

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re WACHOVIA PREFERRED
SECURITIES AND BOND/NOTES
LITIGATION

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No. 09 Civ. 6351 (RJS)
ORDER

**ORDER AWARDING LEAD COUNSEL
ATTORNEYS' FEES AND LITIGATION EXPENSES**

On November 14, 2011, the Court conducted a fairness hearing regarding Lead Bond/Notes Plaintiffs' motions for certification of the settlement class and approval of the settlement of this action, and Lead Bond/Notes Counsel's motion to determine whether and in what amount to award Bond/Notes Plaintiffs' Counsel in the above-captioned consolidated class action (the "Action") attorneys' fees and reimbursement of litigation expenses. The Court granted Plaintiffs' motions for certification of the settlement class and approved the settlements and the plan of allocation. After considering the parties' submissions and hearing argument during the fairness hearing, the Court reserved judgment on Bond/Notes Plaintiffs' Counsel's motion for an award of attorneys' fees and litigation expenses. As set forth below, the Court awards Bond/Notes Plaintiffs' Counsel fees equal to 12% of the Settlement Fund, totaling \$75,240,000, which sum the Court finds to be fair and reasonable, and \$860,877.47 in reimbursement of litigation expenses.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order incorporates by reference the definitions in the Stipulation and Agreements of Settlement dated August 5, 2011 (Doc. No. 136-1) (the “Stipulation”). All terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation.

2. The Court has jurisdiction to enter this Order. Likewise, the Court has jurisdiction over the subject matter of the Action and all Parties to the Action, including all Settlement Class Members.

3. Notice of Lead Bond/Notes Counsel’s application for attorneys’ fees and reimbursement of litigation expenses was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the application for attorneys’ fees and expenses satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, due process, the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(a)(7), the Rules of the Court, and all other applicable law and rules, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

4. Lead Bond/Notes Plaintiffs’ Counsel have moved for an award of attorneys’ fees of 17.5% of the gross Settlement Amount, or \$109,725,000, and reimbursement of \$860,877.47 in litigation expenses.

5. The Court has analyzed the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), and finds that:

(a) The Settlements have created a fund totaling \$627 million in cash that has been funded into an escrow account pursuant to the terms of the Stipulation, and that numerous Settlement Class Members who submit acceptable Proof of Claim Forms will financially benefit from the Settlements that occurred because of the efforts of Bond/Notes Plaintiffs’ Counsel.

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

(c) Copies of the Notice were mailed to over 214,000 potential Settlement Class Members or their nominees stating that Lead Bond/Notes Counsel would apply for attorneys' fees in an amount not to exceed 17.5% of the Settlement Fund and reimbursement of litigation expenses in an amount not to exceed \$1.8 million. To date, no objections to the requested award of litigation expenses have been filed. Only one unsigned objection to the requested attorneys' fees was filed – and that objection was withdrawn (without ever being signed, even after notice to the Objector's counsel of this defect) by Objector's counsel prior to the Settlement Hearing.

(d) Bond/Notes Plaintiffs' 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 was actively prosecuted for over two and a half years; however, it never proceeded beyond the motion to dismiss and did not enter formal discovery.

(f) Had Lead Bond/Notes Counsel not achieved the Settlements there would remain a significant risk that Lead Bond/Notes Plaintiffs and the other members of the Settlement Class may have recovered less – or nothing – from the Defendants.

(g) The requested amount of attorneys' fees is high in relation to the Settlement Fund. Although fee recoveries over 15% of the settlement fund are not uncommon in PSLRA securities class actions, *see, e.g., In re Bristol-Meyers Squibb Co. Sec. Litig.*, No. 07 Civ.

5867 (PAC), Doc. No. 78, at 1 (Dec. 8, 2009) (awarding 17% of \$125 million settlement fund), “[t]o avoid routine windfalls where the recovered fund runs into the multi-millions, courts typically decrease the percentage of the fee as the size of the fund increases,” *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009) (quoting *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004)). Indeed, in recent settlements of comparable magnitude, courts have awarded fees below eight percent of the settlement fund. See *In re Countrywide Fin. Corp. Sec. Litig.*, No. 07 Civ. 5295, Doc. No. 1062, at 4 (C.D. Cal. Mar. 4, 2011) (granting 7.7% of \$601.5 million settlement fund); *In re Merrill Lynch & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 07 Civ. 9633 (JSR), 2009 WL 2407551, at *1 (S.D.N.Y. Aug. 4, 2009) (granting 7.8% of \$475 million settlement fund).

(h) Bond/Notes Plaintiffs’ Counsel state that they have devoted over 79,000 hours, with a lodestar value of \$32,736,353.50, to achieve the Settlements. The requested fee therefore represents a lodestar multiplier of roughly 3.35.

(i) Although the Second Circuit generally favors the percentage of recovery approach to determining attorneys’ fees in common fund cases, it nonetheless “encourage[s] the practice of requiring documentation of hours as a ‘cross check’ on the reasonableness of the requested percentage.” *Goldberger*, 209 F.3d at 50 (citation omitted). In cases in which the percentage recovery is similar to that requested by Plaintiffs, the lodestar multiplier is frequently very low. See *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 514, 516 (S.D.N.Y. 2009) (granting 33.3% recovery of \$586 million fund, resulting in “negative” multiplier of 0.7); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 414 (D. Conn. 2009) (granting 16% of \$750 million settlement fund, resulting in lodestar multiplier of 1.56); *In re HealthSouth Corp. Stockholder Litig.*, No. 03 Civ. 1500, Doc. No. 1617, at 1 (N.D. Ala. June 12, 2009) (granting 18.49% of portion of settlement,

resulting in multiplier of 0.44); *In re Adelpia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) (granting 21.4% of \$455 million settlement fund, resulting in multiplier of 2.89); *In re Lucent Tech., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) (granting 17% of \$517 million settlement fund, resulting in lodestar multiplier of 2.13). Moreover, the cases in which the fee awards were most comparable to counsel's request in this case – *Adelpia* and *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1065-66 (E.D. Mo. 2002) (granting 18% of \$490 million settlement fund, resulting in multiplier of 3.2 for counsel representing one set of plaintiffs and 2.91 for another because requested fees resulting in lodestar multipliers greater than 4 “would overcompensate counsel at the expense of the . . . plaintiffs”) – are distinguishable in important ways. *Adelpia* was both longer in duration and required counsel's participation in ongoing bankruptcy, SEC enforcement, and criminal actions, *see* 2006 WL 3378705, at *2; in *BankAmerica*, the parties had completed discovery, the matter was set for trial, and trial preparations were underway, *see* 228 F. Supp. 2d at 1065. The most glaring exception to this recent trend occurred in the settlement of *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 770 (S.D. Ohio 2007), in which the district court granted counsel 18% of the \$600 million settlement fund, resulting in a lodestar multiplier of 5.9.

(j) The fee agreement entered between Lead Bond Plaintiff SEPTA and its counsel, KTMC, at the outset of the litigation called for a fee award of 17.79% of the settlement, which is larger than the fee now requested by counsel. Although a fee agreement negotiated at arms' length by a sophisticated lead plaintiff is entitled to some weight, *see In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005), the Second Circuit has emphasized that scrutiny of even a negotiated fee agreement is important because class members “have no real

incentive to mount a challenge that would result in only a ‘minuscule’ pro rata gain from a fee reduction,” *Goldberger*, 209 F.3d at 53; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 (2d Cir. 2005) (ruling that district court did not abuse its discretion in declining to follow fee negotiated by lead plaintiffs in antitrust case “when settlement payments to approximately five million absent class members are at stake”).

(k) There can be no doubt that Bond/Notes Plaintiffs’ Counsel have provided high quality representation in a complex case, resulting in an exceptional recovery for the Settlement Class. They are to be commended for it, and surely they deserve to be fairly compensated for their efforts. Nevertheless, the Court is persuaded that Counsel’s requested fee award exceeds what is reasonable in the circumstances and would provide a significant windfall to Counsel that might otherwise go to the class members. Acting with “an eye to moderation,” and “as a fiduciary who must serve as a guardian of the rights of absent class members,” *Goldberger*, 209 F.3d at 52-53 (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977)), the Court hereby orders that Bond/Notes Plaintiffs’ Counsel shall be awarded (1) attorneys’ fees in the amount of 12% of the Settlement Fund, totaling \$75,240,000.00, and resulting in a lodestar multiplier of approximately 2.3, and (2) \$860,877.47 in reimbursement of litigation expenses, both of which shall be paid to Lead Bond/Notes Counsel from the Settlement Fund. The Court finds this award to be fair and reasonable under the circumstances. Indeed, although “it is necessary to provide appropriate financial incentives” to plaintiffs’ lawyers to vigorously litigate claims such as the ones in this case, *Worldcom*, 388 F. Supp. 2d at 359, Bond/Notes Plaintiffs’ Counsel’s requested fee award of \$109 million exceeds that which is necessary to attract competent counsel to pursue complex securities claims in the future. Considered another way, the \$109 million fee sought by Counsel exceeds the combined annual

salary of 630 federal district court judges and the combined salaries of the entire House of Representatives. By any measure, the amount awarded by the Court – which exceeds \$75 million – provides a substantial reward to Plaintiffs’ counsel for their exemplary work in this matter, while ensuring that class members are able to retain a significant portion of the settlement. Based on the unique circumstances of this case, and ““a jealous regard to the rights of those who are interested in the fund,”” *Goldberger*, 209 F.3d at 53 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974)), the Court concludes that this is a fair and generous result.

6. As provided for in the Stipulation, Lead Bond/Notes Counsel shall allocate the attorneys’ fees awarded amongst Bond/Notes Plaintiffs’ Counsel in a manner which they, in good faith, believe reflects the contributions of such counsel to the commencement, prosecution, and settlement of the Action.


7. 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 Judgment.

8. Exclusive jurisdiction is hereby retained over the parties and the Settlement Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order.

9. In the event that the Settlements are terminated or the Effective Date of the Settlements otherwise fails to occur, this Order shall be rendered null and void to the extent provided by the Stipulation.

SO ORDERED.

DATED: December 30, 2011
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE