In re Salomon Inc. Sec. Litig.

United States District Court for the Southern District of New York

June 15, 1994, Decided ; June 16, 1994, Filed

91 Civ. 5442 (RPP)

Reporter

1994 U.S. Dist. LEXIS 8038 *; 1994 WL 265917

IN RE SALOMON INC SECURITIES LITIGATION; THIS DOCUMENT RELATES TO ALL ACTIONS

Case Summary

Procedural Posture

Plaintiff purchaser class brought a claim against defendants, a trader, its subsidiary, and its officers, charging that defendants made improper bids for United States Treasury securities. The parties entered a settlement agreement and the class sought the court's approval of the settlement.

Overview

Putative actions brought by the purchasers individually were consolidated into the class action. The class consisted of various subclasses. The claims were based on allegations that the trader made allegedly improper bids for treasury securities in violation of Treasury Department rules and the trader's failure to disclose its knowledge of at least one improper bid, which the trader's management admitted. It was alleged that public revelations of the events resulted in a decline in the prices of publicly traded securities held by the trader and caused injury to members of each of the classes. The parties entered a settlement agreement and the parties all agreed to support the approval of that proposed settlement, which included a payment of attorneys' fees and expenses. The court determined a proper settlement amount had been determined. There was no showing the manner in which the fee amount was negotiated was not at arm's length as required and the factors for determining whether a settlement agreement in a class action were sufficiently shown for the approval of the settlement the parties entered.

Outcome

The court approved the proposed settlement.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

***HN1*[ ] Special Proceedings, Class Actions**

See Fed. R. Civ. P. 23(e).

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

***HN2*[ ] Class Actions, Judicial Discretion**

As protector of the members of the class, the court has the responsibility of determining that a proposed settlement submitted for its approval is fair, reasonable and adequate. In assessing whether a proposed settlement is fair, reasonable and adequate, the court must evaluate the substantive terms of the settlement to ensure that they are reasonable in light of the court's informed and objective opinion of the probabilities of ultimate success should the claim be litigated. In aid of its assessment, the court should also examine the negotiating process by which the settlement was reached to determine that the compromise is the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

***HN3*[ ] Class Actions, Compromise & Settlement**

Among the factors that are proper for a court to consider in assessing the fairness, reasonableness, and adequacy of a proposed settlement 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 in light of all the attendant risks of litigation.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN4[] **Implied Private Rights of Action, Deceptive & Manipulative Devices**

17 C.F.R. § 240.10b-5 and 15 U.S.C.S. § 78j(a) impose liability on issuers of securities for making any untrue statement of a material fact or for failing to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN5[] **Implied Private Rights of Action, Deceptive & Manipulative Devices**

Absent a duty to disclose, the mere failure to report or disclose criminal conduct by an employee of an issuer does not constitute a violation of 15 U.S.C.S. § 78j(b), even if such information is material. However, if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it.

Securities Law > ... > Registration of Securities > Exemptions > Exempt Classes of Securities

Securities Law > Initial Offerings of Securities > Securities Act Actions > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Securities Law > ... > Registration of Securities > False Registration Statements > General Overview

HN6[] **Exemptions, Exempt Classes of Securities**

Under 15 U.S.C.S. § 77k, a purchaser of securities issued pursuant to a registration statement which contained, at the time it became effective, an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading has a valid cause of action against the issuer. Scienter is not required for plaintiffs to assert a valid claim under § 77k.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN7[] **Settlements, Settlement Agreements**

The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that proposed settlement is grossly inadequate and should be disapproved.

Civil Procedure > Remedies > Damages > General Overview

HN8[] **Remedies, Damages**

The lodestar amount can be useful in testing the propriety of an award based on the percentage of recovery.

Counsel: [*1] For Class Plaintiffs: Abbey & Ellis, New York, NY, By: Arthur N. Abbey, Esq., Wolf, Popper, Ross, Wolf & Jones, New York, NY, By: Stephen Oestreich, Esq.

For Defendants Salomon Inc and Salomon Brothers Inc: Cravath, Swaine & Moore, New York, NY, By: John R. Hupper, Esq., Frederick A.O. Schwarz, Jr., Esq.

Judges: PATTERSON, JR.

Opinion by: ROBERT P. PATTERSON, JR.

Opinion

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

On September 13, 1993, a Stipulation of Settlement and Compromise (the "Stipulation") was submitted to the Court by counsel for the plaintiffs and counsel for defendants Salomon Inc ("Salomon") and Salomon Brothers Inc ("Salomon Brothers") (collectively, the "Salomon Defendants"), in this amended and consolidated class action filed June 1, 1992. The consolidated actions were brought on behalf of all purchasers of Salomon common stock and all other publicly issued or traded securities of Salomon (and in one instance on behalf of purchasers of call options for Salomon common stock) during the period March 27, 1991 through August 14, 1991 (the "Class Period"), against Salomon, its wholly owned subsidiary Salomon Brothers, which is a designated primary dealer at auctions of government securities [*2] conducted by the Treasury Department of the United States (the "Treasury Department" or "Treasury"), and certain individual defendants. The individual defendants are Paul Mozer ("Mozer"), then managing director of Salomon Brothers' Government Trading Desk; Thomas Murphy ("Murphy"), then managing director of Salomon Brothers and assistant to Mozer; John W. Meriwether ("Meriwether"), then Vice Chairman of Salomon Brothers and supervisor of Mozer and Murphy; Thomas W. Strauss ("Strauss"), then President of Salomon Inc.; and John H. Gutfreund ("Gutfreund"), then Chairman and Chief Executive Officer of Salomon Inc. [1] For the reasons set forth below, the proposed settlement is approved.

[*3] **BACKGROUND**

This consolidated class action consists of thirteen putative actions brought by plaintiffs individually and as representatives of various subclasses on August 12, 1991 and thereafter. The allegations relate to the activities of defendants in connection with Salomon Brothers' alleged submission, between August 1989 and May 1991, of improper bids in certain auctions for United States Treasury securities in violation of Treasury Department rules, and Salomon's failure, admitted by Salomon management in August 1991, to disclose its knowledge of at least one improper bid. It is alleged that public revelations of these events resulted in a decline in the prices of publicly traded Salomon securities and caused injury to members of each of the plaintiff subclasses.

A. The Proposed Settlement

Pursuant to the terms of the proposed settlement, Salomon agrees to the allocation of $ 54.5 million (the "Settlement Fund") for the benefit of the class to be distributed from a Civil Claims Fund of $ 100 million established in the action *Securities and Exchange*

[1] Although the Stipulation was entered into only by counsel for Plaintiffs and counsel for the Salomon Defendants, the Stipulation provides that the Plaintiffs and Salomon Defendants shall jointly request the Court to enter an order and final judgment dismissing this action with prejudice as to all defendants if the Court finally approves the proposed settlement. Stipulation at P 5(c).

Commission v. Salomon Inc, *et al.*, 92 Civ. 3691 (RPP), for payment of any civil judgment arising out of the aforesaid [*4] events. Other civil litigation is pending against Salomon and Salomon Brothers which may result in further liabilities to Salomon and further claims against the Civil Claims Fund. The proposed settlement provides that, in addition to the $ 54.5 million to be paid from the Civil Claims Fund, Salomon would provide up to $ 12.5 million for the payment of attorneys' fees and expenses as may be awarded by this Court. In connection with the parties' request for Court approval of the proposed settlement, counsel for plaintiffs request that the Court order an award of $ 12.5 million in attorneys' fees and expenses.

B. Notice to the Beneficiaries of the Proposed Settlement

Rule 23(e) of the Federal Rules of Civil Procedure provides: ***HN1***[] "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Pursuant to Court order dated September 13, 1993, notice of the proposed settlement and of a Court hearing to be held on November 23, 1993 on the fairness, adequacy and reasonableness of the proposed settlement was given to the members [*5] of the class (1) by individual mailings to 1,579 known purchasers of Salomon common stock and depository preferred series C stock during the class period; (2) by mailings to 833 brokers, banks, institutions and other nominees requesting them to notify potential class members; and (3) by notice published on September 30, 1993 and on October 20, 1993 in the *Wall Street Journal.* As a result of these and additional mailings, over 25,829 notices of the class action and proposed settlement were disseminated in mailings by the Settlement Administrator, KPMG Peat Marwick ("Peat Marwick"). Five valid exclusion requests have been received by the Settlement Administrator. These exclusion requests comprise 1,500 shares of stock and $ 108,000 par value in notes. [2]

C. The Allegations of the Amended Complaint

1. The Allegedly Improper Bids

On June 1, 1992, plaintiffs filed [*6] an amended and consolidated class action complaint (the "Amended Complaint") alleging that between August 1989 and May 1991 Salomon

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[2] After the November 23, 1991 hearing, an additional, but untimely, exclusion request by a holder of 700 shares of Salomon common stock was filed.

Brothers participated in the submission of ten bids which circumvented Treasury Department rules limiting the proportion of Treasury securities a single entity may bid and obtain at any one auction. Am. Compl. P 24. The ten bids totaled $ 15.5 billion and are alleged to have resulted in the illegal acquisition by Salomon Brothers of $ 9.548 billion of Treasury securities. *Id.* Nine of the illegal bids are alleged to have been submitted by Salomon Brothers in the names of customers of Salomon Brothers but without the authorization or knowledge of those customers. *Id.* The tenth "nominee" bid is alleged to have been submitted by another primary dealer on behalf of Salomon Brothers. *Id.* The "nominee" bid is alleged to have failed to disclose that Salomon Brothers was the actual bidder for the securities.

Salomon Brothers is alleged to have placed the following improper bids: On December 27, 1990, a bid of $ 2.975 billion for Salomon Brothers and a bid in the amount of $ 1 billion in the name of Warburg Asset Management (Am. Compl. PP 25-27); on [*7] February 7, 1991, a $ 1 billion bid in the name of Pacific Investment Management Company (Am. Compl. PP 28-30); on February 21, 1991, three $ 3.15 billion bids in the names of Salomon Brothers, Warburg Asset Management and Quantum Fund (Am. Compl. PP 31-32); on April 25, 1991, a $ 3 billion bid for Salomon Brothers and a $ 2.5 million bid in the name of Tudor Jones (Am. Compl. PP 33-35); on May 22, 1991, a $ 2 billion bid in the name of Tiger Investments, a $ 4.2 billion bid in the name of Salomon Brothers, a $ 4.287 billion bid in the name of Quantum Fund, and $ 130 million of bids for numerous other Salomon Brothers customers (Am. Compl. P 42(a)).

2. Salomon Defendants' Knowledge of the Allegedly Illegal Bids

The Amended Complaint charges that, in connection with the February 21, 1991 auction of two year Treasury notes, Mozer submitted an unauthorized bid in the name of "Warburg" which it later attributed to Mercury Asset Management ("Mercury"), one of Salomon Brothers' customers (Am. Compl. PP 48-49); [3] that the Treasury Department sent Mozer a copy of an April 17, 1991 letter from the Treasury Department to Mercury inquiring about the propriety of Mercury's purchase of two [*8] year Treasury notes in the February 21, 1991 auction in light of Mercury's relationship with S.G. Warburg (Am. Compl. PP 51-52); that in late April, following receipt of the April 17, 1991 letter, Mozer advised defendant Meriwether of the unlawful bid in the February 21, 1991 auction (Am. Compl. P 53); that around the end of April defendants Gutfreund, Strauss and Salomon's chief legal

[3] According to the Amended Complaint, the unauthorized bid was submitted in the name of "Warburg." Upon inquiry by a Treasury employee, Mozer and Murphy notified the Treasury that the bid should have been submitted on behalf of Mercury. S.G. Warburg, a designated primary dealer, and Mercury were subsidiaries of the same holding company, S.G. Warburg plc. Unbeknownst to Mozer, S.G. Warburg had submitted a bid on its own behalf in the February 21, 1991 auction, prompting the Treasury Department's inquiry. Am. Compl. PP 48-50.

officer, Donald Fuerstein, were also advised of Mozer's violation of the Treasury regulations and agreed that Mozer's conduct should be reported to governmental authorities and discussed how it should be done (Am. Compl. P 55); and that the defendants did not notify government authorities of Mozer's conduct until August 9, 1991 (Am. Compl. P 55).

[*9] The Amended Complaint further alleges that in July 1991, following receipt of a June 26, 1991 letter to Salomon Brothers from the Securities and Exchange Commission ("SEC") requesting information relating to the May 22, 1991 auction of Treasury two year notes, Salomon authorized its then outside counsel, Wachtell, Lipton, Rosen & Katz ("Wachtell Lipton"), to conduct an investigation of the activities of Salomon's government trading desk (Am. Compl. PP 57-58); that this investigation uncovered other illegal bids by Salomon Brothers' Government Trading Desk (Am. Compl. P 59); that on August 9, 1991, Salomon issued a press release disclosing violations of Treasury rules by Salomon Brothers in connection with Treasury note auctions on December 27, 1990, February 21, 1991, and May 22, 1991, and the suspension of defendants Murphy and Mozer (Am. Compl. P 61); and that the price of common stock shares of Salomon fell from a closing price of $ 36.625 per share on August 8, 1991 to a closing price of $ 31.625 on August 12, 1991, the next trading day after disclosure (Am. Compl. P 61).

The Amended Complaint also alleges that the August 9, 1991 press release failed to disclose that Gutfreund, [*10] Strauss and Meriwether had known since late April 1991 of Mozer's violation of the Treasury rules in connection with the February 21, 1991 auction (Am. Compl. P 61(b)); that on August 14, 1991 Salomon issued a second press release disclosing that those defendants had learned of the violation in late April and disclosing further violations of Treasury rules in connection with auctions held on February 21, 1991, April 25, 1991, and May 22, 1991 (Am. Compl. P 62(b) and (c)); and that the price of common stock shares of Salomon fell from a closing price of $ 32 per share on August 13, 1991 to a closing price of $ 26.875 on August 15, 1991 (Am. Compl. P 62(b)).

Count I of the Amended Complaint charges all defendants, including the Salomon Defendants, with violating Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Section 10(b)"), and Rule 10b-5, 17 C.F.R. § 240.10b-5. Count II charges Defendants Salomon, Gutfreund and Strauss with violating Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k(a) ("Section 11"). Count III alleges that Defendants Gutfreund and Strauss are liable to [*11] plaintiffs under Section 15 of the Securities Act of 1933, 15 U.S.C. § 77o, and Section 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78t.

D. Litigation Activity in this Action

Following the issuance of the press releases on August 9 and 14, 1991, the plaintiffs filed their putative class actions, suing as purchasers of various Salomon securities, and in one instance as a purchaser of call options for Salomon common stock, on behalf of themselves and other purchasers of such securities during the Class Period. After a hearing, the Court approved a Stipulation and Pretrial Order, dated August 30, 1991, providing, *inter alia*, for the filing of a consolidated amended complaint joining all the named plaintiffs and the claims in all of the actions filed and designating the law firms of Abbey & Ellis and Wolf Popper Ross Wolf & Jones as co-lead counsel for the consolidated class action. Thereafter, discovery was delayed during a government investigation of possible criminal and civil penalties to be imposed arising from the subject matter of the consolidated amended complaint.

On May 20, 1992, [*12] with the consent of Salomon, a Final Judgment of Permanent Injunction and Other Relief ("Final Judgment") was entered in *Securities and Exchange Commission v. Salomon Inc and Salomon Brothers Inc*, 92 Civ. 3691 (RPP). This Final Judgment required Salomon, *inter alia*, (1) to pay the United States Treasury $ 190 million for penalties, forfeiture and the settlement of potential claims of the U.S. Department of Justice, and (2) to establish a $ 100 million Civil Claims Fund under the Court Registry Investment System for the purpose of paying valid damage claims for compensatory damages, following bona fide settlement or non-appealable final judgment, arising out of the activities of Salomon or Salomon Brothers in connection with United States Treasury or government securities sold at auction during the period January 1, 1989 to August 9, 1991, or relating to the disclosure or nondisclosure of such activities. Pursuant to the terms of the Final Judgment, the Court appointed Joel L. Carr, Esq., to administer the Civil Claims Fund and to determine, after consultation with the SEC, whether claims submitted for payment are valid claims for compensatory damages within the scope of the [*13] Final Judgment.

Following plaintiffs' filing of the Amended Complaint on June 1, 1992, plaintiffs proceeded to engage in extensive document discovery. This discovery was facilitated by the filing of a stipulation on June 19, 1992, pursuant to which the Salomon Defendants waived their attorney-client and work product privileges to the extent they had done so in proceedings before the SEC with respect to both documents and testimony before the SEC. On October 16, 1992, Salomon answered the Amended Complaint asserting various defenses. Thereafter, the plaintiffs took over forty party and non-party depositions. [4] On November 2, 1992 Defendant Meriwether moved pursuant to Rule 12(b)(6) of the Federal

[4] On November 13, 1992, defendants moved to protect certain of its documents on the ground of the "self evaluative privilege," which motion was denied.

Rules of Civil Procedure to dismiss the complaint as to him, which motion was granted on April 5, 1993 without prejudice to replead.

On June 10, 1993, counsel for the plaintiffs [*14] and defendants reached an agreement in principle, subject to Court approval, settling the plaintiffs' claims in return for payment of $ 54.5 million to the members of the class (the "Settlement Fund") and payment of up to $ 12.5 million to plaintiffs' counsel for attorneys fees and expenses, for a total settlement of up to $ 67 million. As stated earlier, the settlement documents were submitted to the Court on September 13, 1993. On that date, the Court provisionally certified the class pursuant to Rule 23 of the Federal Rules of Civil Procedure pending the entry of an order and final judgment.

E. The Proposed Plan of Allocation of the Settlement Fund

As a result of a process of revision and review in response to various Court orders and in light of preliminary analysis of data from claims which have been received by the Settlement Administrator, the proposed plan of allocation before the Court for approval differs from the proposed plan of allocation initially submitted with the settlement papers on September 13, 1993. The proposed plan of allocation for which plaintiffs' counsel now seek approval is best described with reference to the initial proposed plan of allocation and [*15] its interim revisions.

1. The Initial Proposed Allocation

In the proposed allocation contained in the initial settlement papers, plaintiffs' counsel employed a two-step analysis to allocate the $ 54.5 million Settlement Fund among the various types of Salomon securities purchased by members of the plaintiff class during the Class Period and to delineate subclasses of claimants based on the strength of their different claims. In the first step, the Settlement Fund was allocated among the different classes of Salomon securities based on damages estimates from publicly-available trading data and trading data produced by Salomon during discovery. The proposed allocation also took into account the types of claims alleged by holders of each type of security and provided an increased allotment to purchasers of Salomon debt securities including notes and debentures since those purchasers were asserting claims under Section 11 of the Securities Act of 1933.

The initial proposed allocation of the Settlement Fund was:

(a) 80% for purchasers of Salomon Inc common stock (the "Common Stock Subclass");

(b) 2% for purchasers of Salomon Inc depositary shares series C (the "Preferred C Stock [*16] Subclass");

(c) .2% for purchasers of call options to purchase Salomon common stock (the "Call Options Subclass"); and

(d) 17.8% for purchasers of Salomon Inc debt securities, including notes and debentures (the "Debt Securities Subclass").

In the second step, plaintiffs' counsel delineated subperiods based on the time of purchase of Salomon securities. To determine the maximum "recognized loss" of each claimant, plaintiffs' counsel assigned different weights to claims based on purchases made during each subperiod to reflect plaintiffs' counsel's estimates of the relative likelihood of success of the legal claims asserted by purchasers in each subperiod. The relative weights were as follows:

(a) claims of class members who purchased Salomon securities from March 27, 1991 through April 30, 1991 and held them until August 9, 1991 ("Subperiod (a)") were assigned a relative weight of .25;

(b) claims of class members who purchased Salomon securities from May 1, 1991 through August 9, 1991 ("Subperiod (b)") and held them until August 9, 1991 were assigned a relative weight of .80; and

(c) claims of class members who purchased Salomon securities from August 9, 1991 through [*17] August 14, 1991 ("Subperiod (c)") were assigned a relative weight of 1.0.

Thus, if the Settlement Fund were sufficient, a class member who purchased Salomon securities during Subperiod (a) could recover a maximum of 25 percent of his or her loss while a member who purchased securities during Subperiod (c) could recover all of his or her loss.

The initial proposed plan of allocation provided that each claimant would be paid based on that claimant's aliquot share of the Settlement Fund allocated to the subclass of securities on which his or her claim is based. The allocated proportion was to have been determined by the ratio of the "recognized loss" attributable to the claimant to the total "recognized loss" for all purchasers within the Class Period of the same subclass of securities, provided that no claimant would receive more than 100 percent of his or her "recognized loss." Accordingly, if the total "recognized loss" for a subclass of securities were to exceed the amount in the Settlement Fund allocated to that subclass, then claimants whose claims are based on securities in that subclass would be paid less than the "recognized loss" attributable to their claims.

2. Revisions [*18] **to the Initial Proposed Plan of Allocation**

Before taking the form now before the Court for approval, the initial proposed plan of allocation was revised in response to Court orders seeking clarification and ordering review of plaintiffs' counsel's damages estimates. Certain elements of that review process remain relevant to the final proposed plan of allocation.

First, plaintiffs' counsel initially estimated provable damages at $ 202,207,214. [5] Upon further review by plaintiffs' experts, the estimate of provable damages has been adjusted to $ 193,102,138. Pls.' Mem. in Resp. to Court's Dec. 13, 1993 Order. The adjustment is based upon plaintiffs' experts' understanding that the market reacted more efficiently to the August 14, 1991 disclosure than previously estimated and that certain shares had been traded more than once a day which had increased their earlier estimate of trading volume.

[*19] Second, plaintiffs' counsel proposed creating two subclasses for the Debt Securities Subclass to reflect that certain purchasers of Salomon debt securities within the Class Period have only Section 10(b) claims while other purchasers of debt securities have both Section 10(b) and Section 11 claims. [6] Plaintiffs' counsel also proposed a revised allocation of the Settlement Fund to the Debt Securities Subclass of 16.34 percent. In this manner, plaintiffs' counsel sought to provide for the additional value of Section 11 claims which require no proof of scienter. To account for the difference in value between the claims of Debt Securities Subclass members who have only Section 10(b) claims and those who have both Section 10(b) and Section 11 claims, plaintiffs' counsel proposed to reduce the "recognized loss" of the members with only Section 10(b) claims by a factor of 0.645 while making no adjustment to the "recognized loss" of those members who assert Section 11 claims.

[*20] On January 11, 1994, the Court ordered that a supplemental notice of the plaintiffs' revised proposed plan of allocation be mailed to all persons whom had been mailed the initial notice of settlement and that a summary notice be published in *The Wall Street Journal.* Pursuant to that order, 33,970 supplemental notices were disseminated to potential class members and a summary notice was published in *The Wall Street Journal* on January 31, 1994. The supplemental notice stated, *inter alia,* that

> the Court expressly reserves the right to . . . approve Plaintiffs' Revised Proposed Plan of Allocation with such further modifications consented to by Plaintiffs' and Salomon as the Court may deem proper, without further notice to members of the Class.

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[5] This damages estimate was provided to the Court in plaintiffs' memorandum dated December 2, 1993. That memorandum stated that an estimate of $ 288,789,783 contained in a document handed to the Court by plaintiffs' counsel at a hearing on November 23, 1993 was a "draft" estimate which had not been relied upon in negotiating the settlement.

[6] In addition, reflecting their understanding that Salomon's Preferred C stock was issued on June 13, 1991 pursuant to an effective registration statement and that, accordingly, purchasers of such stock could assert Section 11 claims, plaintiffs' counsel increased the allocation to the Preferred C Stock Subclass.

3. The Final Proposed Plan of Allocation

During the pendency of the supplemental notification, the Settlement Administrator continued to receive claims forms submitted by members of the class. The claims data provided to the Court by the Civil Claims Fund Administrator revealed that the aggregate recognized loss of claims submitted with respect to certain subclasses, namely the Common Stock Subclass and the Preferred C Stock [*21] Subclass, exceeded the amount of the Settlement Fund allocated to those subclasses. With respect to the Call Options Subclass and the Debt Securities Subclass, by contrast, the aggregate recognized losses either slightly exceeded or was less than the amounts allocated under the revised proposed plan of allocation. The result would be that members of different subclasses asserting claims based on the same legal theories would recover disparate proportions of their claimed losses.

Upon this situation being brought to counsel's attention, Plaintiff's counsel, by letter dated May 19, 1994, proposed to simplify the plan of allocation (the "Final Proposed Plan of Allocation"). Although the Final Proposed Plan of Allocation retains the proposed method of calculating recognized loss based upon the subperiods in which claimants purchased Salomon securities, it eliminates the allocation of the Settlement Fund among the subclasses based on the type of security purchased. Instead, the recognized loss of claims based solely on Section 10(b) will be reduced by a factor of .645, while the recognized loss of any claim which is based in whole or in part on Section 11 will suffer no reduction. The [*22] Settlement Fund will thus be allocated pro rata among all valid claims with adjustments based on the subperiod of purchase and whether a given claimant has a Section 11 claim or has only a Section 10(b) claim.

F. Opposition to the Proposed Settlement

Neither the Securities and Exchange Commission nor the Civil Claims Fund Administrator opposes the proposed settlement as outside the scope of the Final Judgment in *Securities and Exchange Commission v. Salomon Inc.*, 92 Civ. 3691 (RPP).

On November 13, 1993 Alan Mantle filed a submission opposing the allocation of the Settlement Fund as not providing for payments to the purchasers of "puts" for common stock of Solomon during the Class Period. Mr. Mantle is not a member of the proposed class since no holder of "puts" has filed as a plaintiff in this litigation. Accordingly, Mr. Mantle does not have standing to object to the settlement. As stated earlier, the requests for exclusion from the class have been minimal. No other objections have been filed.

Prior to a hearing before this Court on March 2, 1994 after distribution of the supplemental notice, no responses or objections to the proposed or revised proposed plan of proposed [*23] allocation had been received from any class members. As of May 2, 1994, a total of 9,058 claim forms had been submitted, including 612 claim forms submitted after the February 21, 1994 deadline. Letter of Joel Carr, dated May 3, 1994.

DISCUSSION

A. Standard for Approval of Class Action Settlements

HN2[] As protector of the members of the class, the Court has the responsibility of determining that a proposed settlement submitted for its approval is "fair, reasonable and adequate." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 77 (1983). In assessing whether a proposed settlement is "fair, reasonable and adequate," the Court must evaluate the substantive terms of the settlement to ensure that they are reasonable in light of the Court's "informed and objective opinion of the probabilities of ultimate success should the claim be litigated." *Id.* at 74 (quoting *Protective Com. for Indep. Stockholders of TMT Trailer Ferry, Inc., v. Anderson*, 390 U.S. 414, 424, 20 L. Ed. 2d 1, 88 S. Ct. 1157 (1968)). [*24] In aid of its assessment, the Court should also examine the "negotiating process by which the settlement was reached" to determine that "the compromise [is] the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *Id.* (citation omitted).

HN3[] Among the factors the Second Circuit has held it proper for a Court to consider in assessing the fairness, reasonableness, and adequacy of a proposed settlement 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 in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) [*25] (citations omitted). Accordingly, the Court will assess the plaintiffs' claims and the probability of their success in light of these factors.

B. The Risks of Establishing Liability

1. The Section 10(b) Claims of Class Members who Purchased Salomon Securities during Subperiod (a)

Plaintiffs' primary claim is that defendants violated Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5. ***HN4***[] These provisions impose liability on issuers of securities for making "any untrue statement of a material fact" or for failing "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. *See* 15 U.S.C. § 78j(a).

HN5[] Absent a duty to disclose, the mere failure to report or disclose criminal conduct by an employee of an issuer does not constitute a violation of Section 10(b), even if such information is material. *See Chiarella v. United States*, 445 U.S. 222, 235, 63 L. Ed. 2d 348, 100 S. Ct. 1108 (1980) ("When an allegation of fraud is based upon nondisclosure, there [*26] can be no fraud absent a duty to speak," and "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information."); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."); *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 26-28 (1st Cir. 1987) (failure to disclose corporation's payment of bribe could not violate Section 10(b) where plaintiff did not allege duty to disclose). However, "if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it." *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990).

With respect to the claims of the class members who purchased securities during Subperiod (a)--from March 27, 1991 through April 30, 1991--the primary statement alleged to be a false statement of material fact is contained in Mr. Gutfreund's letter to the shareholders accompanying Salomon's Annual Report dated March 27, 1991, and filed with the Securities [*27] and Exchange Commission, together with the corporation's Form 10K. Paragraph 67 of the Amended Complaint paraphrases Gutfreund's statement as follows: "The character of our professionals and their reputation for ethical business conduct is one of several areas of competence that distinguishes the businesses of Salomon." Although not literally accurate in text, plaintiffs' paraphrase is a fair representation of Mr. Gutfreund's statement.

The statement, however, must be evaluated in the context of the entire paragraph, which exalts other "areas of competence [which] distinguish the business of Salomon Inc," including "our superior risk-management and financial engineering capabilities" and "our first-class analytical skills and databases." In that context, it is possible that the trier of fact would find the statement about Salomon's ethical conduct, although false, to be mere puffery, unlikely to be considered important by an investor in making a decision to purchase securities and thus unlikely to have caused investors to pay an inflated price for the securities purchased. As such, the statement would not be material, and plaintiffs would not prevail under Section 10(b). *See Basic Inc.,* 485 U.S. at 231-32 [*28] (fact is material only if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision); *Sonnenberg v. Prospect Park Fin. Corp.,* 1991 WL 329755 at *14 (D.N.J. Aug. 20, 1991) (finding statements in annual report describing bank's performance in positive terms not actionable as "mere puffery").

Similarly, assuming the statement to be false, if plaintiffs are unable to show that any of Salomon's officers and directors knew that such statement was false at the time it was made, plaintiffs would not prevail unless the trier of fact found that defendants had learned of such falsity and failed to correct it. *See Backman,* 910 F.2d at 16-17. In the extensive discovery conducted to date, plaintiffs have been unable to elicit testimony showing that the defendants knew that Gutfreund's statement was false when made, *i.e.,* that they knew at the time of the statement that Salomon Brothers had submitted false bids. Nor have plaintiffs been able to elicit testimony that the defendants discovered that Gutfreund's statement was false at any other time during Subperiod (a). Accordingly, it appears that [*29] plaintiffs, in proving the falsity of this statement at trial, would be forced to rely wholly on inferences that Gutfreund had such knowledge based on the closeness of his relationship with Mozer and Murphy and his "hands on supervision" of Salomon Brothers' trading activities. [7]

In light of the considerable infirmities of proof with respect to the rights of the plaintiffs who purchased during Subperiod [*30] (a) to recover under Section 10(b), the relative weight of .25 ascribed to their claims for the purposes of determining "recognized loss" seems reasonable.

2. The Section 10(b) Claims of Class Members who Purchased Salomon Securities during Subperiod (b)

Recovery under Section 10(b) by plaintiffs who purchased Salomon securities during Subperiod (b)--from May 1, 1991 through August 9, 1991--also depends on findings that the statements made in the Annual Report filed with the 10K statement are materially false

[7] The Court has reviewed paragraph 68 of the Amended Complaint relating to the statements on page 12 of the Annual Report describing Salomon's trading expertise "in marketing securities for governments and high-grade primary issuers, and its ability to execute a high level of institutional volume" and finds that Mozer's bidding irregularities are so attenuated from such remarks that it is unlikely that a reasonable investor could reasonably be found to have been misled by these remarks. *See In re Par Pharmaceutical, Inc. Securities Litigation,* 733 F. Supp. 668, 678 (S.D.N.Y. 1990).

and are not mere puffery upon which a reasonable investor would not rely. Plaintiffs assert that defendant Salomon through its officers, Gutfreund and Strauss, should have corrected the allegedly false statement about Salomon's character and reputation for ethical business conduct in the light of what they had learned in the end of April 1991 about Mozer's conduct. Defendants argue that Gutfreund and Strauss were aware of only one false bid that was made in the February 21, 1991 auction and that this single aberration did not require a correction of the statement made in Gutfreund's letter to the shareholders which the plaintiffs acknowledge was a true statement about Salomon's [*31] reputation.

Defendants further argue that the defendants had no duty to disclose Mozer's conduct, *see Chiarella,* 445 U.S. at 235, and relied on advice of in-house counsel in that regard; that plaintiffs must show more than that defendants possessed "nonpublic market information"; that failure to perform their duty, if any, to report to the government, which they categorize as corporate mismanagement, does not amount to a violation of Salomon's public disclosure duties. Plaintiffs' counsel cite no law demonstrating that Salomon did have a legal duty to report Mozer's conduct to the government; neither do the Salomon Defendants cite law showing they had no duty to report such conduct to public authorities. The Salomon Defendants contend, to the contrary, that Salomon was entitled to rely on in-house counsel's advice, that there was no duty to report Mozer's action to governmental authorities and that there was no duty of public disclosure. The Salomon Defendants argue that the failure to report the violation to the government was "inexcusable" mismanagement but not a violation of Salomon's public disclosure duties actionable [*32] under Section 10(b) or Rule 10b-5. *See Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 474-77, 51 L. Ed. 2d 480, 97 S. Ct. 1292 (1977) (holding corporate mismanagement, absent deception, not actionable under Section 10(b)). Both plaintiffs and Salomon Defendants acknowledge that, other than the false bid in connection with the February 21, 1991 auction, Salomon management did not learn of any additional false bids until early August, days before the end of Subperiod (b).

On this state of the record, the ultimate success at trial of the claims based on purchases during Subperiod (b), though more probable than the success of claims based on purchases during Subperiod (a), cannot be assured. In view of the risks of trial and appeal, plaintiffs' counsel's evaluation of the relative strength of the claims based on purchases during Subperiod (b) is not unreasonable. Accordingly, the relative weight (.80) is fair and reasonable.

3. The Section 10(b) Claims of Class Members who Purchased Salomon Securities during Subperiod (c)

The claims of class members who purchased Salomon securities during Subperiod (c)--from August 9, [*33] 1991 through August 14, 1991--are based on the alleged insufficiency of the first press release acknowledging the illegal conduct of Salomon Brothers' government trading desk. This press release by Salomon was alleged by the SEC to be false and misleading and in violation of Rule 10b-5 in that it failed to disclose that Salomon's and Salomon Brothers' senior management had known of Mozer's violations in the February 21 auction since the end of April 1991. [8] Plaintiffs' counsel assigned a relative weight of 1.0 for this subclass.

[*34] In view of the facts disclosed in *Securities and Exchange Commission v. Salomon Inc, et al.,* 92 Civ. 3691 (RPP), the weight of 1.0 relative to the legal claims of the other classes is fair and reasonable. It should be noted, however, that the Salomon Defendants have asserted a defense to the claims based on purchases during Subperiod (c). The Salomon Defendants argue that, as with Subperiod (b) claims, plaintiffs' claims based on purchases during Subperiod (c) fail for lack of proof of scienter because management was relying on advice of counsel. With respect to Subperiod (b) claims, the Salomon Defendants point out that, although Fuerstein had advised management to report Mozer's conduct for business reasons, he advised that there was no legal duty of public disclosure and no legal duty to report the conduct to governmental authorities. With respect to Subperiod (c) claims, the Salomon Defendants argue that because Salomon's outside counsel Wachtell Lipton had drafted the August 9, 1991 press release and determined that Gutfreund's prior knowledge need not be disclosed, the Salomon Defendants relied on Wachtell Lipton for their compliance with the securities laws and thus did [*35] not intend any violation.

Some authorities hold that good faith reliance on counsel's exercise of due care to determine whether a duty of disclosure exists is a factor weighing against liability. *See* Bevis Longstreth, *Reliance on Advice of Counsel as a Defense to Securities Law Violations,* 37 Bus. Law 1185, 1197 (1982); *Feit v. Leasco Data Processing Equipment Corp.,* 332 F. Supp. 544, 582-83 (E.D.N.Y. 1971) (finding that defendants adequately established due diligence defense incorporating reliance on advice of counsel). Here, Salomon Defendants claim to have relied on the advice of both Salomon's in-house counsel and outside counsel in connection with the investigation of Salomon Brothers' government trading desk and the subsequent press releases. The degree of weight a jury would place on the Salomon defendants' reliance on legal advice cannot be weighed in advance.

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[8] The SEC also alleged that Salomon filed a registration statement on July 29, 1991 which became effective on August 8, 1991 and which also failed to disclose the knowledge of Salomon senior management of the false bid in the February 21, 1991 auction. Complaint in *Securities and Exchange Commission v. Salomon Inc, et al.,* 92 Civ. 3691 (RPP), at 115. However, it was also alleged that no securities were sold pursuant to that registration statement until after the omissions were corrected by amendment. *Id.*

Notwithstanding Salomon Defendants' asserted defense, the plaintiffs' counsel's assignment of a relative weight of 1.0 to the claims based on purchases during Subperiod (c) is not unreasonable.

3. Plaintiffs' Section 11 Claims

The second cause of action [*36] in the Amended Complaint charges that Salomon is liable to plaintiffs because its registration statements for securities issued during the Class Period did not disclose Mozer's conduct in violation of Section 11 of the Securities Act of 1933. [9] ***HN6***[] Under Section 11 a purchaser of securities issued pursuant to a registration statement which contained, at the time it became effective, "an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading" has a valid cause of action against the issuer. 15 U.S.C. § 77k(a). Scienter is not required for plaintiffs to assert a valid claim under Section 11. *See Greenapple v. Detroit Edison Co.,* 618 F.2d 198, 209 (2d Cir. 1980).

[*37] Plaintiffs allege that Salomon issued securities during the Class Period pursuant to registration statements containing the same false and misleading statement of material facts as alleged in the first cause of action by way of incorporating the March 27, 1991 Annual Report and the filing of the 10K statements. Plaintiffs also allege that, upon learning of the falsity of the statements, Salomon failed to disclose the known material facts in the Form 10ks as required by Regulation S-K. *See* 17 C.F.R. § 229.303. Thus, with the exception of the scienter requirement of a Section 10(b) claim, the second cause of action turns on the same legal issues as the first cause of action.

In opposing this claim, defendants rely on the same arguments, other than lack of scienter, they marshalled against Section 10(b) liability. They also assert that Mr. Gutfreund's letter to the shareholders, as distinguished from Salomon's Annual Report, was not incorporated in any registration statement or Form 10K filed by Salomon.

For the Court's consideration of whether the proposed settlement is fair and reasonable and adequate to the members of the various classes, the main significance of the second cause [*38] of action is that only certain members of the Debt Securities Subclass and the members of the Preferred C Stock Subclass are alleged to have purchased in reliance on the registration statements, and thus have stronger claims to the Settlement Fund. Accordingly, the provision in the Final Proposed Plan of Allocation for Section 11 claimants to receive payments without the reduction of their recognized loss by a factor of

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[9] As stated earlier, because no other securities were issued pursuant to a registration statement during the Class Period, only the members of the Preferred C Stock Subclass and certain members of the Debt Securities Subclass can assert Section 11 claims.

.645 applicable to Section 10(b) claims is fair and reasonable. The adjustment of the recognized loss of those members of the Debt Securities Subclass who do not assert Section 11 claims is also fair and reasonable.

C. The Risks of Establishing Damages

Plaintiffs' class counsel state that, of total market losses which "could approach approximately $ 400 million," Pls.' Mem. in Supp. of Prop. Sett. and Fee Applic. at 23, total provable damages from losses sustained by class members are estimated at $ 193 million, Pls.' Mem. in Resp. to Court's Order of Dec. 13, 1993 at 1. [10]

[*39] The Salomon Defendants contend that the price drop after the disclosures in the press releases is not necessarily probative of any inflation in securities prices resulting from the alleged misleading statements by Salomon set forth in the Amended Complaint or from the omissions to correct such statements at the time of the purchaser's acquisition of the security, as opposed to inflation in securities prices resulting from other factors.

It thus appears that, in the event of liability, the risks in proving at trial the damages claimed by plaintiff's experts would be significant. Therefore, the amount of the Settlement Fund is not unreasonable.

D. The Other Grinnell Factors

Consideration of the remaining factors set forth in *Grinnell*, 495 F.2d 448 (2d Cir. 1974), weighs in favor of the proposed settlement. Given the complexity of this litigation, it is likely that, were this case to proceed through trial, both plaintiffs and the Salomon Defendants would incur substantial risks and costs. The prospect of a lengthy trial and the likelihood of appeal add to the attendant risks of litigation. Also greatly weighing in favor of the proposed settlement [*40] is the minimal number of members of the class electing to opt out of the proposed settlement prior to the hearing and the fact that no objections to the proposed settlement have been filed by members of the class.

The amount of discovery completed prior to settlement gives assurance to the Court that the counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them and the risks of maintaining the class action through trial.

As class counsel acknowledge, Salomon is well able to withstand a greater judgment. Nevertheless, the size of the Settlement Fund in the light of plaintiffs' estimated best

[10] In arriving at their estimate of provable damages, plaintiffs' experts attempted to identify and factor out trading by specialists, arbitrageurs and third market traders which resulted in shares trading more than once a day, thereby inflating previous estimates of trading volume. Pls.' Mem. in Resp. to the Court's Order of December 13, 1993, Exh. A n.2.

possible recovery of $ 193 million, although difficult to weigh, does not fall outside the range of reasonableness, particularly in consideration of all the attendant risks of litigation. [11] As the Second Circuit stated in *Grinnell*, 495 F.2d at 455, ***HN7***[] "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that proposed settlement is grossly inadequate and should be disapproved." *See also In re Gulf Oil/Cities Service Tender Offer Litigation*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992) [*41] (quoting *Grinnell)*. There exists a distinct possibility of no recovery after trial by jury or appeal based on the limited proof of the scienter requirement of Section 10(b) and the difficulty of proving reckless conduct to support that claim. The Section 11 claims are also not without defenses able to prevail at trial or on appeal.

E. Manner in which the Proposed Settlement was Negotiated

An evaluation of the manner in which this proposed settlement was negotiated also weighs in favor of approving the settlement. *See Weinberger*, 698 F.2d at 74. There is no indication that this proposed settlement does not represent the product of arm's-length negotiations between counsel. *See In re Warner Communications Securities Litigation*, 798 F.2d 35, 37 (2d Cir. 1986) (court has fiduciary duty to ensure that settlement is not collusive). Class counsel [*42] are established firms each of which would in this Court's judgment be able to maintain the class action through trial and appeal. Extensive discovery has been engaged in by plaintiff's counsel and their experts. Under these circumstances, the judgment that the settlement is fair by class counsel, each of which is highly experienced in securities litigation and knowledgeable of the attendant risks of litigation, weighs strongly in favor the proposed settlement. *See Chatelain v. Prudential-Bache Securities, Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992). The Court does not believe that counsel were motivated to settle by any factors other than their assessment of the strengths and weaknesses of plaintiffs' claims and their understanding of the risks of litigation.

Accordingly, having weighed all the *Grinnell* factors and considered the manner in which the proposed settlement was negotiated, the Court certifies the class as described in the consolidated Amended Complaint and finds the proposed settlement as contained in the Notice of Proposed Settlement dated September 13, 1993, as amended by the Supplemental Notice of January 11, 1994 and the letter of [*43] class counsel to the Court dated May 19, 1994 to be fair, reasonable and adequate.

F. Attorneys' Fees

[11] It is further noted that plaintiffs' counsel's estimate of provable damages appears reasonably deduced.

Class counsel for plaintiffs submit a joint application for an award of legal fees for all plaintiffs' counsel of $ 12,059,025.35, as well as aggregate expenses of $ 440,974.65, for a total award of $ 12,500,000. By agreement of counsel for the parties, any such award of attorneys' fees and expenses would not be deducted from the settlement on behalf of plaintiffs and would not be opposed by counsel for defendants. Regardless of the lack of opposition to the application of plaintiffs' counsel for an award of $ 12,500,000, the Court has an obligation to set a fair and reasonable fee for plaintiffs' counsel.

In this case the lodestar attorneys' fees of all plaintiffs' counsel total $ 4,033,114. Of this total, the co-lead counsel firms Abbey & Ellis and Wolf Popper Ross Wolf & Jones incurred $ 1,153,836 and $ 1,185,350, respectively, in regular time charges for attorney time. In recent years the lodestar method has been found to be wanting and inappropriate, *In re Agent Orange Prod. Liab. Litigation,* 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985), *aff'd* [*44] *in part and rev'd in part,* 818 F.2d 226 (2d Cir. 1987), and an award based on a percentage of recovery is considered more appropriate. Nonetheless, ***HN8***[] the lodestar amount can be useful in testing the propriety of an award based on the percentage of recovery. *In re Ames Dep't Stores, Inc. Litigation,* 835 F. Supp. 147, 149-50 (S.D.N.Y. 1993).

As pointed out by plaintiff's counsel, an award of $ 12.5 million would be the equivalent of less than 20 percent of a class action settled for a total award of $ 67 million, not an inappropriate percentage in most securities class actions. Setting an appropriate percentage is difficult in this case, however, because although lead counsel acted resourcefully, the principal discovery in this action was conducted after the Securities and Exchange Commission had concluded its case against the defendants and had required the establishment of the Civil Claims Fund from which payment of plaintiffs' claims will be made. The Salomon Defendants then provided the plaintiffs with the document and testimonial discovery they had provided to the SEC, including access to the investigation conducted by the [*45] Salomon Defendants' outside counsel.

In *In re Par Pharmaceutical Securities Litigation,* 1992 WL 150632 (S.D.N.Y. June 15, 1992), class counsel were awarded a fee of approximately 20 percent of the value of the settlement fund. In reducing the proposed fee of 30 percent, the *Par* court noted that counsel had, to a large extent, been able to ride the coattails of litigation by law enforcement and regulatory authorities, who had obtained guilty pleas by certain defendants. [12]

Plaintiff's counsel argue that the services rendered in this case were more substantial and benefitted the class more than those rendered in *Par.* Pls. Mem. in Sup. of Prop. Sett. and

[12] Plaintiffs' case against certain defendants had not been predetermined, however, and counsel demonstrated a creative approach in negotiating a satisfactory settlement with those defendants.

Fee Applic. at 28. They are correct in that the facilitation of plaintiffs' counsel's efforts by the earlier SEC action and by Salomon's lack of opposition to extensive [*46] discovery concerning that action is less substantial as far as proving liability than the assistance provided to plaintiffs' counsel in *Par* by certain defendants' guilty pleas. Cf. *In re Gulf Oil Cities Service Tender Offer Litigation,* 142 F.R.D. 588, 597 (S.D.N.Y. 1992) ("this is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill"). However, proving the extent of liability, i.e., the damages sustained, is another matter. Indeed, in this case the complexity of the damage claims of the various classes has been more difficult to develop than in ordinary class action cases, and class counsel have demonstrated considerable skill in delineating and balancing the rights of the various subclasses. Furthermore the Court must take into consideration the likelihood that plaintiffs' counsel's services will be called upon in the post award period to deal with the Settlement Administrator and Civil Claims Fund Administrator to assure that fairness continues throughout the proceedings.

Nevertheless, plaintiffs' counsel in *Par* were engaged [*47] in motion practice and discovery not dissimilar from that engaged in here. The uniqueness of the contribution of plaintiffs' counsel in *Par,* however, was their resourcefulness and ability to fashion for the class a fair and reasonable settlement consisting of stock contributions from a diverse group of defendants and the issuance of stock to the class, all of which resulted in benefit to the corporation as well. Nevertheless, in view of the liability issues being somewhat predetermined, the court in *Par* awarded a reduced fee to counsel even though plaintiffs' counsel were obliged to take their fee in stock, which could not be distributed except over a period of time and thus was subject to the uncertainty of the market for those securities.

In this case plaintiffs counsel were confronted with greater liability issues and a more complex factual situation than counsel in *Par* due principally to the variety of Salomon securities purportedly affected by the actions alleged. However, as noted, plaintiffs' counsel's role was facilitated by the availability of extensive discovery from the SEC action, and persuasive talents were not required to fashion a settlement from several [*48] different defendants. Further, any fee awarded will not be subject to the vagaries of the securities market and delayed distribution, as was the fee award of shares of stock in *Par*.

Under these circumstances, the Court determines that an award of fees and expenses totaling $ 9.6 million, or approximately 15 percent of a "total" award of $ 64.1 million, is fair and reasonable and, under all the circumstances, appropriate.

CONCLUSION

Having considered all the *Grinnell* factors, the Court finds the proposed settlement adequate, fair and reasonable, and the settlement is approved. Class counsel are awarded fees and expenses totaling $ 9.6 million.

IT IS SO ORDERED.

Dated: New York, New York

June 15, 1994

ROBERT P. PATTERSON, JR.

U.S.D.J.

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