UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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	:	MDL DOCKET NO. 1241
IN RE: FINE HOST CORPORATION	:	
SECURITIES LITIGATION	:	MASTER DOCKET NO.
	:	3:97-CV-2619 (JCH)
	:	
	:	NOVEMBER 8, 2000

RULING ON APPLICATION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES [DKT. NO. 210]

Plaintiffs in this consolidated securities class action have applied for an award of attorneys' fees and reimbursement of expenses in connection with the settlement of the consolidated action. See Dkt. No. 210. On October 26, 2000, the court entered an Order and Final Judgment approving the class action settlement reached by the parties. See Dkt. No. 211. The plaintiffs now seek attorneys' fees in the amount of one-third of the settlement fund of $17,750,000, or $5,916,666.67. In addition, the plaintiffs seek costs and expenses of $137,477.36. The court has been informed by counsel for the plaintiffs that no objections to the proposed fee award have been received.[1] Notice of the proposed settlement mailed to class members and

[1] The Court of Appeals, however, has cast considerable doubt upon the importance of this fact:

> And the class members—the intended beneficiaries of the suit—rarely object. See Federal Judicial Center, Empirical Study of Class Action in Four Federal District Courts 76 (1996). Why should they? They have no real incentive to

published in the Wall Street Journal indicated that the plaintiffs' attorneys were seeking an award of one-third of the settlement fund and reimbursement for expenses up to $225,000.

I. STANDARD

A party that has secured a benefit on behalf of a class of people is entitled to recover its costs, including attorneys' fees, from a common fund created as part of a settlement agreement. See Savoie v. Merchants Bank, 166 F.3d 456, 460 (2d Cir. 1999) ("Savoie II") (citing Savoie v. Merchants Bank, 84 F.3d 52, 56 (2d Cir. 1996) ("Savoie I")). In implementing the common fund doctrine, courts have used two methods of calculating attorneys' fees. Historically, the traditional method of calculating fees in such cases was as a percentage of the fund. See In re Crazy Eddie Secs. Litig., 824 F. Supp. 320, 325 (E.D.N.Y. 1993) (citing, inter alia, Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885)).

In the 1970's, however, the Third Circuit devised an alternate method, the "lodestar," as a response to perceived problems with the percentage method.[2] See

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> mount a challenge that would result in only a "minuscule" pro rata gain from a fee reduction.

Goldberger v. Integrated Res., Inc., 209 F.3d 43, 52 (2d Cir. 2000) (citation omitted).

[2] The percentage approach initially had begun to be seen as a problem because courts ran the risk of creating a "windfall" for attorneys that bore no relationship to "the

Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), appeal following remand, 540 F.2d 102 (3d Cir. 1976). Under the lodestar method, the court first multiplies the number of hours expended by each attorney by the hourly rate normally charged for similar work by attorneys of like skill in the area, then multiplies this "base" or "lodestar" rate by a "multiplier" that takes into account "other less objective factors, such as the 'risk of litigation,' the complexity of the issues, and the skill of the attorneys." Savoie II, 166 F.3d at 460 (quoting City of Detroit v. Grinnell Corp., 560 F.32d 1093, 1098 (2d Cir. 1977) ("Grinnell II")). At the time that the Third Circuit and other courts initially adopted the lodestar method, the Second Circuit also adopted it for common fund cases in its decisions in City of Detroit v. Grinnell Corp., 495 F.2d 448, 468-74 (2d Cir. 1974) ("Grinnell I") and Grinnell II, 560 F.2d at 1098-1100. The Grinnell decisions, while not specifically stating that the percentage method could not be used, directed a district court "to begin its inquiry on remand by first calculating the basic value of appellee's services," and emphasized that "district courts should place primary reliance on the value of the time actually expended by fee applicants as

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actual effort made by the attorney to benefit the class." City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1099 (1977) ("Grinnell II"). On the other hand, the percentage approach also "has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases." Savoie II, 166 F.3d at 460-61.

determined by normal billing rates." Grinnell II, 560 F.2d at 1098, 1099.

Since that time, the Third Circuit has repudiated its earlier endorsement of the lodestar method and returned to a percentage-based analysis. Following the Supreme Court's observation in dicta that "under the 'common fund doctrine' . . . a reasonable fee is based on a percentage of the fund," Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984), a Third Circuit Task Force convened by the author of the Lindy opinion rejected the lodestar method and recommended a return to percentage-based calculations. See Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) ("Third Circuit Task Force"). In rejecting the lodestar method, the Third Circuit Task Force noted that the lodestar method "unnecessarily overtaxed the judicial system, created an illusory sense of mathematical precision leading to disparate results, was easily manipulated by judges, and created disincentives to an early settlement." See Crazy Eddie, 824 F. Supp. at 325 (citing Third Circuit Task Force, 108 F.R.D. at 246-49); see also Goldberger v. Integrated Res., Inc., 209 F.3d 43, 49 (2d Cir. 2000) (under the lodestar method, "[t]here was an inevitable waste of judicial resources").

Under a percentage-of-the-fund method, lawyers have no incentive to increase the number of billable hours for which they would be compensated under the lodestar method. Savoie II, 166 F.3d at 460-61. Similarly, the percentage method

does not encourage plaintiffs' counsel to drag their feet in settling a case, since plaintiffs' counsel's fees do not increase with delay. Id. at 461. Moreover, it has been argued that, by aligning the lawyers' interests with those of their clients, the percentage or "contingent fee" method gives lawyers an incentive to negotiate and litigate vigorously on behalf of their clients.

Courts in this Circuit have utilized both types of fee awards. Compare Chatelain v. Prudential-Bache Secs., Inc., 805 F. Supp. 209, 215-16 (S.D.N.Y. 1992) (declining to use lodestar and applying "straight percentage of recovery method") and In re Union Carbide Corp. Consumer Prods. Bus. Secs. Litig., 724 F. Supp. 160, 166 (S.D.N.Y. 1990) (finding lodestar "is not an ideal way to fix fees") with In Re "Agent Orange" Prod. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987) (noting general practice of applying lodestar based on hourly rates within district in which court sits) and Wallace v. Fox, 7 F. Supp. 2d 132, 138-39 (D. Conn. 1998) (finding lodestar still required in Second Circuit despite the Supreme Court's statement suggesting that a percentage approach is acceptable in Blum, 465 U.S. 886). However, "[s]ince at least the late 1980s[,] the trend within this circuit has been toward the percentage-of-recovery method." Crazy Eddie, 824 F. Supp. at 325 (citations omitted). A number of district courts in this Circuit have applied the percentage method of calculating fees in common fund cases in recent years. These

courts have read footnote 16 of the Supreme Court's decision in Blum, 465 U.S. 886, as authorizing the use of a percentage method in common fund cases and have apparently rejected the view espoused in Wallace, 7 F. Supp. 2d at 138-39, that "the Second Circuit continues to require use of the lodestar-multiplier method" as laid out in Grinnell. See, e.g., In re Medical X-Ray Film Antitrust Litig., 1998 WL 661515, at *6 (E.D.N.Y. 1998) (noting that despite Grinnell decisions, percentage method "gained favor" in late 1980s and applying percentage method even though Eastern District plan requiring percentage approach had expired). Mindful of the Second Circuit's admonitions in Grinnell I that the purpose of the common fund doctrine was the compensation of the attorney for the reasonable value of services benefitting the claimant, courts have also used the lodestar method as a "cross-check" to ensure that the percentage fees are not unreasonably high. See, e.g., In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

The Second Circuit finally settled the uncertainty surrounding the method that district courts should use to assess attorneys' fees in common fund class actions by holding in Goldberger v. Integrated Res., Inc., "that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases." 209 F.3d at 50. The Court of Appeals held that "Agent Orange[, 818 F.2d 232,] does not bar a return to this Circuit's earlier

practice of setting fees on a percentage of the fund basis." Id. at 49 (citations omitted). The Court of Appeals noted that "[t]he express goal of the Grinnell opinions was to prevent unwarranted windfalls for attorneys," and "[s]o long as that object is achieved, we see no need to compel district courts to undertake the 'cumbersome, enervating, and often surrealistic process' of lodestar computation." Id. (quoting Savoie II, 166 F.3d at 461 n. 4, and citing Grinnell II, 560 F.2d at 1098-1099, and Grinnell I, 495 F.2d at 469-71). Accordingly, in the Second Circuit, "the lodestar approach is an accepted but not exclusive methodology in common fund cases." Id. (citations omitted). The Court of Appeals observed in Goldberger that "there are cases 'where [the district court] can calculate the relevant parameters (hours expended and hourly rate) more easily than it can determine a suitable percentage to award,'" and, at all events, "the lodestar remains useful as a baseline even if the percentage method is eventually chosen." Id. at 50 (quoting General Motors, 55 F.3d at 821, and citing Charles v. Goodyear Tire & Rubber Co., 976 F. Supp. 321, 324 (D.N.J. 1997)). "Indeed, [the Second Circuit] encourage[s] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." Id. (quoting General Motors, 55 F.3d at 820).

The court is aware that, when applying a percentage, some courts have adopted 25% as a "bench mark" that may then be adjusted in light of the effort expended by class counsel, the risk assumed by class counsel, the result obtained, the value of other benefits to the class, and the absence of objections from class members. See, e.g., Crazy Eddie, 824 F. Supp. at 326 (citing Mashburn v. National Healthcare, Inc., 684 F. Supp. 679, 688 (M.D. Ala. 1988) (surveying cases)). However, the Court of Appeals in Goldberger rejected the notion of beginning a common fund attorneys' fees analysis with a 25% benchmark, noting that, inter alia, "even a theoretical construct as flexible as a 'benchmark' seems to offer an all too tempting substitute for the searching assessment that should properly be performed in each case" and "[s]tarting an analysis with a benchmark could easily lead to routine windfalls where the recovered fund runs into the multi-millions." 209 F.3d at 52. Moreover, the Court of Appeals rejected the "assumption that there is a substantial contingency risk in every common fund case." Id. The Court of Appeals cautioned that it was "not suggesting that compensation for risk is never permitted, merely that it is not—under either the percentage or lodestar methods—an appropriate starting assumption." Id. The Court of Appeals was driven to this conclusion by the observation that, "[e]ven where there is some contingency risk but recovery remains virtually certain, we question whether a fully informed group of

plaintiffs able to negotiate collectively would routinely agree to pay their lawyers a fee of 25% of a multi-million dollar settlement." Id. Thus, the Second Circuit held that it "continue[s] to approach fee awards 'with an eye to moderation.'" Id. at 53 (quoting Grinnell II, 560 F.2d at 1099 (quoting Grinnell I, 495 F.2d at 470)). Accordingly, the Court of Appeals "adhere[d] to [its] prior practice that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.'" Id. (quoting Grinnell I, 495 F.2d at 469, and citing Grinnell II, 560 F.2d at 1098- 99).

Thus, "whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances." Id. at 47 (citations omitted). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, . . . and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." Id. (citations omitted). According to the Second Circuit, "no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(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.'" Id. at 50 (quoting Union Carbide, 724 F. Supp. at 163 (summarizing Grinnell opinions)).

The court finds it appropriate to apply the percentage method in this case, while remaining cognizant of the policy considerations favoring the lodestar calculation and using the lodestar documentation "as a 'cross check' on the reasonableness of the requested percentage."[3] The court now takes up consideration of the plaintiff's request for a fee award of one-third of the common fund, plus costs.

II. DISCUSSION

As noted above, plaintiffs seek one-third of the $17,750,000 class action settlement fund in attorneys' fees (approximately $5.9 million) and reimbursement of expenses totaling $137,477.36. The court finds that one-third is an excessive percentage, both under a percentage-of-the-common-fund analysis and when cross-checked against a lodestar determination.

Turning first to the time and labor expended by counsel, the court notes that, while it is undisputed that counsel for the plaintiffs conducted extensive discovery

[3] In Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000), the Court of Appeals noted that, "[o]f course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." 209 F.3d at 50 (citing In re Prudential Ins. Co. Am. Sales Litig., 148 F.3d 283, 342 (3d Cir. 1998)). "Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." Id.

and litigated both the Motion to Dismiss and the class certification issue, it cannot be said that these efforts were out of the ordinary. In fact, this case settled before proceeding to the trial stage, or even the summary judgment stage, when a more thorough presentation of the facts and the law would certainly have been required.

On the other hand, the court finds that the magnitude and complexities of the litigation and the quality of representation by plaintiffs' counsel weigh in favor of a percentage award within a close range of the one-third award requested. The Court of Appeals has held that "the quality of representation is best measured by results, and that such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" Id. at 55 (citation omitted). Moreover, the Second Circuit also noted that it has "historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement" under a lodestar calculation. Id. at 54 (citation omitted). In this context, "[r]isk falls along a spectrum, and should be accounted for accordingly." Id. "For example, [the Second Circuit has] held that public policy considerations justified the award of no contingency allowance in a case that was risky simply because it was of 'highly questionable merit,'" and "[s]imilarly, there are cases where the risk is 'so slight' that any enhancement for the contingent nature of the fee must be 'minimal.'" Id. (citations omitted).

As the court found in approving the settlement, this case involved many complex issues, particularly after Fine Host declared bankruptcy, which threatened the plaintiffs' chances for a successful recovery. Moreover, the plaintiffs' claims were met with difficult defenses, presented vigorously by able and experienced defense counsel. Overall, the court finds that the $17.5 million settlement is an excellent recovery given the difficulties and defenses which made a recovery of the $100 million that plaintiffs' counsel estimated in actual damages highly uncertain. The court also finds that the plaintiff class received excellent counseling, particularly from the Chair of the Plaintiffs' Executive Committee, Attorney Dumain.

The court also does not find that this case was of highly questionable merit, as evidenced by Fine Host's decision not to file a motion to dismiss the plaintiff's Rule 10b-5 action. This factor, however, cuts both for and against a substantial award of attorneys' fees to the plaintiffs, since the court should seek to encourage able attorneys to bring meritorious claims, but meritorious claims present a lesser risk of failing to make any recovery. Moreover, because of the relatively early stage of the litigation and because, as the Second Circuit has observed, "[a]necdotal evidence tends to confirm th[e] conclusion" of "[a]t least one empirical study . . . that 'there appears to be no appreciable risk of non-recovery' in securities class actions, because 'virtually all cases are settled,'" the court finds that the one-third fee request by the

plaintiffs is excessive and unreasonable in this case. Id. at 52 (quoting Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 578 (1991)). Nevertheless, given the difficulty of the issues litigated, coupled with the highly contested nature of the litigation and the substantial benefit received by the class, this court concludes that the plaintiffs should be awarded 17.5% of the settlement fund in attorneys' fees, or $3,106,250.

Even if this court had applied the lodestar method, an award of approximately $3.1 million would appropriately compensate plaintiffs' counsel. Class counsel have calculated their lodestar as $1,981,009.25 for 6,158 hours. The court has not exhaustively scrutinized the fee entries submitted by the plaintiffs, but instead relies upon its familiarity with the case to utilize an approximate lodestar analysis as a cross check on the reasonableness of a 17.5% fee award.

"The 'lodestar' figure should be 'in line with those [hourly rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Luciano v. Olsten Corp., 109 F.3d 111, 115 (2d Cir. 1997) (quoting Blum, 465 U.S. at 896 n.11). "It is well-established that the 'prevailing community' the district court should consider to determine the 'lodestar' figure is 'the district in which the court sits.'" Id. (quoting Polk v. N.Y. State Dep't of Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983)). The court finds that some of the

hourly rates charged by the plaintiffs' counsel and support staff are excessive in comparison to rates charged in Connecticut, e.g., $575/hour for a senior attorney and $150/hour for a paralegal. See Wallace, 7 F. Supp. 2d 132 (reducing requested hourly rate of $550 to maximum of $300). However, other rates charged by plaintiffs' counsel fall in line with the hourly rates normally charged for similar work by attorneys of like skill in Connecticut. Thus, the court finds that applying the lodestar method in this case would, at a minimum before analyzing the reasonableness of each fee entry, require a recalculation of counsel's hourly rates. Basing the reasonable hourly rates for the plaintiffs' attorneys partly on those applied by other courts in Connecticut and New York, see, e.g., Wallace, 7 F. Supp. 2d 132 (creating table of fees based on court's experience); In re Bausch & Lomb, Inc. Secs. Litig., 183 F.R.D. 78, 84 (W.D.N.Y. 1998) (noting that New York State Bar Association 1997 Desktop Reference on the Economics of Law Practice in New York provided $225 median hourly rate for all attorneys in New York City), and partly on the court's own experience in Connecticut practice, the court would reduce the plaintiffs' total lodestar figure by 40% to approximate this inflation in rates, to approximately $1,188,600.[4]

[4] This is admittedly a rough approximation, since the court is not engaged in a full lodestar analysis, but merely "checking" the reasonableness of the percentage method result.

"[T]he court may, in its discretion, increase or decrease this figure by examining such factors as the quality of counsel's work, the risk of the litigation and the complexity of the issues." Agent Orange, 818 F.2d at 232 (citation omitted). The most significant factor in deciding whether to apply a multiplier greater than 1.0 is the risk of the litigation, since awarding only the lodestar would give inadequate encouragement to counsel who would represent meritorious but risky claims. Id. at 236. However, "[a]s the chance of success on the merits or by settlement increases, the justification for using a risk multiplier decreases." Id. (citation omitted). In addition, a multiplier may reflect the novelty and complexity of the legal issues involved and quality of representation. Savoie II, 166 F.3d at 460.

Based on the court's familiarity with the litigation and the difficulties presented in achieving a settlement following Fine Host's bankruptcy, the court finds that the application of a multiplier would be appropriate. In addition to the factors discussed above in relation to a percentage award, the court notes that, unlike the situation in Goldberger, counsel here had no prior regulatory or criminal proceeding upon which to draw in gathering facts or refining legal arguments. On the basis of the analysis of the factors delineated in the Second Circuit's Goldberger and Savoie II decisions, the court finds that the multiplier that would result from an

attorneys' fee award of 17.5% of the recovery, of approximately 2.6, falls within the range of appropriate multipliers for this type of case. See Wallace, 7 F. Supp. 2d at 141 (applying 1.5 multiplier in shareholder derivative suit); Crazy Eddie, 824 F. Supp. at 327 (applying 1.72 multiplier in securities fraud settlement); Union Carbide, 724 F. Supp. at 170 (applying 2.3 multiplier for steering committee counsel and 1.5 multiplier for other attorneys involved where chance of recovery was relatively high). Thus, even on a lodestar analysis, the court finds that an award of $3,106,250 million is fair and reasonable in light of the factors the Second Circuit has outlined in, most recently, Goldberger.

Finally, the court has reviewed the costs for which the plaintiffs seek reimbursement. The court finds that these disbursements are reasonable in the context of this litigation. Accordingly, in addition to a fee award of 17.5% of the settlement fund, the court awards the plaintiffs costs and expenses of $137,477.36.

III. CONCLUSION

Accordingly, the application of plaintiffs' counsel for an award of fees is GRANTED in the amount of $3,106,250. In addition, the plaintiffs' request for a reimbursement of costs and expenses is GRANTED in the amount of $137,477.36.

SO ORDERED.

Dated at Bridgeport, Connecticut this 8th day of November, 2000.

_____/s/_____
Janet C. Hall
United States District Judge