a settlement of $12 .5 million, dating from June 14, 2006, the date of judgment for one year (assuming the case takes only one year to go through the appellate process). That amount would be $643,750.00. Plaintiffs assert that the appeal would likely result in attorneys' fees of $30,000.00. The costs for the earlier appeal in the case amounted to $680.80. Double costs, or $1,361.60, plaintiffs contend, would be appropriate under Fed. R.App. 38, if the Court of Appeals agrees that this appeal was frivolous.

I agree with this computation with one exception: the $30,000.00. attorneys' fees amount. Counsel has provided an evidentiary basis for all components of the bond, with the sole exception of the attorneys' fees.

Accordingly, I order that objector Nancy Feldman post a bond in the amount of Six Hundred Forty–Five Thousand, One Hundred Eleven and 60/100 ($645,111.60) Dollars.

SO ORDERED.

D.Mass.,2006.
Barnes v. Fleetboston Financial Corp.
Not Reported in F.Supp.2d, 2006 WL 6916834 (D.Mass.)

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Not Reported in F.Supp.2d, 2007 WL 2049726 (S.D.N.Y.)
(Cite as: 2007 WL 2049726 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

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

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

MEMORANDUM ORDER

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

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

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

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

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

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

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

tegrated Resources, Inc., 209 F.3d 43, 47 (2d Cir.2000) ("[A]ttorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund.") The question of whether a particular fee is reasonable must be guided by consideration of such factors as "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy." *See Goldberger*, 209 F.3d at 50(citation omitted). Moreover, a "key consideration required by the PSLRA [FN1] 'is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.' " *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir.2007) (quoting Advisory Comm. Notes to Fed.R.Civ.P. 23, 2003 Amendments).

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

S.D.N.Y.,2007.

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

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--- F.3d ----, 2014 WL 2444388 (C.A.7 (Ill.))
(Cite as: 2014 WL 2444388 (C.A.7 (Ill.)))

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Seventh Circuit.
Kent EUBANK, et al., Plaintiffs–Appellants,
and
Leonard E. Saltzman, et al., Plaintiffs–Appellees,
v.
PELLA CORPORATION and Pella Windows and Doors, Inc., Defendants–Appellees.
Appeals of Ron Pickering and Michael J. Schulz, Objecting class members.

Nos. 13–2091, 13–2133, 13–2136, 13–2162, 13–2202.
Argued April 22, 2014.
Decided June 2, 2014.

Background: Window buyers brought class action against manufacturer, alleging fraudulent concealment of inherent product defect. Parties reached a settlement, and the United States District Court for the Northern District of Illinois, Eastern Division, James B. Zagel, J., approved the settlement. Objectors to the settlement appealed.

Holding: The Court of Appeals, Posner, Circuit Judge, held that approval of the settlement was not warranted.

Reversed and remanded.

West Headnotes

[1] Compromise and Settlement 89 59

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k59 k. Adequacy or Representation; Collusion. Most Cited Cases

The adversity among subgroups in class action requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

[2] Compromise and Settlement 89 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Approval of class action settlement concerning window buyers' claims against manufacturer alleging fraudulent concealment of inherent product defect was not warranted, where the settlement ignored certification of two classes consisting of owners who had already replaced or repaired the windows and those who had not and purported to bind a single nationwide class consisting of all owners of the windows, lead class counsel was the son-in-law of the lead class representative, lead counsel was a defendant in a lawsuit asserting misappropriation of assets of former law firm and a disciplinary proceeding against lead counsel was underway when the settlement was negotiated, four named plaintiffs who opposed the settlement were removed and replaced with plaintiffs who supported the settlement, class members were to obtain merely contingent claims and some were entitled only to coupons or extension of warranty, and any reduction in attorney fees award reverted to manufacturer rather than being added to the compensation of class members. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 164

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak164 k. Representation of Class;

Typicality; Standing in General. Most Cited Cases

When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class. Fed.Rules Civ.Proc.Rule 23(g), 28 U.S.C.A.

[4] Federal Courts 170B 3255

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3255 k. Particular Persons. Most Cited Cases

Absent objectors to class action settlement have standing to appeal from an adverse judgment.

[5] Federal Courts 170B 3255

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3255 k. Particular Persons. Most Cited Cases

Named plaintiffs who settle class action nevertheless have standing to appeal a denial of class certification.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 C 4481—James B. Zagel, Judge.David M. Oppenheim, Anderson & Wanca, Rolling Meadows, IL, Jeffrey A. Leon, Complex Litigation Group LLC, Highland Park, IL, Hall Adams, III, Law Offices of Hall Adams LLC, Chicago, IL, Joseph Darrell Palmer, Law Office of Darrell Palmer, Carlsbad, CA, John Jacob Pentz, III, Sudbury, MA, for Plaintiffs–Appellants.

Aaron D. Van Oort, Faegre Baker Daniels LLP, Minneapolis, MN, John Allen Roberts, Edwards Wildman Palmer LLP, Chicago, IL, for Defendants–Appellees.

Theodore H. Frank, Washington, DC, Peter F. Higgins, Lipkin & Higgins, Chicago, IL, for Michael J. Schulz

Before POSNER, WILLIAMS, and TINDER, Circuit Judges.

POSNER, Circuit Judge.

***1** The class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury, but are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims. Normally only a few of the claimants are named as plaintiffs (sometimes only one, though there are several in this case). The named plaintiffs are the representatives of the class—fiduciaries of its members-and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class (class counsel). They receive modest compensation, in addition to their damages as class members, for their normally quite limited services—often little more than sitting for a deposition—as class representatives. Invariably they are selected by class counsel, who as a practical matter control the litigation by the class. The selection of the class representatives by class counsel inevitably dilutes their fiduciary commitment.

The class action is a worthwhile supplement to conventional litigation procedure, David L. Shapiro, "Class Actions: The Class As Party and Client," 73 *Notre Dame L.Rev.* 913, 923–24 (1998); Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'," 92 *Harv. L.Rev.* 664, 666–68

(1979), but it is controversial and embattled, see Robert H. Klonoff, "The Decline of Class Actions," 90 *Wash. U.L.Rev.* 729, 731–33 (2013), in part because it is frequently abused. Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 1–2 (2009); Jonathan R. Macey & Geoffrey P. Miller, " The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," 58 *U. Chi. L.Rev.* 1, 3–4 (1991); John C. Coffee, Jr., " Rethinking the Class Action: A Policy Primer on Reform," 62 *Ind. L.J.* 625, 627 (1987). The control of the class over its lawyers usually is attenuated, often to the point of nonexistence. Except for the named plaintiffs, the members of the class are more like beneficiaries than like parties; for although they are authorized to appeal from an adverse judgment, *Smith v. Bayer Corp.*, —— U.S. ——, 131 S.Ct. 2368, 2379, 180 L.Ed.2d 341 (2011); *Devlin v. Scardelletti*, 536 U.S. 1, 9–10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), they have no control over class counsel. In principle the named plaintiffs do have that control, but as we've already hinted this is rarely true in practice. Class actions are the brainchildren of the lawyers who specialize in prosecuting such actions, and in picking class representatives they have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation.

***2** A high percentage of lawsuits is settled—but a study of certified class actions in federal court in a two-year period (2005 to 2007) found that *all* 30 such actions had been settled. Emery G. Lee III et al., "Impact of the Class Action Fairness Act on the Federal Courts" 2, 11 (Federal Judicial Center 2008). The reasons that class actions invariably are settled are twofold. Aggregating a great many claims (sometimes tens or even hundreds of thousands—occasionally millions) often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment. At the same time, class counsel, un-governed as a practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorneys' fees—which (besides other expenses) are all they can get from the class action—at the expense of the class. The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees. As we said in *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir.2011), "we and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests. *Reynolds v. Beneficial National Bank*, [288 F.3d 277, 279 (7th Cir.2002)]; *Culver v. City of Milwaukee*, [277 F.3d 908, 910 (7th Cir.2002)]; *Greisz v. Household Bank (Illinois), N.A.*, 176 F.3d 1012, 1013 (7th Cir.1999); *Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 7 (1st Cir.1999); *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 805 (3d Cir.1995); *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir.1982)."

Fortunately the settlement, including the amount of attorneys' fees to award to class counsel, must be approved by the district judge presiding over the case; unfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class. *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation,*

supra, 55 F.3d at 789–90; Redish, *supra,* at 188.

***3** Enter the objectors. Members of the class who smell a rat can object to approval of the settlement. See, e.g., *Reynolds v. Beneficial National Bank, supra,* 288 F.3d at 287–88; Edward Brunet, " Class Action Objectors: Extortionist Free Riders or Fairness Guarantors," 2003 *U. Chi. Legal F.* 403, 411–12. If their objections persuade the judge to disapprove it, and as a consequence a settlement more favorable to the class is negotiated and approved, the objectors will receive a cash award that can be substantial, as in *In re Trans Union Corp. Privacy Litigation,* 629 F.3d 741 (7th Cir.2011).

In this case, despite the presence of objectors, the district court approved a class action settlement that is inequitable—even scandalous. The case underscores the importance both of objectors (for they are the appellants in this case—without them there would have been no appellate challenge to the settlement) and of intense judicial scrutiny of proposed class action settlements.

The suit was filed in the summer of 2006, almost eight years ago. Federal jurisdiction was based on the Class Action Fairness Act's grant of federal jurisdiction over class actions in which there is at least minimal (as distinct from complete) diversity of citizenship. 28 U.S.C. § 1332(d)(2)(A). The defendants are Pella Corporation and an affiliate that we can ignore. Pella is a leading manufacturer of windows. The suit alleges that its "Proline Series" casement windows (a casement window is a window attached to its frame by hinges at the side) manufactured and sold between 1991 and 2006 had a design defect that allowed water to enter behind the window's exterior aluminum cladding and cause damage to the window's wooden frame and to the house itself. Pella's sale of the defective windows is alleged to have violated the product-liability and consumer-protection laws of a number of states in which the windows were sold.

The district judge certified two separate classes: one for customers who had already replaced or repaired their defective windows, the other for those who hadn't. The latter class sought only declaratory relief and so was nationwide, but the former sought damages and was limited to customers in six states, with a separate subclass for each state. We upheld the certifications over Pella's objections in *Pella Corp. v. Saltzman,* 606 F.3d 391 (7th Cir.2010) (per curiam).

[1][2] Class counsel negotiated a settlement of the class action with Pella in the fall of 2011. The district judge gave final approval to the settlement in 2013, precipitating the objectors' appeals. The settlement agreement ignores the certification of the two classes and purports to bind a single nationwide class consisting of all owners of Pella Proline windows containing the defect, whether or not the owners have already replaced or repaired the windows. This provision is the first of many red flags that the judge failed to see: "the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern & Southern District Asbestos Litigation,* 982 F.2d 721, 743 (2d Cir.1992); see also Amchem *Products, Inc. v. Windsor,* 521 U.S. 591, 627–28, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Smith v. Sprint Communications Co.,* 387 F.3d 612, 614–15 (7th Cir.2004).

***4** Initially there was only one named plaintiff, a dentist named Leonard E. Saltzman. His son-in-law, Paul M. Weiss, was lead counsel for the class, continuing in that role throughout the district court proceedings that culminated in the approval of the settlement. Technically the law firm of which he is the founder and senior partner (Complex Litigation Group LLC) is a lead class counsel too, along with two of his partners in the firm. The settlement agreement designates still another firm as a lead class counsel as well; but the fee petition describes that firm as merely a class counsel. The agreement gave lead class counsel "sole discretion" to allocate the award of attorneys' fees to which the

parties had agreed among the class counsel, and Weiss proposed to allocate 73 percent of the fees to his own firm. Realistically *he* was the lead class counsel.

Weiss's wife—Saltzman's daughter—is a lawyer too, and a partner in her husband's firm. Both spouses are defendants in a lawsuit charging them with misappropriation of the assets of their former law firm, Freed & Weiss LLC, and other misconduct relating to that firm. *Freed v. Weiss*, No. 2011–CH–41529 (Ill. Cook County Ch. Div.). Weiss is also a defendant in a second, similar suit, *Lang v. Weiss*, No. 2012–CH–05863 (Ill. Cook County Ch. Div.). (The two suits are discussed in Sarah Zavala, "Cook County Suits Involve Alleged Takeover at Freed and Weiss," *Madison–St. Clair Record*, March 7, 2012, pp. 1, 8.) The Freed & Weiss firm was still another class counsel in the present case; and one of the objectors points out that "the dissolution and descent into open warfare that consumed Freed & Weiss in 2011 and 2012 clearly rendered that firm inadequate class counsel, especially in light of the articulated financial needs of the partners that drove the settlement of this case." And six weeks ago the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission recommended in a 94–page report that the Supreme Court of Illinois suspend Weiss from practicing law for 30 months because of repeated misconduct. *In re Paul M. Weiss*, No. 08 CH 116 (Ill. Att'y Registration & Disciplinary Commission Hearing Board, Apr. 17, 2014). The recommended penalty is severe by Illinois standards; the state allows lawyers sanctioned with "disbarment" to apply for reinstatement to the bar after 60 (in some cases just 36) months. Ill. S.Ct. R. 767(a); Illinois Attorney Registration & Disciplinary Commission, *Annual Report of 2013*, at 21, 25.

The impropriety of allowing Saltzman to serve as class representative as long as his son-in-law was lead class counsel was palpable. See *Greisz v. Household Bank (Illinois)*, 176 F.3d 1012, 1014 (7th Cir.1999); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1155 (8th Cir.1999); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir.1978); *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir.1976) (per curiam); "Developments in the Law—Class Actions," 89 *Harv. L.Rev.* 1318, 1585–86 n. 29 (1976). Weiss may have been desperate to obtain a large attorney's fee in this case before his financial roof fell in on him.

***5** Early in the case four other class members had been added as plaintiffs, making a total of five including Saltzman. When the settlement was presented to the district court for preliminary approval, the four class members who had been added as named plaintiffs opposed it, leaving only Saltzman among the original class members to support it. But pursuant to a motion filed by George Lang, who at the time was a partner of Weiss, four other class members were added as named plaintiffs. (Lang says that Weiss rather than he picked them.)

Weiss removed the original four class members who had opposed the settlement; naturally their replacements joined Saltzman in supporting it.

Lang now represents the defrocked named plaintiffs, who are four of the six objectors. A lawyer's switching sides in the same lawsuit would normally be considered a fatal conflict of interest, but the courts are lenient when it is a class action lawyer. E.g., *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir.1988). For often "only the attorneys who have represented the class, rather than any of the class members themselves, have substantial familiarity with the prior proceedings, the fruits of discovery, the actual potential of the litigation. And when an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution." *In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14, 18–19 (2d Cir.1986).)

As finally approved by the district judge, the settlement directed Pella to pay $11 million in attorneys' fees to class counsel. The basis of this figure was the plaintiffs' claim that the settlement was worth $90 million to the class. Were that so, then considering the multistate scope of the suit and perhaps the length of time that elapsed between its filing and the approval of the settlement by the district court in May 2013 (our "perhaps" reflecting doubt that the time was well spent), the fee award, equal to 12 percent of the amount of the settlement earmarked for the class members, would have been defensible. But the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather it specified a procedure by which class members could claim damages. So there was an asymmetry: class counsel was to receive its entire award of attorneys' fees up front; class members were to obtain merely contingent claims, albeit with a (loosely) estimated value of $90 million (actually far less, as we'll see).

The named plaintiffs were each awarded compensation (an "incentive award," as it is called) for their services to the class of either $5,000 or $10,000, depending on their role in the case. Saltzman, being the lead class representative, was slated to be a $10,000 recipient.

***6** Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative. Still another questionable provision of the settlement, which the judge refused to delete, made any reduction in the $11 million attorneys' fee award revert to Pella, rather than being added to the compensation of the class members.

Not only did the settlement agreement not quantify the benefits to the class members, but the judge approved it before the deadline for filing claims. He made no attempt to estimate how many claims were likely to be filed, though without such an estimate no responsible prediction of the value of the settlement to the members of the class could be made. Furthermore, the judge's approval of the settlement (over the objection of the former class representatives and other class members) is squeezed into two two-page orders (the second addressed to the attorneys' fee award) that ignore virtually all the objections to the settlement. Unheeded was our warning that "because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir.2004) (citations omitted).

The settlement should have been disapproved on multiple grounds. To begin with, it was improper for the lead class counsel to be the son-in-law of the lead class representative. Class representatives are, as we noted earlier, fiduciaries of the class members, and fiduciaries are not allowed to have conflicts of interest without the informed consent of their beneficiaries, which was not sought in this case. Only a tiny number of class members would have known about the family relationship between the lead class representative and the lead class counsel—a relationship that created a grave conflict of interest; for the larger the fee award to class counsel, the better off Saltzman's daughter and son-in-law would be financially—and (which sharpened the conflict of interest) by a lot. They may well have had an acute need for an infusion of money, in light not only of Weiss's ethical embroilment, which cannot help his practice, but also of the litigation against him by his former law partners and his need for money to finance his new firm. The appellees (primarily Saltzman, who is still a named plaintiff, and Pella) point out that Saltzman was one of five class representatives, and the other four

didn't have a conflict of interest. But the four other *original* class representatives had opposed the settlement, whereupon they had been replaced by new named plaintiffs—selected by the conflicted lead class counsel.

***7** Weiss's ethical embroilment was another compelling reason for kicking him and Saltzman off the case. The disciplinary proceeding against Weiss was already under way when the settlement agreement was negotiated. It was very much in his personal interest, as opposed to the interest of the class members, to get the settlement signed and approved *before* the disciplinary proceeding culminated in a sanction that might abrogate his right to share in the attorneys' fee award in this case. He could negotiate a quick settlement only by giving ground to Pella, which upon discovering the box that Weiss was in would have stiffened its terms (it plays hardball, as its conduct throughout this litigation has demonstrated).

So Weiss's ethical troubles should have disqualified him from serving as class counsel even if his father-in-law hadn't been in the picture. Another suspicious feature of the settlement, doubtless also related to Weiss's woes, was Pella's agreeing to a $2 million advance of attorneys' fees to lead class counsel before notice of the settlement was sent to the members of the class.

[3] Counsel for a certified class is appointed by the district judge presiding over the class action, and in deciding to appoint a lawyer to be class counsel the court "may consider," besides the lawyer's competence, experience, and related professional qualifications, "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(1)(B), (g)(4). "When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class." *Creative Montessori Learning Centers v. Ashford Gear LLC, supra,* 662 F.3d at 918. Weiss was unfit to represent the class.

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that "the representative parties will fairly and adequately protect the interests of the class." This both Saltzman and the other class representatives who approved the settlement failed to do. The settlement that the district judge approved is stacked against the class. Pella itself estimates the value of the settlement to the class at only $22.5 million-and that is an overestimate. The settlement strews obstacles in the path of any owner of a defective Proline Series casement window. A member of the class may either file a claim with Pella, period, or file a claim that he must submit to arbitration with Pella. If he chooses the first option, he is limited to a maximum damages award of $750 per "Structure," confusingly defined not as a window but as the entire building containing the window. There's also a per-window damages cap that ranges from $60 to $100 (with an additional $0 to $250 for the cost of installation), depending on when the class member purchased his window and when he replaced it. And the cap falls to zero unless he gave "notice" to Pella before replacing the defective window.

***8** A class member who chooses arbitration can receive up to $6000 per "Structure" (defined the same way), and doesn't have to prove that his window or windows were in fact defective, only that they were in the category of Pella windows that contained the design defect. But if Pella convinces the arbitrator that the damage the claimant is seeking compensation for was not caused by the defect or by "any other defect in the structure" (whatever that means), or that the claimant was compensated for the damage from some other source, the claimant gets nothing; and likewise if Pella successfully interposes a complete defense, such as that the statute of limitations had run. The settlement allows Pella to assert ten categories of defenses, including "natural weathering." And the limitations periods applicable to the class members' claims vary from three to five years and involve different accrual and tolling rules. Statutes of repose are also in the picture.

Pella also reserved in the settlement agreement the right to plead and prove partial defenses such as comparative fault and failure to mitigate damages. And some claimants are entitled only to "coupons" (discounts on *future* purchases of Pella windows, discounts that may be worth very little to current owners of Pella's defective windows)—a warning sign of a questionable settlement. *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir.2006); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1179–80 (9th Cir.2013); Christopher R. Leslie, "The Need to Study Coupon Settlements in Class Action Litigation," 18 *Geo. J. Legal Ethics* 1395, 1396–98 (2005); Geoffrey P. Miller & Lori S. Singer, "Nonpecuniary Class Action Settlements," *Law & Contemp. Probs.*, vol. 60, Autumn 1997, pp. 97, 108; cf. 28 U.S.C. § 1712 (Coupon Settlements).

Some class members may be entitled only to an extension of warranty, under a program (the "Proline Service Enhancement Program") that Pella had adopted *before* the settlement and that requires class members to deduct $100 per window from the cost of installation or other labor services required to replace it. The $90 million estimate of the value of the settlement to the class includes the value of these warranty extensions even though they were a contractual entitlement that preceded the settlement rather than being conferred by it and thus were not part of the value created by the settlement, although the settlement does forbid Pella to revoke the extensions, which confers a bit of extra value.

The claim forms are long—12 pages for the "simple" claim with its $750 ceiling, 13 pages for the claim that has the higher ceiling ($6000) but requires the claimant to run the gauntlet of arbitration, doubtless without assistance of counsel or expert witnesses, because the legal fees and experts' fees would quickly mount to or above $6000, leaving the claimant with nothing or even less than nothing: additional bills to pay. There is no provision for shifting the legal or expert-witness costs of a victorious claimant in the arbitration proceeding to Pella.

***9** Both forms require a claimant to submit a slew of arcane data, including the "Purchase Order Number," "Glass Etch Information," "Product Identity Stamp," and "Unit ID Label" of each affected window. The claim forms are so complicated that Pella could reject many of them on the ground that the claimant had not filled out the form completely and correctly.

And that's assuming that class members even *attempt* to file claims. The notice of settlement that was sent to them is divided into 27 sections, some with a number of subsections. For example, the section on eligibility for benefits under the settlement lists nine criteria that must be satisfied while the section on "How Do I Get Out of the Settlement?" specifies six requirements that must be met for a class member to be allowed to opt out of the settlement. And to object to the settlement the class member must satisfy seven other criteria, one of which is again multiple, as it requires listing "each specific reason for your objection."

Considering the modesty of the settlement, the length and complexity of the forms, and the unfamiliarity of the average homeowner with arbitration, we're not surprised that only 1276 claims (of which only 97 sought arbitration) had been filed as of February 2013, out of the more than 225,000 notices that had been sent to class members. The claims sought in the aggregate less than $1.5 million and were likely to be worth even less because Pella would be almost certain to prevail in some, maybe most, of the arbitration proceedings. It's been found that on average consumers prevail in arbitration roughly half the time, and those who win are awarded roughly half of what they seek. Christopher R. Drahozal & Samantha Zyontz, "An Empirical Study of AAA Consumer Arbitrations," 25 *Ohio St. J. Dispute Resolution* 843, 898–900 (2010) . The implication is that Pella would be able to knock 75 percent off the damages sought by class members who filed claims that were submitted to arbitration.

A class recovery of little more than $1 million is a long way from the $90 million that the district judge thought the class members likely to receive were the suit to be litigated. It's true that another 9500 or so simple claims were filed after the district court entered its final judgment, plus another 1387 claims that would require arbitration. But Pella's estimate that the class will recover $22.5 million assumes against all reason that every one of the claims will reap the maximum authorized benefits—$750 for the simple claims and $6000 for the claims that go to arbitration. And that recovery would be only $17 million, not $22.5 million (Pella contends, however, that the extension of its warranty is worth another $5.5 million to the class). There is no evidence that Pella would pay the maximum benefits on all, or indeed on any, of the claims.

If the average payment were half the amount of the claim—a very generous assumption given the estimate of a 75 percent success rate for Pella—the aggregate value of the settlement to the class ($8.5 million) would be less than the attorneys' fees ($11 million). Even the $8.5 million figure is an exaggeration, because the settlement subtracts from the award compensation received from any other source—and one of the other sources is the warranty program.

***10** We don't understand the judge's valuing the settlement at $90 million or thinking the feeble efforts of class counsel led by Weiss to obtain benefits for the class (as distinct from benefits for themselves in the form of generous attorneys' fees) worth $11 million. The restrictions that Pella was allowed to place on the settlement would, if upheld, enormously reduce the class members' recovery of their losses, and the residue is to be returned to Pella. Class counsel sold out the class.

The class as we said could not expect to receive more than $8.5 million from the settlement, given all the obstacles that the terms of the settlement strewed in the path of the class members. And even that figure seems too high. For if the class received that amount, this would indicate that Pella had agreed to pay attorneys' fees equal to 56 percent of the total settlement ($11 million = .56 x ($8.5 million + $11 million)) in order to induce class counsel to settle the case on terms that would minimize Pella's overall liability.

We note the remarkable statement in Saltzman's brief defending the settlement that "in comparison to this $90 million independent valuation of the Settlement, a trial of the certified claims here, even with a complete victory, would result in an award of $0." Zero? But if Pella has no liability, why would it agree to a $33.5 million settlement ($22.5 million in estimated damages plus the $11 million in attorneys' fees)? Saltzman appears to believe that the alternative of litigating the class action to judgment would be infeasible because the court would go crazy trying to determine the damages of each of several, maybe many, thousand class members. He neglects to mention that we rejected this argument when we approved class certification. *Pella Corp. v. Saltzman, supra,* 606 F.3d at 395–96; see also 1966 Advisory Committee Notes to Fed.R.Civ.P. 23; *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 801 (7th Cir.2013); *In re Whirlpool Corp. Front–Loading Washer Products Liability Litigation,* 722 F.3d 838, 860–61 (6th Cir.2013); *Tardiff v. Knox County,* 365 F.3d 1, 6–7 (1st Cir.2004); 2 *Newberg on Class Actions* § 4:54, pp. 205–10 (5th ed.2012). Pella argues that it would fight the individual damages claims if the case were litigated. But the settlement agreement allows it to fight the damages claims submitted to it pursuant to the agreement.

In the district court Saltzman valued the case if it went to trial at $50 million. If he was lying and actually thinks the case worthless, how could he have been an effective class representative even if he had had no conflict of interest?

The mystery deepens: Pella thinks the case if tried would be worth only $14.5 million to the class members. If that is so, why has it agreed to a settlement that it claims will cost it $33.5 million? Be-

cause it would incur legal fees and other expenses of more than $19 million ($14.5 million + $19 million = $33.5 million)? But if the case were tried, class counsel would incur heavy expenses as well, which would induce it to settle for less than $14.5 million. The truth must be that, protected by the bristling technicalities of the settlement agreement, Pella does not believe that the settlement will cost it anywhere near $14.5 million.

***11** If Saltzman is right and damages if the case were tried would be zero, a settlement of $90 million would be a remarkable achievement. (Also an inexplicable one.) But the district judge did not find that the trial would yield zero damages. He didn't estimate the likely outcome of a trial, as he should have done in order to evaluate the adequacy of the settlement. *Reynolds v. Beneficial National Bank, supra*, 288 F.3d at 285.

Saltzman as we said defends the $90 million figure as an "independent valuation" of the settlement. But the only evidence we can find supporting that valuation is the affidavit of an accountant—hired and paid by Weiss's law firm, so hardly independent. Maybe by "independent" Saltzman is referring (though he doesn't say so) to the fact that the settlement was mediated by two retired judges. One, however, stopped mediating (we don't know why) before the negotiations were completed and the other limited his mediation to issues of attorneys' fees.

Saltzman and Pella argue that the objectors did not present an expert witness to support their estimate of the value of the litigation, and Saltzman did: the brother of one of Saltzman's lawyers! Anyway Saltzman has implicitly repudiated his expert, who did *not* testify that the value of the suit if litigated was $0.

Saltzman and Pella point out that the notice of the settlement sent to the class members provoked few objections. Of course not; it was not intended to; it was incomplete and misleading. It failed to mention that four of the five original class representatives had opposed the settlement and been promptly replaced by other persons, selected by class counsel; that the only original representative who had supported the settlement was the father-in-law of the lead class counsel who was both in financial trouble and ethically challenged; that up to half the recipients of the notice would if they filed a claim and it was accepted receive only a coupon discount on a future purchase of a Pella window; and that four of the original class representatives believed the notice of the settlement misleading because it implied that class members would be guaranteed at least $750 or $6000 in response to their claim, whereas these were ceilings and were not even potential payments to those class members entitled only to coupons. The judge was informed of these objections to the notice but declined to order it modified. He said that the notice was "fair," that it was "a neutral communication from the court." It was not neutral and it did not provide a truthful basis for deciding whether to opt out. The judge said the objectors could send their own notice to the class members. But what would the recipient of two conflicting notices do? And it wouldn't be just two. For if the objectors sent their own notice class counsel would send out a rebuttal notice. Better for the court to make sure that the single notice it sent would be a responsible communication rather than an un-candid communication from class counsel than to subject the class members to a blizzard of conflicting notices.

***12** All this is academic, however, because opting out of a class action is very rare. Virtually no one who receives notice that he is a member of a class in a class action suit opts out. He doesn't know what he could do as an opt-out. He's unlikely to hire a lawyer to litigate over a window. In fact the opt-outs in this case were only one twentieth of one percent of the recipients of the notice of approved settlement. A study of other product-liability class actions found that the average opt-out percentage was less than one tenth of one percent. Theodore Eisenberg & Geoffrey Miller, "The Role of Opt–Outs and Objectors in Class Action Litiga-

tion: Theoretical and Empirical Issues," 57 *Vand. L.Rev.* 1529, 1549 (2004); see also *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co. of Chicago*, 834 F.2d 677, 680–81 (7th Cir.1987). Contrary to the statement in Pella's brief, a low opt-out rate is no evidence that a class action settlement was "fair" to the members of the class.

In sum, almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for was present in this case. See, e.g., *Synfuel Technologies, Inc. v. DHL Express (USA), Inc., supra*, 463 F.3d at 654; *Smith v. Sprint Communications Co.*, 387 F.3d 612, 614 (7th Cir.2004); *Mirfasihi v. Fleet Mortgage Corp., supra*, 356 F.3d at 785–86; *Reynolds v. Beneficial National Bank, supra*, 288 F.3d at 282–83; *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 880 (7th Cir.2000); *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir.2011); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir.1991). Most were not even mentioned by the district judge, and those that were received a brush-off. The settlement flunked the "fairness" standard by the one-sidedness of its terms and the fatal conflicts of interest on the part of Saltzman and Weiss. This is a case in which "the lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information." *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir.1996) (dissent from denial of rehearing en banc).

A couple of loose ends remain to be tied up:

[4][5] 1. Saltzman has moved to dismiss the appeals on the ground that the appellants—objectors to the settlement approved by the district judge—lack standing to litigate their objections. Since absent objectors have standing to appeal from an adverse judgment, *Devlin v. Scardelletti, supra*, 536 U.S. at 14, 122 S.Ct. 2005, named objectors must as well. Even named plaintiffs who *settle* nevertheless have standing to appeal a denial of class certification. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876 (7th Cir.2012).

2. Objector Schulz asks us to sanction Saltzman's lawyers for filing the motion on standing. Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough; because the motion on standing was indeed frivolous, little time was spent on it either by us judges or by the objectors' lawyers. Both motions (standing and sanctions) are therefore denied.

***13** To conclude:

After eight largely wasted years, much remains to be done in this case. For starters, Saltzman, Paul Weiss, and Weiss's firm, Complex Litigation Group, must be replaced as class representative (Saltzman), and as class counsel (Weiss and his firm), respectively. And since we are rejecting the settlement agreement, the plaintiffs named in the third amended complaint, whom that agreement caused to be substituted for the original named plaintiffs (other than Saltzman), must be discharged and the four original named plaintiffs (whom we've called the "defrocked" plaintiffs) reinstated.

The judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

C.A.7 (Ill.),2014.
Eubank v. Pella Corp.
--- F.3d ----, 2014 WL 2444388 (C.A.7 (Ill.))

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--- F.R.D. ----, 2013 WL 1181489 (D.D.C.)
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United States District Court,
District of Columbia.
In re **LIVINGSOCIAL** MARKETING AND SALES PRACTICE LITIGATION.
This Document Relates To: All Cases
Forshey v. **LivingSocial** Inc.,
Miller v. **LivingSocial** Inc.,
Pullman v. Hungry Machine, Inc.,
Gosling v. Hungry Machine, Inc.,
Abbott v. Hungry Machine, Inc., and
Schultz v. Hungry Machine, Inc.

Misc. Action No. 11–mc–0472(ESH).
MDL Docket No. 2254.
Nos. 11–cv–0745, 11–cv–1208, 11–cv–1533, 11–cv–1532, 11–cv–1535, 11–cv–1697.
March 22, 2013.

Background: Consumers brought putative class action against defendants, alleging defendants marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation a variety of federal and state laws, including the Credit Card Accountability Responsibility and Disclosure Act, the District of Columbia Consumer Protection Act (CCPA), and state gift certificate laws. The parties reached a settlement and sought final approval of the agreement, and consumers sought final certification of the class for settlement purposes only and approval of their attorneys' fee application.

Holdings: The District Court, Ellen Segal Huvelle, J., held that:
(1) consumers satisfied the requirements for class certification;
(2) settlement agreement was fair, adequate and reasonable;
(3) two organizations designated to receive cy pres awards were appropriate choices; and
(4) district court would award 18% of the $7.5 million fund as attorneys' fees and expenses.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 182.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. Most Cited Cases

Consumers satisfied numerosity requirement for class certification in their action alleging defendant marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation a variety of federal and state laws, based on the fact that defendant sold "Deal Vouchers" to 10.9 million individuals during the defined class period. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 182.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. Most Cited Cases

Consumers satisfied commonality requirement for class certification in their action alleging defendant marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation a variety of federal and state laws, in light of the common contention that defendant sold each class member one or more "Deal Vouchers" with expiration dates that allegedly violated the Credit Card Accountability Responsibility and Disclosure Act, and various state gift certificate laws. Credit Card Accountability Responsibility and Dis-

closure Act of 2009, § 1 et seq., 15 U.S.C.A. § 1601 note; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 165

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak165 k. Common interest in subject matter, questions and relief; damages issues. Most Cited Cases

The commonality prerequisite for class certification requires that plaintiffs advance a common contention that must be of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 161.1

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak161.1 k. Factors, grounds, objections, and considerations in general. Most Cited Cases

Federal Civil Procedure 170A 161.2

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak161.2 k. Superiority, manageability, and need in general. Most Cited Cases

When a class is being certified for settlement purposes only, 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; but other specifications of the class action rule, those designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in the settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3)(A–D), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 182.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. Most Cited Cases

Consumers' class action alleging defendant marketed and sold gift certificates, marked as “Deal Vouchers,” with limited expiration periods in violation a variety of federal and state laws, satisfied the predominance requirement for class certification; predominant issues in the case were certain policies of defendant that were applicable to all class members and the question of defendant's liability under the Credit Card Accountability Responsibility and Disclosure Act. Credit Card Accountability Responsibility and Disclosure Act of 2009, § 1 et seq., 15 U.S.C.A. § 1601 note.

[6] Federal Civil Procedure 170A 165

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak165 k. Common interest in subject matter, questions and relief; damages issues. Most Cited Cases

The existence of minor differences in state law does not preclude the certification of a nationwide class.

[7] Federal Civil Procedure 170A 182.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represen-

ted

170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. Most Cited Cases

Consumers' class action alleging defendant marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation a variety of federal and state laws, satisfied the superiority requirement for class certification, in light of the small individual stakes involved. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 161.2

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak161.2 k. Superiority, manageability, and need in general. Most Cited Cases

The purpose of the superiority requirement for class certification is to ensure that resolution by class action will 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 consequences. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[9] Federal Civil Procedure 170A 161.2

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak161.2 k. Superiority, manageability, and need in general. Most Cited Cases

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights; accordingly, it is relevant to the superiority inquiry that where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[10] Compromise and Settlement 89 64

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k64 k. Antitrust and trade regulation actions. Most Cited Cases

Settlement agreement in consumers' class action alleging defendant marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation a variety of federal and state laws, was fair, adequate, and reasonable and the result of arms-length negotiations, and thus the district court would approve the award; settlement provided for full economic recovery by claimants, as well as injunctive relief requiring defendant to follow certain procedures after the final settlement date, which may have provided some benefits to future customers of defendant. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[11] 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

Whether a proposed class action settlement should be approved lies within the sound discretion of the district court. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[12] 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

Under the class action rule, a court must eschew any rubber stamp approval of a settlement,

yet, at the same time, must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[13] 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

Compromise and Settlement 89 ⚿59

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k59 k. Adequacy or representation; collusion. Most Cited Cases

In passing on a proposed class settlement agreement, a district court has a duty under the class action rule to ensure that it is fair, adequate, and reasonable and is not the product of collusion between the parties. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[14] 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

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. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[15] Deposits in Court 123 ⚿11

123 Deposits in Court
123k11 k. Disposition under judgment or order of court. Most Cited Cases

Two organizations designated to receive cy pres awards in settlement agreement in consumers' class action alleging that defendant marketed and sold gift certificates, marked as “Deal Vouchers,” with limited expiration periods in violation a variety of federal and state laws, were appropriate choices; one organization played a role in securing the passage of the Credit Card Accountability Responsibility and Disclosure Act, and in particular, the gift card provision in the law, and also engaged in other legislative and public advocacy efforts relating to the pitfalls and hidden costs of gift cards, and the other organization was involved in a range of consumer protection activities, including issues relating to gift cards. Credit Card Accountability Responsibility and Disclosure Act of 2009, § 1 et seq., 15 U.S.C.A. § 1601 note; Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[16] Deposits in Court 123 ⚿11

123 Deposits in Court
123k11 k. Disposition under judgment or order of court. Most Cited Cases

District court would approve cy pres award in consumers' class action alleging defendant marketed and sold gift certificates, marked as “Deal Vouchers,” with limited expiration periods in violation a variety of federal and state laws, even though the amount of the cy pres award was $2.5 million, plus any amounts not distributed from the attorneys' fees and cost fund, and the direct benefit to claimants was just under $1.9 million; claimants would receive full relief, and it was more desirable for the residual funds to go to the cy pres beneficiaries, than back to defendant. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[17] Federal Civil Procedure 170A ⚿2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorney Fees
170Ak2737.13 k. Class actions; settlements. Most Cited Cases

An award of attorneys' fees in a certified class action must be reasonable in light of the results obtained. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

[18] Federal Civil Procedure 170A 2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorney Fees
170Ak2737.4 k. Amount and elements. Most Cited Cases

Under the lodestar method for calculating a reasonable award of attorney's fees, an attorney's usual billing rate is presumptively the reasonable rate, provided that the rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

[19] Attorney and Client 45 155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and payment from funds in court. Most Cited Cases

District court would apply a percentage below the standard range and award 18% of the $7.5 million fund as attorneys' fees and expenses following settlement of consumers' class action alleging defendant marketed and sold gift certificates, marked as “Deal Vouchers,” with limited expiration periods in violation a variety of federal and state laws; a modest percentage was appropriate given the limited value of the direct benefits to the class members, the small number of class members who would benefit, the proportionally large cy pres distributions in comparison to the monetary relief awarded to the class members, and the somewhat dubious value of the injunctive relief. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

[20] Attorney and Client 45 155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and payment from funds in court. Most Cited Cases

District court would consider injunctive relief as a relevant circumstance, but would not increase the common fund by $54 million for purposes of applying the percentage method of determining attorneys' fees in consumers' class action alleging defendant marketed and sold gift certificates, marked as “Deal Vouchers,” with limited expiration periods in violation a variety of federal and state laws; value of the injunctive relief to prospective consumers was far from clear, as the extent to which defendant's policies with respect to expiration dates changed was ambiguous at best, and the major thrust of the injunctive relief was, in essence, an agreement by defendant to abide for three years by what plaintiffs claimed was required by law. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

[21] Attorney and Client 45 155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and payment from funds in court. Most Cited Cases

It is appropriate to consider the proportion of an award that is going to cy pres when assessing the benefit of the settlement to the class and the corresponding calculation of attorneys' fees. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

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MEMORANDUM OPINION

ELLEN SEGAL HUVELLE, District Judge.

***1** Eight named plaintiffs,[FN1] on behalf of a class of 10.9 million consumers, sued defendants LivingSocial, Inc. ("LivingSocial") and Jack's Canoes and Kayaks, LLC, d/b/a Jack's Boathouse ("Jack's Boathouse") (collectively, "defendants"), alleging that defendants market and sell gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation of a variety of federal and state laws, including the Credit Card Accountability Responsibility and Disclosure Act (the "CARD Act"), Pub.L. No. 111–24, 123 Stat. 1734 –1766 (codified in scattered sections of U.S.C.); the District of Columbia Consumer Protection Act ("CCPA"), D.C.Code § 28–3901 *et seq.;* and state gift certificate laws. (*See* Consolidated Amended Class Action Complaint [ECF No. 10] ("Compl.") ¶¶ 1, 5, 9). The parties reached a settlement that includes both injunctive and monetary relief for consumers who purchased LivingSocial Deals prior to October 1, 2012, and received Deal Vouchers with allegedly illegal expiration dates and other restrictions. The parties now seek final approval of the settlement agreement that this Court preliminarily approved on October 26, 2012. Plaintiffs additionally seek final certification of the class for settlement purposes only and approval of their attorneys' fee application.

BACKGROUND

A. LivingSocial

LivingSocial is a company that markets "Daily Deals" over the internet, offering consumers a variety of goods and services from local merchants (such as co-defendant Jack's Boathouse) at a discount. (*See* Joint Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for Class Certification [ECF No. 38] ("Final Approval Mot.") at 4.) The Deal Vouchers are generally divided into a "paid" portion, which is the actual amount paid for the voucher, and a "promotional" portion, which is any amount above the paid portion of the voucher. (*See id.*) Between when the company first began offering Daily Deals in 2009 and the closing of the class period on October 1, 2012, approximately 10.9 million individuals purchased defendants' vouchers. (*See* 3/7/12 Fairness Hearing Transcript ("Tr.") at 4–5; Compl. ¶ 24.)

B. The Litigation

This litigation began as six separate suits, filed in various jurisdictions between February and April of 2011.[FN2] On May 2, 2011, LivingSocial filed a motion with the Judicial Panel on Multidistrict Litigation ("JPML") to transfer the actions for coordinated or consolidated proceedings pursuant to 28 U.S.C. § 1407. (*See* Joint Proposed Scheduling Order and Case Management Plan [ECF No. 5] at 1.) On August 22, 2011, the JPML issued a transfer order with respect to five of the cases, and on September 7, 2011, it issued a second transfer order with respect to the sixth case. (*See* Conditional Transfer Orders [ECF Nos. 1, 3].)

On November 4, 2011, plaintiffs filed a Consolidated Amended Class Action Complaint, asserting six claims against defendants: (1) violations of the CARD Act; (2) violations of twenty-seven state gift certificate statutes; (3) violations of the CCPA; (4) breach of contract; (5) quasi-contract, restitution, or unjust enrichment; and (6) declaratory or injunctive relief. Plaintiffs allege that the CARD Act's prohibition on the sale of gift certificates with expiration periods of less than five years is applicable to LivingSocial Deals, and that the inclusion of expiration dates violates a number of state laws pertaining to expiration dates on gift cards and gift certificates. Plaintiffs also allege that Deal Vouchers include a number of other unfair or unconscionable terms, such as requiring that the entire Voucher be redeemed in a single transaction and not providing for any unused portion of the Voucher to be exchanged for cash.

***2** The parties engaged in written discovery between November 2011 and April 2012. (*See* Final Approval Mot. at 7–8.) Since the parties were unable to resolve certain disagreements with respect to the scope of plaintiffs' discovery requests, on April 16, 2012, plaintiffs filed a motion to compel, which was fully briefed in May 2012. (*See id.* at 8.) In addition, defendants took the depositions of three of the named plaintiffs. Additional deposition notices were served by both defendants and plaintiffs, but the action settled before any further depositions were conducted. (*See id.*) The parties, with the help of a mediator, reached a settlement prior to conducting any expert discovery and prior to the resolution of the pending motions to dismiss and to compel. (*See id.*)

C. The Settlement

Soon after the transfer order was entered, the parties engaged in settlement discussions, attending an in-person mediation before Judge Edward A. Infante (Ret.) of JAMS on August 30, 2011, and a second such session on June 14, 2012. (*See id.* at 9 (citations omitted).) In addition to these two in-person mediations, the parties engaged in further discussions and negotiations under Judge Infante's supervision. (*See id.* (citations omitted).) The parties finally came to an agreement in principle, with the exception of attorneys' fees and expenses, which were negotiated after the other terms of the settlement were agreed upon. (*See id.* at 10 (citation omitted).) Through subsequent discussions, the parties worked out the details of the agreement, and on October 19, 2012, the parties filed the settlement agreement with the Court. (*See* Settlement Agree-

ment and Release ("Settlement Agreement") [ECF No. 24–1] at 6–10.)

The settlement terms ultimately agreed upon include both monetary and injunctive relief. (*See id.*) Under the agreement, LivingSocial agrees to pay $4.5 million into a settlement fund, out of which all claims will be paid, as well as the claims processing costs incurred by the settlement administrator. (*See id.* at § 2.1(a), (c).) Each claimant is entitled to a "one-time cash payment equal to the purchase price (also known as the "paid value") of unredeemed, expired LivingSocial Deal Vouchers, up to a maximum of 100%." (*Id.* at § 2.2) The agreement provides that if the claims exceed the fund, then payments to claimants will be reduced pro rata. (*See id.* at § 2.2(a).) It is now clear that the fund far exceeds the value of the filed claims, so there will be no pro rata reduction and all claimants will receive 100% of the paid value of each validly submitted unredeemed, expired Deal Voucher. Claimants will receive payment between thirty and forty-five calendar days after the final settlement date and after the claims processing costs have been paid. (*See id.* at § 2.2(c).)

The agreement also includes a provision for *cy pres* distribution. Between thirty and forty-five calendar days after the deadline for class members to cash their settlement checks,[FN3] any funds remaining in the settlement fund will be paid as a *cy pres* distribution, divided equally between National Consumers League and Consumers Union. (*See id.* at § 2.3.)

***3** The agreement also includes several forms of injunctive relief that LivingSocial will institute within thirty days after the final settlement date and will maintain for three years. (*See id.* at § 2.4(a).) First, for Deals that contain an expiration date and that can be broken into paid value and promotional value, LivingSocial will more clearly identify and make more prominent the paid and promotional values and the respective expiration dates on the Deal Vouchers and on the LivingSocial website. (*See id.* at § 2.4(a)(i).) Second, for any LivingSocial Deal that can be broken into paid and promotional values, the paid value shall not expire any sooner than the period of expiry provided for by the CARD Act or under the state gift card/gift certification law in which the merchant is located, whichever period is longer. (*See id.* at § 2.4(a)(ii).) Third, LivingSocial will state in its terms and conditions that a purchaser may request a refund of the paid value for any unredeemed Deal Voucher within seven days of purchase, and will include a hyperlink to the terms and conditions in a prominent position on the Deal check-out page. (*See id.* at § 2.4(a)(iii), (iv).) Fourth, LivingSocial will include in its terms and conditions a webpage or webform to facilitate a refund request if the Deal is unredeemed and the merchant goes out of business before the promotional period expires. (*See id.* at § 2.4(a)(v).)

The agreement also addresses plaintiffs' attorneys' fees and costs. Plaintiffs agree to petition the Court for no more than $3 million in fees and costs, while defendants agree that they will not oppose any application in that amount.[FN4] (*See id.* at § 2.5(a).) The "attorneys' fees and costs fund" is paid into an interest-bearing escrow account separate and apart from the settlement fund. (*See id.* at § 2.5(b).) If the Court approves the award of attorneys' fees and costs, payment is to be made to class counsel within five business days after the entry of the Fairness Hearing Order and Judgment. (*See id.* at § 2.5(e).) The agreement also provides that "[w]ithin five (5) business days after payment of Class Counsel is complete, any funds remaining in the Attorneys' Fees and Costs Fund shall be paid into the Settlement Fund." (*Id.* at § 2.5(f).) The agreement further provides for incentive awards for the three named plaintiffs in the amount of $2,500 for plaintiffs who provided deposition testimony and $500 for those who did not. (*See id.* at § 2.6.)

D. Preliminary Approval

The Court preliminarily approved the settlement agreement on October 26, 2012. (*See* Preliminary Approval and Provisional Class Certification Order [ECF No. 28].) Prior to granting approval,

the Court indicated during a telephonic conference on October 12, 2012, that final approval would have to wait until the actual number of claimants and the value of the claims to be paid were known and that detailed billing records had to be submitted to support the attorneys' fee request.

E. Submitted Claims and Actual Expenses

***4** According to the settlement administrator, 26,830 claims for settlement relief were completed, timely submitted, and validated, including both online and paper claim forms. (*See* Declaration of Jennifer M. Keough in Support of Joint Motion for Final Approval of the Class Action Settlement ("Keough Decl.") [ECF No. 38–5] ¶ 18.) FN5 The aggregate dollar value of those claims is $1,894,803.70. (*See id.*) In addition, the claims processing costs that are to be deducted from the Settlement Fund under the terms of the Settlement Agreement are $53,951.44. (*See id.* ¶ 19.) FN6 The sum of the cash relief to be distributed to class members and the total claims processing costs is therefore $1,948,755.14, leaving a residual of $2,551,244.86 to be designated as the *cy pres* award. (*See* Pl. Resp. at 4.)

F. Objections

Class members have filed four formal objections to the settlement agreement. Class members Frederic Fletcher and Katherine Schaffzin have objected to certain settlement terms, but as explained herein, their objections are premised on a fundamental misunderstanding of the settlement or of the scope of the release. FN7 (*See* Fletcher Objection [ECF No. 34] and Schaffzin Objection [ECF No. 35].) Class members Michelle Melton and Cery Perle, filing together, and Jeremy de la Garza object to the *cy pres* award and the attorneys' fee request. (*See* Melton and Perle Objection [ECF No. 37] and De la Garza Objection [ECF No. 33].) Fletcher objects to the fee request as well. These objections will be addressed herein.

G. Pending before the Court

Currently pending are plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Award Payments [ECF No. 31] and the parties' Joint Motion for Final Approval of the Class Action Settlement and Plaintiffs' Motion for Class Certification [ECF No. 38]. In addition, as noted, four class members have filed objections to the settlement agreement, and plaintiffs have filed a response to those objections [ECF No. 40]. FN8 A Fairness Hearing was held on March 7, 2013, at which objector Frederic Fletcher testified.

ANALYSIS

I. CLASS CERTIFICATION

As a preliminary matter, the Court will certify the class for settlement purposes, FN9 based on its finding that the class satisfies the prerequisites of Federal Rule of Civil Procedure 23(a) with respect to numerosity, commonality, typicality, and adequacy, as well as the prerequisites of Rule 23(b)(3) with respect to predominance and superiority.

A. Rule 23(a) and (b)(3) Requirements

1. Numerosity

[1] Rule 23(a) requires that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). The numerosity requirement is easily satisfied by the undisputed fact that LivingSocial has sold Deal Vouchers to 10.9 million individuals between 2009 and October 1, 2012, which has been defined as the class period. (*See* Tr. at 4–5; *see also* Keough Decl. ¶ 8 (stating that notice of the proposed settlement was emailed to 10.9 million purchasers of Deal Vouchers).)

2. Commonality

***5** [2][3] Another prerequisite of Rule 23(a) is that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "Under Rule 23(a), commonality requires that plaintiffs advance a 'common contention' that 'must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' " *Cobell v. Salazar,* 679 F.3d 909, 922 (D.C.Cir.2012) (quoting *Wal–Mart v. Dukes,* ——

U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011)). In this case, commonality is satisfied because the claims are based on the common contention that LivingSocial has sold each class member one or more Deal Vouchers with expiration dates that allegedly violate the CARD Act and various state gift certificate laws.

3. Typicality

Under Rule 23(a), the Court must find that that "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). Typicality is satisfied here because the claims of named plaintiffs and of class members are based on the same core set of facts and underlying legal theory. *See Trombley v. Nat'l City Bank*, 826 F.Supp.2d 179, 192–93 (D.D.C.2011) (typicality is met when "each class member's claim arises from the same course of events that led to the claims of the representative parties" (internal quotation marks and citation omitted)).

4. Adequacy

Finally, Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The Court finds that the named plaintiffs adequately represent the class and there is no conflict between the named plaintiffs' interests and those of the class. *See Trombley*, 826 F.Supp.2d at 193. Class member Schaffzin objects, based on her misunderstanding of the settlement terms, that there is a conflict between class representatives and class members because the named plaintiffs do not hold vouchers that include both paid and promotional value, and "the sweeping definition of the class includes those who hold the full face value of their vouchers." (*See* Schaffzin Obj. at 9.) While the class is defined broadly, that provision of the agreement must be read alongside the provision regarding the relief provided to the settlement class. (*See* Agreement § 2.2.) The relief provision makes clear that only individuals who hold vouchers that are *expired*, unredeemed, and not subject to a refund are entitled to receive monetary relief; therefore, those individuals who hold vouchers that are still valid are unaffected by the settlement. They neither can nor are forced to exchange their unexpired vouchers for a cash payment under the settlement. Thus, there is no possible conflict.

[4][5] Because plaintiffs have pursued this action under Rule 23(b)(3), they must meet two additional criteria: 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." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting Fed.R.Civ.P. 23(b)(3)). Factors relevant to this inquiry include:

> ***6** (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3)(A)–(D). When a class is being certified for settlement purposes only, "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. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem Prods.*, 521 U.S. at 620, 117 S.Ct. 2231.

5. Predominance

[6] Courts in this jurisdiction have found that the factor of predominance is satisfied by "generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position." *Trombley*, 826

F.Supp.2d at 194 (internal quotation marks and citations omitted). The predominant issues in this case are certain LivingSocial policies that are applicable to all class members and the question of LivingSocial's liability under the federal CARD Act. Plaintiffs also allege that LivingSocial's policies violate various state gift certificate laws, which may differ with respect to the particular limits on expiration periods that they establish,[FN10] but "the existence of minor differences in state law does not preclude the certification of a nationwide class." *Cohen v. Chilcott,* 522 F.Supp.2d 105, 116 (D.D.C.2007). The Court finds, therefore, that the predominance requirement is met.

6. Superiority

[7][8][9] The purpose of the superiority requirement is to "ensure [ ] that resolution by class action will '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 consequences.' " *Trombley,* 826 F.Supp.2d at 194 (quoting *Amchem Prods.,* 521 U.S. at 615, 117 S.Ct. 2231). As the Supreme Court has noted, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods.,* 521 U.S. at 617, 117 S.Ct. 2231. Accordingly, it is relevant to the superiority inquiry that " '[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.' " *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 545 (6th Cir.2012) (quoting *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)). Because of the small individual stakes involved here, this is the very type of case that would not likely be pursued by in the absence of a class. Thus, a class action is a superior mechanism.

***7** The Court therefore concludes that the class satisfies all of Rule 23's prerequisites.

II. NOTICE TO SETTLEMENT CLASS

Under Rule 23, "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).

> The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude form the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
>
> *Id.*

Having carefully examined both the short-form and long-form notices that were issued to class members, the Court has no difficulty finding that notice was adequate. Objector Schaffzin's misunderstanding of the terms of the settlement renders her arguments about the inadequacy of these notices and the online claim forms meritless. (*See* Schaffzin Obj. at 10.)

III. REASONABLENESS OF SETTLEMENT

[10] Having found that the class should be certified, the Court now turns to consider the reasonableness of the settlement to determine if it should be approved.

A. General Principles of Law Under Rule 23

[11][12][13] Whether a proposed class action settlement should be approved lies within the sound discretion of the district court. *See In re Vitamins Antitrust Litig.,* 305 F.Supp.2d 100, 103 (D.D.C.2004). Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may

be settled, voluntarily dismissed, or compromised only with the court's approval." "The Court must eschew any rubber stamp approval ... yet, at the same time, must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Id.* (citation omitted). "[I]n passing on the proposed settlement agreement, the district court has a duty under Fed.R.Civ.P. 23(e) to ensure that it is fair, adequate, and reasonable and is not the product of collusion between the parties." *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 30 (D.C.Cir.2000) (citations omitted).

There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 375 (D.D.C.2002) (" *Lorazepam I* ") (collecting cases). The Court will address each in turn.

1. Arms–Length Negotiations

***8** [14] "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.' " *Vitamins Antitrust Litig.*, 305 F.Supp.2d at 104 (quoting Manual for Complex Litig. § 30.42). Class counsel and defense counsel are experienced in litigating class actions, including actions pertaining to gift certificate laws. (*See* Final Approval Mot. at 13.) Counsel engaged in adversarial, arms-length negotiations that extended over more than a year, while simultaneously conducting discovery. (*See id.* at 14.) Judge Infante, an experienced mediator who oversaw the settlement negotiations, has indicated in a sworn statement that "[t]here was never any type of collusion between the Parties in any of the negotiations," adding that those negotiations "were intense at every step of the way, and the Parties vigorously advocated for their respective positions." (Declaration of Hon. Edward A. Infante (Ret.) ("Infante Decl.") [ECF No. 38–4] ¶¶ 1, 10.)

While objector Fletcher alleges, without support, that "[t]he Settlement favors LivingSocial to such an unprecedented degree that collusion must have occurred" (Fletcher Obj. at 4), his assumption is based on a flawed understanding of the settlement agreement and the release. Fletcher incorrectly interprets the settlement as releasing LivingSocial from "the same egregious conduct into perpetuity," by "provid[ing] indefinite immunities for claims not accrued, and parties presently unaffected." (*See id.* at 1, 5.) As made clear during the Fairness Hearing, the settlement agreement only releases *claims* based on vouchers purchased prior to October 1, 2012; it does not release any and all future claims made by any person who may have purchased a voucher prior to October 1, 2012. (*See* Tr. at 34–36; Agreement § 5.1 (releasing claims "arising out of or relating to any of the acts, omissions, or other conduct that was or could have been alleged in the Actions").) In other words, LivingSocial is released from liability with respect to certain claims, not certain individuals.[FN11]

Mr. Fletcher's argument that the settlement agreement renders the CARD Act inapplicable is likewise meritless. (*See* Fletcher Obj. at 7.) To the contrary, under the terms of the settlement, LivingSocial agrees that for three years, the Vouchers it issues will have expiration dates that are no shorter than the five years required by the CARD Act (and in some cases longer, if required by the applicable state gift certificate laws). (*See* Agreement § 2.4.) After the settlement period ends, LivingSocial will be still be bound to follow the law, including the CARD Act to the extent that it applies to Deal Vouchers. The Court thus rejects Fletcher's objections, and concludes that the settlement was the product of arms-length negotiations.

2. Terms of Settlement in Relation to Strength of Plaintiffs' Case

***9** The settlement agreement provides for mon-

etary and injunctive relief for millions of LivingSocial customers nationwide. (*See* Final Approval Mot. at 15.) LivingSocial will pay $4,500,000 into the Settlement Fund, which will provide complete relief to class members who have submitted valid claims—that is, each claimant will receive 100% of the paid value of their expired, unredeemed Vouchers. (*See id.* at 16.) Indeed, now that the claims period has closed, it is clear that the Settlement Fund is significantly larger than necessary to satisfy the submitted and validated claims. Once all claims for refunds for expired and unredeemed Deal Vouchers have been fully satisfied, the remaining funds will be distributed as *cy pres* awards to two nonprofit organizations with missions that are aligned with plaintiffs' interests and closely approximate the purpose of the suit. (*See id.*)

In addition, the settlement agreement includes injunctive relief requiring LivingSocial to follow certain practices for three years after the final settlement date. (*See id.* at 17.) As detailed above, these changes include what is essentially an agreement to abide by the five-year expiration period of the CARD Act (or pertinent state gift certificate laws that may prescribe longer expiration periods) and a series of changes that will make LivingSocial's disclosures of its policies more transparent and effective. In fact, according to counsel for LivingSocial (*see* Tr. at 12, 26) and plaintiffs' filing (*see* Pl. Resp. at 12), these practices are already in place at LivingSocial, having been instituted beginning shortly after the first suit was filed on February 14, 2011.

These benefits to the class must be considered in juxtaposition with the risks attendant to continued litigation of this matter. *See Lorazepam I,* 205 F.R.D. at 377. Defendants assert that they have strong defenses, which might have foreclosed the possibility of any class-wide recovery, in the absence of a settlement. (*See* Final Approval Mot. at 17.) They maintain that plaintiffs would be unlikely to succeed in establishing that Deal Vouchers are, or should be, regulated as "gift certificates" under federal or state law. (*See id.* at 18.) In addition, they argue that even if Deal Vouchers are considered gift certificates, the relevant gift certificate regulations expressly permit the placement of expiration dates on the Vouchers' promotional (as opposed to paid) value. (*See id.*) If the litigation had progressed, defendants would have also contended that individual issues predominate over common issues, thereby precluding class certification under Rule 23(b)(3). (*See id.* at 19.)

3. Status of Litigation Proceedings at Time of Settlement

Courts also " 'consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-a-vis the probability of success and range of recovery.' " *Chilcott,* 522 F.Supp.2d at 117 (quoting *In re Lorazepam & Clorazepate Antitrust Litig.,* 2003 WL 22037741, at *4 (D.D.C. June 16, 2003) (" *Lorazepam II* ")). In this case, the parties engaged in written discovery, with defendants producing 29,000 documents, consisting of more than 73,000 pages, and more than 100 megabytes of electronically stored information. (*See* Final Approval Mot. at 20; Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Award Payments ("Pl. Fee Mot.") [ECF No. 31] at 10.) Defendants noticed the depositions of all named plaintiffs and deposed three. (*See* Final Approval Mot. at 20.) As a result, the parties had sufficient information to have a realistic assessment of their prospects in the litigation. The parties briefed a motion to dismiss and a motion to compel, but had not reached the point of briefing summary judgment motions. The Court therefore finds that the settlement "does not 'come too early to be suspicious nor too late to be a waste of resources' but is rather 'at a desirable point in the litigation for the parties to reach an agreement and to resolve these issues without further delay, expense, and litigation.' " *Chilcott,* 522 F.Supp.2d at 117 (quoting *Vitamins Antitrust Litig.,* 305 F.Supp.2d at 105.)

4. Reaction of the Class

***10** Four formal objections have been filed in this case, along with four "informal" objections that were not properly served on the parties or the Court and contained minimal information. This is not a significant number of objections. While the Court agrees that some of the objections raised valid points with respect to attorneys' fees, it rejects the objections regarding the settlement and the *cy pres* award, for they are largely based on misreading the terms of the settlement. In addition, there have been 361 valid requests for exclusion from the class, which is also not a significant number, in view of the size of the class and the more than 26,000 claims submitted. (*See* Final Approval Mot. at 21.)

5. Opinion of Experienced Counsel

Courts in this jurisdiction have noted that "[t]he opinion of experienced counsel 'should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement.' " *Meijer, Inc. v. Warner Chilcott Holdings Co. III,* 565 F.Supp.2d 49, 58 (D.D.C.2008) (quoting *Lorazepam II,* 2003 WL 22037741, at *6.) The experienced counsel involved in this case are obviously of the opinion that the settlement is fair, reasonable and adequate, and as noted, no one has seriously disputed this position. (*See* Final Approval Mot. at 21–22 (citations omitted).)

B. *Cy Pres* Award

[15] The Court finds that the two organizations that have been designated to receive *cy pres* awards out of the residual funds after claimants are fully compensated are appropriate choices. Consumers Union, which is the non-profit policy and advocacy arm of Consumer Reports, is dedicated to "work for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves." (Declaration of Ellen Bloom, Senior Director, Consumers Union [ECF No. 38–2] ¶ 3.) Consumers Union played a role in securing the passage of the CARD Act of 2009, and in particular, the gift card provision in the law. (*See id.* ¶ 6.) The organization has engaged in other legislative and public advocacy efforts relating to the "pitfalls and hidden costs of gift cards." (*Id.* ¶ 8.) The Court finds that the interests and activities of Consumers Union are thus directly aligned with those advanced in this lawsuit.

Similarly, National Consumers League ("NCL") is dedicated to "protect[ing] and promot[ing] social and economic justice for consumers and workers in the United States and abroad." (Declaration of Sally Greenberg, Executive Director, NCL [ECF No. 38–3] ¶ 3.) NCL has been involved in a range of consumer protection activities, including issues relating to gift cards. NCL supported passage of the CARD Act and has advocated for measures designed to protect consumers from abusive gift cards practices in the District of Columbia and Maryland. (*See id.* ¶¶ 6, 7.) So, as is the case with Consumers Union, NCL's interests and activities are aligned with those of this lawsuit.

***11** Indeed, the *cy pres* beneficiaries here are far better choices than were the intended *cy pres* beneficiaries in *In re Groupon, Inc., Mktg. and Sales Practices Litig.* (" *Groupon* "), No. 11–md–2238 (S.D.Cal. *consolidated* June 2, 2011). In *Groupon,* counsel argued that the intended *cy pres* beneficiaries—the Electronic Frontier Foundation and the Center for Democracy and Technology—were sufficiently related to the case because the "Class Members are Internet users whose claims arise from Groupon's purportedly unlawful online marketing and sales practices," while the beneficiaries were "two advocacy organizations dedicated to pursuing Internet consumer rights." Order Denying Joint Motion for Final Approval of Class Action Settlement, *Groupon,* No. 11–md–2238, *slip op.* at *15 (S.D.Cal. Sept. 28, 2012). The *Groupon* court rejected the *cy pres* provision, finding that there was no "driving nexus" between the "claims alleged in the case and the *cy pres* beneficiary." *See id.* In addition, the claims period in *Groupon* did not close before final approval of the settlement agreement, so it was possible that the *cy pres* award would have been distributed before all class members had been fully compensated for their losses.

In contrast, the intended beneficiaries of the *cy pres* award in this case are sufficiently aligned with the claims in the lawsuit. Furthermore, the claims period has already closed, and it is readily apparent that all claimants will be fully compensated for their losses. Therefore, it is appropriate for the residual funds to go to two non-profit organizations that are dedicated to the public interest, particularly where the alternatives would be to return the funds to defendant, thereby reducing the deterrent effect of the suit, or to escheat to the state. Objector De la Garza argues that the residual funds should escheat to the U.S. government, or, in the alternative, be used for pro rata distribution beyond the value of the unused voucher, because the class complaint sought punitive damages. (*See* De la Garza Obj. at 1.) Because the Court does not find any of these alternatives to be preferable, it will approve the *cy pres* beneficiaries as designated.[FN12]

[16] Although there are grounds to argue that the amount of the *cy pres* award is disproportionate in relation to the recovery by the class, the Court will nonetheless approve it. In this regard, the Court recognizes the Third Circuit's recent pronouncement that "[b]arring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir.2013). But in that case, a fund of approximately $21.5 million was designated for the class, but only approximately $3 million actually ended up being distributed to the class, leaving a *cy pres* award of $18.5 million. *Id.* at 168–70. The sheer disproportion between the awards going to claimants and the award going to *cy pres* beneficiaries clearly factored into the Third Circuit's decision to reverse the district court's approval of the settlement. More significantly, however, the Third Circuit held that the district court "did not have the factual basis necessary to determine whether the settlement was fair to the entire class," and "did not know the amount of compensation that will be distributed directly to the class." *Id.* at 175.

***12** In the instant case, by contrast, all of those numbers are now known. The claims period has ended and the number of claims and the value of those claims are known. The amount of the *cy pres* award ($2.5 million, plus any amounts not distributed from the Attorneys' Fees and Cost Fund) as compared to the direct benefit to claimants (just under $1.9 million), while far from ideal, is not nearly as lopsided as in *Baby Products.* Claimants will receive full relief, and it is more desirable for the residual funds to go to the *cy pres* beneficiaries, than back to LivingSocial. Moreover, several courts in this jurisdiction have approved similar *cy pres* awards. *See, e.g.*, *In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F.Supp.2d 58, 61 (D.D.C.2009) (approving settlement agreement including *cy pres* award likely to be more than $14 million compared to $2.1 million directly distributed to plaintiffs); *Radosti v. Envision EMI, LLC*, 760 F.Supp.2d 73, 75 (D.D.C.2011) (approving settlement agreement including *cy pres* award of $3.69 million with $8 million in direct distribution); *Diamond Chem. Co. v. Akzo Nobel Chemicals B. V.*, 517 F.Supp.2d 212, 215, 220–21 (D.D.C.2007) (approving *cy pres* distribution of $5.1 million out of $12.9 million settlement fund); *cf. Boyle v. Giral*, 820 A.2d 561, 565 n. 6, 570 (D.C.2003) (approving settlement with $107 million distributed to consumer class while $107 million intended for consumer class designated as a *cy pres* award because of impracticality of distributing directly to consumer class members). Nonetheless, as other judges in this jurisdiction have done, the Court will take into consideration the relatively small proportion of the settlement fund that provides direct monetary relief to claimants when it determines attorneys' fees. *See In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F.Supp.2d at 61 (taking into account "the peculiar balance between the return to class members and the size and nature of the *cy pres* contribution" in determining fee award).

C. Conclusion

For the above reasons, the Court finds, consistent with Fed.R.Civ.P. 23(e), that the settlement

agreement is fair, adequate, and reasonable and the result of arms-length negotiations. The settlement provides for full economic recovery by claimants, as well as injunctive relief that may provide some benefits to future LivingSocial customers. The Court will also approve the reasonable incentive awards, which are $2500 for the three named plaintiffs who were deposed and $500 for the remaining named plaintiffs, for a total of $10,000. (*See* Final Approval Mot. at 10).

IV. LEGAL FEES

The Court will now turn to the vexing issue of attorneys' fees, which is, unfortunately, one of the central issues in this case, as it is in most class action litigation. It is especially challenging here, since only 26,830 class members out of a possible 10.9 million will recover $1,894,803 (or approximately $70 per class member), but the attorneys seek $3 million in fees and costs.

A. Governing Principles of Law

***13** [17] "In a certified class action, 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). However, "[a]n award of attorneys' fees must be reasonable in light of the results obtained." *In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F.Supp.2d at 60. The D.C. Circuit has held that "a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases." *Swedish Hosp. v. Shalala*, 1 F.3d 1261, 1271 (D.C.Cir.1993). While "fee awards in common fund cases may range from fifteen to forty-five percent," *Lorazepam II*, 2003 WL 22037741, at *7, "a majority of common fund class action fee awards fall between twenty and thirty percent." *Swedish Hosp.*, 1 F.3d at 1272.

Courts frequently use the lodestar as a cross-check on the propriety of fees awarded under the percentage-of-the-fund method, sometimes adjusting the percentage or the award upward or downward accordingly. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir.2005) ("[I]t is sensible for a court to use a second method of fee approval to cross-check its initial fee calculation."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir.2000) ("[T]he lodestar remains useful as a baseline ... we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage."); Manual for Complex Litig. (Fourth) (2009) § 14.121 n. 504 (collecting cases); *id.* § 14.122.

[18] Under the lodestar method, "an attorney's usual billing rate is presumptively the reasonable rate, provided that the rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.' " *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C.Cir.1993) (quoting *Blum v. Stenson*, 465 U.S. 886, 895–96 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). However, courts have reduced the lodestar in cases in which it is apparent that counsel's calculations are suspect. *See, e.g.*, *Miller v. Holzmann*, 575 F.Supp.2d 2, 45 (D.D.C.2008) (reducing attorneys' fees by 25.5 percent based on ambiguous time entries, block billing, inefficient staffing, and erroneous inclusion of clerical work), *vacated in part on separate grounds by United States ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871 (D.C.Cir.2010); *Muldrow v. Re–Direct, Inc.*, 397 F.Supp.2d 1, 4–5 (D.D.C.2005) (reducing attorneys' fees by 25 percent because of disproportion between fee request and size of judgment in "relatively straightforward negligence suit").

B. Plaintiffs' Position

[19] Plaintiffs have requested an award of $3,000,000 for fees and expenses, which defendants have agreed not to oppose. (*See* Pl. Fee Mot. at 13.) They argue that this amount is justified by "the comprehensive settlement benefits achieved on behalf of the Settlement Class, as well as the time, effort and resources expended by Plaintiffs' Counsel in successfully prosecuting this Action to conclusion." (*Id.*) They suggest that the requested fee award is fair and reasonable as a percentage of the

"total constructive common fund" and when cross-checked against the lodestar. (*Id.* at 13–14.)

***14** Plaintiffs frame their fee request as constituting "less than 5%" of the "constructive common fund," which they value at $62 million, including "the value of the cash relief available to the Settlement Class and certain administrative costs ($4,500,000), the additional administration costs borne by LivingSocial (approximately $80,000), the agreed-upon amount of attorneys' fees and expenses ($3,000,000) and the value of the injunctive relief ($54 million at the low end)." (*Id.* at 4.) Regarding the lodestar cross-check, plaintiffs maintain that their total lodestar is $2,025,465.50 for 4,012.50 hours of work, in addition to $43,297 in expenses. (*See* Notice of Errata [ECF Doc. 39] at 1; Pl. Fee Mot. at 29.) FN13 They suggest, therefore, that their fee request represents a "modest multiplier of less than 1.5 times the lodestar." (*See* Pl. Fee Mot. at 4.)

C. *Lorazepam* Factors

Plaintiffs contend that their fee request is reasonable under the *Lorazepam* factors, which Judge Hogan adopted from the Third Circuit in the absence of any definitive test in this Circuit. Those factors include:

> (1) The size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Lorazepam II, 2003 WL 22037741, at *8. Of these factors, the most significant factor here is the size of the fund, which in turn depends on whether injunctive relief should be valued at $54 million and whether it should be included in the fund.

1. The Size of the Fund and Number of People Who Will Benefit

a. The Fund

[20] The Court rejects plaintiffs' attempt to value the common fund at $62 million. While there are many cases where courts have taken the fact of "valuable" injunctive relief into account in awarding attorneys' fees, the Court is unaware of any case where a fund has been defined to include the supposed value of the injunctive relief to the class members. *See, e.g.*, *Pinto v. Princess Cruise Lines, Ltd.*, 513 F.Supp.2d 1334, 1343 (S.D.Fla.2007) (acknowledging the "important injunctive relief," but not discussing a particular dollar value); *In re Excess Value Ins. Coverage Litig.*, 598 F.Supp.2d 380, 388 (S.D.N.Y.2005) ("Rather than attempt to assign a specific dollar value to the Structural Changes, the Court is acknowledging that they do benefit the Class by awarding legal fees at the upper end (30%) of the Settlement Value commonly awarded under the percentage method, although still substantially lower than the fees sought by counsel."); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 525 (E.D.N.Y.2003) (the court accounted for the "substantial injunctive relief" while still reducing fees from $660 million to $220 million). FN14

***15** Because the value of injunctive relief can be so difficult to quantify, some courts have opted to use the lodestar method in jurisdictions in which they have the discretion to use either the lodestar or the percentage-of-the-fund method. *See, e.g.*, *In re HP Laser Printer Litig.*, 2011 WL 3861703, at *5 (C.D.Cal.2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 2012 WL 6869641, at *8 n. 24 (C.D.Cal.2012) (choosing not to "treat[ ] the settlement as a common fund due to the excessive degree to which various assumptions about the value of the injunctive relief can manipulate the attorney's fee award").

In the few cases where courts have accepted that the injunctive relief may be worth a particular amount, their acknowledgment of that figure appears to have made little to no difference in their

ultimate calculations. For instance, in *McCoy v. Health Net, Inc.*, 569 F.Supp.2d 448, 478 (D.N.J.2008), the court accepted the parties' valuation of the injunctive relief and made a fee award that "represents just over 32% of the common fund of $215 million and 28% of the $249 million value of the common fund plus the parties' lowest estimated value of the injunctive relief." In that case, it was clear that whether the injunctive relief was included, the fee award did not deviate much from the standard range of awards, and resulted in only a four percentage point difference. Meanwhile, in the sole case cited by plaintiffs where the court did incorporate the injunctive relief into the value of the common fund, the court awarded fees in the amount of 12.9% of the fund, well below the 20–30% general range of awards in common fund cases. *See Sheppard v. Consol. Edison of New York*, 2002 WL 2003206, at *7 (E.D.N.Y.2002). Also, that case involved $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief," which was based on the estimated cost to the defendant of implementing the changes, rather than the economic value of those changes to the class. *Id.*

This Court believes there is a significant difference between valuing injunctive relief based on concrete figures as to the cost to defendant of *implementing* the relief and representing approximately 40% of the fund (as in *Sheppard*), and this case, where plaintiffs propose valuing injunctive relief based on speculation about consumer behavior and rough estimates of the economic consequences thereof, which would represent an astonishing 87% of the fund. *See Kings Choice Neckwear, Inc. v. DHL Airways, Inc.*, 2003 WL 22283814, at *4 (S.D.N.Y. Oct. 2, 2003) ("[T]he value of the injunction differs enormously depending on whether it is considered from the viewpoint of the plaintiffs or defendants.") FN15

In this regard, the Court is persuaded by the Ninth Circuit's rationale in *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir.2003), where the court observed:

> only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees. When this is not the case, courts should consider the value of the injunctive relief obtained as a relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as a part of the fund itself.

***16** (internal quotation marks and citations omitted). Consistent with this reasoning, the Court will consider the injunctive relief as a "relevant circumstance," but it will not increase the common fund by $54 million. Plaintiffs' estimates of the value of the injunctive relief are simply too speculative. FN16 While the injunctive relief is not worthless, to value it at $54 million serves no useful purpose other than to inflate the fund for purposes of lowering the percentage of the fund represented by the fee request.

In addition, the value of the injunctive relief to prospective LivingSocial consumers is far from clear. First, the extent to which LivingSocial's policies with respect to expiration dates have changed is ambiguous at best. Even plaintiffs' characterization of the value of the injunctive relief is far from compelling: they note that "as a direct result of this Settlement, LivingSocial has agreed to *maintain its current practice* of not placing an expiration date on the paid value of any Deal Voucher that is shorter than the five-year period of expiry set forth by the CARD Act ... for at least three years," and "LivingSocial will *maintain its current practice* of providing clear and conspicuous disclosures explaining the difference between the paid value and promotional value on its Deal Vouchers, as well as on its Company website." (Pl. Resp. at 12 (emphasis added).) Admittedly, certain policy changes were made subsequent to the filing of this

suit,[FN17] but, as made clear by defense counsel, "under the CARD Act, the notion of a paid promotional split is *something that the company has always recognized.* And via this settlement, the company has made clear and added additional disclosures regarding the nature of that split and the duration of the paid value which, of course, is five years under the CARD Act—and in many states, perpetual—as opposed to the promotional value." (Tr. at 26 (emphasis added).) Moreover, it is unclear if LivingSocial's expiration policies before this suit was filed were considerably different from the practices prescribed by the settlement agreement. (*See* Compl. ¶ 38 ("LivingSocial attempts to circumvent federal and state gift certificate laws by inserting a disclaimer on some LivingSocial gift certificates in which it claims its expiration terms do not apply to any prepaid portion of the gift certificates"); Tr. at 45 (LivingSocial's counsel explaining that the settlement term providing for a full refund if the merchant goes out of business before the expiration of the promotional period "is primarily one of disclosure in that it is now clear to LivingSocial's customers and class members that that, in fact, is going to be the practice in the event of a merchant going out of business").)

Second, whenever these policies were implemented and even if the injunctive relief did cause the implementation of better disclosure practices, the major thrust of the injunctive relief is, in essence, an agreement by LivingSocial to abide for three years by what plaintiffs claim is required by law. (*See* Tr. at 25 (class counsel agreeing with the Court's assessment that injunctive relief requires LivingSocial to abide by "an expiration date that at least purportedly is federally mandated").) Moreover, the injunctive relief provides limited direct benefit to class members since they bought their Vouchers prior to October 2012 and the injunctive relief applies only to prospective purchasers who may or may not have bought in the past. *See Staton*, 327 F.3d at 974.

***17** Rather than attempting to disguise the size of their fee request by painting it as "less than 5%" of a $62 million fund (Pl. Fee Mot. at 4), it would have been preferable for counsel to have acknowledged that the common fund consists only of the monetary relief plus fees and costs (or $7.5 million) and then to have requested a fee of $3 million, which amounts to 40% of the fund.[FN18]

b. Number Who Will Benefit

[21] As far as the number of people who will benefit, 26,830 valid claims have been submitted, representing a mere .25% of the purported class of 10.9 million. While the number of people is not negligible and those individuals will receive 100% of the paid value of their Deal Voucher, the recovery by each person amounts to approximately $70.00. Furthermore, even the $4.5 million in monetary relief includes less than $2 million in direct benefits to class members while awarding a *cy pres* of more than $2.5 million. The Court is cognizant that generally "the percentage applies to the total fund created, even where the actual payout following the claims process is lower." *Pinto*, 513 F.Supp.2d at 1339. However, it is also appropriate to consider the proportion of the award that is going to *cy pres* when assessing the benefit of the settlement to the class and the corresponding calculation of attorneys' fees. *See In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F.Supp.2d at 61 ("Here, I believe the proportional size of the *cy pres* contribution counsels an award that is at the low end, or even below the low end, of the standard range.")

2. Objections to Settlement Terms and/or Fees Request

As discussed above, only four formal objections have been filed. The objections to the settlement terms are largely meritless, but the Court agrees with those objectors who have challenged the size of the fee request. While four is not a large number of objections, the fact that few objections have been made is not necessarily an indication of the value of the suit. *See, e.g.*, *Parker v. Time Warner Entm't Co., L.P.*, 631 F.Supp.2d 242, 258 (E.D.N.Y.2009) ("While the number of objections

and exclusions constitutes only a small fraction of the Class, the Court does not attribute a great deal of significance to the number given the low stakes of a $5 settlement and the burden on each objector to provide their written objections in triplicate, buy three stamps and mail copies to the Court, Class Counsel and defense counsel.").

3. Skill and Efficiency of Attorneys Involved

The attorneys involved in this matter are clearly experienced class action attorneys. The Court harbors some doubt, however, as to whether the litigation was prosecuted in the most efficient manner possible. Forty-six lawyers at twelve firms billed time to this case, and at one of the two firms that served as lead class counsel, every attorney in the firm—seventeen in all—billed time to this litigation. (*See* Tr. at 27.) At a minimum, this is a highly inefficient way of doing business. *See Miller*, 575 F.Supp.2d at 40–41 ("too many attorneys were assigned to discrete tasks," including eleven attorneys working on one deposition and seven attorneys working on a fifth amended complaint).

4. Complexity and Duration of Litigation

***18** The litigation lasted just over two years from the filing of the first complaint on February 14, 2011, to the Fairness Hearing on March 7, 2013. This is a relatively brief time span for an MDL action. It also involved only six cases, which is a relatively small MDL. Although there were novel issues of law regarding the CARD Act, all of these issues had to be researched first in *Groupon* by the same firm, Robbins Gellar, that served as co-lead class counsel in this case. While, as noted by plaintiffs' counsel, the *Groupon* case settled early in the litigation because plaintiffs faced a risk of being forced into individual arbitration, the instant case also settled relatively quickly and it presented no new legal issues. (*See* Tr. at 15.) Therefore, this factor argues against a high percentage fee award.

5. Risk of Nonpayment

Because there were several novel legal issues and other hurdles, such as a potential cap on damages for CARD Act claims and the possibility that varying state laws could pose a bar to class certification, class counsel assumed a degree of risk in pursing this case since they were not guaranteed to receive compensation for their work and time.

6. Amount of Time Devoted by Plaintiffs' Counsel

According to the time records and representations of plaintiffs' counsel, they spent substantial time on this matter—a total of 4,012 attorney and paralegal hours. As noted, however, this number may not reflect the complexity of the case as much as the inefficiencies involved in prosecuting a class action where twelve law firms (and forty-six lawyers) [FN19] were involved. Furthermore, the class action plaintiffs' lawyers are unconstrained by market forces; they do not regularly charge by the hour, they have no clients to monitor their billings, and there is no real incentive to be efficient or to cut hours or rates. As a result, the number of hours spent by these lawyers and paralegals is of limited use in assessing plaintiffs' fee request.

7. Awards in Similar Cases

Courts in this jurisdiction have generally awarded fees ranging from 20–30% with some exceptions based on the particular circumstances of the case. *See In re Baan Co. Sec. Litig.*, 288 F.Supp.2d 14, 22 (D.D.C.2003) (awarding 28%); *Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C.2001) (awarding 34%); *Radosti*, 760 F.Supp.2d at 78 (awarding 33%); *Lorazepam II*, 2003 WL 22037741, at *9 (awarding 30%); *Wells v. Allstate Ins. Co.*, 557 F.Supp.2d 1, 7 (D.D.C.2008) (approving 45% award "in this unique case"); *In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F.Supp.2d at 61 (awarding 18% due to "the peculiar balance between the return to class members and the size and nature of the *cy pres* contribution").

In the case most similar to this one—*Groupon*—plaintiffs' counsel sought and were awarded 25% of the common fund, which amounted to $2,125,000. Class counsel tries to distinguish that case by arguing that they were forced to resolve the

case quickly because of the threat of forced arbitration, and thus, they did not seek as much in fees as they perhaps might have, but rather, they agreed to a fee that was significantly less than their lodestar of $2.9 million. (*See* Pl. Resp. at 5–6). Class counsel also correctly maintains that the settlement in this case is superior to the *Groupon* settlement because class members receive more complete compensation through a less convoluted process. (*See id.*) However, they concede that *Groupon* was riskier, larger, and more legally complex because of the arbitration issue, than this case. (*See* Tr. at 14, 19–20.)

***19** Furthermore, the *Groupon* settlement fund was larger ($6.375 million v. $4.5 million (excluding attorneys' fees in each case)); it represented a larger potential class (14.2 million class members v. 10.9 million class members); and even though the claims period in *Groupon* has hardly begun, more claimants have stepped forward (61,245 as of February 2, 2013 v. 26,830) and a greater amount of the fund has been claimed ($2.428 million v. $1.89 million). (*See* Pl. Resp. at 8; Order Denying Joint Motion for Final Approval of Class Action Settlement, *Groupon*, 11–md–2238, *slip op.* at *4 (S.D.Cal. Sept. 28, 2012); Order Approving Class Action Settlement, *Groupon*, 11–md–2238, *slip op.* at *7 (S.D.Cal. Dec. 18, 2012).) And, as noted, although the injunctive relief in both cases was similar, counsel did not attempt to value the injunctive relief achieved in *Groupon*, while here they claim that the injunctive relief is "conservatively valued at $54 million at a minimum." (*See* Pl. Fee Mot. at 15.) Given this comparison between the cases, there is *no* compelling rationale for awarding counsel here $1 million more than they received in *Groupon.*

D. Lodestar Cross–Check

With respect to the lodestar, it too is of minimal value as a cross-check on the requested percentage of the fund. First, the 4,012 hours spent litigating this matter over two years when only three depositions were taken and two motions were briefed seems excessive. With twelve firms involved, certain inefficiencies and redundancies were inevitable, but, as noted, the number of lawyers (forty-six) who spent time on this matter and the obvious lack of any market restraints on the amount of time spent [FN20] causes the Court to be highly skeptical of counsel's claim that the number of hours is reasonable. [FN21]

Furthermore, the Court is unwilling to accept the high hourly rates that were billed by some of the plaintiffs' lawyers. [FN22] It is noteworthy that most of the attorneys who were involved in both this matter and in *Groupon* have increased their billing rates 10%–20% between the filing of their two fee petitions. [FN23] In the instant case, plaintiffs' counsel have calculated their lodestar based on 2013 billing rates, even though the work was done in 2011 and 2012. The Supreme Court and lower courts have held that where payment is delayed in fee-shifting cases, a court may compensate for the time value of money by either using historic billing rates plus interest [FN24] or by using present-day rates. *See Missouri v. Jenkins*, 491 U.S. 274, 283–84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); *Mathur v. Bd. of Tr. of S. Illinois Univ.*, 317 F.3d 738, 744–45 (7th Cir.2003). However, a significant number of those cases, including *Missouri v. Jenkins,* dealt specifically with fee shifting under 42 U.S.C. § 1988 in protracted civil rights litigation. This case cannot be compared to those cases. Counsel here is facing a delay in payment of a year or two at the most. But since this is a percentage-of-the-fund case, the Court does not need to resolve the question of whether to use 2013 rates, historic rates with interest, or historic rates without interest. Nonetheless, counsel's use of 2013 rates in their lodestar does cast further doubt on the validity of using plaintiffs' $2 million lodestar as a cross-check.

***20** In support of their claimed rates, counsel invokes PricewaterhouseCoopers ("PwC") survey data. (*See* Pl. Fee Request at 28; Declaration of Charles LaDuca ("LaDuca Decl.") [ECF No. 32],

Ex. 2.) Significantly, this data reflects nationwide rates, not local rates. Furthermore, plaintiffs do not provide any affidavits regarding local rates of the sort that are commonly submitted with fee requests. In such a situation in this jurisdiction, the default standard for calculating appropriate hourly rates is the *Laffey* Matrix. *See Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C.1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C.Cir.1984); *see also Miller*, 575 F.Supp.2d at 18 n. 29 (noting that *Laffey* matrix is "the benchmark for reasonable fees in this Court" (quotation marks and citation omitted)); *Heller v. District of Columbia*, 832 F.Supp.2d 32, 48 (D.D.C.2011) (awarding fees based on *Laffey* Matrix). For, as the D.C. Circuit has observed, the updated *Laffey* Matrix prepared by the United States Attorneys' Office is evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n. 14, 1108, 1109 (D.C.Cir.1995) ("plaintiff must produce data concerning the prevailing market rates in the relevant community").

Several of the attorneys who have billed the most hours in this case have used rates that far exceed the rates established by the updated *Laffey* Matrix. For example, Michael McShane of Audet & Partners in San Francisco billed 143.75 hours at a rate of $695.00 per hour. Mr. McShane had 25 years of experience when this suit began in 2011, so under the *Laffey* Matrix, his hourly rate for 2011–2012 would have been $495 and for 2012–2013 it would be $505. (*See* Declaration of Michael McShane ("McShane Decl.") [ECF No. 32–2] at 2.) Charles LaDuca of Cuneo Gilbert & LaDuca in Washington, D.C. billed 233.75 hours at $600 per hour. With 10 years of experience when the suit began, under the *Laffey* Matrix, his hourly rate for 2011–2012 would have been $350 and for 2012–2013 it would be $355. (*See* LaDuca Decl. at 15–16.) William Anderson, also of Cuneo Gilbert, billed 543.25 hours at $500 per hour. As of 2011, he had seven years of experience, which under the *Laffey* Matrix places him at $285 in 2011–12 and $290 in 2012–2013. (*See id.*)

Furthermore, as courts in this jurisdiction have noted, "[t]he market generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms—presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services." *Heller*, 832 F.Supp.2d at 46–47 (quotation marks and citation omitted). Here the vast majority of plaintiffs' counsel practice in small firms and they offer no plausible justification for claiming that they are entitled to the large firm rates reflected in the PwC survey. (*See* Declaration of Thomas Merrick [ECF No. 32–1] at 16; LaDuca Decl., Ex. 1; McShane Decl., Ex. 1; Declaration of Sean Gillespie [ECF No. 32–5], Ex. 1; Declaration of Christopher Ellis [ECF No. 32–3], Ex. 1; Declaration of Elaine Ryan [ECF No. 32–4], Ex. 1; Declaration of Charles Schaffer [ECF No. 32–8], Ex. 1.) Indeed, even in large firms, lawyers often do not bill at their reported rates or, in the alternative, they discount their bills because they must compete in the marketplace for business. *See, e.g.*, Catherine Ho, "Is Time Running Out on the Billable Hour?," WASH. POSTT, Jan. 15, 2012 (Capital Business) (describing commonly available billing discounts and alternative fee arrangements).

***21** In sum, the lodestar hardly serves as a cross-check on the percentage-of-the-fund in this case. Regardless of whether the multiplier is fair, the evidence as to rates and as to hours does not support a lodestar of $2 million.[FN25]

Based on the factors used in *Lorazepam*, the Court has decided to apply a percentage below the standard range and award 18% of the $7.5 million fund.[FN26] A modest percentage is appropriate in this case given the limited value of the direct benefits to the class members, the small number of class members who will benefit, the proportionally large *cy pres* distributions in comparison to the monetary relief awarded to the class members, and the somewhat dubious value of the injunctive relief, espe-

cially as to those class members who do not intend to purchase Deal Vouchers in the next three years.

CONCLUSION

For the reasons stated above, the Court grants the parties' Joint Motion for Final Approval of the Class Action Settlement and Plaintiffs' Motion for Class Certification and grants in part plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Award Payments. The Court awards fees of $1,350,000, plus $43,297.18 in costs to plaintiffs' counsel; incentive awards of $10,000 in total to the named plaintiffs; and *cy pres* distributions of $4,157,947.68 to be divided equally between Consumers Union and National Consumers League. A separate order accompanies this Memorandum Opinion.

FN1. Named plaintiffs are Melissa Forshey, Mandy Miller, Kimberly Pullman, Sarah Gosling, Dawn Abbott, Barrie Arliss, Cara Lauer, and Amy Schultz. (*See* Consolidated Amended Class Action Complaint ("Compl.") [ECF No. 10] at 1.)

FN2. *Abbott v. LivingSocial, Inc.*, No. 11–0253 (W.D.Wash. *filed* Feb. 14, 2011); *Miller v. LivingSocial, C.A.*, 11–60519 (S.D.Fla. *filed* Mar. 11, 2011); *Forshey v. LivingSocial, Inc.*, No. 11–0745 (D.D.C. *filed* Apr. 19, 2011); *Pullman v. Hungry Machine, Inc.*, No. 11–0846 (S.D.Cal. *filed* Apr. 21, 2011); *Gosling v. Hungry Machine, Inc.*, No. 11–2094 (N.D.Cal. *filed* Apr. 28, 2011); *Schultz v. Hungry Machine, Inc.*, No. 11–1136 (D.M.N. *filed* Apr. 29, 2011). (*See* Conditional Transfer Orders, dated 8/22/11 [ECF No. 1] and 9/7/11 [ECF NO. 3]; Final Approval Mot. [ECF No. 38] at 5).

FN3. Settlement class members who receive actual checks are given 180 calendar days to cash the checks, after which any funds from checks not cashed will be returned to the settlement fund. If a settlement class member who elects electronic payment fails to provide accurate information to allow payment into an account, those funds will also revert to the settlement fund. (*See* Agreement § 2.2(d).)

FN4. This is known as a "clear sailing" provision. *See In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 947 (9th Cir.2011).

FN5. While 53,315 claim forms were submitted either by U.S. mail or online, it appears that some 26,485 claim forms were, for one reason or another, not "validated." (*See* Keough Decl. ¶¶ 17, 18.) During the Fairness Hearing, class counsel was unable to explain what occurred with those claims. (*See* Tr. at 7.) Defense counsel suggested that a certain number of potential class members may have begun to fill out a claim form before realizing that they did not actually have unredeemed, expired Vouchers, or that they could go to the merchant to redeem the paid value. (*See id.* at 7–8.) Regardless of the explanation, the bottom line is that only 26,830 class members will receive monetary benefit from this settlement, not the 53,315 that class counsel incorrectly represented repeatedly throughout their filings. (*See, e.g.*, Plaintiffs' Response to the Court's February 12, 2013 Order and Opposition to Objections [ECF No. 40] ("Pl. Resp.") at 3–4, 8; Final Approval Mot. at 20, 21.)

FN6. Plaintiffs have represented that the "Claims Processing Costs include the costs associated with processing online and paper claims, the operation of the interactive voice recording ("IVR") telephone line, responding to Class Member communications, and related project management." (Pl. Resp. at 4 (citing Keough Decl. ¶ 13; Agreement § 1.6).) LivingSocial bears additional administrative costs, including

"costs associated with the dissemination of email notice, website and online filing setup, and related project management." (*Id.*)

FN7. At the outset, the Court rejects the absurd notion that LivingSocial's alleged tax-preferred status in the District of Columbia has any bearing on this Court's impartiality or that it provides any basis for recusal. (*See* Fletcher Obj. at 7–8.)

FN8. Plaintiffs notified the Court that a number of "informal objections" were submitted through email, but were not served on the parties or filed with the Court. (*See* Pl. Resp. at 23–25.) The Court has reviewed these objections and finds that they are without merit. (*See* Pl. Resp., Exs. 1–4.)

FN9. The settlement class is defined as "all persons in the United States who purchased or received any Deal Vouchers prior to October 1, 2012." (Agreement § 1.32.)

FN10. For example, according to plaintiffs' representations, Arkansas's gift certificate statute, Ark. Stat. Ann. § 4–88–703(a), (c), prohibits expiration periods of less than two years (*see* Compl. ¶ 138); Kentucky's statute, Ky.Rev.Stat. § 367.890(2), prohibits expiration periods of less than one year (*see id.* ¶ 145); Maryland's statute, Md. Comm. Code Ann. § 14–1319(b), prohibits expiration periods of less than four years (*see id.* ¶ 148); while California's corresponding statute, Cal. Civ.Code § 1749.5(a)(1), Connecticut's statute, Conn. Gen.Stat. Ann. § 42–460(a), and Florida's statute, Fla. Stat. Ann. § 501.95(d)(a), prohibit the imposition of *any* expiration dates. (*See id.* ¶¶ 139, 140, 141.)

FN11. Objector Katherine Schaffzin argues that the settlement "forces class members to forfeit 100% of the paid value remaining in their Vouchers to join a class, which, in the best possible scenario, will offer 100% of the paid value of the voucher back to the class member." (Schaffzin Objection [ECF No. 35] at 4.) Ms. Schaffzin is incorrect. As plaintiffs explain, under the terms of the settlement, "Class Members will be entitled to monetary relief if they purchased or received a Deal Voucher that has expired, remains unredeemed and was not subject to a refund." (Pl. Resp. at 9 (citing Agreement § 2.2).)

FN12. The Court also takes note of, but rejects as baseless, the objection that "the *cy pres* distributions to these organizations do not further the interest of the class members" because "[n]either of [the designated] organizations appear to deal with the prevention of unfair and deceptive business practices, which was the intended purpose of the class action here." (*See* Melton and Perle Obj. at 3–4.) On the contrary, these two organizations do work on issues directly related to the subject of this suit.

FN13. Plaintiffs originally represented that their lodestar was $2,037,278.75, but submitted a Notice of Errata on February 25, 2013, notifying the Court that the hourly rates for attorneys Shawn Wanta and Melissa Wolchansky at Halunen & Associates had been incorrectly listed as $750.00 rather than the correct hourly rate of $425.00, due to "an internal clerical error." (Notice of Errata at 1.)

FN14. At the Fairness Hearing, plaintiffs' counsel was unable to cite any case where the fund has been calculated to include a specific amount representing the value of the injunctive relief to the plaintiff class. (*See* Tr. at 20–21.)

FN15. LivingSocial's counsel made clear at the Fairness Hearing that the injunctive relief does not actually cost the company anything. (*See* Tr. at 43–44 ("[T]he fact is LivingSocial does not benefit economically if the voucher is not redeemed ... The changes in practice that the company has instituted that it will be enjoined to continue under the settlement agreement are not directly relevant to the company's bottom line financially. They don't affect the manner or the means or the amount of revenue.").)

FN16. The Court acknowledges that plaintiffs have submitted the expert report of Alexander Hoinsky to support their request of $54 million for injunctive relief. The Hoinsky report, however, is of marginal value. He suggests a wide range of possible values for the injunctive relief ranging from $54 million to $216 million. (*See* Expert Report of Alexander Hoinsky Report, Ex. 1 to Pl. Fee Mot. [ECF No. 31–1].) In his calculations, Hoinsky starts with the imprecise estimate that between 5% and 21% of Deal Vouchers expire and go unredeemed each year. He then projects "the impact at three levels of additional redemption [of Deal Vouchers] by Class Members resulting from the Settlement Agreement: two and one-half percent (2.5%), five percent (5%) and ten percent (10%)," and reduces those figures to present value at a "conservative ten percent (10%) present value rate." *Id.* at 6. He arrives at the following present values for the five-year period from 2013 through 2017: $54,040,699 at 2.5%; $108,081,397 at 5.0%; and $216,162,793 at 10.0%. (*See id.*) Without the benefit of the adversarial process, the Court is unable to assess the reliability of this report. However, it is apparent that the projections used do not support a finding regarding the " 'undisputed and mathematically ascertainable' " value of the injunctive relief to each class member, as would be necessary to award fees on that basis. *See Staton*, 327 F.3d at 972 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478–79, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)).

FN17. *See* Tr. at 10 ("The practices that are listed in the settlement agreement that LivingSocial has agreed to continue and maintain for the three-year period were instituted after the first lawsuit in what became this MDL.")

FN18. It is notable that the same attorneys did not assign any value to the injunctive relief in *Groupon*, even though it was similar to the relief obtained here and involved a potential class of over 14 million Groupon customers. Plaintiffs' counsel attributed this significant difference in approach to the fact that the *Groupon* case was riskier given the mandatory arbitration clause (*see* Tr. at 14), but as noted by LivingSocial's counsel, the arbitration issue affected a certain percentage of the class here as well. (*See id.* at 16.)

FN19. Admittedly, eight of the lawyers on plaintiffs' team account for 2,584 of the 4,012 hours spent on this litigation.

FN20. As stated at the Fairness Hearing, the Court cannot accept class counsel's contention that their hours are "governed by the market because federal judges have to approve our rates." (Tr. at 30.)

FN21. For example, Michael McShane of Audet & Partners was not one of the lead class counsel, but he billed a surprisingly significant 143 hours at a rate of $695 per hour. (*See* Declaration of Michael McShane [ECF No. 32–2] at 2.)

FN22. For instance, several partners at the two lead law firms billed between $800 and $850 per hour, and numerous others billed between $700 and $750. (*See* Declaration of Charles LaDuca [ECF No. 32] at 15; Declaration of Thomas Merrick [ECF No. 32–1] at 12; Declaration of Clayton Halunen [ECF No. 32–6] at 3; Declaration of Charles Schaffer [ECF No. 32–8] at 2.)

FN23. The lawyers in *Groupon* filed their fee request in June 2012 using 2012 rates, whereas the lawyers here filed their request in February 2013 and used 2013 rates.

FN24. Of course, the certificate of deposit interest rate was .42% in 2011 and .44% in 2012. *See* "Selected Interest Rates—H.15," Historical Data for CDs (secondary market) 6–month annual report, Bd. Of Governors of the Federal Reserve System, http://www.federalreserve.gov/releases/h15/data.htm.

FN25. Milton, Perle, and De La Garza object to the "quick pay" provision that allows class counsel to be paid in short order, even if an appeal is taken, and the provision that lead class counsel will be responsible for distributing the fee award to the other plaintiffs' firms. (*See* Milton and Perle Obj. at 9–10; Garza Obj. at 4–6.) There is ample authority for the "quick pay" provision. *See, e.g., In re Chipcom Corp. Sec. Litig.*, 1997 WL 1102329, at *10 (D.Mass. June 26, 1997) (approving settlement stipulation authorizing payment of attorneys' fees upon entry of judgment "despite the existence of any objections filed to the Fee and Expense Award, the potential for Appeal from the Fee and Expense Award, or collateral attack on the Settlement or any part thereof"); *Turabo Med. Ctr. v. Beach*, 1997 WL 33810581, at *5 (D.P.R. Aug. 13, 1997) (ordering payment of attorneys' fees within 30 days of entry of final approval order); *Gilman v. Independence Blue Cross*, 1997 WL 633568, at *15 (E.D.Pa. Oct. 6, 1997) (ordering fees and costs to be paid from the settlement fund 31 days after entry of final approval order).

As for the lack of specificity as to fee division among plaintiffs' counsel, that is not the Court's concern. *See Bowling v. Pfizer*, 102 F.3d 777, 781 (6th Cir.1996) ("As long as class and special counsel are paid only what their collective work is worth, their distributions among themselves, even if done in a manner unrelated to the services a particular counsel has performed for the class, will in no way harm the class or negatively impact the fund from which the class's benefit is measured[.]").

FN26. *See* Tr. at 22 (class counsel acknowledging that "[w]ithout a monetary valuation of the injunctive relief," the common fund would be valued at $7.5 million).

D.D.C.,2013.
In re LivingSocial Marketing and Sales Practice Litigation
--- F.R.D. ----, 2013 WL 1181489 (D.D.C.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: SATYAM COMPUTER SERVICES LTD. SECURITIES LITIGATION	No.: 09-MD-2027-BSJ

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

This matter came on for hearing on September 8, 2011 (the "Settlement Hearing") on the motion of Lead Counsel to determine, among other things, whether and in what amount to award Lead Counsel in the above-captioned consolidated securities class action (the "Action") fees and reimbursement of expenses.

The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that notices of the Settlement Hearing substantially in the form approved by the Court were mailed to all Class Members who or which could be identified with reasonable effort, except those persons or entities excluded from the definition of the Class, and that summary notices of the hearing substantially in the form approved by the Court were published in *The Wall Street Journal*, *Investor's Business Daily* and *The Financial Times* and transmitted over *Business Wire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order Awarding Attorneys' Fees and Expenses incorporates by reference the definitions in the Stipulations and Agreements of Settlement (the "Settlement Stipulations") and all

terms used herein shall, with respect to the respective Settlement Stipulations, have the same meanings as set forth in the applicable Settlement Stipulations.[1]

2. The Court has jurisdiction to enter this Order Awarding Attorneys' Fees and Expenses, and over the subject matter of the Action and all parties to the Action, including all Class Members.

3. Notice of Lead Counsel's application for attorneys' fees and reimbursement of expenses was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the motion for attorneys' fees and expenses constituted due, adequate, and sufficient notice to all persons or entities entitled to receive notice of the motion and satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u-4, et seq.) (the "PSLRA"), and all other applicable law and rules.

4. Lead Counsel are hereby awarded attorneys' fees in the amount of 17% of the total Settlement Funds, as well as 17% of any additional Settlement Funds recovered by Satyam from the PwC Entities, net of any taxes withheld from the Initial Escrow Accounts and ultimately paid pursuant to Indian tax law, and $1,027,076.94 in reimbursement of litigation expenses advanced or incurred by Lead Counsel collectively while prosecuting this Action (which expenses shall be paid from the Settlement Funds) with interest on such fees and expenses at the same rate as earned by the Settlement Funds from the dates the Settlement Funds were funded to the date of payment, which sums the Court finds to be fair and reasonable. The foregoing award of Attorneys' Fees and

[1] The Settlement Stipulations are: the Stipulation and Agreement of Settlement with Defendant Satyam Computer Services Ltd., dated February 16, 2011 (the "Satyam Stipulation") and the Stipulation and Agreement of Settlement between Lead Plaintiffs and the PwC Entities, dated April 27, 2011 (the "PwC Entities Stipulation") entered into by and among Lead Plaintiffs and the Settling Defendants (together, the "Settlement Stipulations").

Expenses shall be payable immediately in accordance with the terms set forth in ¶¶ 19 and 16, respectively of the Satyam Stipulation and the PwC Entities Stipulation. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a manner which, in the opinion of Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution and settlement of the Action.

5. Also in accordance with the terms set forth in ¶¶ 20 and 17, respectively of the Satyam Stipulation and the PwC Entities Stipulation, Lead Counsel who seek to be paid their share of the attorney fee and expense award prior to the Effective Date shall be jointly and severally obligated to make appropriate refunds or repayments of attorneys' fees and expenses and any interest thereon paid to Lead Counsel to the Settlement Funds or to the Settling Defendants who contributed the Settlement Funds in direct proportion to their contributions to the Settlement Funds, as applicable, plus accrued interest at the same net rate as is earned by the Settlement Funds, if the Settlements are terminated pursuant to the terms of the Stipulations or if, as a result of any appeal or further proceedings on remand, or successful collateral attack, the award of attorneys' fees and/or litigation expenses is reduced or reversed by final non-appealable court order.

6. Class Representative the Public Employees' Retirement System of Mississippi is awarded $14,400 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

7. Class Representative Mineworkers' Pension Scheme is awarded $98,711 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

8. Class Representative SKAGEN AS is awarded $59,000 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

EXHIBIT S

9. Class Representative Sampension KP Livsforsikring A/S is awarded $21,000 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

10. Subclass Representative Brian F. Adams is awarded $2,000 as reimbursement for his costs and expenses directly relating to his services in representing the Class and Subclass.

11. A litigation fund in the amount of $1,000,000 from the Satyam Settlement Fund shall be established to fund the continued prosecution of the Action against the Non-Settling Defendants.

12. In making this award of attorneys' fees, and reimbursement of expenses to be paid from the Settlement Funds, the Court has considered and found that:

(a) The Settlements have created a total settlement amount of $150.5 million in cash that is already on deposit and has been earning interest, and that numerous Class Members who submit acceptable Proofs of Claim will benefit from the Settlements created by the efforts of Lead Counsel;

(b) The fee sought by Lead Counsel has been reviewed and approved as fair and reasonable by the Court-appointed Lead Plaintiffs, sophisticated institutional investors that were substantially involved in all aspects of the prosecution and resolution of the Action;

(c) To date, over 208,000 copies of the Notices were disseminated to putative Class Members stating that Lead Counsel were moving for attorneys' fees not to exceed 17% of proposed Settlements and reimbursement of expenses incurred in connection with the prosecution of this Action. Only one objection to the terms of the Settlement and the fees and expenses requested by Lead Counsel contained in the Notice was received, although it was untimely and not filed with the Court as required by the Preliminary Approval Orders. The objector has not proven that he is a member of the Class, nor does he have standing; even if he did, his objection has been considered and overruled;

(d) Lead Counsel have conducted the litigation and achieved the Settlements with skill, perseverance and diligent advocacy;

(e) The Action involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings with uncertain resolution of the complex factual and legal issues;

(f) Had the Settlements not been achieved, there would remain a significant risk that Lead Plaintiffs and the other members of the Class may have recovered less or nothing from the Settling Defendants; and

(g) The amount of attorneys' fees awarded and expenses reimbursed from the Settlement Funds are fair and reasonable and consistent with awards in similar cases.

13. Any appeal or any challenge affecting this Court's approval regarding any attorneys' fees and expense application shall in no way disturb or affect the finality of the Judgments entered with respect to the Settlements.

14. Continuing jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Settlement Stipulations and this Order, including any further application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

15. In the event that any of the Settlements are terminated or do not become Final or the Effective Date does not occur in accordance with the terms of the applicable Settlement Stipulation(s), this Order, except for ¶ 5 above, shall be rendered null and void to the extent provided by the applicable Settlement Stipulation(s) and shall be vacated in accordance with the terms of the applicable Settlement Stipulation(s).

16. There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

Dated: New York, New York
September 13, 2011

Honorable Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Not Reported in F.Supp.2d, 2012 WL 1320124 (S.D.N.Y.)
(Cite as: 2012 WL 1320124 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Renee **SEWELL**, et al., Plaintiffs,
v.
BOVIS LEND LEASE, INC. and **Bovis** Lend Lease LMB, Inc., Defendants.

No. 09 Civ. 6548(RLE).
April 16, 2012.

Adam T. Klein, Esq., Rachel Bien, Esq., Outten & Golden, LLP, New York, NY, for Class Counsel.

Jason Steven Aschenbrand, Winston & Strawn, LLP, New York, NY, Joan B. Tucker Fife, Winston & Strawn, LLP, San Francisco, CA, Kevin M. Cloutier, Winston & Strawn, LLP, Chicago, IL, for Defendants.

OPINION & ORDER

RONALD L. ELLIS, United States Magistrate Judge.

I. INTRODUCTION

***1** This action was commenced as a putative class action under Federal Rule of Civil Procedure 23 by Plaintiff Renee Sewell on behalf of herself and others similarly situated as current and former employees of Defendant Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc. ("Bovis"). Sewell and class members, including class representative Emily Diangson, worked as assistant project managers, project managers, project engineers and other salaried employees below a project manager, who performed similar work to Sewell though under a different title. Amended Compl. ¶¶ 5, 36 ("Compl."). Sewell and class members alleged violations of the Fair Labor Standards Act (FLSA), New York Labor Law (N.Y.LL) and NJSWHL (New Jersey State Wage and Hour Law). Sewell and Diangson now seek certification of the settlement class, approval of the class action settlement and approval of the FLSA settlement. In addition, Plaintiffs seek approval for attorney's fees and expenses associated with litigating this case as well as a service award for both Sewell and Diangson as class representatives.

II. BACKGROUND

Sewell, a project engineer, and Diangson, an assistant project engineer, were employed by Defendants in New York and New Jersey. Mot. for Cert. of Settlement Class ("Mot. for Settlement"), Exh. A, at 1. On July 23, 2009, Plaintiffs commenced this action as a putative class action alleging violations of FLSA, NYLL and NJSWHL on behalf of themselves and others similarly situated. Sewell filed a First Amended Complaint on August 17, 2009, adding Diangson as a plaintiff in the action. She alleged that Bovis 1) failed and/or refused to pay Plaintiffs overtime for hours worked in excess of forty hours per week, 2) failed to maintain accurate records documenting the time Plaintiffs worked, and 3) mistakenly classified workers as exempt to avoid the obligation of overtime pay. Compl. ¶¶ 41, 48. Sewell alleged that she worked in excess of forty hours most weeks and sometimes worked more than fifty hours, but never received overtime compensation, and Bovis failed to keep accurate records of her performance. Compl. ¶¶ 54–57. Diangson made similar allegations. *Id.* at ¶¶ 58–62.

Class members in the present action number 603 persons (Swartz Decl. ¶ 39) and include any and all persons who have been employed by Bovis as a project engineer, assistant project manager, assistant superintendent, field engineer, senior field engineer, contract administrator, field administrative manager, project control representative, senior contract administrator, and/or senior inspector in New York at any point between July 23, 2003, and December 31, 2010, with the exception of persons on Bovis's payroll for fewer than three pay periods. Not. of Mot. for Cert. of Settlement Class 2. The Settlement Agreement proposes to distribute mon-

ies from the settlement to two classes of employees: the "NY Class" will consist of those employed between July 23, 2003, and December 31, 2010, while the "FLSA Class" will consist of those employed between March 4, 2007, and December 31, 2010. Swartz Decl. ¶¶ 23–27.

***2** In January 2010, the Parties agreed to submit themselves to non-binding mediation in an attempt to resolve the dispute. Mot. for Cert. of the Settlement Class, Final Approval of Class Action Settlement and Approval of FLSA Settlement 2 ("Mot. for Settlement"). In preparation for mediation, they exchanged discovery that would allow for damages calculations, including data provided by Defendants on the number of workers "in each of the Class Positions, average number of workweeks, and average compensation." *Id.* Defendants also produced sample time records for project engineers and assistant project managers. The exchange of discovery did not initially prove successful, but in early 2011 the Parties arrived at the settlement reflected in the Joint Stipulation of Settlement and Release ("Settlement Agreement"). *Id.* at 3–4.

The Settlement Agreement created a fund of $2,530,000 for the wage and hour and collection action, inclusive of attorney's fees and any service awards. Mot. for Settlement 5. Notice of the settlement was sent to all class members on June 9, 2011, by the Claims Administrator, Settlement Services, Inc. ("SSI"). Swartz Decl. ¶¶ 36, 41. Additionally, Defendants sent notice per the Class Action Fairness Act ("CAFA") to the appropriate state and federal officials. The 90–day notice period required by CAFA expired on January 18, 2012, and no government officials have objected to the settlement. *See* Mot. for Settlement 4.

On September 7, 2011, the Court granted preliminary approval of the class action settlement, conditional certification of the settlement class, appointment of class counsel and approval of Plaintiffs' notice of settlement. Order Granting Pls' Prelim. Approval of Class Action Settlement, ECF No. 58. As a result, notice has been mailed to class members of the preliminary settlement and only four members have opted out, with one class member objecting to the settlement, as of the date of this Order. Scwhartz Decl. Exh. B ¶ 14; Notice of Filing of Opt Out by the Settlement Administrator, Doc. No. 69. For the reasons which follow, certification of the class is **GRANTED** and the final class settlement and FLSA settlement are **APPROVED.**

III. DISCUSSION

A. CERTIFICATION OF THE CLASS IS APPROPRIATE AS THE REQUIREMENTS OF RULE 23 ARE SATISFIED.

1. The Class Satisfies the Prerequisites of Rule 23(a).

Before assessing whether a class action settlement can be approved, the Court must first ascertain whether the class itself can be certified, even if preliminary certification has been granted, as in the instant case. Class action certification requests must satisfy both Rule 23(a) and Rule (23(b) of the Federal Rules of Civil Procedure. Rule 23(a) states that certification may be appropriate if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> ***3** Fed.R.Civ.P. 23(a).

a. Numerosity

Numerosity is easily satisfied here as it is presumed to be satisfied in this Circuit with at least forty members, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995), and there are 603 former and current employees in this class.

b. Commonality

The commonality requirement under Rule 23(a)(2) refers to claims among members that are

"common to the class as a whole." *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). "The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *MarisolA. v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997). For purposes of judicial economy and convenience for all parties, class certification may be granted where "class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Shakhnes ex rel. Shakhnes v. Eggleston*, 740 F. Supp 2d 602, 625 (S.D.N.Y.2010).

The claims raised by class members in the instant action are identical in that they commonly allege failure by Bovis to abide by state and federal labor laws. The NYLL class assert "identical claims that Defendants failed to pay them overtime in violation of the NYLL." Mot. for Settlement 10. Although there are two separate classifications of members-the NYLL group and the FLSA group-who may not share exact experiences in terms of uncompensated or improperly compensated hours worked, the claims are based on similar allegations, which give rise to the same or similar legal arguments. *See Califano*, 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176; *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.*, 504 F.3d 229, 245 (2d Cir.2007) (citing *Robinson v. Metro–N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir.2001); *Wal–Mart Stores, Inc. v. Dukes*, ––U.S. ––––, ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (noting commonality requires that class members suffer the same injury.) The common allegations to the whole class include

> "(a) whether [Defendants] misclassified Plaintiffs and N.Y. Class Members as exempt; (b) whether Defendants maintained true and accurate time records for all hours worked by Plaintiffs and N.Y. Class Members; (c) what proof of hours worked is sufficient where an employer fails in its duty to maintain time records; and (d) whether Defendants acted wilfully or in reckless disregard of the NYLL."

Mot. for Settlement 10–11. In *Wal–Mart*, the Supreme Court stated that what is critical is not necessarily that all members raise "common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart Stores, Inc.*, 131 S.Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–32 (2009)) (emphasis in original). Settlement here provides an answer to the common issues raised by all class members, regardless of specific type of injury suffered by the alleged violations of state and federal wage and hour laws.

c. Typicality

***4** Separate from commonality, 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." *Marisol A.*, 126 F,3d at 376; Fed.R.Civ.P. 23(a)(3). However, the Supreme Court has noted that the elements of commonality and typicality tend to merge. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740. Typicality does not require that the " 'factual predicate of each claim be identical to that of all class members'; rather, it 'requires that the disputed issue of law or fact' " be considered equally central in both the named class representative's claim as it is in claims of the class members. *Attenborough v. Const. and General Bldg. Laborers' Local 79*, 238 F.R.D. 82, 94 (S.D.N.Y.2006) (citing *Caridad v. Metro–North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir.1999)).

Plaintiffs' claims arise from the same factual and legal circumstances that give rise to all class members' claims. Allegations of failure to pay overtime would apply to all New York class members since they were classified as exempt and performed

the same or similar duties. "The unique circumstances of each (plaintiff) do not compromise the common question of whether ... defendants have injured all class members by failing to meet their federal and state law obligations." *Marisol A.*, 126 F.3d at 377. Typicality is met in this case.

d. Adequacy

Lastly, the court must assess whether the class representative will "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). An adequacy determination must consist of assessing the credibility of the plaintiff(s) and whether there are any potential conflicts of interest between the proposed plaintiff(s) and class members. *See Cohen v. Beneficial Indus., Loan Corp.*, 337 U.S. 541, 549, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (noting class interests are dependent upon the class representative's credibility and knowledge); *see also Epifano v. Boardroom Business Products, Inc.*, 130 F.R.D. 295, 300 (S.D.N.Y.1990) (noting that contribution claims against class representatives may create conflicts of interest with the class, compromising their credibility). The Court can find no facts demonstrating Plaintiffs' lack of knowledge about the salient aspects of this case or any potential conflicts of interests they may have with class members, nor has Bovis pointed to any.

2. The Class Satisfies the Certification Requirements under Rule 23(b)(3).

In addition to satisfying the four components describing the class and claims under Rule 23(a), Plaintiffs must also satisfy Rule 23(b). Plaintiffs argue that the case satisfies Rule 23(b)(3), which requires that

> [t]he court find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> ***5** (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
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> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3). As long as there are common issues of fact or law applicable to the class that predominate over individual claims, Rule 23(b)(3) is satisfied despite individualized damages that particular members may sustain. *See Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 253 (2d Cir.2011); *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir.2010) ("it is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification.") That common questions of fact or law predominate, i.e., the predominance requirement, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). A common nexus of fact or law, particularly in FLSA cases, can include the fact that all plaintiffs were subject to the same company-wide policy that violated federal labor laws. *Shahriar*, 659 F.3d at 253. Here, the allegations are that Defendants misclassified all members of the class and failed to compensate them adequately based on their proper non-exempt status, resulting in violations of the same state and federal labor laws for all class members. That damages may vary and differ by person is irrelevant to certifying a class under Rule 23(b)(3).

In addition to the issue of predominance, Plaintiffs must establish that a class action is a superior mechanism to all other alternative means and

forums. The rule itself contemplates a number of factors for the Court to consider. A class can only be certified if it "achieve[s] economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Myers v. Hertz, Corp.*, 624 F.3d 537, 547 (2d Cir.2010) (internal citations omitted). Plaintiffs argue that it would be financially improbable for all class members to litigate their claims individually, as well as a burden on the court. The Court finds that class action suits are appropriate where judicial economy can preserve scarce judicial resources and common issues and claims can be consolidated. It is equally appropriate for the Court to consider the financial capacity of class members in considering whether the means exists to enforce their rights outside of the class action. *See McBean v. City of New York*, 228 F.R.D. 487, 503 (S.D.N.Y.2005) (citing *Labbate–D'Alauro v. GC Services Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y.1996)) ("It is appropriate for the court [in examining Rule 23(b)(3)superiority] to consider the inability of the poor or uninformed to enforce their rights and the improbability that large numbers of class members would possess the initiative to litigate individually.) Based on these considerations, the Court finds that the elements of Rule 23 have been satisfied.

B. FINAL APPROVAL OF THE SETTLEMENT IS MERITED AS THE SETTLEMENT IS FOUND TO BE PROCEDURALLY AND SUBSTANTIVELY FAIR.

***6** Plaintiffs ask this Court to approve the Parties' joint Settlement Agreement creating a Fund of $2,350,000 that would cover class members' awards, attorney's fees and costs, and any service awards to named Plaintiffs. Although the Parties jointly arrived at this amount, it is at least in part based on Plaintiffs' assessment of various documents produced in discovery, including "job descriptions, pay records, time sheets, personnel documents and corporate documents." Mot. for Settlement at 3. In addition, Plaintiffs' counsel conducted interviews to get information related to the hours worked and wages paid to each Plaintiff. Swartz Decl. ¶ 10. The Parties agreed to the proposed amount in the Settlement Agreement and that none of the Fund will revert back to Defendants. Mot. for Settlement 5; Swartz Decl. ¶ 23; Ex. A (Settlement Agreement ¶ 3.1(A) and (E)).

Disbursement of the award will be based on the length of employment of each class member at Bovis as determined by a point system whereby members are assigned a point for each pay period worked, with an additional three points assigned for each pay period worked by the FLSA Class between March 4, 2007, and December 31, 2010 (resulting in four points for pay periods falling in this time frame). Mot. for Settlement 6. The additional points are in "recognition of the risks these class members incurred by joining the lawsuit ... [in protecting] their FLSA rights." *Id.* This would include their right to 100% liquidated damages under FLSA in addition to their unpaid wages claims. *Id.*

Under Rule 23(e)(l)-(3), settlements of class actions claims, issues or defenses must have court approval and include the following procedures:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
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> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

Fed.R.Civ.P. 23(e). The court's approval is necessary to ensure that any settlement reached is procedurally and substantively fair, as well as reasonable and adequate. Procedural fairness is ascertained by examining the process that led to the settlement (*Wal–Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96 (2d Cir.2005)), while substantive fairness

considers the actual terms and whether those terms are reasonable and adequate per the *Grinnell* factors. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974) (*abrogated on other grounds*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000)).

1. Procedural Fairness

In considering the process leading to settlement, a "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *In re Sony Corp. SXRD*, 2011 WL 4425361, at *1 (2d Cir.2011) (citing *Wal–Mart Stores*, 396 F.3d at 116) (internal citations omitted). Settlement in a class action context is highly encouraged by the courts as sound public policy while promoting judicial economy. *Id.* The Parties here arrived at settlement after some discovery, a session with an experienced employment mediator and months-long settlement talks. Mot. for Settlement 3. There is evidence that Plaintiffs engaged in extensive discovery that included reviewing voluminous documents of both Plaintiffs and Defendants and conducting interviews of class members. The Court finds that the settlement is procedurally fair and reasonable based on the Parties' adequate negotiations at arm's length and independent investigations.

2. Substantive Fairness

***7** In evaluating the substantive fairness of the settlement, the courts must "independently [examine] whether the interests of all class members were adequately represented." *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242, 254 (2d Cir.2011). Courts apply the *Grinnell* factors to determine substantive fairness, which include, "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 2d. at 463.

a. Complexity, Expense and Likely Duration of Litigation

Litigating the claims of hundreds of putative class members would undoubtedly yield expensive litigation costs that can be curbed by settling the action. *See In re Nasdaq Market–Makers Antitrust Lit. .*, 187 F.R.D. 465, 477 (S.D.N.Y.1998) ("[C]lass actions 'have a well deserved reputation as being most complex." ') (internal citations omitted). Additional discovery would include the depositions of a number of individuals and would be fact-intensive given the number of class members involved. Preparation for trial would involve potentially hundreds of class members and would seriously prolong the outcome of this suit in addition to consuming tremendous amounts of time, expenses and judicial resources. Mot. for Settlement 18. The Court finds this factor supports a finding of substantive fairness of the settlement.

b. Reaction of the Class

"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 (citing 4 Newberg § 11.41, at 108); *In re Austrian and German Bank Holocaust Litigation*, 80 F, Supp.2d 164, 175 (S.D.N.Y.2000); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir.1990) (finding settlement favored despite 29 objections out of 281class members). Here, only three class members out of 603 have opted out of the settlement, and there was one objection. Plaintiffs assert that adequate notice was provided, and this Court has no reason to believe otherwise as that assertion has not been challenged. A settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settle-

ment and of the options that are open to them in connection with the proceedings." *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir.1982). It must also be "understood by the average class member." *Wal–Mart,* 396 F.3d at 114 (internal citations omitted). Moreover, "a district court's decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion." *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007). The notice sent out explained in detail to class members their rights to opt out of the class and an estimate of each class member's potential award. The fact that the overwhelming majority of class members have neither objected nor opted out weighs in favor of settlement approval,

c. Stage of Proceedings

***8** While discovery is not complete, enough discovery has been completed for the Parties to ascertain an adequate settlement on behalf of the class. "The Court need not find that the parties have engaged in extensive discovery. Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make ... an appraisal' of the Settlement." *In re Austrian,* 80 F.Supp.2d at 176 (internal citations omitted). The Parties have exchanged thousands of pages of documents and Plaintiffs' counsel has interviewed numerous class members. Mot. for Settlement 18, 20. *See D'Amato v. Deutsche Bank,* 236 F.3d 78,87 (2d Cir.2001) (stating that "although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information" which weighed in favor of settlement approval.) The purpose of this factor is to ensure there is no collusion between the parties. Here, there are no facts to suggest any collaboration. The Parties engaged in months of litigation and negotiation and even endured a failed mediation session before arriving at settlement. After substantial document review and interviews of class members, the Parties seem to be in a position to evaluate a fair and reasonable settlement.

d. Risks to Establishing Liability and Damages

In assessing the Plaintiffs' exposure to real weaknesses in their case regarding allegations of liability, the Court does not need to reach the merits of Plaintiffs' arguments. *See Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). The Court must only "weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Marisol A. ex rel. Forbes v. Giuliani,* 185 F.R.D. 152, 164 (S.D.N.Y.1999). Plaintiffs admit that their case is "not without risk." Mot. for Settlement 20. In addition, risks are inherent in litigation and Plaintiffs would have to secure favorable outcomes at trial and after a likely appeal to establish liability. Defendants assert that class members were classified as "exempt," meaning they were ineligible to qualify for overtime pay. Plaintiffs would have to undergo much more factual discovery to disprove this defense and it's unknown exactly what costs and resources that would require. Because settlement eliminates the uncertainty naturally involved in litigation, *see Matheson v. T–Bone Restaurant, LLC,* 2011 WL 6268216, at *5, (S.D.N.Y. Dec.13, 2011), the Court finds this factor weighs in favor of settlement.

Additionally, even if Plaintiffs were to prevail on liability, there is no guarantee a jury would award them damages in the amount they seek, or even nominal damages. *See Wal–Mart,* 396 F.3d at 118. Thus, "even assuming that plaintiffs had a strong chance of success at trial with respect to liability, the relief granted by the Settlement Agreements is sufficiently favorable to weigh in favor of approval of the Settlement Agreements." *Marisol A.,* 185 F.R.D. at 164.

e. Maintaining the Action Throughout Trial and Withstanding Greater Judgment

***9** While the Court is granting Plaintiffs' application for certification of the class under Rule 23 , the possibility of decertification as discovery progresses is always possible. *See Wal–Mart,* 396 F.3d at 119 fn. 124. A contested class would inevitably

require additional briefing, discovery, and litigation expenses by Plaintiffs. The settlement ensures that Plaintiffs are granted damages that are deemed fair and adequate while alleviating the need to enforce a judgment or seek collection. While there is no evidence the Defendants could not undergo further greater judgment, the contrary is unproven as well. The Court finds this factor neutral and not determinative of whether the settlement should be approved.

f. Possible Recovery and Attendant Risks of Litigation

Inevitably, there will be class members who believe that they would have gotten a larger award for damages had they proceeded to trial, and while that may be true, it also does not take into account the increased litigation expenses or Defendants' ability to pay. *See In re Austrian*, 80 F.Supp.2d at 178. Class counsel is responsible for ensuring a fair settlement to the class as a whole, and for distributing it in the manner that is most fair to all members based on their individual damage assessments. Class members here will each receive a payment under the settlement based on their length of employment with Defendants and whether he or she consented to join the FLSA class. Ultimately, the Settlement here "represents a compromise between the strengths of Plaintiffs' case and the possible success of [Defendants'] defenses." *Cronas v. Willis Group Holdings, LLC*, 2011 WL 6778490, at *4 (S.D.N.Y. Dec.19, 2011) (citing *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y.2005)). This Court finds the proposed settlement to be procedurally and substantively fair and **GRANTS FINAL APPROVAL** of the settlement.

C. ADEQUATE NOTICE WAS PROVIDED TO THE CLASS

Notice of the class as approved by the Court was mailed by the Claims Administrator, SSI, to all class members on June 9, 2011. Mot. for Settlement 7. The mailings were made in accordance with a list provided by Bovis. SSI found new addresses for members who had moved and re-mailed notices to 49 members. *Id.* A total of 110 op-in forms were returned to SSI, ten of which were untimely but accepted and one of which was untimely and denied. Notice of the preliminary settlement was mailed on October 13, 2011, to eligible class members, including 109 FLSA members and 365 NYLL members. The notice included the estimated award each class member would receive based on length of employment, SSI again found new addresses for relocated members and re-mailed notices to 54 class members. *Id.* at 7–8, SSI received 37 notices for NYLL members that were returned as undeliverable as of November 10, 2011, but was able to obtain new addresses for 30 of the 37 and re-mailed notices to them. The final postmark date for those to op-out was December 14, 2011, and only four class members have opted out of the settlement—Dawn Ramos, Thomas Drumm, Mark Patton and Peter McKee (Swartz Decl. ¶ 46, Exh. B (Patton Deck ¶ 14), Letter From Peter McKee Opting Out (Rec. Dec. 12, 2011); Notice of Filing of Opt Out by the Settlement Administrator, Doc. No, 69)—with one member, Alec Ross, filing an objection with the Claims Administrator. Let. to Claims Admin. (Rec. Dec. 5, 2011). Mr. Ross's objection concerns his individual share and do not contend that the settlement is unfair to the class as a whole. *Id.* The Court notes his concern, but "the objection[ ] raised to this settlement do[es] not alter the conclusion that the amount of the class action settlement and its terms are entitled to approval." *In re Interpublic Securities Corp.*, 2004 WL 2397190, at *8 (S.D.N.Y. Oct.24, 2004). The class members who did not opt-out will effectively release Defendants from all wage and hour claims under the NYLL that were asserted, or could have been asserted, in the Complaint. Mot. for Settlement 5; Swartz Deck, Exh. A (Settlement Agreement ¶ 2.5).

D. APPROVAL OF THE FAIR LABOR STANDARDS ACT (FLSA) CLASS

***10** Plaintiffs ask this Court to also grant final approval to the FLSA class, which requires a less rigorous standard than Rule 23 of the Federal Rules of Civil Procedure given that due process concerns

are not implicated in the same fashion. In a FLSA settlement, class members must affirmatively opt-in to the collective action, but a failure to opt-in does not cause a class member to forfeit the right to bring suit at a later date, *Matheson v. T–Bone Restaurant, LLC,* 2011 WL 6268216, at *6 (S.D.N.Y. Dec.13, 2011). Courts approve FLSA settlements so long as they are the result of contested litigation where adversarial parties reach an agreement on disputed issues. *Id.; See Lynn's Food Stores, Inc. v. United States,* 679 F.2d 1350, 1353 n. 8 (11th Cir.1982). Plaintiffs here were represented by class counsel throughout the settlement process and the settlement was reached as a result of arms-length negotiations. *See Johnson v. Brennan,* 2011 WL 4357376, at *12 (S.D.N.Y. Sept.16, 2011). Therefore, the FLSA settlement is **APPROVED.**

E. APPROVAL OF ATTORNEY'S FEES AND COSTS

In calculating an award for reasonable attorney's fees, courts often utilize the lodestar method which computes the number of hours counsel may work on a particular case by a reasonable fee per each hour. The resulting number may be increased by a multiplier depending on the type of case and work performed or courts may award a percentage of the overall recovery instead. In class action settlements, a common fund is usually created from which damages are awarded and from which attorney's fees may be paid. “Under the common fund doctrine, attorneys who create a fund for the benefit of a class of plaintiffs are entitled to reasonable compensation from that fund.” *Victor v. Argent Classic Convertible Arbitrage Fund L .P.,* 623 F.3d 82, 84 (2d Cir.2010) (noting that “[c]lass action lawsuits are the prototypical example of instances where the common fund doctrine can apply.”) Commenting on the use of lodestar, the Second Circuit has said that “the lodestar approach is an accepted but not exclusive methodology in common fund cases” and it remains useful in such cases, even where the percentage method is ultimately chosen, *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000). However, the trend in this Circuit in class action cases is to apply the percentage method because it “ ‘provides a powerful incentive for the efficient prosecution and early resolution of litigation.’ “ *Wal–Mart,* 396 F.3d at 121 (internal citations omitted). This method is similar to private practice where counsel operates on a contingency fee, negotiating a reasonable percentage of any fee ultimately awarded. *See Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany,* 522 F.3d 182, 191 (2d Cir.2008).

Class counsel seek no more than one-third of the total settlement payment of $2,350,000, or $843,340, in addition to reimbursement for their “actual reasonable litigation costs and expenses ... which shall not exceed $20,000.” Swartz Decl. ¶ 23; Ex. A (Settlement Agreement ¶ 3.2(A)). Class counsel have been operating on a contingency fee basis and they, along with support staff, have expended 747 hours prosecuting this case, which results in a lodestar of $288,000. Mot. for App. of Att'y's Fees and Reimbursement of Expenses (“Mot. for Att'y's Fees”) 1. The proposed award equals the lodestar amount increased by a multiplier of 2.93. There have been no objections by class members to the proposed award for attorney's fees. While the lack of objections does not relieve the Court of it's obligation to conduct an independent investigation into the reasonableness of the fee, it does lend support for approval of the award. *See Davis v. J.P. Morgan Chase & Co.,* —— F.Supp.2d ——, 2011 WL 4793835, at *9 (W.D.N.Y. Oct.11,2011).

***11** To determine whether $843,340 is a reasonable award of attorney's fees to Class counsel, this Court is guided by the *Goldberger* factors, 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. The most important factor to consider in evaluating an award is modera-

tion. *Id.* at 52–53.

1. Time and Labor Expended by Counsel

It is apparent that class counsel has worked diligently in prosecuting this case on behalf of the class. They have reviewed hundreds of pages of documents related to 603 class members, including "job descriptions, pay records, time sheets, personnel documents and corporate documents." Mot. for Att'y's Fees 6. They conducted interviews and participated in a formal mediation session, albeit unsuccessful. They have also spent months participating in settlement discussions and prepared the settlement agreement for this Court's preliminary approval. The Court recognizes the amount of work put into this case and notes class counsel's efforts to utilize the attorney or paralegal with the lowest hourly rate to perform the work as effectively and competently as possible. *Id.* at 7.

The 747 hours expended are reasonable in a case such as this where records are incomplete and therefore a more comprehensive review of the available records is needed to ensure a proper estimation of damages to the class. Class counsel appropriately divided litigation tasks based upon complexity and cost. The proposed percentage fee also includes future expenses in administering the settlement after litigation has ceased. Mot. for Att'y's Fees 7. In an almost exactly similar scenario, the Court in *Johnson* recognized the acts of class counsel in litigating, negotiating, and settling the case, as well as handling post-settlement administration of the fund. *Johnson,* 2011 WL 4357376, at *15–16 . The requested one-third of the fund is a reasonable amount given the time and labor of counsel.

2. Magnitude and Complexities of Litigation

"Courts have recognized that wage and hour cases involve complex legal issues." *Johnson.* 2011 WL 4357376, at *17. As in other cases before this Court, this case involves factual, and thus legal, disputes regarding the exempt status of certain employees and what, if any, additional compensation they may be owed. It is a "hybrid" case of State wage and hour claims where class members must "opt out" of the action if they do not wish to be a part of the class and a federal claim under FLSA that requires members to "opt in" if they do wish to be part of the class. An award of thirty-three percent, or one-third, of the settlement fund is appropriate given the disputes and is in accordance with this Court's precedent. *See Johnson,* 2011 WL 4357376, at *17; *deMunecas v. Bold Food, LLC,* 2010 WL 3322580, at *7–8 (S.D.N.Y. Aug.23, 2010).

3. Risk of the Litigation

***12** A contingency fee arrangement presents a financial risk to class counsel who are asked to front the costs of the litigation with a chance of not receiving any award in return. Mot. for Att'y's Fees 9. "Lawyers undertaking representation of large numbers of affected employees in such actions inevitably must be prepared to make a tremendous investment of time, energy, and resources." *Johnson,* 2011 WL 4357376, at *17. The claim of misclassification placed the burden on plaintiffs to prove that a significant number of people were misclassified and deprived of overtime wages. The disputed facts present issues of credibility and triable issues of fact for a jury to determine. The significant risks presented by litigating the case weigh in favor of approval of the award.

4. Quality of Representation

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Johnson,* 2011 WL 4357376, at *17 (citing *Taft v. Ackermans,* 2007 WL 414493, at *10 (S.D.N.Y. Jan.31, 2007)). Recovery of $2,350,000 is a sizeable award that ensures all 603 class members will receive a payment corresponding to their length of employment with Defendants. When considering the risk of litigation with the settlement fund, the settlement is reasonable. Additionally, class counsel are members of the respected labor and employment firm Outten & Golden. They are experienced employment lawyers with good reputations among the employment law

bar. They have prosecuted and favorably settled many employment law class actions, including wage and hour class actions." *deMunecas,* 2010 WL 3322580, at *7; *see McMahon v. Olivier Cheng Catering and Events, LLC,* 2010 WL 2399328, at *6 (recognizing Outten and Golden as a respected labor and employment firm). In the *deMunecas* case, the court recognized the work put forth by class counsel and approved an attorney's award of thirty-three percent of the common fund. *Id.* Similarly this Court finds class counsel zealously represented the interests of their clients and provided a high quality of representation.

5. Requested Fee in Relation to Settlement

Courts consider the size of the settlement when considering the reasonableness of the award being requested. "Where the size of the fund is relatively small, courts typically find that requests for a greater percentage of the fund are reasonable." *Johnson,* 2011 WL 4357376, at *18. Courts in this Circuit have found that an award of one-third of the settlement fund is considered reasonable where the fund amount was similar to the amount being considered here. *See, e.g., Prasker v. Asia Five Eight LLC,* 2010 WL 476009, at *6 (S.D.N.Y. Jan.6, 2010) (awarding $1,050,000), *Khait v. Whirlpool Corp.,* 2010 WL 2025106, at *8 (E.D.N.Y. Jan.20, 2010) (granting an award for fees of $3,052,000), and *Mohney v. Shelly's Prime Steak,* 2009 WL 5851465, at *5 (S.D.N.Y. Mar.31, 2009) (awarding $3,265,000). In particular, courts in this Circuit have routinely granted attorney's fees awards in the amount of one-third of the settlement in state and FLSA wage and hour class action settlements that involve amounts far larger than the settlement award contemplated here. *See Willix v. Healthfirst, Inc.,* 2011 WL 754862, at *6 (E.D.N.Y. Feb.18, 2011) ($7,675,000 settlement fund); *Clark v. Ecolab, Inc.,* 2010 WL 1948198, at *8–9 (S.D.N.Y. May 11, 2011) ($6,000,000); *Khait v. Whirlpool Corp.* ., 2010 WL 2025106, at *8 (E.D.N.Y. Jan.20, 2010) ($9,250,000); *see also Westerfield v.* Wash. Mut. Bank, 2009 WL 5841129, at *4–5 (E.D.N.Y.Oct.8, 2009) (30% of $38 million fund). A fee of one-third, or thirty-three percent, of the settlement fund is consistent with this Circuit's established law. *Johnson,* 2011 WL 4357376, at * 19. Ultimately, "[d]istrict courts in the Second Circuit routinely award attorney's fees that are 30 percent or greater." *Velez v. Novartis Pharmaceutical Corp.,* 2010 WL 4877582, at *21 (S.D.N.Y. Nov. 10,2010).

6. Public Policy Considerations

***13** Were this action not settled via the class action format, hundreds of individual claims would be brought before this Court, consisting of an inefficient use of judicial resources. "Where relatively small claims can only be prosecuted through aggregate litigation, 'private attorneys general' play an important role." *Khait,* 2010 WL 2025106, at *8 (*citing Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 338–39, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)). Private attorneys prosecuting wage and hour claims must be adequately compensated for their time and labor. "If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk." *Prasker v. Asia Five Eight LLC,* 2010 WL 476009, at *6 (S.D.N.Y., Jan.6, 2010). Attorneys who protect labor rights must be adequately compensated and such compensation "furthers the remedial purposes of the FLSA and the NYLL." *Id.* This factor also favors approval of the settlement.

F. THE LODESTAR CROSS CHECK SUPPORTS APPROVAL OF THE AWARD

When applying the percentage method to an award for attorney's fees, courts in this Circuit follow the trend of applying the lodestar method as a "cross-check" to ensure the reasonableness of the award. *Goldberger,* 209 F.3d at 50. "[W]here [the lodestar method is] 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." *Davis,* 2011 WL 4793835, at *10 (citing *Goldberger,* 209 F.3d at 50), The lodestar is assessed by

"multiplying the hours reasonably expended on the case by a reasonable hourly rate." Courts then consider factors such as: "(1) the contingent nature of the expected compensation for services rendered; (2) the consequent risk of non-payment viewed as of the time of filing the suit; (3) the quality of representation; and (4) the results achieved." *Johnson,* 2011 WL 4357376, at *20 (internal citations omitted).

Courts commonly award lodestar multipliers between two and six. *See id.* (discussing cases where lodestar multipliers between 2.09 and six were awarded). Additionally, where "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" because the award includes not only time spent prior to the award, but after in enforcing the settlement *Bellifemine v. Sanofi,* 2010 WL 3119374, at *6 (S.D.N.Y. Aug.6, 2010). Class counsel's 747 hours spent litigating this case generates a lodestar of $288,000. A lodestar multiplier of three falls well within the range granted by our Courts and equals the one-third percentage being sought. For the reasons discussed above, the award for attorney's fees of one-third share of the overall settlement fund is **GRANTED.**

G. APPROVAL OF EXPENSES UNDER SETTLEMENT AGREEMENT

***14** "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." *Miltland RaleighDurham v. Myers,* 840 F.Supp. 235, 239 (S.D.N.Y.1993) (internal citations omitted). Where a common fund has been created, "[i]t is well-established that counsel who create [it] ... 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). Expenses and costs in class action settlements total approximately 2.8 percent of total recovery nationwide, which in the instant case would be $65,800. *Velez,* 2010 WL 4877582, at *24.

The Settlement Agreement allows for class counsel to seek reimbursement of expenses and costs up to $20,000, well below the national average. Class counsel seeks reimbursement of that amount despite their actual expenses totaling $28,000. Mot. for Att'y's Fees 15. The costs include Plaintiff's share of mediator's fees, expert fees, telephone charges, fees charged by the claims administrator, postage, transportation and meals during working sessions, copies and electronic research. *Id,* An award of $20,000 in costs and expenses is hereby **GRANTED.**

H. APPROVAL OF THE SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

Plaintiffs Sewell and Diangson are seeking a service award in the amount of $15,000 and $10,000, respectively, for their vigor in pursuing this case on behalf of the class. Class awards in the amount being requested here have been granted before to zealous class representatives in the prosecution of a class action suit, *see Johnson,* 2011 WL 4357376, at *21; *Reyes v. Altamarea Grp., LLC,* 2011 WL 4599822, at *9 (S.D.N.Y. Aug.16, 2011) (granting an award of $15,000 to three class representatives); *Duchene v. Michael Cetta, Inc.,* 2009 WL 5841175 (S.D.N.Y. Sept.10, 2009) (approving an award of $25,000), while much larger awards have also been granted where merited. *See Roberts v. Texaco, Inc.,* 979 F.Supp. 185, 205 (S.D.N.Y.1997) (approving awards of $50,000 and $85,000 to two of the named plaintiffs in a racial discrimination employment class action); *Wright v. Stern,* 553 F.Supp.2d 337, 345 (S.D.N.Y.2008) (awarding $50,000 to each of eleven named plaintiffs in employment discrimination action where total settlement fund was $11,869,856,25); *Velez,* 2010 WL 4877852, at *26 (granting awards of $175,000–$425,000 for class members who testified at trial out of a settlement fund of $175 million). In *Khait,* service awards in the amounts being requested here-$10,000 and $15,000—were granted

to named plaintiffs. *Khait*, 2010 WL 2025106, at *9 (granting service awards in the amount of $15,000 to five class members and $10,000 to ten members out of a settlement fund of $9,250,000).

Plaintiffs litigating cases in an employment context face the risk of subjecting themselves to adverse actions by their employer. *See Velez v. Majik Cleaning Serv.*, 2007 WL 7232783, at *7 (S.D.N.Y. June 25, 2007) (noting that by prosecuting their case, plaintiffs expose themselves to potential adverse actions by their employer in order that the full class may benefit from the litigation.) "In discrimination-based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril." *Roberts*, 979 F.Supp. at 201. While this suit is not based on claims of discrimination, Sewell and Diangson risked potential exposure of jeopardizing future employment by joining this suit. *See Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960 (S.D.N.Y. Feb.9, 2010) (awarding class representatives up to $15,000 out of a settlement fund of $745,000) ("as employees suing their current or former employer, the plaintiffs face the risk of retaliation. The current employees risk termination or some other adverse employment action, while former employees put in jeopardy their ability to depend on the employer for references in connection with future employment."). While Plaintiffs were not employed by Defendants at the time this suit was brought, as former employees they facc potential risks of being blacklisted as "problem" employees. *See Roberts*, 979 F.Supp. at 201. Plaintiff Sewell, in particular, has been the public face of this litigation and has been the subject of several news stories, including one in the New York Daily News, Swartz Decl. in Support of Mot. for Svc Award ¶ 54.

***15** Plaintiffs argue they have served class members by "providing counsel with relevant documents in their possession, assisting counsel to prepare for the mediation, participating in litigation strategy, and reviewing and commenting on the terms of the settlement." Swartz Decl. ¶¶ 32–33. Class counsel asserts that the class representatives provided detailed factual information to class counsel for the prosecution of their claims and made themselves available regularly for any necessary communications with counsel. Mot. for Approval of Class Rep. Svc Awards ("Mot. for Svc Award") 1; Swartz Decl. in Support of Mot. for Svc Award ¶ 55. No class members have filed any objections to the proposed service awards established under the Settlement Agreement. The service awards in the proposed amounts of $10,000 for Plaintiff Sewell and $15,000 for Plaintiff Diangson are therefore **GRANTED.**

S.D.N.Y.,2012.
Sewell v. Bovis Lend Lease, Inc.
Not Reported in F.Supp.2d, 2012 WL 1320124 (S.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 4115808 (S.D.N.Y.)
(Cite as: 2007 WL 4115808 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re VEECO INSTRUMENTS INC. SECURITIES LITIGATION.
This Document Relates to All Actions.

No. 05 MDL 01695(CM).
Nov. 7, 2007.

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES TO PLAINTIFFS' LEAD COUNSEL, AND REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES TO LEAD PLAINTIFF FOR REPRESENTATION OF THE CLASS

McMAHON, District Judge.

I. INTRODUCTION

***1** Concluding almost two years of litigation, Steelworkers and Plaintiffs' Lead Counsel have obtained a settlement of $5,500,000 in cash, plus interest, for the Class (the "Settlement"). The Settlement was achieved after extensive motion practice and fact and expert discovery, and after the parties participated in two mediation sessions before a highly respected mediator, the Honorable Nicholas H. Politan. Moreover, the Settlement was reached only after extensive and near-complete pre-trial preparations, including submission of trial exhibits and a full-day pre-trial hearing before this Court on June 28, 2007. The parties executed an agreement in principle to settle the litigation on July 5, 2007, only days before trial was scheduled to begin on July 9, 2007.

In light of the risks posed by continued litigation, the $5.5 million Settlement is an excellent result for Plaintiffs. Moreover, published data on securities fraud settlements further confirms the quality of the proposed Settlement. The $5.5 million settlement results in an estimated average recovery of $.87 per share of Veeco common stock for the approximately 6.3 million shares which suffered damages in accordance with this Court's June 28, 2007 opinion, or 23.2% of the estimated maximum $3.75 per share suffered by any Class Member, The 23.2% possible recovery of estimated damages exceeds the median percentage reported by Cornerstone Research for settlements overall, which was 3.6% through year-end 2005 and 2.4% for 2006.[FN1]

FN1. *See* Laura E. Simmons & Ellen M. Ryan, *Cornerstone Research, Securities Class Action Settlements: 2006 Review and Analysis* (Cornerstone Research 2007), at 6, *available at* http://www.cornerstone.com (the "Cornerstone Report").

As compensation for the efforts expended to achieve the settlement for the Class. Lead Counsel Berger & Montague applied for counsel fees of $1,650,000-equaling 30% of the Settlement Fund-and for reimbursement of Plaintiffs' Counsel's out-of-pocket expenses in the amount of $774,329,29. The 30% fee requested is well within the range of fees customarily sought by (and awarded to) experienced counsel in similar securities class actions, and the fairness of the percentage fee is underscored by a lodestar crosscheck, which reveals that counsel will not be compensated for a substantial portion of the time they devoted to litigating the Action on behalf of the certified Class. Plaintiffs' Counsel litigated the case to the eve of trial on a wholly contingent basis, incurring $774,329.29 in out-of-pocket expenses, and spent over 12,000 hours incurring over $4.5 million in lodestar. The lodestar crosscheck shows that the fee requested in fact represents a fractional multiplier-only about 35.91%-of the aggregate lodestar accumulated by Plaintiffs' counsel.[FN2] Berger & Montague alone bore all the risks and out-of-pocket expenses for almost two years during this litigation against an able opponent. The Steelworkers, a sophisticated institutional investor, which was actively engaged in the prosecution of this Action, approved the Settlement and fee percentage sought by Plaintiffs' Counsel.

FN2. Lead Counsel will reimburse from its fee award the law firm Milberg Weiss LLP for the time it expended in serving as liaison counsel

> from April 2005 until the time the Court decided to dispense with liaison counsel in view of the ease of electronic filing. (Order of October 12, 2005.) Lead Counsel has included the out-of-pocket expenses incurred by Milberg Weiss as liaison counsel during that period in Lead Counsel's fee and expense petition.

No Class Member has objected to the fee and expenses requested. A total of 15,528 notices of the settlement were mailed to Class Members advising them of Plaintiffs' Counsel's intent to apply to the Court for an award of attorneys' fees of 30% of the Settlement Fund, reimbursement of out-of-pocket expenses not to exceed $775,000, and reimbursement to the Steelworkers of their costs and expenses for representing the Class of $16,089. Information regarding the settlement, including downloadable copies of the Notice and Claim Form, was made available through the Claim Administrator's website. The lack of any objections further supports the fairness and reasonableness of the fee and expense reimbursement requests.[FN3]

> FN3. Moreover, there has been only one request for exclusion.

***2** For the foregoing reasons, as explained in greater detail below, the Court awards to Plaintiffs' Counsel the fees and expenses that it seeks, as well as reimbursement of costs and expenses to Lead Plaintiff.

II. THE REQUESTED FEE IS FAIR AND REASONABLE

A. A Reasonable Percentage of the Fund Recovered Comports with the Legal Standards Governing Awards of Attorneys' Fees in this Circuit

Pursuant to the " 'equitable' or 'common fund' doctrine established more than a century ago in *Trustees v. Greenough*, 105 U.S. 527, 532-533, 15 Otto 527, 26 L.Ed. 1157 (1881), *Trustees v. Greenough*, 105 U.S. 527, 532-33, 26 L.Ed. 1157 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work." *In re American Bank Note Holographies*, 127 F.Supp.2d 418, 430 (S.D.N.Y.2001) (McMahon, J.). *See In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *43, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) (McMahon, J.) ("The Supreme Court has recognized that 'a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole.' " (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), and *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir.1996))). Fees and expenses are paid from the common fund so that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir.2000) (the common fund doctrine "prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost").

Courts have recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature. *See Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 369 (S.D.N.Y.2002) (McMahon, J.). The Supreme Court has stated that private securities actions, such as the instant action, provide " 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.' " *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (citation omitted); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, --- U.S. ----, 127 S.Ct. 2499, 168 L.Ed.2d 179, 2007 WL 1773208, at *4 (June 21, 2007).

In *Goldberger*, the Second Circuit emphasized the need for fee awards to plaintiffs' counsel to be fair and reasonable, and described two acceptable fee calculation methodologies. One is the "lodestar" method, under which "the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Goldberger*, 209 F.3d at 47. Once the

lodestar is calculated, the court "may, in its discretion, increase the lodestar by applying a multiplier based on 'other less objective factors/ such as the risk of the litigation and the performance of the attorneys." *Id.* (citation omitted). The second method for calculating fees is the "percentage of recovery" method. *Id.* "In determining what percentage to award, courts have looked to the same 'less objective' factors that are used to determine the multiplier for the lodestar." *Id.* (citation omitted). Because the percentage of recovery approach does not require courts to "exhaustively scrutinize [ ]" attorneys' time records, that methodology is "simpler" than the lodestar approach. *Id.* at 47. 50.

***3** Indeed, the Supreme Court has held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fees should be determined by the percentage of recovery method. *See, e.g.*, *Boeing*, 444 U.S. at 478-79; *Blum v. Stenson*, 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The advantages of this methodology led the Second Circuit in *Goldberger* to reaffirm this Circuit's view that it is an accepted means for calculating attorneys' fees in class actions, *Goldberger*, 209 F.3d at 47-50, a view which was expressed again just recently. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir.2005). The Second Circuit in *Wal-Mart* observed that "[t]he trend in this Circuit is toward the percentage method." *Id.* at 122.

Moreover, from a public policy perspective, this Court has noted that "[t]he percentage method is attractive because it directly aligns the interests of the Class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *American Bank Note*, 127 F.Supp.2d at 431-32. The percentage approach "is uniquely the formula that mimics the compensation system actually used by individual clients to compensate their attorneys," often serves as a favorable substitute for more costly judicial monitoring of the attorney's performance, and "can serve as a proxy for the market in setting counsel fees." *Id.* at 432 (citing *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 397 (S.D.N.Y.1999), and *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir.1992)).

This Court has recently stated that the percentage of recovery method continues to be the trend of district courts in this Circuit, and that it "has been expressly adopted in the vast majority of circuits." *EVCI*, 2007 U.S. Dist. LEXIS 57918, at *44-46 & *46, 2007 WL 2230177 n. 3 (collecting cases). This Court observed:

> For many years, courts within this Circuit recognized that "Support for the lodestar/multiplier approach in common fund cases has eroded, and there has been a 'groundswell of support for *mandating* a percentage-of-the-fund approach' in the common fund cases."

Id. at ----46-47 n. 3. (citing *In re Sumitomo Copper Litig.*, 74 F.Supp.2d at 397 (citation omitted, emphasis in original)). *See also Taft v. Ackermans*, 2007 U.S. Dist. LEXIS 9144, at *28, 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007). This view is in accord with the dictates of the Private Securities Litigation Reform Act ("PSLRA"), which provides that an award of fees and expenses should constitute "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6) (emphasis added). *See EVCI*, 2007 U.S. Dist. LEXIS 57918, at *46, 2007 WL 2230177.

B. The Requested Fee is Fair and Reasonable as a Percentage of the Settlement Benefit Obtained for the Class

***4** The requested amount of attorneys' fees, $1.65 million-representing 30% of the total all-cash recovery to the Class of $5.5 million-is consistent with fees awarded in other securities class action settlements in this Circuit. [FN4] "Thirty percent of a larger settlement fund could constitute a windfall; however, a settlement fund of this size does not create such an issue." *Taft*, 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493; *Hicks*, 2005 WL 2757792, at *9 ("A settlement amount of $10 million does not raise the windfall issue in the same way as would a $100 million settlement, and a 30% fee does not produce such a windfall."). A thirty percent fee, requested here by Plaintiffs' Counsel, is consistent with fees awarded in similar class action set-

tlements of comparable value.[FN5]

FN4. *See, e.g., Taft v. Ackermans,* 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.17 million settlement); *Hicks v. Morgan Stanley,* 2005 WL 2757792, at *9 (S.D.N.Y. Oct.24, 2005) (30% of $10 million settlement); *In re Warnaco Group. Inc. Sec. Litig.,* 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *In re Bisys Sec. Litig.,* 2007 U.S. Dist. LEXIS 51087, at * 8 (S.D.N.Y. July 11, 2007) (30% of $65.87 million settlement).

FN5. *See, e.g., The Takara Trust v. Molex, Inc.,* No. 05-1245 (N.D.Ill. Mar. 1, 2007) (30% of $10.5 million settlement); *In re Amerco Sec. Litig.,* No. 04-2182 (D.Ariz. Nov. 2, 2006) (30% of $7 million settlement); *Davidco Investors, LLC v. Anchor Glass Container Corp.,* No. 04-2561 (M.D.Fla. Mar. 16, 2007) (30% of $5.5 million settlement); *In re Carreker Corp. Sec. Litig.,* No. 03-250 (N.D.Tex. Aug. 16, 2006) (30% of $5.25 million settlement); *Mairah v. Medical Staffing Network Holdings, Inc.,* No. 04-80158 (S.D.Fla. March 6, 2007) (30% of $5 million settlement); *Gulp v. Gainsco, Inc.,* No 04-723 (N.D.Tex. Feb. 13, 2007) (30% of $4 million settlement); *In re Dobson Communications, Inc. Sec. Litig.,* No. 04-1394 (W.D.Okla. Mar. 20, 2007) (30% of $3.4 million settlement).

> Indeed, there are numerous other common fund cases in this District alone where fees were awarded in the amount of 33 1/3% of the settlement fund, an amount greater than that requested here. *See, e.g., Strougo v. Bassini,* 258 F.Supp.2d 254, 262 (S.D.N.Y.2003); *Maley,* 186 F.Supp.2d at 370; *Newman v. Caribiner Int'l Inc.,* No. 99 14 Civ. 2271 (S.D.N.Y. Oct. 19, 2001); *In re Net Ease.com, Inc. Sec. Litig.,* C.A. 01-CV-9405 (S.D.N.Y. May 30, 2003); *Meridian Inv. Club v. Delta Financial Corp.,* Master File No. CV-99-7033 (S.D.N.Y. April 14, 2003); *Lemmer v. Golden Books Family Entm't Inc.,* 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999); *Maywalt v. Parker & Parsley Petroleum Co.,* 963 F.Supp. 310, 313 (S.D.N.Y.1997).

C. The Percentage Fee Requested by Plaintiffs is Reasonable Under the Second Circuit's *Goldberger* Factors

The Second Circuit has set forth the following six factors that should be considered by District Courts, regardless of which method is used, in determining the reasonableness of the fee:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50; *Wal-Mart,* 396 F.3d at 122 ("Irrespective of which method is used, the '*Goldberger* factors' ultimately determine the reasonableness of a common fund fee"). The lodestar value then acts as a "cross check," and the hours submitted by the attorneys are reviewed but not exhaustively scrutinized. *Goldberger,* 209 F.3d at 50.

Consideration of the relevant *Goldberger* factors supports an award of a fee of 30% of the settlement fund to Lead Plaintiffs' Counsel in this case.

1. The Significant Time and Labor Expended by Plaintiffs' Counsel

The first factor set forth in *Goldberger* for determining an appropriate fee is "the time and labor expended by counsel." 209 F.3d at 50. Plaintiffs' Counsel has devoted over 12,000 hours to the prosecution and settlement of this Action, including the following matters:

- extensive pre-filing investigatory work, including research, review, and analysis of public filings, articles, and analyst reports about Vecco.

- moving for certification of the Class under Fed.R.Civ.P. 23, and, at the same time, opposing De-

fendants' motion to dismiss. In connection with the motion for class certification, Lead Plaintiff produced documents in response to Defendants' requests and defended the depositions of the proposed Class Representative-Lead Plaintiff Steelworkers-and its asset manager.

• review of approximately 225,000 pages of documents produced by Defendants, including documents produced as a result of Lead Plaintiff's motion to compel Defendants' production of documents on backup tapes. Lead Plaintiff also subpoenaed documents from twenty-six third-parties, including Veeco's auditor Ernst & Young, and received and reviewed approximately ten thousand pages of documents from Ernst & Young alone.

***5** • conducting ten days of depositions, including the depositions of: Individual Defendants Braun, Rein and Kiernan; three Ernst & Young partners involved in Veeco's audit; former TurboDisc controller Bruce Huff, to whom the Company attributed the improprieties leading to the restatement; and Veeco's internal auditors during the Class Period, Gary Reifert and Herman Birnbaum. Lead Plaintiff also served interrogatories and requests for admission upon Defendants.

• during expert discovery, exchanging reports of accounting and damages experts, deposing Defendants' damages expert, and defending depositions of Plaintiffs' accounting and damages experts.

• engaging in extensive motion practice, including a number of contentious discovery motions involving briefing and court appearances, for example: (i) Lead Plaintiffs' motion to compel Defendants to produce documents concerning the internal investigation of TurboDisc by Veeco and Jefferson Wells; and (ii) Lead Plaintiffs' motion to obtain documents on Defendants' backup tapes.

• completing substantial preparation for trial, including submission of pre-trial order and exhibits, and filing responses to motions *in limine*. The parties attended a pre-trial conference on June 28, 2007 and were prepared to select a jury on July 9.2007.

In total, Plaintiffs' Counsel reported spending over 12,000 hours litigating this case up until trial, representing a lodestar of about $4,6 million. Plaintiffs' Counsel also incurred $774,329.29 in out-of-pocket expenses on this matter since its initiation. Plaintiffs' Counsel's efforts were undertaken on a contingent fee basis despite the possibility that Plaintiffs would not prevail in this litigation (and would therefore receive no compensation). The tasks performed by Plaintiffs' Counsel were necessary in order to achieve the Settlement, and the time and labor expended by counsel in producing this Settlement supports the requested fee. Indeed, Plaintiffs' fee request represents a fractional multiplier of .3591 in this case. As a result, Lead Counsel will receive no compensation for almost two-thirds of its time spent litigating this case.

2. The Complexity, Magnitude and Risks of Litigation, and the Contingent Nature of the Fee Supports the Requested Fee

A securities case, "by its very nature, is a complex animal." *Maley*, 186 F.Supp.2d at 372 (quotation omitted). Berger & Montague, P.C. prosecuted this Action by itself against a team of defense lawyers from the well-known law firm Gibson Dunn & Crutcher, LLP. for almost two years, up until the eve of trial. Plaintiffs' Counsel did not "piggy back" on any prior governmental action related to Veeco. *Maley*, 186 F.Supp.2d at 371. Prosecution of this Action was heavily dependent on expert testimony, thereby adding substantially to its costs. Plaintiffs have encountered-and would certainly continue to encounter at trial, absent the Settlement-significant litigation risks, including successfully proving all of the necessary elements to establish that Defendants' dissemination of materially false and misleading statements regarding Veeco violated Rule 10b-5, and proving that any or all of the price drop of the stock was attributable to the disclosure of the alleged fraud as opposed to market factors.

***6** The complex and difficult issues in this case included the following:

• the difficulty of proving Plaintiffs' case through the

testimony of Veeco's employees and former employees, who could be considered hostile witnesses.

• the difficulty of establishing loss causation in light of the Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005).

• the complexity of the legal and factual accounting issues involved, including GAAP and the relative novelty of the internal control issues involving the Sarbanes-Oxley Act that had to be presented to substantiate Plaintiffs' allegations of fraud and scienter.

• the difficulty of proving that Defendants' public statements were materially false and misleading.

• the difficulty in proving that any or all of the Defendants acted with scienter where there was no insider selling and no finding of wrongdoing by any governmental or other investigative body.

The Courts of this Circuit, including this District, have expressly recognized that the contingent nature of counsel's fee. with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded. As the Second Circuit stated:

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

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir.1974); *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 747 (S.D.N.Y.1985) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.") (citations omitted).

Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery.[FN6] As the Court stated in *Warner:* "Even a victory at trial is not a guarantee of ultimate success.... An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." 618 F.Supp. at 747-748.

> FN6. *See, e.g., Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir.1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir.1997) (Seventh Circuit affirmed the lower court's granting of summary judgment in favor of defendants); *Anixier v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir.1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973-and tried in 1988-on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir.1990) (*en banc*) (class won a substantial jury verdict and a motion for judgment n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed, after 11 years of litigation); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.2000) (granting defendants' motion for judgment as matter of law after jury verdict for plaintiffs); *Krinsk v. Fund Asset Mgmt., Inc.*, 715 F.Supp. 472 (S.D.N.Y.1988), *aff'd*, 875 F.2d 404 (2d Cir.1989) (verdict for defendants after trial); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir.1987) (directed verdict for defendants after five years of litigation; affirmed on appeal); *Bentley v. Legent Corp.*, 849 F.Supp. 429 (E.D.Va.1994) (directed verdict in favor of defendants after plaintiffs' presentation of its case to jury).

3. The Quality of Plaintiffs' Counsel's Representation and Substantial Benefit to the Class Supports the Requested Fee

The result achieved and the quality of the services

provided are also important factors to be considered in determining the amount of reasonable attorneys' fees. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("[T]he most critical factor is the degree of success obtained."); *Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 547-48 (S.D.Fla.1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.").

***7** In this case, the quality of the representation of Plaintiffs' Counsel is best evidenced by the result. Despite vigorous opposition by Defendants at every stage up to trial. Plaintiffs obtained a Settlement of $5.5 million in cash. Not only did Plaintiffs' Counsel's "skill and expertise contribute to the favorable settlement for the class, it contributed to the overall efficiency of the case." *Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317, 352 (S.D.N.Y.2005).

Defendants were represented by a well-staffed team of lawyers from the New York office of Gibson, Dunn & Crutcher, LLP, one of the country's largest law firms, who tenaciously challenged Plaintiffs at every stage of the litigation up until the eve of trial. That Plaintiffs' Counsel was able to obtain a substantial settlement from these Defendants confirms the quality of Plaintiffs' Counsel's representation in this matter, and is a factor in determining the reasonableness of the fee request. *See, e.g., Taft,* 2007 U.S. Dist. LEXIS 9144, at *31, 2007 WL 414493 (noting that, in determining the quality of the representation, courts review, *inter alia,* the recovery obtained and the backgrounds of the lawyers involved in the suit).

4. The Requested Fee Award is Reasonable in Relation to the Settlement Amount

As discussed above, a fee of 30% of the $5.5 million settlement fund is consistent with fees awarded in a similar class action settlements of comparable value. Moreover, it does not create a windfall. *See Wal-Mart,* 396 F.3d at 122; *Taft v. Ackermans,* 2007 U.S. Dist. LEXIS 9144, at *32, 2007 WL 414493; *In re Greenwich Pharm. Sec. Litig.,* 1995 WL 251293, at * 7 (E.D.Pa. April 26, 1995) (fee award of 33% of $4.3 million settlement does not present danger of windfall that would accompany a "megafund" of, for example, $100 million settlement).

5. Public Policy Considerations Fully Support the Requested Fee

The Second Circuit has also noted that "public policy considerations" should be considered in determining the fee awarded to plaintiffs' counsel in class actions. *Goldberger,* 209 F.3d at 50.

Private enforcement of the federal securities laws, as is the nature of the action here, is a necessary adjunct to government intervention because neither the SEC nor the Justice Department has sufficient assets to address all forms of securities fraud. *See, e.g., Bateman Eichler, Hill Richards, Inc.,* 472 U.S. at 310 (lawsuits brought by investors provide " 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action' " (quoting *J.I. Case Co. v. Barak,* 377 U.S. 426, 432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964))). As this Court has stated:

> "It is ... imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks for pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts. Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities like securities fraud."

***8** *Maley,* 186 F.Supp.2d at 374. *See also Goldberger,* 209 F.3d at 51 (noting the "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest").

Moreover, public policy considerations support the award in this case because the Lead Plaintiff and Class Representative, Steelworkers Pension Trust-a large public pension fund-conscientiously supervised the work of lead counsel and has approved the fee request. Since passage of the PSLRA, courts-including this Court have found that in a PSLRA case, a fee request which has

been approved and endorsed by a properly-appointed lead plaintiff is "presumptively reasonable," especially where the lead plaintiff is a sophisticated institutional investor. *EVCI*, 2007 U.SDist. LHXIS 57918. at *49-50 (citing *In re Cendanl Corp. Litig.*, 264 F.3d 201, 282 (3d Cir.2001)). This accords with Congress's belief that institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request. *In re EVCI*, 2007 U.S. Dist. LEXIS 57918, at *50 n. 4, 2007 WL 2230177.

D. A "Cross-Check" Of Plaintiffs' Counsel's Lodestar Demonstrates the Reasonableness of the Requested Percentage Fee

The Second Circuit "encourages" an analysis of counsel's lodestar "as a 'cross-check' on the reasonableness of the requested percentage." *Goldberger*, 209 F.3d at 50; *EVCI*, 2007 U.S. Dist. LEXIS 57918, at *54, 2007 WL 2230177. Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

1. The Number of Hours Expended By Plaintiffs' Counsel Was Reasonable

The starting point for a lodestar analysis is the calculation of the lodestar-which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential Sec. Ltd. P'shps. Litig.*, 985 F.Supp. 410, 414 (S.D.N.Y.1997); *see EVCI*, 2007 U.S. Dist. LEXIS 57918, at *54, 2007 WL 2230177. Here, Plaintiffs' Counsel devoted 12,185 hours to this matter, and their lodestar through October 18, 2007, was $4,594,233.40. The requested fee represents only a fractional multiplier of the lodestar. Plaintiffs' Counsel performed substantial work on behalf of the Class, litigating this case to the eve of trial against a formidable opponent.

Berger & Montague bore all the risks and expenses of the litigation, including extensive fact and expert discovery, motion practice, participation in and preparation of submissions for mediations, and preparation for trial. Berger & Montague was efficient in litigating this action, as it is highly experienced in prosecuting securities law claims and shareholder class actions. *Cf. Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 U.S. Dist. LEXIS 8608, at *20, 2004 WL 1087261 (S.D.N.Y. May 14, 2004) (noting that the skill and prior experience of counsel in the specialized field of shareholder securities litigation is relevant in determining fair compensation).

2. The Rates Charged By Plaintiffs' Counsel Are Reasonable

***9** The second step in the lodestar cross-check analysis is to evaluate the reasonableness of the current billing rates charged by plaintiffs' counsel. The Second Circuit in *Goldberger* noted that the overall goal of the fee-setting process is to replicate the rate that counsel would be paid in a perfect market. 209 F.3d at 52 ("market rates, where available, are the ideal proxy for their compensation"). The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283-84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("an appropriate adjustment for delay in payment" by applying "current" rate is appropriate); *LeBlanc-Sternberg v. Fletcher.*, 143 F.3d 748, 764 (2d Cir.1998) (current rates "should be applied in order to compensate for the delay in payment").

In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have held that the standard is the rate charged in the community where the services were performed for the type of service performed by counsel. *See Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir.1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation' " (quoting *Blum*, 465 U.S. at 896 n. 11)); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y.1998); *see also Sutton v. Bernard*, 504 F.3d 688, 2007 WL 2963940, at *4 (7th Cir. Oct.12, 2007) (in deciding fee award in common fund cases, courts should look to marketplace for legal services as guide to what is reasonable). Viewed in light

of a "marketplace" barometer, Plaintiffs' Counsel's rates are reasonable.

In class actions, courts in this district and around the country have consistently found to be reasonable rates comparable to those at issue here, given the nature of plaintiffs' counsel's work in such cases and the risks associated with financing class actions.[FN7] Thus, substantial precedent-as well as a market check-demonstrates that the rates utilized by Plaintiffs' Counsel in calculating its lodestar is are reasonable.

> FN7. *See, e.g., In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 U.S. Dist. LEXIS 17090, at *30 (S.D.N.Y. Sept. 26, 2003) (rates of $650/hour for a partner, and $300-$425/hour for associates, are "not extraordinary for a topf-light New York City law firm"); *In re Bankamerica Corp. Secs. Litig.*, 228 F.Supp.2d 1061, 1065 (E.D.Mo.2002) ("IWJhilc the hourly rates ranging up to S695 are high for the Eastern District of Missouri, they are nonetheless within the range of reasonableness in the realm of nationwide securities class actions.").

E. The Requested Fee Is Reasonable Because It Implies a Fractional Multiplier, Indicating that Plaintiffs' Counsel Will Not Be Compensated for Much of Their Time Spent Litigating This Case

Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross-check" for a percentage of recovery analysis, counsel may be entitled to a "multiplier" of their lodestar rate to compensate them for the risk assumed by them, the quality of their work, and the result achieved for the class. *See, e.g.*, *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." (citation omitted)); *Prudential*, 985 F.Supp. at 414 ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee.").

***10** Berger & Montague spent over 12,000 hours on this case and their lodestar for the services performed by the firm is approximately $4.6 million. Lodestar multiples of over 4 are routinely awarded by courts, including this Court. *See, e.g.*, *Maley*, 186 F.Supp.2d at 369 (awarding fee equal to 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *EVCI*, 2007 U.S. Dist. LEXIS 5791S, at *56 & n. 7, 2007 WL 2230177 (2.48 multiplier "is within the range found to be reasonable"; collecting cases and noting that "[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District" (citation omitted)). Here, Lead Counsel seeks no multiple of its lodestar. In fact, Plaintiffs' Counsel will recoup less than 36% of their lodestar. Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar "cross-check" unquestionably supports a percentage fee award of 30%.

F. The Reaction of the Class Demonstrates The Reasonableness of the Fee Request

Finally, "[t]he reaction by members of the Class is entitled to great weight by the Court" and confirms the reasonableness of the requested fees. *Maley*, 186 F.Supp.2d at 374. The Notice mailed to members of the Class specifically indicated that Plaintiffs' Counsel would apply for a fee award of 30% of the Gross Settlement Fund, and that any class member could object to the fee application by October 19, 2007. No member of the Class has objected to either the Settlement or to Plaintiffs' Counsel's request for an award of attorneys' fees. This response suggests that the fee request is fair and reasonable. *Id.*

III. LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND APPROPRIATE

It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class. *See, e.g.*, *Teachers' Ret. Sys.*, 2004 U.S. Dist. LEXIS 8608, at *17, 2004

WL 1087261 (citations omitted). "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *EVCI*, 2007 U.S. Dist. LEXIS 57918, at *57, 2007 WL 2230177 (citations omitted); *see American Bank Note*, 127 F.Supp.2d at 433; *Taft*, 2007 U.S. Dist. LEXIS 9144, at *35, 2007 WL 414493; *Miltland Raleigh-Durham v. Myers*, 840 F.Supp. 235, 239 (S.D.N.Y.1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients" (citation omitted)).

As set forth in the affidavit of Plaintiffs' Counsel, the total unreimbursed out-of-pocket expenses incurred by them to date are $774,329.29. The expenses were incurred on an ongoing basis for such items as consultant and expert fees, photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for service of subpoenas to witnesses, on-line research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel and other expenses directly related to the prosecution of this Action, including preparation for trial. All of these expenses are customary and necessary expenses for a complex securities action, and were necessary for Plaintiffs' Counsel to successfully prosecute this case to trial. Moreover, Plaintiffs had no co-counsel or local counsel to perform any of these tasks.

***11** The largest portion of the $774,329.29 in out-of-pocket expenses incurred by Plaintiffs in litigating this case was for accounting and damages experts retained by Plaintiffs, which comprised over $543,000, or over 70% of the total costs. These expenses reflected the fact that this was a complex case which was litigated until a week before trial.

The prosecution of this Action was heavily dependent on expert assistance and testimony. The case involved a $10.2 million restatement of Veeco's financials and allegations concerning complex accounting, internal financial reporting and disclosure control issues. Plaintiffs alleged that Defendants violated the Securities Exchange Act of 1934 by issuing statements and financial reports for the first, second and third quarters of 2004, by employing improper accounting at the Company's TurboDisc division, including alleged improper revenue recognition, and accounting for inventory, and warranty costs. Plaintiffs requested and received over 225,000 pages of documents from Defendants and another 10,000 pages of documents from Defendants' internal auditor, Ernst & Young.

During the course of discovery, Plaintiffs retained accounting and damages experts to assist Plaintiffs, including analyzing the documents produced. During expert discovery, the parties exchanged expert reports and took and defended expert depositions. Plaintiffs' damages expert Steven P. Feinstein, Ph.D., CFA, opined on damages and loss causation, and their accounting expert, Robert W. Berliner, CPA, CFE, opined on issues of liability, materiality, and scienter with respect to the alleged fraud involving accounting and internal control issues. The non-testifying expert assisted Plaintiffs in the factual investigation and analysis in connection with the amended complaint and during merits discovery, and also assisted Plaintiffs in preparing their submissions for mediation, including the two-day mediation in October 2006. Expert accounting and damages testimony would have been crucial at trial, and Dr. Feinstein and Mr. Berliner were prepared to testify. The expenses for Plaintiffs' accounting and damages experts totaled $543,196.49, as follows:

•	Non-testifying forensic accounting expert	$218,000.00
•	Robert W. Berliner, CPA, CRD (testifying accounting expert)	$252,349.49

•	Stephen P. Feinstein,, Ph.D., CFA (testifying damages expert)	$ 72,847.00

This Court and others have reimbursed such expert witness fees where "[t]he expenses incurred were essential to the successful prosecution and resolution of [the] Action." *EVCI,* 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177. at *57-58.[FN8]

FN8. *See also In re Media Vision Technology Sec. Litig.,* 913 F.Supp. 1362, 1366 (N.D.Cal.1995) (courts award consulting and expert expenses where the testimony is "crucial or indispensable" to the litigation al hand); *In re Immune Response Secs. Litig.,* 497 F.Supp.2d 1166, 1178 (S.D.Cal.2007) (reimbursement for experts and consultants was "reasonable" given the "complex factual nature" of case in which experts opined on materiality, loss causation, and damages, which was "crucial or indispensable" to the litigation (internal quotation omitted)); *Uniroyal Goodrich Tire Company v. Mutual Trading Corp.,* 63 F.3d 516, 526 (7th Cir.1995) (court reimbursed counsel for expert expenses where the expert testimony was "reasonably necessary" for plaintiff to prove its case); *In re Greenwhich Pharm. Secs. Litig.,* 1995 WL 251293, at *7 (E.D.Pa. Aug.26, 1995) (awarding expert witness fees, which was "a reimbursable expense since expert testimony would have been crucial at trial"); *Hicks,* 2005 WL 2757792, at *10 (awarding expenses incurred by co-lead counsel including expert witness fees and other expenses "necessary to the litigation and settlement of [the] action").

The Notice to the Class advised Class members that Lead Counsel would seek reimbursement of expenses in addition to attorneys' fees, in an amount not to exceed $775,000, exclusive of costs of notice and claims administration. Lead Counsel received no objections to this request. The requested expenses are well within the amount specified in the notice Accordingly, Berger & Montague are awarded $774,329.29 for out-of-pocket expenses.

IV. AN AWARD OF REASONABLE COSTS AND EXPENSES FOR THE STEELWORKERS IS APPROPRIATE

***12** The PSLRA states that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

The Steelworkers were appointed Lead Plaintiff and, subsequently, Class Representative in this action. The Steelworkers expended over eighty hours valued at a total of $15,964.20, and incurred $125 of out-of-pocket expenses directly relating to the representation of the Class. From the outset of the litigation to settlement, the Steelworkers monitored the litigation and participated in prosecuting the case, including participation in discovery, subjecting itself to deposition, and reviewing significant pleadings and briefs. "Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks,* 2005 WL 2757792, at *10; *see In re Worldcom, Inc. ERISA Litig.,* 2004 WL 2338151, at *11 (S.D.N.Y. Oct.18, 2004) (awarding $5,000 to each of the three named plaintiffs who were involved in the litigation, had been deposed, and had "performed an important service to the class").

The Notice to the Class advised Class members that Lead Counsel would seek reimbursement of $16,089 to Steelworkers for their reasonable costs and expenses, including lost wages, directly relating to its representation of the Class. Lead Counsel has received no objections to this request. Accordingly, the Court awards the Steelworkers $16,089.20 as compensation for their reasonable costs and expenses incurred in representing the Class.

CONCLUSION

For the foregoing reasons, the Court hereby awards; (I) attorneys' fees in the amount of $1,650,000, or 30% of the $5,500,000 settlement fund, together with reimbursement of Plaintiffs' Counsel's expenses in the amount of $774,329.29; and (ii) reimbursement of Lead Plaintiff Steelworkers Pension Trust's reasonable costs and expenses related to their representation of the Class in the amount of $16,089.20.

S.D.N.Y.,2007.
In re Veeco Instruments Inc. Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 4115808 (S.D.N.Y.)

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