UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re VIRTUS INVESTMENT PARTNERS, INC. Securities Litigation	:	15cv1249 MEMORANDUM & ORDER

WILLIAM H. PAULEY III, Senior United States District Judge:

Lead Plaintiff Arkansas Teacher Retirement System ("Lead Plaintiff"), on behalf of itself and the other members of the certified Class, moves for final approval of its proposed settlement with Defendants (the "Proposed Settlement") and the proposed Plan of Allocation. (ECF No. 149.) In addition, Labaton Sucharow LLP ("Labaton") and Bernstein Litowitz Berger & Grossmann LLP ("Bernstein," and collectively with Labaton, "Class Counsel") move for an award of attorneys' fees and expenses. (ECF No. 151.) For the reasons that follow, the motions are granted.

BACKGROUND

This Court assumes familiarity with the facts and refers only to those necessary to explain its decision. But some procedural background is warranted. This action was filed on February 20, 2015. This Court certified a class of investors on May 15, 2017. In re Virtus Inv. Partners, Inc. Sec. Litig., 2017 WL 2062985, at *7 (S.D.N.Y. May 15, 2017). During the course of this litigation, the parties briefed and this Court resolved motions to dismiss and for class certification. In addition, the parties fully briefed and argued a motion for summary judgment, but asked this Court to withhold decision pending settlement negotiations. The parties also participated in mediation. On June 28, 2018, this Court preliminarily approved the settlement. The settlement funds have been deposited into a Court Registry Investment System ("CRIS") account.

The Proposed Settlement resolves the entire litigation for a cash payment of $22 million. No objections have been lodged. In addition, Class Counsel seeks attorneys' fees in the amount of 25% of the settlement fund ($5.5 million), plus $898,497.96 in litigation expenses, as well as $5,648.73 in reimbursement for Lead Plaintiff as class representative.

DISCUSSION

I. Settlement Approval

There is a "strong judicial policy in favor of settlements, particularly in the class action context." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (quotation marks omitted). However, a court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not the product of collusion." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (citations omitted). Under this two-part inquiry, a court "must determine whether both the negotiating process leading to a settlement and the settlement itself are fair, adequate, and reasonable." In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110, 122 (S.D.N.Y. 2009). In other words, the settlement must be both procedurally and substantively fair.

With respect to procedural fairness, the "[n]egotiation of a settlement is presumed fair when the settlement is 'reached in arm's length negotiations conducted by experienced, capable counsel after meaningful discovery.'" Dial Corp. v. News Corp., 317 F.R.D. 426, 430 (S.D.N.Y. 2016) (quoting Wal-Mart, 396 F.3d at 116). Indeed, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." In re PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 125 (S.D.N.Y. 1997); accord City of Providence v. Aeropostale, Inc., 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014). Moreover, where a settlement is reached "under the supervision and with the endorsement of a

sophisticated institutional investor . . . [, it] is entitled to an even greater presumption of reasonableness." In re Hi-Crush Partners L.P. Sec. Litig., 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) (quotation marks omitted). Given that the Proposed Settlement was the product of arm's length negotiations between experienced counsel and created under the supervision and endorsement of a sophisticated investor and counsel, the Proposed Settlement is procedurally fair.

To determine substantive fairness, courts consider the factors set forth in City of Detroit v. Grinnell Corp.: "(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 trial; (7) the ability of the defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation." Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp., 318 F.R.D. 19, 24 (S.D.N.Y. 2016) (citing City of Detroit v. Grinnell, 495 F.2d 446, 463 (2d Cir. 1974) abrogated on other grounds by Golberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000)); Wal-Mart, 396 F.3d at 117. "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." Dial Corp., 317 F.R.D. at 431 (citation omitted) (alteration in original).

A. Complexity, Expense, and Likely Duration of the Litigation

"As a general rule, securities class actions are notably difficult and notoriously uncertain to litigate." In re Facebook, Inc. IPO Sec. & Derivative Litig., 2015 WL 6971424, at

*3 (S.D.N.Y. Nov. 9, 2015); see also In re Facebook, Inc. IPO Sec. & Derivative Litig., 2018 WL 6168013, at *8 (S.D.N.Y. Nov. 26, 2018); Bank of Am. Corp., 318 F.R.D. at 24. Such is the case here, where expert testimony would have been required with respect to materiality, scienter, loss causation, and damages. As such, this factor strongly counsels in favor of approval.

B. Reaction of the Class to the Settlement

It is well settled that "the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." In re Facebook, 2018 WL 6168013, at *9 (quotation marks omitted). And "the absence of objections by the class is extraordinarily positive and weighs in favor of settlement." Dial Corp., 317 F.R.D. at 431 (quotation marks omitted); Bank of Am. Corp., 318 F.R.D. at 24. Here, no class members objected, which strongly favors approval.

C. Stage of the Proceedings and the Amount of Discovery Completed

The parties completed fact and expert discovery, summary judgment briefing and oral argument, and mediation. The Second Circuit has held that completion of these litigation stages demonstrates that "a substantial amount of work had been completed." Wal-Mart, 396 F.3d at 118. Moreover, the parties briefed (and this Court decided) a motion to dismiss and a class certification motion. This factor also favors approval.

D. Risks of Establishing Liability and Damages and of Maintaining the Class Through Trial

"Courts generally consider the fourth, fifth, and sixth Grinnell factors together." Dial Corp., 317 F.R.D. at 432. With respect to establishing liability, there was a substantial question regarding whether Plaintiffs could prove loss causation for each of the alleged corrective disclosures. Failure to establish liability for any one of those corrective disclosures at summary judgment or trial would have substantially lowered the recoverable damages. And with

dueling damages expert reports, there was risk in establishing damages, which counsels in favor of approving the settlement. See Dial Corp., 317 F.R.D. at 432 ("Plaintiffs would have encountered additional challenges to proving damages given the parties' dueling expert reports"). Moreover, "[a]s with any complicated securities action, the class faced the very real risk that a jury could be swayed by experts . . . who could minimize or eliminate the amount of Plaintiffs' losses." Bank of Am. Corp., 318 F.R.D. at 24 (quotation marks omitted). Finally, Class Counsel acknowledges there was little risk this Court would amend its decision certifying the class. (Oct. 24, 2018 Oral Arg. Tr., ECF No. 160 ("Oral Arg. Tr."), at 10:3–5.) However, overall, these factors counsel in favor of approving the settlement.

E. Ability of Defendants to Withstand a Greater Judgment

Defendants can withstand a greater judgment. (Oral Arg. Tr. at 10:6–9.) Nevertheless, "while relevant to settlement approval, the ability of defendants to withstand greater judgment does not alone suggest the settlement is unfair or unreasonable." In re Facebook, 2015 WL 6971424, at *5; D'Amato, 236 F.3d at 86 ("[T]his factor, standing alone, does not suggest that the settlement is unfair.").

F. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of the Litigation

"The final two Grinnell factors are typically considered together." Dial Corp., 317 F.R.D. at 432. Here, the maximum recoverable damages were estimated to be approximately $275 million, which would have required all five corrective disclosures to have survived summary judgment and a jury trial. The settlement is for $22 million, which is 8% of the estimated maximum recoverable damages. But "[t]he fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate. Dollar amounts are judged not in comparison with the possible recovery in the best of all possible

worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." In re Facebook, 2015 WL 6971424, at *6. Given the risks of proving loss causation—and the possibility that at least some of the corrective disclosures would not have survived summary judgment or a trial—the recoverable damages were unlikely to be anywhere close to $275 million. Class Counsel proffers that the true maximum recoverable damages is closer to $67 million, which would include recovery for only Defendants' final disclosure. If that were the case, the settlement amount would be about 32.8% of the estimated recovery.

While this settlement may not constitute a windfall for Plaintiffs, it is within the range previously approved by judges in this district. See, e.g., In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig., 909 F. Supp. 2d 259, 269 (S.D.N.Y. 2012) (approving settlement amounting to 11% of estimated damages); In re Canadian Superior Sec. Litig., 2011 WL 5830110, at *4 (S.D.N.Y. Nov. 16, 2011) (approving settlement worth 8.5% of maximum amount of estimated damages); In re Merrill Lynch Tyco Research Sec. Litig., 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving settlement worth approximately 3% of total estimated damages). Ultimately, this was a lengthy, hard fought litigation and there is no indication that the Proposed Settlement was anything but the result of an arm's length negotiation. In view of the risks of litigation and the estimated recovery, the $22 million settlement fund is reasonable.

G. Aggregation of All Factors

Overall, the Grinnell factors counsel in favor of approving the Proposed Settlement. No one has objected, and this action was hotly contested and proceeded to a late stage of litigation. While the settlement amount may not be extraordinary, Plaintiffs faced substantial risks in proving loss causation. Accordingly, this Court approves the Proposed Settlement.

II. Plan of Allocation

"The standard for approval of a plan of allocation is the same as the standard for approving a settlement: namely, it must be fair and adequate." In re Top Tankers, Inc. Sec. Litig., 2008 WL 2944620, at *11 (S.D.N.Y. July 31, 2008) (quotation marks omitted). "[I]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel." In re Giant Interactive Grp., Inc. Sec. Litig., 279 F.R.D. 151, 163 (S.D.N.Y. 2011) (quotation marks omitted); see also In re Top Tankers, 2008 WL 2944620, at *11 ("If the plan of allocation is formulated by competent and experienced class counsel, an allocation plan need only have a reasonable, rational basis." (quotation marks omitted)). Here, the Plan of Allocation—which was developed by Class Counsel—is based on each claimant's "recognized loss," as calculated by the formulas described in the Settlement Notice. Because the Plan of Allocation appears fair and adequate and comes by the recommendation of experienced Class Counsel, it is approved.

III. Notice

"The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." Wal-Mart, 396 F.3d at 113. The Second Circuit explains that:

> There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member.

Wal-Mart, 396 F.3d at 114 (quotation marks and citations omitted).

The Settlement Notice is reasonable. Notice and claim forms were mailed to those who received a Class Notice, as well as any potential class members. The Summary Settlement Notice was published in the Wall Street Journal and Financial Times, and a website was created for this action. The Settlement Notice also set forth the amount of the settlement,

maximum amount of attorneys' fees and expenses sought, rights to object, dates and deadlines, and the Plan of Allocation. This Court approves the Settlement Notice.

IV. Attorneys' Fees

In a class action settlement, courts must carefully scrutinize lead counsel's application for attorneys' fees to "ensure that the interests of the class members are not subordinated to the interests of . . . class counsel." Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995). A court's role in this context is "to act as a fiduciary who must serve as a guardian of the rights of absent class members." McDaniel v. Cty. of Schenectady, 595 F.3d 411, 419 (2d Cir. 2010). The trend in the Second Circuit is to assess a fee application using the "percentage of the fund" approach, which "assigns a proportion of the common settlement fund toward payment of attorneys' fees." Dial Corp., 317 F.R.D. at 433. As a "cross-check on the reasonableness of the requested percentage," however, courts also look to the lodestar multiplier, which should be a reasonable multiple of the total number of hours billed at a standard hourly rate. Goldberger, 209 F.3d at 53.

And regardless of which method is used, courts rely on the factors set forth in Goldberger to determine whether fees are reasonable: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." Wal-Mart, 396 F.3d at 121 (quoting Goldberger, 209 F.3d at 50) (ellipsis in original). These factors largely overlap with the Grinnell factors and thus counsel in favor of approval.

Here, Class Counsel seeks 25% of the settlement fund ($5.5 million) in attorneys' fees. In assessing reasonable percentages of settlement funds, "this Court [has] cabined awards

to between 12% to 28%" for "class action settlements ranging from $15 million to $336 million." Dial Corp., 317 F.R.D. at 436, 438 (awarding fees representing 20% of a $244 million settlement fund); see also Bank of Am. Corp., 318 F.R.D. at 27 (allowing fees representing 12% of a $335 million settlement fund); In re Platinum & Palladium Commodities Litig., 2015 WL 4560206, at *5 (S.D.N.Y. July 7, 2015) (awarding fees representing 22.5% of the $72.5 million fund); In re Bayer AG Sec. Litig., 2008 WL 5336691, at *2, *6 (S.D.N.Y. Dec. 15, 2008) (approving 12% of an $18.5 million settlement fund); In re Polaroid, 2007 WL 2116398, at *3 (S.D.N.Y. July 19, 2007) (approving 28% of a $15 million settlement fund); see also In re Facebook, 2018 WL 6168013, at *16 (approving 25% of a $35 million settlement fund). Thus, on its face, a fee award of 25% of the settlement fund is reasonable, particularly given the lower settlement amount and the late stage of this litigation.

With respect to the lodestar cross check, Plaintiffs' spent about 23,451 attorney and professional support hours on this litigation, leading to lodestar of approximately $11 million. This amounts to a lodestar multiplier of only 0.49. And even if this Court were to remove staff attorney hours from the lodestar, the multiplier would still only amount to 0.88. These lodestar multipliers are well below multipliers previously approved by this Court. See Bank of Am. Corp., 318 F.R.D. at 27 (1.2 lodestar multiplier); Dial Corp., 317 F.R.D. at 437 (1.75 lodestar multiplier); In re Platinum & Palladium, 2015 WL 4560206, at *3 (1.4 lodestar multiplier).

Given the lean partner staffing, competence of counsel, and advanced stage of this litigation—coupled with the fact that the fee is reasonable under both the percentage and lodestar approaches—this Court approves an attorneys' fee award of $5.5 million. These attorneys' fees may be disbursed from the CRIS account once 75% of the net Settlement Fund has been

distributed. See Bank of Am., 318 F.R.D. at 28; Beane v. Bank of N.Y. Mellon, 2009 WL 874046, at *9 (S.D.N.Y. Mar. 31, 2009).

V. Litigation Expenses

"In class action settlements, [a]ttorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients. When the 'lion's share' of expenses reflects the typical costs of complex litigation such as experts and consultants, trial consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses, courts should not depart from the common practice in this Circuit of granting expense requests." Bank of Am. Corp., 318 F.R.D. at 27 (quotation marks omitted).

Here, Plaintiffs seek $898,497.96 in litigation expenses, which is below the $1.2 million Plaintiffs informed the class they might apply for in the Settlement Notice. The bulk of expenses were for Plaintiffs' expert, accounting for over $340,000. The next largest expense was for litigation support of approximately $336,000. This Court finds Class Counsel's expense request reasonable and approves it.

VI. Reimbursement for Class Representatives

Under 15 U.S.C. § 78u-4(a)(4), class representatives may be reimbursed for "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." "These awards compensate lead plaintiffs for the substantial time and effort the class representatives incurred, including written discovery, being deposed, reviewing and editing submissions, and attending hearings." Bank of Am. Corp., 318 F.R.D. at 27 (quotation mark omitted). Courts typically require an affidavit demonstrating "a thorough accounting of hours dedicated to the litigation and a statement that these hours constituted lost work time . . . ." In re

Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 772 F.3d 125, 133 (2d Cir. 2014).

The $5,648.73 request for reimbursement represents 0.02% of the Settlement Fund, which is well within the range of reasonableness. See Bank of Am. Corp., 318 F.R.D. at 27 (awarding expenses amounting to .01% of the fund); see In re Currency Conversion, 263 F.R.D. at 131 (award representing approximately 0.1% of the fund). In addition, Plaintiffs appended an affidavit describing Lead Plaintiff's involvement in this litigation, including that an employee from Lead Plaintiff traveled to New York to attend the mediation sessions. Accordingly, this Court approves the expense.

CONCLUSION

For the foregoing reasons, Plaintiffs' and Class Counsel's motions are granted. The Proposed Settlement, the Plan of Allocation, and the Settlement Notice are approved. In addition, Class Counsel is awarded attorneys' fees in the amount of $5.5 million. These attorneys' fees may be disbursed from the CRIS account once 75% of the net Settlement Fund has been distributed. Moreover, Class Counsel may be reimbursed $898,497.96 in litigation expenses forthwith. Finally, Lead Plaintiff may be reimbursed $5,648.73 forthwith. The Clerk of Court is directed to terminate all pending motions and to mark this case closed.

Dated: December 4, 2018
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.