UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	C.A. No. 02 Civ. 5571 (PAE)

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT FOR RELIANCE CLAIMANTS AND FOR REIMBURSEMENT OF ADDITIONAL EXPENSES

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Class Plaintiffs, by Lead Counsel Abbey Spanier LLP, respectfully submit this memorandum in support of their motion for final approval of the proposed settlement on behalf of the 96 class members whose claims were dismissed on summary judgment on the ground that defendant Vivendi had rebutted the presumption of reliance as to them (the "Reliance Claimants"), and for approval of reimbursement of $104,462.06 expenses incurred by Lead Counsel since April 2016 and estimated to be incurred in prosecuting this action and administering the claims process through distribution of funds and termination of the this class action ("the Action") if the proposed settlement is approved.

Background

As the Court is aware, this case was filed in 2002 and was tried before Judge Holwell from October 5, 2009, to January 29, 2010, when the jury returned a verdict against defendant Vivendi on Plaintiffs' claims under section 10(b) of the Securities Exchange Act of 1934. The verdict addressed class-wide common issues, including daily inflation values for Vivendi's securities during the class period, but left open the issues of individual class members' reliance and damages.

As a result of *Morrison v. National Australia Bank,* 561 U.S. 247 (2010), the class was redefined post-verdict to include only ADS purchasers. A claims procedure was established, notice was disseminated, and claims were submitted to the claims administrator, Garden City Group, L.L.C. ("GCG" or "the Claims Administrator"). GCG determined that around 2,000 of the submissions were valid class member claims, and it calculated damage amounts for each claim according to rules based on the verdict, negotiations between the parties, and rulings on disputed damage calculation issues by Judge Scheindlin.

Following discussions between the parties and with Judge Scheindlin, Vivendi agreed not to dispute reliance and GCG's calculated damage amounts for 1,924 of the class members,

who had submitted valid claims totaling approximately $49.8 million (with prejudgment interest). Those claims were included in a Rule 54(b) judgment, which was entered on December 22, 2014 (Dkt. 1231). Vivendi appealed class certification and the trial verdict from that judgment, and Class Plaintiffs cross-appealed from the order excluding purchasers on foreign exchanges from the class. On September 27, 2016, the Second Circuit affirmed the district court decisions. On November 10, 2016, Vivendi's petition for rehearing *en banc* was denied.

The parties continued their discussions concerning the remaining class members whose claims Vivendi continued to challenge on various eligibility grounds. The parties reached agreement on the eligibility of ten additional claims, totaling approximately $1.3 million. Judgment was entered by this Court under Rule 58 in favor of those class members on July 14, 2016 ("the Rule 58 Judgment"); also in the Rule 58 Judgment the claims of other class members who had been determined to be ineligible by GCG were dismissed (Dkt. 1301).

Class Plaintiffs moved for an award of attorneys' fees, reimbursement of expenses, and class representative compensation, which Judge Scheindlin granted by order dated April 29, 2016 (Dkt. 1294). The order awarded as attorney fees one-third of the total damage and interest amount payable to class members, net of court-awarded litigation expenses. The amount of reimbursed litigation expenses was $21,456,585.20. The order also provided that Class Plaintiffs could move at a later date for reimbursement of additional expenses of litigation (but not for additional attorneys' fees) incurred for future services in connection with ongoing litigation and claims administration. Those expense amounts were to be paid when all judgments in the litigation become final. This order was included in the July 14, 2016 judgment.

In 2015 and 2016, Vivendi filed summary judgment motions (Dkts. 1267 & 1280)

contending it had rebutted the presumption of reliance with respect to claims submitted by 96 class members (the "Reliance Claimants"), whose purchases of ADSs were advised or managed by two investment management firms. Judge Scheindlin granted the motions and dismissed those claims by orders in August 2015 (Dkt. 1272) (the order also denied a cross-motion for summary judgment by Class Plaintiffs) and in April 2016 (Dkt. 1292). The Rule 58 judgment entered on July 14, 2016 (Dkt. 1301) also dismissed the Reliance Claimants' claims.

Based on those decisions and judgments, all claims of class members who submitted proofs of claim have been adjudicated by this Court.

Vivendi and Class Plaintiffs filed appeals from the Rule 58 judgment, with Vivendi again contesting the jury verdict and class certification, and Class Plaintiffs appealing dismissal of the claims of the Reliance Claimants. Pending settlement discussions, the parties stipulated to temporarily withdraw or suspend their appeals without prejudice and subject to reinstatement if a final settlement is not reached.

The parties held lengthy intermittent settlement discussions and reached a proposed agreement on the Reliance Claimants' claims in January 2017 ("the Settlement"). See Declaration of Arthur N. Abbey ("Abbey Decl. submitted herewith. The total damages of the Reliance Claimants, as calculated by GCG, plus pre-judgment interest, is approximately $79 million; the proposed Settlement amount is approximately one-third (33 1/3 percent) of that -- $26.4 million, subject to minor adjustments for interest. At this time, the judgment amount for the class members recovering under the verdict totals approximately $51.6 million, including post-judgment interest. The Settlement amount, along with the damages to class members whose judgment amounts will be satisfied in full under the Rule 54(b) and Rule 58 Judgments, will yield a total recovery in this Action of $78 million for all class members.

In return for the Settlement payment, upon effectiveness of the Settlement, the Reliance

Claimants will release Vivendi and related persons from all further liability in this matter. The proposed Settlement does not affect the amounts being recovered by class members in full satisfaction of their damage awards under the prior Rule 54(b) and Rule 58 judgments, and those class members are therefore not giving releases to Vivendi.

Lead Counsel for Class Plaintiffs is also seeking an additional $104,462.06 reimbursement for litigation expenses, as described in the Abbey Declaration.

It is the intent and expectation of the parties that, if the Court grants the present motion for approval of the Settlement, this Action will be finally concluded.

Argument

A. The Particular Circumstances of This Case Strongly Indicate That the Proposed Settlement Is Fair, Reasonable, and Adequate

When evaluating a proposed settlement under Fed. R. Civ. P. 23(e), a court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate, and was not the product of collusion. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). As a matter of public policy, courts strongly favor settlements. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1983), particularly in complex class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

This proposed Settlement is separate from, and does not affect, the judgments that have been entered in favor of about 2,000 class members, and their recoveries.

The present situation is different from practically every other proposed class settlement in three fundamental respects, and these considerations militate strongly in favor of approval of the settlement:

First, a jury verdict has been rendered in favor of the class, which has provided ample experience to both plaintiffs' and defense counsel to inform their post-verdict settlement negotiations and decisions. This adds to the presumption in favor of a class settlement.

Second, the particular claims proposed to be settled have been dismissed on Vivendi's post-verdict summary judgment motions, and those dismissals are on appeal. Those proceedings have provided further information to both sides' counsel about all relevant factors and risks, and also give each side real motivation to settle.

Third, the two investment advisory firms that were responsible for the ADS purchase decisions (and alleged reliance) of the 96 affected class members support this settlement. The class members were given post-verdict notice to submit proofs of claim; they have accordingly been individually identified; and they recently have been given individual notice of this proposed Settlement. Based on the absence of comment or objection to date, it is reasonable to conclude that the class members themselves support the Settlement. At a more granular level, therefore, this also indicates that the settlement merits Court approval.

In addition, a proposed class settlement enjoys a presumption of fairness where, as here, it was the product of arm's-length negotiations conducted by capable and experienced counsel. *Wal-Mart*, 396 F.3d at 116. Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *3 (S.D.N.Y. Dec. 19, 2014) (internal quotations omitted).

B. This Settlement Should Be Approved Under the Second Circuit's *Grinnell* Factors

This proposed settlement fits well within the factors applicable to judging whether a settlement should be approved. Those factors are well settled. They are:

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

possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). In weighing these factors, courts recognize that settlements usually involve significant give and take between the negotiating parties; therefore courts do not attempt to rewrite settlement agreements or try to resolve issues that are left undecided as a result of the parties' compromise. *See, e.g., In re Warner Commc'ns. Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("It is not a district judge's job to dictate the terms of a class settlement."). The proposed Settlement meets the *Grinnell* factors and the Court should approve it.

1. Complexity, expense, and likely duration of litigation

In general, securities class action cases are recognized as being particularly "difficult and notoriously uncertain" with respect to both liability and damages issues. *See In re Sumitomo Copper Litig.*, 189 F.R.D 274, 281 (S.D.N.Y. 1999). The scale of the pretrial and trial in this case bears out those observations.

With respect to the reliance issues that pertain to the Reliance Claimants' situation, resolution could proceed in several stages that would likely be protracted. Class Plaintiffs would first have to prosecute their appeal, which in the Second Circuit would likely take a minimum of one year to complete. If there was a reversal, the claims would likely be remanded, with the potential for an actual trial of the claims. This all would likely consume several years.

As the briefing of the reliance issues before Judge Scheindlin showed, and the preparations of Lead Counsel on appeal have borne out, these issues are both legally and factually highly contested and complex. This confirms that extensive delay on remand would be likely (unless of course, a Second Circuit decision went to the U.S. Supreme Court on a successful petition for certiorari, in which case another layer of risk, delay and expense falls

upon the Reliance Claimants and Vivendi).

Even then, if the Reliance Claimants prevailed on remand to this Court, it would be open to Vivendi to appeal such an adverse ruling, which would entail further delay. *See Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class"); *see also Stieberger v. Sullivan*, 792 F. Supp. 1376, 1377 (S.D.N.Y. 1992); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992).

"[M]uch of the value of a settlement lies in the ability to make funds available promptly." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985). The proposed settlement here avoids months or years of potential delay and will give prompt and substantial compensation to the Reliance Claimants if the Settlement is approved.

2. Adequate notice and reaction of the class

Courts have repeatedly held that "one indication of the fairness of a settlement is the lack of or small number of objections." *Strougo*, 258 F. Supp. 2d at 258 (citing *Hammon v. Barry*, 752 F. Supp. 1087, 1093 (D.D.C. 1990)); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478-80 (S.D.N.Y. 1998) (approving settlement where "minuscule" percentage of the class objected); *Grinnell,* 495 F.2d at 462 (approving settlement where 20 objectors appeared from group of 14,156 claimants); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922 (E.D. Mich. 2007) (approving settlement where 82 objectors appeared from a class of 11,000 people).

As the Court directed, notice of the proposed settlement has been sent directly to the Reliance Claimants by email and U.S. mail and by posting the notice documents on the Vivendi Securities Class Action website. *See* Declaration of Stephen J. Cirami annexed as Exhibit 2

to the Abbey Declaration.

Although this brief is being submitted before the deadline (April 28), Lead Counsel are quite confident that the 96 Reliance Claimants will not raise objections, certainly not serious or substantive ones, to this proposed Settlement. This is based upon discussions with representatives of Southeastern Asset Management, Inc. (SAM) and Capital Guardian Trust Company (Capital Guardian), which were the investment advisors for all of the Reliance Claimants' Vivendi ADS transactions and submitted many of their claims in the proof of claim proceedings.

3. Stage of proceedings and discovery completed

If the Class Plaintiffs prevailed on appeal with respect to the claims of the Reliance Claimants and the claims were remanded, some interesting discovery and trial testimony issues would arise. Depositions have been taken of the analysts who made the purchase recommendation decisions at SAM and Capital Guardian. They reside outside this jurisdiction, so their deposition testimony would presumably also be their trial testimony. Although Judge Scheindlin granted summary judgment on the basis that there were no genuine triable issues, presumably if there is a remand that conclusion may not stand. If the only real witnesses are not available for trial, it is unclear what other evidence would be admitted at trial. This in turn would call into question the entitlement of the Reliance Claimants to the presumption of reliance.

Of course, these matters are completely conjectural, without knowing the grounds for a hypothetical reversal and remand. This simply introduces further uncertainty, which the proposed Settlement is designed to avoid.

4. Risks of establishing liability and damages

The risks to the Reliance Claimants and Vivendi of continuing with the appeal, and then

on remand if remand is ordered, should be the main issue in assessing the reasonableness of the proposed Settlement. In general, the Court should balance the immediacy and certainty of a recovery for the affected claimants against the possible risks and rewards of continued litigation of their claims. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591-92 (S.D.N.Y. 1992); *In re Warner Commc'ns. Sec. Litig.*, 618 F. Supp. at 741.

One paramount consideration is that Judge Scheindlin awarded summary judgment, twice, to Vivendi on these reliance issues. Inevitably, this places an appeal for the Reliance Claimants at high risk of failure.

Lead Counsel has spent a lot of time preparing their appeal from the summary judgment rulings. While we believe we have very strong arguments for reversal and remand, of course that is a long distance from assured success. We presume that Vivendi's counsel felt at least comparably confident of their prospects on appeal. There does not appear to be any generally accepted and precise articulation of what factual showing by a defendant may overcome the presumption of reliance, or conversely how a plaintiff can preserve the presumption or otherwise prevail on the reliance issue.

Lead Counsel thoroughly understands the strengths and weaknesses of the Reliance Claimants' case. This ultimately yielded Lead Counsel's decision to shake hands with Vivendi's counsel on the proposed settlement, subject to Court approval.

In addition, the negotiations were indisputably arms-length. No one could suggest that Lead Counsel and counsel for Vivendi were anything less than very determined adversaries throughout the 14 years of this litigation. *See* Abbey Declaration.

The judgment of informed and experienced counsel negotiating and proposing a settlement after arms-length negotiations is perhaps the major factor to be considered by courts asked to approve class action settlements. *See In re Warner Commc'ns. Sec. Litig.*, 618 F.

Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (settlement approved where the parties "have a clear view of the strengths and weaknesses of their cases"); *Wal-Mart*, 396 F.3d at 116 (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery'"); *American Bank Note*, 127 F. Supp. 2d at 428 ("Courts have looked to ensure that the settlement resulted from arm's-length negotiations between counsel possessed of experience and ability necessary to effective representation of the class's interests") (internal quotations omitted); *Sumitomo*, 189 F.R.D. at 280 (when settlement negotiations are conducted at arm's length, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (quoting *In re Paine Webber Ltd. P'ships. Litig.*, 171 F.R.D. at 125); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 at 87-89 (4th ed. 2002).

5. Collection risks, greatest possible recovery amount, and reasonableness of amount of proposed settlement

Vivendi is an ongoing successful company and Lead Counsel did not identify any appreciable collection risks.

The greatest possible recovery amount for the Reliance Claimants -- *i.e.*, their full amount of recognized damages -- is known for each claimant and in the aggregate, as a result of the proof of claim process. As set forth above, the proposed settlement amount is one-third of full damages.

Most securities class actions that settle do so for a far smaller fraction of actual or estimated class damages. *See In re China Sunergy Sec. Litig.*, No. 07-Civ.7895, 2011 WL 1899715, at *15 (S.D.N.Y. May 13, 2011) (noting that the average settlement in securities

class actions ranges from 3% to 7% of the class' total estimated losses); *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, *14 (S.D.N.Y. Nov. 30, 2010) (noting that "courts often approve class settlements even where the benefits represent 'only a fraction of the potential recovery'" and collecting cases from the Southern District where settlements were approved for percentages of estimated damages such as 1.6%, 2%, and 5%). According to Cornerstone Research, in 2015, the median settlement in cases with estimated damages of less than $50 million was for 6.7% of total damages. *Securities Class Action Settlements: 2015 Review and Analysis*, at 9 (Cornerstone Research 2016). Then again, most such cases do not settle after a jury verdict was rendered for plaintiffs, but after some claimants' claims were knocked out for lack of reliance. Under the circumstances, a one-third recovery is well within the range of reasonableness.

It may also be noted parenthetically that Lead Counsel and other class counsel stand to recover a portion of the settlement amount as attorney fees, thereby aligning their interests with the interests of the Reliance Claimants on this proposed recovery. Lead Counsel are satisfied that this settlement is reasonable from that perspective as well.

C. Lead Counsel's Motion to Receive Reimbursement of Additional Litigation Expenses Should Be Granted

As set forth in the Abbey Decl., Lead Counsel incurred or will incur additional litigation expenses amounting to $104,462.06, since their original application to Judge Scheindlin for fees and expenses was submitted. In addition, GCG has estimated that if the Settlement is approved it will be able to complete distribution of funds to eligible claimants through termination of the Action for $77,000. *See* Declaration of Stephen J. Cirami ("Cirami Decl."), Exh.2 to the Abbey Declaration. These expenses have been or will be billed to Lead Counsel. GCG has requested, if the Court approves, the right to make a subsequent and final application

for administration costs after the initial distribution of funds to class members, only if additional distributions are required that result in expenses in excess of the estimate.

As described in the Abbey Declaration, the expense items included are of the same type as previously ordered reimbursed by the Court, and were necessary and reasonable in the ongoing prosecution and administration of the Action. The proposed Settlement is not contingent on approval of reimbursement of expenses.

For these reasons Lead Counsel respectfully submit that he Court should approve reimbursement of those expenses to Lead Counsel.

Conclusion

Class Plaintiffs' request that their motion for final approval of the proposed Settlement for the Reliance Claimants and for reimbursement of additional litigation expenses be granted.

Dated: April 21, 2017

Respectfully submitted,

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