

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN RE WACHOVIA CORPORATION
ERISA LITIGATION

MASTER FILE: 3:09-CV-00262-MR

THIS DOCUMENT RELATES TO:
All Actions

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, FOR
SETTLEMENT CLASS CERTIFICATION, AND FOR APPROVAL OF
PLAN OF ALLOCATION, AND PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES AND EXPENSES AND NAMED PLAINTIFF
CASE CONTRIBUTION AWARDS**

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Named Plaintiffs¹ submit this memorandum in further support of their Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for Approval of Plan of Allocation (“Final Approval Motion”), and Class Counsel’s Motion for Award of Attorneys’ Fees and Expenses and Named Plaintiff Case Contribution Awards (“Fee Petition”). Plaintiffs filed their Motions and supporting documents on July 12, 2011. [Dkt. Nos. 163-65]. Since that time, Evercore Trust Company, N.A., (“Evercore”) in its capacity as independent fiduciary (the “Independent Fiduciary”) has completed its review of the Settlement and has authorized the Plans to enter into the Settlement (“Independent Fiduciary Report”),² and also filed on August 16, 2011, as Dkt. No. 168. Further, the deadline for objections to the Settlement, the Final Approval Motion and the Fee Petition was August 18, 2011,³ with only four objections filed from a Class in excess of 155,000 persons. [Dkt. Nos. 159-61, 167]. As is explained below, these facts provide further support for the approval of the Settlement, the Final Approval Motion and Fee Petition.

¹ Capitalized Terms not otherwise defined herein have the meanings set forth in the Class Action Settlement Agreement (“Settlement Agreement”), which appears as Exhibit A the Declaration of Derek W. Loeser in Support of Plaintiffs’ Motion for Final Approval of ERISA Class Action Settlement, for Settlement Class Certification, and for Approval of Plan of Allocation, and Class Counsel’s Motion for Award of Attorneys’ Fees and Expenses and Named Plaintiff Case Contribution Awards (“Initial Loeser Decl.”). [Dkt. No. 165].

² The Independent Fiduciary Report is attached as Exhibit A to the Declaration of Derek W. Loeser in Support of Plaintiffs’ Reply in Support of Plaintiffs’ Motion for Final Approval of ERISA Class Action Settlement, Settlement Class Certification, and Plan of Allocation and Motion for Award of Attorneys’ Fees, Expenses, and Case Contribution Awards (“Loeser Decl.”)

³ Objections were to be postmarked no later than July 25, 2011, with service of the objection on counsel and filed with the Court no later than August 18, 2011. *See* Preliminary Approval Order ¶ 5. [Dkt. No. 156].

A. The Independent Fiduciary's Authorization of the Settlement Supports Approval of Final Approval Motion and Fee Petition.

As contemplated by Section 4 of the Settlement Agreement, Evercore was appointed to approve and authorize the Settlement in accordance with U.S. Department of Labor Prohibited Transaction Class Exemption 2003-39 (the "Class Exemption"). Evercore has extensive experience in serving in the capacity as an independent fiduciary, including in connection with ERISA class action settlements. Independent Fiduciary Report at 1. The Class Exemption requires Evercore to make determinations whether (i) there is a genuine controversy involving the Plans; (ii) the terms of the Settlement, including the scope of the release of claims, the amount of cash and the value of any non-cash assets received by the Plans; and the amount of any attorney's fee award or other sums to be paid from the recovery, are reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (iii) the terms and conditions of the transaction are no less favorable to the Plans than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances; and (iv) the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest. Independent Fiduciary Report at 2.

In evaluating the Settlement, Evercore primarily considered the merits of the claims and the respective parties' arguments; the amount of the consideration paid; and the terms of the Settlement, including, but not limited to, the scope of the release, the plan of allocation and the legal fees requested by Plaintiffs' counsel. Independent Fiduciary Report at 2. Evercore reviewed various documents filed with the Court in this litigation, interviewed counsel, evaluated the strengths and

weaknesses of the legal and factual arguments asserted in the litigation, and reviewed and analyzed the scope of the Settlement release and the plan of allocation. Independent Fiduciary Report at 2. After this review and analysis, Evercore authorized the Plans to enter into the Settlement, concluding that the Settlement is reasonable and otherwise meets the requirements of the Class Exemption. Independent Fiduciary Report at 3. Evercore's authorization of the Settlement provides strong support for the Court's approval of the Final Approval Motion and Fee Petition.

B. The Class's Reaction Strongly Supports Approval of the Settlement.

In response to the more than 155,000 Class Notices mailed to Plan participants and beneficiaries, as well as the Internet/Publication Notice made available, only four persons have lodged objections to the proposed Settlement or requested attorneys' fees. The small number of objections from a class so large strongly militates in favor of approval of the Settlement. *See generally In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654 (E.D. Va. 2001) (including class reaction as a factor to be considered in evaluation of a proposed settlement) (*citing Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). This conclusion is reinforced by the fact that Class Counsel received and responded to inquiries from 690 Class members or potential Class members. The Settlement websites have had 1,567 hits. Loeser Decl. ¶ 6. Thus, the Class has evidenced significant interest regarding the Settlement; the small number of objections clearly indicates that the Class overwhelmingly supports the Settlement.

C. The Four Objections Do Not Undermine the Settlement Agreement.

Plaintiffs previously addressed the first three objections, submitted by Jorge H. Miyares, Jr. (Dkt. No. 159), Harvey E. Baker (Dkt. No. 160), and Lorraine

Zbuchalski (Dkt. No. 161), in their Final Approval Memo at 17-18 and in the Initial Loeser Declaration ¶¶ 54-60. The fourth objection is from John H. Loughridge, Jr., and includes an Intention to Appear at the Final Approval Hearing by Norwood Robinson on behalf of Mr. Loughridge. On Monday, August 22, 2011, Class Counsel contacted Mr. Loughridge and his attorney, Norwood Robinson, and discussed Mr. Loughridge's objections. Loeser Decl. ¶ 7. With all due respect to Mssrs. Loughridge and Robinson, and for the reasons discussed below, the objection does not warrant disapproval of the Settlement.

1. Exclusion from Released Claims.

Mr. Loughridge has requested that *Brown, et al. v. Thompson, et al.*, No. COA 11-852 and *Ehrenhaus v. Baker, et al.*, No. COA 10-1034 both be excluded from the Released Claims. Class Counsel raised this request with Defendants, who approved language adding the *Brown* and *Ehrenhaus* cases to the carve out from the release in ¶ 4.1.5 of the Settlement Agreement (with the caveat that claims, if any, raised in cases that are ERISA claims or claims preempted by ERISA, are released). Class Counsel emailed Mssrs. Loughridge and Robinson proposed language to this effect for their review and consideration. Loeser Decl. ¶¶ 8-10.

2. Class Representatives.

Mr. Loughridge has requested more information on the Named Plaintiffs. The Named Plaintiffs include a wide range of persons, including persons who worked at Wachovia for decades, who retired from Wachovia, who had substantial retirement account balances in Wachovia stock during the Class Period and lost significant portions of their retirement savings when Wachovia stock dropped. Loeser Decl. ¶ 11. As such, the Plaintiffs have standing to bring the ERISA claims asserted in the Complaint on behalf of the class.

3. Discovery.

Mr. Loughridge questions how the Settlement can be considered ““fair, reasonable, and adequate”” when no real discovery was completed. The case was dismissed prior to formal discovery beginning. Nonetheless, Class Counsel: (1) reviewed and analyzed documents that were publicly available concerning the Company’s financial condition and the performance of Company stock during the relevant time period, including but not limited to: news articles, related complaints and pleadings, press releases, analyst reports, and regulatory filings; (2) inspected, reviewed, and analyzed numerous documents concerning the Plans and the administration of the Plans; (3) interviewed participants of the Plans and reviewed and analyzed documents collected from participants; and (4) researched the applicable law with respect to the claims asserted and the potential defenses thereto. Loeser Decl. ¶ 12. Based on this analysis, as well as Class Counsel’s extensive experience litigating cases of this type, Class Counsel respectfully submit that they were well informed of the strengths and weaknesses of the claims. *See, e.g., In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (approving proposed partial class action settlement prior to any formal discovery).

4. Mediation.

Objector Loughridge asks for more information on the mediation which took place on December 8, 2010. In response, Class Counsel provide the following additional information. The mediation was conducted by Robert A. Meyer, Esq., a nationally recognized and highly experienced mediator. A copy of his resume is attached to the Loeser Decl. as Exhibit B.

While the mediation itself occurred on only day, December 8, 2010, and while the Term Sheet was signed at the mediation,⁴ the whole settlement process did not occur in just one day. Rather:

- The mediation occurred after months of phone calls between Class Counsel and defense counsel discussing the prospects of settling the case;
- The Parties submitted detailed mediation statements to the mediator prior to the mediation that discussed the facts, law, and potential damages; and
- Following the mediation, the parties engaged extensive additional negotiations over a more than two month period regarding the specific terms of the formal Settlement Agreement.

Thus, the settlement process was both lengthy and thorough and conducted at all times at arm's-length. Loeser Decl. ¶¶ 13-14.

5. Class Settlement Amount.

Mr. Loughridge objects to the size of the settlement. Again, respectfully, Class Counsel note that this case was dismissed with prejudice. Several similar ERISA company stock cases involving the financial meltdown of 2008 were dismissed at the pleading stage. *See, e.g., In re Citigroup ERISA Litig.*, No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842 (S.D. Ohio 2009); and *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 756 F. Supp. 2d 330 (S.D.N.Y. 2010). While Plaintiffs strongly disagree with the bases for dismissal, and timely appealed the decision, the likelihood of success on appeal was unknown. Different courts

⁴ The Term Sheet is attached to the Loeser Decl. as Exhibit C.

have come to different conclusions on the legal basis and the standards for liability in cases of this type – even within the same circuits.⁵ Furthermore, even if Plaintiffs had prevailed on their appeal, success at trial was far from guaranteed. To date, only four ERISA company stock cases have gone to trial, and in each instance, defendants prevailed. *See Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009); *Nelson v. Hodowal*, 512 F.3d 347 (7th Cir. 2008); *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006); *Landgraff v. Columbia/HCA Healthcare Corp.*, No. 98-90, 2000 WL 33726564 (M.D. Tenn. May 24, 2000).

As explained in the Final Approval Memo, as well as the Independent Fiduciary Report, the \$12.35 million Settlement amount is reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone. Final Approval Memo at 2; Independent Fiduciary Report at 3.

6. Plan of Allocation.

Mr. Loughridge also questions the Plan of Allocation. As part of the Settlement Agreement, Wells Fargo agreed to pay for the implementation of the Plan of Allocation. Rather than a cause for concern, this is a significant benefit to the Class, since the Class does not have to pay for Settlement administration out of the Settlement proceeds.

Wells Fargo's function in implementing the Plan of Allocation is purely administrative. The Plan of Allocation was prepared by Class Counsel and is to be

⁵ *Compare In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008) (holding that a “myriad of circumstances” can require fiduciaries to divest company stock under ERISA’s “prudent man” standard) with *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (requiring plaintiffs to show that either “the company’s viability as an ongoing concern” is threatened or there was “a precipitous decline in the employer’s stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement” (quotations and citations omitted)).

approved by the Court.⁶ Additionally, as stated in the Plan of Allocation, the Court will retain jurisdiction over the Plan of Allocation to the extent necessary to ensure that it is fully and fairly implemented. *See* Plan of Allocation at 6 (Exhibit C to the Initial Loeser Decl.).

Mr. Loughridge questions section B(iii) of the Plan of Allocation, which provides: “If data is not available to determine the account balances of Class members at the beginning or end of the Class Period, then data from the nearest available date will be used.” This language is often used in plans of allocations in ERISA company stock cases. Often, individual transactional data is recorded on a monthly basis, rather than daily basis. Accordingly, if individual transactional data is not available for the exact dates of the beginning and end of the Class Period are not available, then Wells Fargo can use data from the nearest available date.

7. Releases/Non-Opt Out Class.

Mr. Loughridge questions the non-opt out nature of the Release. It is important to note that Federal Rules of Civil Procedures Rule 23(b)(1) specifically authorizes non-opt out classes, where, as here, individual adjudications of claims would be unworkable.

As Plaintiffs have explained previously, ERISA class actions of this type are considered a “paradigmatic example” of a Rule 23(b)(1) class as they constitute claims brought on behalf of an ERISA-governed plan under ERISA § 502(a)(2) and are, therefore, derivative in nature. *In re Schering Plough Corp. ERISA Litig.*

⁶ Similar plans of allocation have been approved in other ERISA company stock cases. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187 (M.D.N.C. Jan. 10, 2007) (Order Approving Plan of Allocation) (approving a similar plan of allocation); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (same).

589 F.3d 585, 604 (3d Cir. 2009) (collecting cases). With regards to 23(b)(1)(B) which looks at possible prejudice to the class members, absent class certification there is a strong possibility that more than one court would have to adjudicate issues common to all class members. Each of the potential proceedings would likely present the same common issues of law and fact, primarily whether Defendants breached their fiduciary duties to the Plans. Class certification protects Plaintiffs and the Class members from the risk of inconsistent rulings that might well be dispositive of their claims.

Additionally, under 23(b)(1)(A), which looks at possible prejudice to the defendants, since claims here are brought on behalf of the Plans for Plan-wide losses due to investments in Company Stock, any judgment necessarily binds the fiduciary in his dealings with the plan, rather than merely in his dealings with individual participants. Hence, two conflicting judgments that arise out of the same breaches of duty to the Plans concerning investment in Company Stock would establish incompatible standards of conduct for the fiduciaries.⁷

8. Independent Fiduciary.

As contemplated in the the Prohibited Transaction Class Exemption 2003-39, 68 Fed. Reg. 75,632 (Dec. 31, 2003), as amended (the “Class Exemption”), Evercore is an *independent* fiduciary. As noted in the Independent Fiduciary Report, as required by the Class Exemption:

[Evercore] has no relationship to, or interest in, any of the parties involved in the Litigation that might affect the exercise of its best judgment as an indendent fiduciary.

Independent Fiduciary Report at 2.

⁷ For further explanation of why the case should be certified under FRCP 23(b)(1), see Final Approval Memo at 22-25.

As explained in the Independent Fiduciary Report, the Class Exemption is designed to ensure that, subject to court approval, a party that is independent of the plan sponsor (here, Wells Fargo, a Defendant) represents the Plans' interests in settling a claims. The Class Exemption specifically contemplates, and allows for, a party in interest such as Wells Fargo to pay for an independent fiduciary. Class Exemption cmt. D. Importantly, the Independent Fiduciary Report acknowledges that it is serving as an independent fiduciary for the Plans, and is representing the Plans' interests in settling the claims. Hence, there is nothing inappropriate about the Independent Fiduciaries' engagement in this case by Well Fargo, and, as contemplated by applicable regulations, the Independent Fiduciary fully and fairly evaluated the fairness of the Settlement to the Plan.

Respectfully submitted this August 22, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2011, I electronically filed PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, FOR SETTLEMENT CLASS CERTIFICATION, AND FOR APPROVAL OF PLAN OF ALLOCATION, AND PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND NAMED PLAINTIFF CASE CONTRIBUTION AWARDS with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

Executed on August 22, 2011, at Seattle, Washington.

s/Derek W. Loeser

Derek W. Loeser