

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE BAYER AG SECURITIES  
LITIGATION :  
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03 Civ. 1546 (WHP)

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Lead Plaintiff Comptroller Thomas DiNapoli (“Lead Plaintiff”) brings this class action pursuant to the Securities Exchange Act of 1934. Lead Plaintiff moves for final approval of the parties’ settlement agreement and plan of allocation. Current lead counsel, Lowey Dannenberg Cohen & Hart, P.C. (“Lowey Dannenberg”) moves for attorneys’ fees and expenses. For the following reasons, the motions for final approval of the parties’ settlement, the plan of allocation, attorneys’ fees and reimbursement of expenses are granted.

BACKGROUND

I. Procedural History Prior to Settlement

Plaintiff alleges that Defendant Bayer AG (“Bayer”) and certain of its officers made material misstatements and omissions about Baycol’s safety and commercial viability. The factual background underlying Plaintiff’s lawsuit is set forth in greater detail in In re Bayer AG Sec. Litig., No. 03 Civ. 1546 (WHP), 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004) (“Bayer I”).

In Bayer I, this Court denied Defendants’ motion to dismiss as to Bayer and certain of its officers, but dismissed the claims against other officers. The Court also dismissed

the claims of foreign purchasers of Bayer shares on foreign exchanges (the “Foreign Purchasers”) for lack of subject matter jurisdiction and granted leave to replead. Lead Plaintiff accepted that invitation and replead. A motion to dismiss the Amended Complaint followed. On September 14, 2005, this Court granted that second motion to dismiss the claims of the Foreign Purchasers with prejudice. In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 115 (S.D.N.Y. 2005).

On February 22, 2006, this Court certified a class consisting of all persons and entities who, between August 4, 2000, and February 21, 2003, (1) purchased shares of Bayer on the U.S. over-the-counter market, (2) purchased American Depository Receipts (“ADRs”) of Bayer on the New York Stock Exchange, or (3) purchased ordinary shares or ADRs on any other exchange and was a citizen or resident of the United States at the time of purchase (collectively, the “Class Members”).

On July 14, 2006, this Court approved then New York State Comptroller, Alan G. Hevesi’s request, in his capacity as sole trustee of the New York State Common Retirement Fund, to replace Milberg Weiss Bershad & Schulman LLP<sup>1</sup> (“Milberg”) as lead counsel. After Lowey Dannenberg was substituted for Milberg, it reviewed more than 10 million pages of documents, 212 days of deposition testimony, and 4,000 deposition exhibits produced from the Baycol mass tort/personal injury actions. (Supplemental Declaration of Thomas M. Skelton dated Oct. 14, 2008 (“Skelton Supp. Decl.”) ¶ 10.) Lowey Dannenberg served more than 1,400 requests for admission, multiple document requests, and conducted 25 depositions of fact witnesses, as well as three expert depositions. (Skelton Supp. Decl. ¶¶ 15-16, 19.) Because the fact setting underlying the securities fraud action involved complex pharmacological issues,

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<sup>1</sup> Now known as Milberg LLP.

Defendants retained six pharmaceutical experts. (Skelton Supp. Decl. ¶ 24.) The parties participated in extensive negotiations, including multiple mediation sessions with Professor Eric Green. (Skelton Supp. Decl. ¶ 25.)

Following the close of discovery, the parties entered into a proposed Stipulation of Settlement (the "Settlement") that they presented to the Court. (Declaration of Thomas M. Skelton dated May 23, 2008 ("Skelton Decl.") Ex. 1: Stipulation of Settlement). On June 13, 2008, the Court granted Plaintiff's motion for preliminary approval of the Settlement ("Preliminary Approval Order"). On June 27, 2008, the Court directed the parties to establish a Court Registry Investment System Account ("CRIS").

## II. The Settlement

Pursuant to the Settlement, Bayer will pay \$18.5 million to settle all claims with the Class Members (the "Settlement Fund"). (Affidavit of Richard W. Simmons dated Sept. 12, 2008 ("Simmons. Aff") Ex. A: Notice of pendency and settlement of class action (the "Notice") ¶ 18(a).) Class Members who submit claim forms will receive damages based on the loss recognized by Lead Plaintiff's damages expert (the "Damages"), or a proportional amount of the Damages if the amount in claims exceeds the Settlement amount, after deducting costs and attorneys' fees. (Notice ¶¶ 18(c)(i), (ii).)

The Settlement allowed Lowey Dannenberg and Milberg to apply for attorneys' fees up to 12 percent of the Settlement Fund, and \$950,000 in costs, and for Lead Plaintiff to seek reimbursement for its out-of-pocket expenses, in the amount of approximately \$2,000 with interest. (Notice ¶ 18(b).)

### III. Notification and Submitted Claims

Pursuant to the notification plan approved by this Court in the Preliminary Approval Order, Lead Plaintiff provided the Notice to 88,392 Class Members by mail, and published a summary notice in the national edition of The Wall Street Journal and the global editions of The Financial Times and The International Herald Tribune. (Simmons Aff. ¶¶ 12, 21.) Two thousand nine hundred fifty-three notices were returned as undeliverable. (Simmons Aff. ¶ 21.) Lead Plaintiff received nine requests for exclusion and no objections. (Simmons Aff. ¶¶ 29-30.)

On September 26, 2008, this Court held a fairness hearing, at which time Lowey Dannenberg moved for an award of attorneys' fees, and reimbursement of expenses. This Court voiced concerns over the large discrepancy between Milberg and Lowey Dannenberg's lodestars, as well as the number of Lowey Dannenberg attorneys billing on the engagement. In particular, this Court noted that Milberg had been involved in the action since its inception in March 2003, and had engaged in substantial motion practice before it was displaced as counsel in July 2006. (Transcript of Fairness Hearing dated Sept. 26, 2008 at 8-9.) Moreover, this Court wondered why Lowey Dannenberg had to enlist virtually every attorney in its firm. Lowey Dannenberg accumulated 12,593.15 hours among twenty lawyers, with four partners touching the case for less than fifteen hours each. (Declaration of Thomas M. Skelton dated Sept. 15, 2008 ¶ 42.) Following the fairness hearing, Lowey Dannenberg filed supplemental submissions addressing these issues.

## DISCUSSION

### I. Approval of Settlement

In determining whether a settlement is substantively fair, adequate and reasonable, the Court must consider the following factors: “(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.” City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

For the reasons set forth at the June 13, 2008 hearing, this Court preliminarily determined that the settlement was fair, adequate, reasonable and not the product of collusion. Nothing has happened since that time to cast doubt on any of the Court’s findings, and the Court affirms and adopts all of those findings for purposes of final approval.

In addition, no class member has filed an objection to the settlement. Thus, the second Grinnell factor – the reaction of the class to the proposed settlement – weighs in favor of approval. See In re PaineWebber Pshps. Litig., 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (noting that the absence of objections may itself be taken as evidence of the fairness of a settlement). Lowey Dannenberg has also submitted a declaration affirming that the parties complied fully with the notice procedure specified in the Preliminary Approval Order, and pursuant to this Court’s June 27, 2008 Order, the parties established a CRIS Account.

For the foregoing reasons, as well as those set forth on the record on June 13, 2008, this Court grants the motion for final approval of the settlement.

## II. Plan of Allocation

“To warrant approval, the plan of allocation must also meet the standards by which the . . . settlement was scrutinized – namely, it must be fair and adequate.” Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel. Maley, 186 F. Supp. 2d at 367.

The plan of allocation proposed by the parties has been crafted by competent counsel, and is based on the opinion of Lead Plaintiff’s damages expert. It provides for a pro rata allocation of settlement proceeds based on the proportional losses suffered by each individual Class Member. The plan of allocation also takes into account when individual Class Members purchased and sold their stock, and whether the claimant was a holder of ordinary stock or ADRs. The Court has received no objection to the plan of allocation, and its features are consistent with other plans that have been approved in this district. See, e.g., In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 463 (S.D.N.Y. 2004); PaineWebber, 171 F.R.D. at 135. Accordingly, the Court grants the motion for approval of the plan of allocation.

## III. Attorneys’ Fees and Expenses

### A. Attorneys’ Fees

Lowey Dannenberg seeks attorneys’ fees amounting to 12 percent of the Settlement, or \$2.22 million plus interest, to be allocated among Lowey Dannenberg and Milberg

on a pro rata basis, as approved by Lead Plaintiff. This amount would compensate Lowey Dannenberg for a total of 12,593.15 billable hours and Milberg for a total of 3,478.25 billable hours. Based on Lowey Dannenberg's lodestar of \$5,265,010.25 and Milberg's lodestar of \$1,388,887.50, the \$2.22 million award would result in a multiplier of 0.33.

In calculating a reasonable attorney's fee, this Court has discretion to choose between the lodestar method and the percentage of recovery method. In re WorldCom, Inc. ERISA Litig., No. 02 Civ. 4816 (DLC), 2005 WL 3101769, at \*7 (S.D.N.Y. Nov. 21, 2005). However, "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." WorldCom, 2005 WL 3101769, at \*7 (quoting Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir. 2005)). Even where the percentage method is used, the lodestar method remains useful as a "cross-check on the reasonableness of the requested percentage." Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47, 50 (2d Cir. 2000).

Under the percentage of recovery method, the Court considers the Goldberger factors and sets a percentage of the settlement as a fee "based on scrutiny of the unique circumstances of each case." Goldberger, 209 F.3d at 47, 51-53. Under the lodestar method, the Court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the plaintiff and multiplies that figure by an appropriate hourly rate and a multiplier. Goldberger, 209 F.3d at 47. Under either method, the Court is guided by the following factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Goldberger, 209 F.3d at 50.

1. Time and Labor Expended By Counsel

Milberg filed a Complaint and two Amended Complaints, as well as briefed and argued two motions to dismiss. Milberg also moved for and obtained class certification. Lowey Dannenberg engaged in lengthy and document intensive discovery. It also participated in settlement negotiations, including lengthy mediation sessions, and prepared the notification to Class Members. Lowey Dannenberg will also likely spend additional hours after final approval of the Settlement working through the claims process with Class Members. Undoubtedly, duplication of effort occurred as a consequence of the displacement of Milberg as lead counsel in this action. Moreover, even if this Court were to discount Lowey Dannenberg's hours for the inefficiencies attendant to having so many attorneys working on the case, the core trial team still devoted substantial time and effort.

2. The Magnitude and Complexities of Litigation

Courts have recognized that shareholder actions are notoriously complex and difficult to prove. See Mathes v. Roberts, 85 F.R.D. 710, 713 (S.D.N.Y. 1980). While this action certainly involved difficult and complex issues, both Lowey Dannenberg and Milberg are nationally recognized complex class action litigators, particularly in the fields of securities and shareholder representation. Here, however, the scientific and medical nature of the expert discovery added a complicating wrinkle that required more work.

3. Risk of Litigation

"Perhaps the foremost . . . factor[] is the attorney's risk of litigation, i.e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed." Grinnell Corp., 495 F.2d at 471 (internal quotation marks omitted). Courts in this district have noted that significant litigation risks, including the difficulty of establishing loss causation in light of the

Supreme Court's decision in Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005), and the difficulty in proving that Defendants acted with scienter, militate in favor of fee awards. See In re Veeco Instruments Inc. Sec.Litig., No. 05 MDL 01695 (CM), 2007 WL 4115808, at \*6 (S.D.N.Y. Nov. 7, 2007). Although Lead Plaintiff withstood a motion to dismiss, it likely faced a motion for summary judgment. Lead Plaintiff also faced substantial risk in establishing scienter, as well as proving causation and damages at trial. In addition, counsel undertook this action on a wholly contingent basis without a guarantee of compensation or recovery of expenses.

4. Quality of the Representation

Lowey Dannenberg and Milberg have provided high-quality representation.

5. The Requested Fee in Relation to Settlement

The proposed fee represents 12% of the Settlement, which is consistent with the wide range of fee awards in this district. See, e.g., In re Elan Sec. Litig., 385 F. Supp. 2d 363 (S.D.N.Y. 2005) (awarding 12% of a \$75 million settlement); Veeco, 2007 WL 4115808 (awarding 30% of a \$5.5 million fund).

6. Public Policy Considerations

While public policy favors “the award of reasonable attorney’s fees,” courts must also “guard against providing a monetary windfall to class counsel to the detriment of the plaintiff class.” In re NTL Inc. Sec. Litig., No. 02 Civ. 3013 (LAK), 2007 WL 1294377, at \*8 (S.D.N.Y. May 2, 2007) (internal quotations omitted).

Applying the Goldberger factors, this Court concludes that a total attorneys’ fee of \$2,220,000 is reasonable and appropriate. That fee would result in a multiplier of 0.33, which is below those fees previously approved by courts in this Circuit. See, e.g., In re Polaroid ERISA

Litig., No. 03 Civ. 8335 (WHP), 2007 WL 2116398, at \*3 (S.D.N.Y. July 19, 2007) (applying a 0.58 multiplier to a \$15 million settlement); Denney v. Jenkins & Gilchrist, 230 F.R.D. 317, 352-54 (S.D.N.Y. 2005) (reducing multiplier on \$81.5 million settlement from 2.04 to 1.5); In re Twinlab Corp. Sec. Litig., 187 F. Supp. 2d 80, 87 (E.D.N.Y. 2002) (reducing multiplier from 3.58 to 1.29). However, that 0.33 multiplier is driven in significant measure by the huge number of attorney hours amassed by Lowey Dannenberg.

B. Expenses

Lowey Dannenberg also seeks reimbursement of \$815,365.47 in litigation expenses.<sup>2</sup> “Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.” Mitland Raleigh-Durham v. Myers, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). The Court is satisfied that the expenses incurred were reasonable. Accordingly, this Court grants Lowey Dannenberg’s motion for reimbursement.

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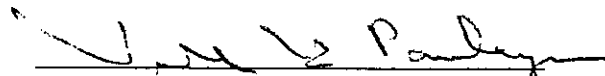
<sup>2</sup> The expenses are divided between Lowey Dannenberg (\$645,554.18), Milberg (\$168,044.89), and Lead Plaintiff (\$1,766.40).

CONCLUSION

For the foregoing reasons, this Court grants final approval of the Settlement and plan of allocation, and grants Lowey Dannenberg's motion for attorneys' fees and reimbursement of expenses.

Dated: December 15, 2008  
New York, New York

SO ORDERED:

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

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