[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

HOWARD LASKER, CRAIG GOLD, NORMAN SHOWERS and NEW JERSEY BUILDING LABORERS PENSION AND ANNUITY FUNDS, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

JOHN A. KANAS, JOHN BOHLSEN, DANIEL M. HEALY, KATHERINE HEAVESIDE, THOMAS S. JOHNSON, JOSIAH AUSTIN, KAREN GARRISON, RAYMOND A. NIELSON, A. ROBERT TOWBIN, WILLIAM M. JACKSON, JR., ALVIN N. PURYEAR, JAMES F. REEVE, GEORGE H. ROWSOM, DR. KURT R. SCHMELLER AND NORTH FORK BANCORPORATION, INC.,

Defendants.

INDEX NO. 103557/2006

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER AND JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Upon the foregoing papers, it is

ORDERED that this settlement of a class action is decided in accordance with the accompanying Findings of Fact, Conclusions of Law and Final Order and Judgment.

Dated: September 26, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

----------x

HOWARD LASKER, CRAIG GOLD, NORMAN SHOWERS and NEW JERSEY BUILDING LABORERS PENSION AND ANNUITY FUNDS, individually and on behalf of all others similarly situated,

Index No. 103557/2006

Plaintiffs,

- against -

FINDINGS OF FACT CONCLUSIONS OF LAW AND FINAL ORDER and JUDGMENT

JOHN A. KANAS, JOHN BOHLSEN, DANIEL M. HEALY, KATHERINE HEAVESIDE, THOMAS S. JOHNSON, JOSIAH AUSTIN, KAREN GARRISON. RAYMOND A. NIELSON, A. ROBERT TOWBIN, WILLIAM M. JACKSON, JR., ALVIN N. PURYEAR, JAMES F. REEVE, GEORGE H. ROWSOM, DR. KURT R. SCHMELLER AND NORTH FORK BANCORPORATION, INC.,

Defendants.

----------x

KARLA MOSKOWITZ, J:

This is a settlement of a class action involving North Fork Bancorporation, Inc. ("NorthFork") shareholders, other than the defendants, who held shares of North Fork Bank's common stock between March 12, 2006 and December 1, 2006 (the "plaintiff class"). The complaint alleges that defendants, members of North Fork's Board of Directors breached their fiduciary duty to plaintiffs by accepting Capital One Corporation's ("Capital One") allegedly inadequate offer of consideration in connection with Capital One's acquisition of all the outstanding shares of North Fork.

Plaintiffs and defendants seek judicial approval of a proposed settlement set forth in a March 12, 2007 Stipulation and Agreement of Compromise and Settlement (the "Settlement Agreement"). On June 15, 2007 the court held a fairness hearing during which the court heard from the parties as well as from the only person objecting to the settlement. At that hearing, the

parties submitted proof that they have provided notice to class members as outlined in the March 12, 2007 provisional settlement.

To determine whether to approve the provisional settlement, the court considered: plaintiffs' memorandum of law in support of the motion for final approval of the settlement and certification of the class; plaintiffs memorandum of law in support of an award of attorneys' fees and expenses; defendants' memorandum of law in support of final approval of the settlement; the affidavit of Norman Showers, sworn to on June 8, 2007 in support of the final approval of the proposed class action settlement; the joint affirmation of plaintiffs' co-lead counsel Mark Levine and Kenneth J. Vianale executed on June 7, 2007, with exhibits, in support of approval of the settlement and the award of attorneys' fees and disbursements; the affirmation of Jules Body executed on June 7, 2007, with exhibits, in support of the approval of the final settlement and the award of attorneys' fees and disbursements; the affirmation of Kenneth J. Vianale executed on June 7, 2007, with exhibits, in support of the final settlement and the award of attorneys' fees and disbursements; the affidavit of Patricia Weiser sworn to on June 6, 2007, with exhibits, in support of the final settlement and the award of attorneys fees and disbursements; the affirmation of Benjamin Kaufman executed on June 7, 2007, with exhibits, in support of the final settlement and the award of attorneys' fees and disbursements; the declaration of Gary S. Graifman executed on June 7, 2007, with exhibits, in support of the final settlement and the award of attorneys' fees and disbursements; the affidavit of Geoffrey P. Miller sworn to on June 7, 2007, with exhibits, in support of the final settlement and the award of attorneys' fees and disbursements; the affidavit of Robert A.G. Monks sworn to on June 7, 2007, with exhibits, in support of the final settlement and the award of attorneys' fees and disbursements; the records of

hours plaintiffs' counsel expended on this matter and the records of disbursements.

The court also considered objections to the settlement from Carol Fisher ("Fisher") dated March 15, 2006 and April 21, 2006 and plaintiffs' response to Fisher's objections dated June 8, 2007 and plaintiffs' corrected response to Fisher's objections dated June 11, 2007. In addition, the court considered the affidavit of Jose C. Fraga dated June 6, 2007 and supplemental affidavit of Jose C. Fraga dated June 21, 2007 regarding the mailing of the notice.

On the basis of the fairness hearing and the submissions of the parties and the objector, the court makes the following findings of fact and conclusions of law and issues its final order and judgment approving the settlement and dismissing the complaint with prejudice.

I. BACKGROUND

Plaintiff Howard Lasker, a North Fork shareholder, commenced this class action on March 15, 2006, challenging the North Fork Board of Director's agreement to allow Capital One to acquire all of North Fork's outstanding shares of common stock for $11.25 in cash plus 0.2216 shares of Capital One stock for each share of North Fork stock. Lasker alleged that the North Fork Board of Directors breached its fiduciary duty to shareholders by approving the proposed merger for inadequate consideration.

Sometime thereafter, plaintiff Craig Gold filed a class action complaint against North Fork alleging similar facts. On May 31, 2006, the court consolidated the Lasker and Gold cases and appointed co-lead counsel.

North Fork shareholders Norman Showers and New Jersey Building Laborers Pension and Annuity Funds filed two separate class action complaints in Nassau County alleging facts similar to those in the Lasker and Gold complaints. Counsel in the Nassau County actions

voluntarily discontinued those actions in favor of proceeding in this court under the consolidated amended complaint.

On July 12, 2006, Capital One and North Fork filed a Joint Prospectus/Proxy ("the proxy") with the Securities and Exchange Commission and mailed the proxy to their respective shareholders with information regarding the proposed merger. The proxy stated that the shareholders' vote on the proposed merger was scheduled for August 22, 2006.

Plaintiffs determined that they would move for a preliminary injunction to enjoin the vote on the proposed merger, and, to that end, they contacted the court and their adversaries, and arranged an expedited pre-motion discovery schedule.

In late July and early August, 2006, with the benefit of discovery, the parties began preliminary settlement discussions and on August 8, 2006 they reached a settlement in principle that they memorialized in a Memorandum of Understanding. The terms of the settlement included: (1) a cash fund of $20 million plus accrued interest payable to North Fork shareholders[1]; (2) additional disclosures about the merger and the events leading up to it; (3) Capital One's acceptance of a $100 million reduction in the profit it was otherwise entitled to receive under a stock option agreement if North Fork terminated the merger and (4) an agreement that North Fork would perform additional due diligence regarding Capital One's operations.

The parties then prepared a formal stipulation of settlement and, at a hearing on March 12, 2007, the court granted preliminary certification of the class and preliminary approval of the settlement.

---

[1] The $20 million cash component represented a portion of the quarterly dividend that North Fork shareholders would not receive because of the anticipated October, 2006 transaction closing date. The merger was ultimately consummated on December 1, 2006.

II. CLASS CERTIFICATION

The Settlement Agreement defines the class as:

> All persons who held the common stock of North Fork Bancorporation, Inc. and their successors-in-interest and transferees, immediate and remote, at any time during the period March 12, 2006 through December 1, 2006, other than defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants.

(Settlement Agreement, Ex. A, para. 3).

Pursuant to CPLR Section 902, the court must determine whether the action may be maintained as a class action under CPLR Section 901. (*In the Matter of Colt Industries Shareholder Litig.*, 155 AD2d 154, 159 [1st Dept 1990], *modified on other grounds*, 77 NY2d 185 [1991]). The court has considered the class prerequisites set forth in CPLR Section 901 (numerosity, typicality, commonality, adequacy of representation and superiority) and holds that this action may be maintained as a class action.

A. The Class is so Numerous that Joinder of All Members would be Impractical

As of January 29, 2007, there were 14,309 record holders of North Fork stock who purchased or held the stock during the class period. Plaintiffs believe that there are many more class members because the above number does not account for North Fork shareholders who held their stock in street name. The notice administrator mailed 101,405 notices to shareholders, and at least 452,000 common shares are eligible to recover damages in this action. "[T]here is no mechanical test to determine whether a class is sufficiently numerous or any authority establishing a minimum threshold." (*Naftulin v Sprint Corp.*, 16 Misc 3d 1131[A] at * 3 [Sup Ct Kings County 2007]). Moreover, while no minimum number of plaintiffs is required to

maintain a suit as a class action, this court certified a class of 38 potential members in *Caesar v Chemical Bank.* (460 NYS 2d 235, 237-38 [Sup Ct NY County 1983]; *see also DeMarco v Nat'l Collector's Mint, Inc.*, 229 FRD 73, 80 [SD NY 2005]).

Here, the numerosity requirement has been satisfied, as the large number of shareholders makes joinder impractical.

B. Plaintiffs' Claims are Typical of All Other Class Members' Claims

Plaintiffs' amended complaint asserts a breach of fiduciary duty claim against defendants for their failure to disclose material information in the proxy mailed to all shareholders. The amended complaint also alleges that the board breached its fiduciary duty by accepting an offer that did not provide adequate consideration for North Fork shares. Proof of these claims raises questions of fact that are applicable to all shareholders and will impact on the consideration that all class members will ultimately receive. There is no indication that the claims of the lead plaintiffs differ in any respect from the claims of the rest of the putative class members. Thus, the typicality requirement is satisfied.

C. Common Issues Predominate

The commonality requirement is satisfied if "all class members are in a substantially identical factual situation and the questions of law and fact raised by the plaintiffs are applicable to each class member." (*In re Playmobil Antitrust Litig.*, 35 FSupp 2d 231, 240 [ED NY 1998]). "As with the numerosity requirement, there is no mechanical test." (*Naftulin*, 16 Misc 3d 1131 [A] at *5). The primary consideration regarding commonality is "whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" (*Friar v Vanguard Holding Corp.*, 434 NYS2d 698,

707 [App Div 2d Dept 1980], quoting *Lamar v H&B Novelty & Loan Co.*, 55 FRD 22, 25 [D Or 1972], *revd on other grounds*, 489 F2d 461 [1973]; *In re Playmobil Antitrust Litig.*, 35 FSupp 2d 231, 240 [ED NY 1998]). Here, the action raises questions of law and fact that are common to the class. Plaintiffs have no special interests that would override the interests of the class. The adequacy of disclosure and the adequacy of compensation are of interest to all class members, and the success of each plaintiff's claim turns on establishing the existence of the same alleged breach of fiduciary duty on the part of the board. Moreover, adjudication of these claims as a class action serves the interests of judicial economy and uniformity. The commonality requirement is therefore satisfied.

D. Plaintiffs and their Attorneys are Adequate Class Representatives

There is no indication that lead plaintiffs' claims conflict in any way with the claims of other class members. Class counsel have extensive experience in litigating complex class actions and have spent considerable time and effort investigating the claims in this case. (*See* Joint Affirmation of Plaintiffs' Co-Lead Counsel Mark Levine and Kenneth J. Vianale, executed 6/7/07). Accordingly, counsel are adequate representatives for the class. (*See Baffa v Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F3d 52 [2d Cir 2000]; *In re Coordinated Title Ins. Cases*, 2 Misc 3d 1007 (A) [Sup Ct Nassau County 2004]).

E. A Class Action is the Superior Method for Adjudicating this Dispute

In this case, many of the class members own only a few shares of North Fork stock. The class members have too small a stake in the outcome to justify prosecution of individual lawsuits. Moreover, separate individual actions would lead to duplicative litigation and the risk of inconsistent outcomes. Clearly, a class action is the superior method to resolve this dispute.

III. THE PROPOSED SETTLEMENT

The settlement consists of cash and non-cash components. Plaintiffs recovered $20,000,000 in cash plus interest of over $700,000 since August, 2006, when North Fork deposited the settlement fund into an interest-bearing escrow account.

The non-cash consideration consists of: (a) additional facts that North Fork disclosed to the public about the merger with Capital One and that it incorporated by reference into the proxy before North Fork shareholders voted on the merger; (b) Capital One's agreement to forego $100 million of the total profit it was entitled to receive under the Stock Option Agreement if North Fork terminated the merger; and (c) confirmation that North Fork undertook and completed additional due diligence concerning certain Capital One operations.

Defendants have also agreed to bear the costs of notice to the class[2] and to administer the payment to the shareholders of their pro rata share of the settlement fund. Class members will not have to fill out any claim forms to receive their share of the cash settlement–they will be paid automatically based on the number of North Fork shares they owned on the relevant date. No cash from the settlement will revert to the defendants.

IV. NOTICE AND JURISDICTION

The court has subject matter jurisdiction over this action pursuant to CPLR Article 9 and the grant of general, original jurisdiction in law and equity provided by the Constitution of New York State.

On April 5, 2007, defendants' Notice Administrator, The Garden City Group, Inc., sent 14,717 notices of settlement to potential class members, by first class mail, and by May 15, 2007,

[2] Plaintiffs state that the cost of notice exceeded $120,000.

as a result of requests from nominees, the Notice Administrator mailed an additional 84,343 notices to beneficial holders or to nominees to forward to beneficial holders. In addition, the notice administrator mailed 2,933 notices after May 15, 2007 in response to requests by nominees. Altogether, the notice administrator sent more than 100,000 notices by first class mail.

In addition, pursuant to the March 12, 2007 preliminary approval order, the defendants twice published the court approved summary notice in *The Wall Street Journal*. Defendants have filed proof of mailing and proof of publication with the court.

The notice apprised potential class members that if they wished to object or exclude themselves from the settlement they must do so in writing, postmarked no later than May 25, 2007. The parties received seven requests for exclusion and one objection to the settlement.

The court finds that, in this action, the combination of individual mailing and publication notice is the most effective and best notice practicable under the circumstances, and that it constitutes due, adequate and reasonable notice to all class members and otherwise satisfies the requirements of CPLR Sections 904 and 908 and other applicable rules. The settlement meets the due process requirements for class actions by providing class members an opportunity either to be heard and participate in litigation or remove themselves from the class. (*See Phillips Petroleum v Shutts,* 472 US 797, 812 [1985]; *Michels v Phoenix Home Life Mutual Ins.*, 1997 WL1161145, *16-17 [Sup Ct NY County]).

Accordingly, the court has personal jurisdiction over the class members consistent with the requirements of CPLR Article 9 and due process.

V. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

In order to approve the settlement of a class action, a court must find that the settlement is fair, reasonable and in the best interests of the class. (*Rosenfeld v Bear Stearns & Co., Inc.*, 237 AD2d 199,199 [1st Dept 1997]; *Brody v Catell,* 2007 WL 1865080 [Sup Ct Kings County]). Although CPLR 908 does not prescribe specific guidelines for a court to follow in determining the merits of a proposed class action settlement, the case law in this state suggests that the court should consider the following factors: (1) the likelihood of success; (2) the extent of support from the parties; (3) the judgment of counsel; (4) the presence of bargaining in good faith and (5) the nature of the issues of law and fact. (*Matter of Colt Industries Shareholder Litig.*, 155 AD 2d at 159; *Rosenfeld,* 237 AD2d at 199-200; *Pressner v MortgageIT Holdings, Inc.*, 2007 WL 1794935 [Sup Ct NY County]).[3]

A. The Compensation is Fair and Adequate

In this case, the settlement provides significant benefits to the class. The cash portion of the settlement, as of June, 2007, is $20,694,142 plus accruing interest. According to plaintiffs, this fund should provide class members with approximately one third of the quarterly dividend they would have earned in the fourth quarter of 2006 if the merger had not occurred. In addition, because the defendants are paying for the cost of notice and the costs of administration, the

---

[3] By comparison in determining whether to approve a class action settlement under the Federal Rules of Civil Procedure Section 23(e), the federal courts advance a standard comprised of the following nine factors: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation. (*See In re Luxottica group S.P.A. Sec. Litig.*, 233 FRD 306, 311 [ED NY 2006]).

settlement fund will not decrease to pay for these items. Each class member will receive a check for his/her pro rata portion of the settlement without having to submit claim forms–a valuable convenience for class members whom the claims process often deters from seeking compensation. (6/7/07 Miller Aff.).

In addition, the class received valuable non-monetary consideration. (*See Seinfeld v Robinson,* 246 AD 2d 291, 298-300 [1st Dept. 1998]). North Fork made additional disclosures to the shareholders prior to the shareholders' vote on August 22, 2006 about discussions North Fork had with other institutions in 2005 and 2006 regarding merger. The settlement also included a $100 million reduction in the amount of profit that Capital One would receive under a stock option agreement with North Fork. This reduced the price a potential third party bidder would need to pay to top Capital One's offer and increased the likelihood that another institution might make a competing offer.

Moreover, other factors militate in favor of approving this settlement.

B. Likelihood of Plaintiffs' Success

Because North Fork was incorporated in Delaware, Delaware law governs plaintiffs' breach of fiduciary claim. (*Kamen v Kemper Fin. Svcs., Inc.,* 500 US 90, 98 [1991]; *Walton v Morgan Stanley & Co.,* 623 F2d 796, 798 n.3 [2d Cir 1980] ["the law of the state of incorporation governs an allegation of breach of fiduciary duty owed to a corporation"]). Plaintiffs are not likely to succeed on this claim under Delaware law because of Delaware's business judgment rule that prohibits a court from second guessing an independent board's business decisions. (*See Brehm v Eisner,* 746 A2d 244 [Del Supr 2000]). Here, the board retained financial advisers who reviewed Capital One's offer and opined that the merger was fair

from a financial point of view.

In addition, Chapter 102(b) of The Delaware General Corporation Law insulates the board's actions from plaintiffs' damages claim. (*See* 8 Del. C. Section 102[b][7]). That provision, often referred to as "the exculpation clause" immunizes a director from a money damages claim unless the plaintiff can prove that the director's actions were: (a) a breach of loyalty to the shareholder; or (b) in bad faith or intentional misconduct or a knowing violation of the law; or (c) a transaction from which a director received an improper personal benefit. (*Gesoff v IIC Indus. Inc.*, 902 A2d 1130, 1164 [Del Ch 2006]).

In this case, based on documentary evidence North Fork's investment advisors produced, plaintiffs alleged that the board failed to pursue offers from bidders other than Capital One. However, further deposition and document discovery demonstrated that in 2005 and 2006, North Fork discussed a potential merger with several other companies, but those other companies never made formal offers. These circumstances would have weighed against a court finding that the board breached its fiduciary duty by failing to consider other viable merger offers.

In addition, discovery demonstrated that, during this same period, North Fork's profits on its loan portfolio began to shrink because of a change in interest rates–the gap between the interest rates North Fork charged its customers and the rates North Fork paid when it borrowed from third parties began to narrow in 2005, making it difficult for North Fork to remain viable as a stand-alone company. These facts also supported the board's decision to merge with Capital One.

Plaintiffs clearly faced an uphill battle to prove that the board did not act in good faith or that it had engaged in intentional misconduct or had committed acts of disloyalty or received an

improper benefit from the merger. Defendants had strong arguments that they had acted in good faith in pursuing the merger with Capital One. Because the evidence revealed that North Fork sought other merger partners but that no other company came forward with a competing offer, plaintiffs faced the possibility that they would be unable to recover damages because they would be unable to prove that the board breached its fiduciary duty by accepting an inadequate offer. (*See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, NYLJ, Sept. 11, 2007, at 30, col. 3).

Moreover, defendants would have argued that they retained two respected financial advisors to assist in their search for a proper merger partner, that they honestly sought the best merger partner available and that, in the end, no other suitor made an offer. In addition, based on the record, plaintiffs' financial experts would have difficulty establishing that Capital One's offer fell outside the range of fairness. Thus, even if plaintiffs could establish that there was a deficiency in the process that lead up to the merger, plaintiffs could not realistically expect to collect a money judgment in favor of the class. (*See Emerald Partners v Berlin,* 2003 WL 21003437 [Del Ch], *aff'd* 840 A3d 641 [Del 2003]).

Finally, if plaintiffs had simply sought to enjoin preliminarily the vote on the merger, the factual record might not have supported a claim of likelihood of success on the merits and irreparable injury.

Here, the settlement agreement provided class members with a certainty that further litigation could not provide. The class will recover at least a part of the 2006 quarterly dividend that they lost because of the merger, and they also received further disclosures that allowed them to make an informed decision regarding the merger.

Thus, the difficulty that plaintiffs would have in proving their case dictates in favor of settlement.

C. Extent of Support from the Parties

Out of the more than 100,000 notices that defendants sent, only seven class members have opted out. (*See* Fraga Aff., Para. 8). Of the class members who have chosen to participate, only Fisher has objected to the settlement. Moreover, several of the named plaintiffs have submitted affidavits expressing their support for the settlement. (Joint Aff., Ex. E). The small number of opt-outs and the single objection from class members compared to the size of the class supports approval of the settlement. (*In re Lorazepan and Clorezepate Antitrust Litig.*, 205 FRD 369, 378 [DDC 2002]; *In re Baldwin-United Corp.*, 607 F. Supp 1312, 1321 [SD NY 1985]; *Michels v Phoenix Home Life Mutual Ins. Co.*, 1997 WL 1161145; *Sutton v Medical Serv. Assn.* of Pennsylvania, 1994 WL 246166, *9 [ED Pa]).

D. Judgment of Counsel

In determining whether to approve a class action settlement, "[t]he court should be able to rely upon the judgment of experienced counsel in determining whether or not the settlement is fair." (*Peterson v Arvida/JMB Partners, L.P. II,* 1994 U.S. Dist. Lexis 2109 at *38 [ND III]; *In re Nasdaq Market-Makers Antitrust Litig.*, 187 FRD 465, 473-74 [SD NY 1998]). Here, the court approved two law firms to act as lead counsel, Stull, Stull & Brody and Vianale & Vianale LLP. These counsel have many years of experience in class action litigation. (Joint Aff, Paras. 41-46). Thus, the class received representation from not one, but two highly qualified law firms to act on behalf of the class. Both law firms believe that the settlement is fair, adequate and in the best interests of the class and the support of qualified counsel is significant to

approval of the settlement. (*Michels,* 1997 WL 1161145 [Sup Ct NY County]).

In addition, counsel for both sides submitted this settlement after using their best efforts to negotiate it. The submissions to this court and the statements counsel made at oral argument indicate that they carefully evaluated the risks of litigation and balanced their decision to accept the settlement in light of those risks and what they achieved in settling this case.

E. The Presence of Good Faith Bargaining

The negotiations leading up to the settlement demonstrate that the parties bargained in good faith. The parties conducted negotiations over a period of several weeks and plaintiffs' counsel conducted discovery–both document production and depositions. Based on the discovery, plaintiffs had an opportunity to review the strengths and weaknesses of their case that contributed to their ability to bargain in good faith and reach a fair and adequate settlement after arm's length negotiations. There is no evidence that suggests that the parties colluded or bargained in bad faith. (*See Rosenfeld*, 237 AD2d at 200).

F. Complexity and Nature of the Factual and Legal Issues

The nature of the issues of law and fact also support approval because "litigating this case to a conclusion would be complex, lengthy and expensive." (*Michels*, 1997 WL 1161145 at *29). Defense counsel was prepared to litigate this case vigorously and pre-trial proceedings would not only protract the litigation, but also substantially increase the costs to the parties with no guarantee of relief to the class members. The breach of fiduciary duty issues would require the court to apply Delaware law, adding to the complexity of the litigation. Under the circumstances, the early settlement, that included both monetary and non-monetary components, provided significant benefits to the class members.

VI. OBJECTION

Fisher objects to the proposed settlement on several grounds. First, she claims that she has been unable to procure a copy of the amended complaint, as it is not in the County Clerk's file. However, a revised complaint is now publically available and this objection is now moot.

In addition, Fisher claims that the consideration to the class is illusory or inadequate. However, based on the discussion, *supra*, regarding plaintiffs' likelihood of success, the court finds that the settlement is fair and adequate under the circumstances, as it provides for a cash payment now–a payment that would have been uncertain, at best, if plaintiffs litigated this matter.

Fisher next objects to the breadth of the release contained in the stipulation of settlement ("stipulation"), contending that it will foreclose her ability to continue litigating her pending federal lawsuit against three North Fork board members.[4] She argues that, because the amended complaint is not in the file, she cannot determine whether the federal court action falls within the terms of the release. (6/15/07 Trans, p. 27-30).

---

[4] The release contained in paragraph 9 of the stipulation states, in pertinent part:

> Upon Final Court Approval . . . any and all known and unknown claims . . . for damages, injunctive relief or any other remedy against Defendants . . . and Capital One . . . that have or could have been asserted by any member of the proposed class in any forum . . . including, without limitation claims under the federal securities laws, arising out of, related to, or concerning (I) the allegations contained in the Action, (ii) the facts or occurrences mentioned in the Action, (iii) the merger . . . (iv) any misrepresentations and/or omissions in the Proxy or any other disclosure relating to the Merger, and (v) any matter that could have been asserted in the Action regarding breach of fiduciary duties or failure to disclose material facts . . . shall be fully, finally and forever compromised, settled, extinguished, dismissed, discharged and released with prejudice . . . .

A. Fisher's Litigation Against the Board

In March 2006, Fisher filed a federal court action against defendant John Kanas, a North Fork board member, and others, alleging a federal proxy violation and that defendants breached their fiduciary duties under Delaware law (the "first Fisher action"). In an amended complaint, Fisher also alleged that several of the board members received unauthorized and undisclosed change of control payments. The federal court dismissed the amended complaint in the first Fisher action in December 2006. Fisher did not appeal the dismissal.

Later that month, Fisher filed a class action complaint against certain board members in Supreme Court, Nassau County on behalf of all former non-management North Fork shareholders who received 2004 and 2005 proxy statements, and owned stock on December 1, 2006 and "were deprived of their full equity interest in North Fork as a result of the egregious sum of money paid to the defendants." (*Fisher v Kanas*, 2007 U.S. Dist. LEXIS 33675 at *2 [ED NY] [the "second Fisher action"]). In January, defendants removed the second Fisher action to federal court and, on May 7, 2007, the federal court dismissed the complaint in the second Fisher action on the ground that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") pre-empted her claim. Fisher has appealed the May 7, 2007 dismissal of the second Fisher action.

Discussion

Although Fisher may have a notice of appeal pending, the federal court has approved a release where, as here, the viability of a claim on appeal is highly speculative. In *In re WorldCom, Inc. Sec. Litig.*, 388 F Supp2d 319, 344 (SD NY 2005), the court stated:

> Given that Reynolds will only be able to litigate the Reynolds Action claims if he succeeds on appeal of the bankruptcy

> courts' determination [dismissing his derivative claim], his objection to the Release is based on highly speculative concerns. Whether specific claims pleaded in the Reynolds Action are barred by the release is a not a determination that needs to be made at this time.

Here, the federal court judge found that SLUSA pre-empted Fisher's claims against the board. Thus, the viability of Fisher's claim against the board that is currently on appeal is highly speculative.

Moreover, a broad release itself is not grounds for sustaining an objection to the settlement. In *Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F3d 96, 106 (2d Cir. 2005), the court stated:

> Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the county. Practically speaking, "class action settlements simply do not occur if the parties cannot set definitive limits on defendants' liability." (*Citations omitted*).

(*See also In re Talley Industries, Inc. Shareholders Litig.*, 1998 WL 191939 at *14 [Del Ch] [noting the appropriateness of approving release that could affect claims with minimal value because of the risk of losing settlement with substantial value]).

The release in this action is not substantially different from releases found in most class actions and is the result of arm's length negotiation and defendants' desire to prevent litigation of additional cases that relate to the allegations in this action. In sum, Fisher's objections to the breadth of the release and the fairness of the settlement do not weigh against approval of the settlement as fair, reasonable and in the best interests of the class members. Also, she can always opt out.

VII. ATTORNEYS' FEES

Counsel request an award of attorneys' fees in the amount of 25% of the $20,000,000 common fund plus a pro rata portion of the interest from the date the fund was established through the date of payment of the court-approved fee. According to the records counsel provided, attorneys and para-professionals expended a total of 1,791.84 hours during this litigation for a lodestar of $976, 553.85.[5] (Compendium of Affirmations, Ex. A). As of June, 2006, counsels' request translated to a fee of $5,173,541.00, representing a multiple of 5.3 over counsels' aggregate lodestar and an hourly rate of $2,887 for all of the legal and paraprofessional work in this action. Counsel also request $42,128.05 in reimbursement for expenses they incurred in prosecuting the action.

Discussion

New York courts recognize that when an attorney creates and preserves a common fund or judgment fund to distribute to class members, the attorney may receive a fee that is payable out of this fund. (*Loretto v Group W. Cable,* 135 AD2d 444, 448 [1st Dept 1987] [under CPLR 909, attorneys' fees are "properly payable out of the judgment fund, if any, that resulted from the lawsuit.").

A court may calculate attorneys' fees in one of two ways. The "lodestar" method calculates the attorneys' fee award "by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." (*McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 427 [2004]; *see* A.R. v N.Y.City Dept. of Educ., 407 F3d 65, 79 [2d Cir. 2005]). The court may then apply a multiplier to the lodestar figure to account for other factors such as the risk of the

[5] The lodestar represents an aggregate hourly rate of $545 per hour.

litigation, the performance of counsel and/or the success achieved. (*See In re Twinlab Corp. Sec. Litig.*, 187 F Supp2d 80, 84-85 [ED NY 2002]; *Rahmey v Bluhm*, 95 AD2d 294, 303-04 [2d Dept 1983]).

The percentage of the fund method, the second method the courts use to calculate fees, is a simpler calculation where the award is based on "some percentage of the fund created for the benefit of the class." (*Savoie v Merchants Bank,* 166 F3d 456, 460 [2d Cir 1999]).

In *Cox v Microsoft Corp.*, Index No. 105193/2000, Decision and Order Granting Final Award of Attorneys' Fees, at 5 (Sup Ct NY County Feb. 2007), this court stated that it prefers the percentage of recovery method to determine an award of attorneys' fees in a class action because the lodestar method tempts lawyers to run up their hours and compels courts to engage in line item fee audits. (*See also Wal-Mart,* 396 F3d at 122). In *Cox*, I stated that the lodestar method can serve as a cross-check of the reasonableness of the fees a court awards under the percentage of recovery method.

In determining the reasonable value of legal services in a class action, using the percentage of recovery method, the court may consider the risk involved in the litigation, the novelty and difficulty of the issues and the skill of counsel in performing the services required. (*Ciura v Muto,* 24 AD3d 1209 [4th Dept 2005]).

In this case, the parties reached an early settlement after limited document discovery and a small number of depositions. The issues in the action were not overly complex, but because of Delaware's business judgment rule, plaintiffs ran a greater than average risk of not prevailing in the lawsuit. Accordingly, the ability of counsel to negotiate the $20,000,000 settlement fund showed considerable skill and resulted in a significant benefit to the plaintiffs. In addition,

several courts have recognized that there is value to shareholders in counsel's ability to obtain additional information disclosures. (*Rosenfeld v Bear Stearns,* 237 AD2d at 199).

The court finds that, although counsel demonstrated significant skill in prosecuting this lawsuit and reaching this settlement, a 25% fee is unwarranted, in particular because the 25% will result in a lodestar multiple of 5.3 and an hourly fee of more than $2,800 dollars. Under the circumstances here, the court awards counsel a percentage fee of 15% that will result in a payment of $3,104,125 (as of 6/07) and a lodestar multiple of approximately 3.2. (*See Chatelaine v Prudential Bache Sec., Inc.,* 805 F Supp 209, 215 [SD NY 1992] [class action fees traditionally fall in the range of 15% to 50%]). This amount takes into account the excellent quality of the representation and the risks inherent in the litigation while balancing that the lawsuit was of a relatively short duration, that the parties engaged in minimal discovery and that the attorneys' fee award in this case will come out of the settlement fund, thus diminishing the class members' recovery. The 15% fee is generous and will result in a significant hourly fee and pro rata award for each of the law firms.

Class counsel have submitted documentation to support a separate award for reimbursement of expenses in the amount of $42,128.05. Counsels' travel expenses are modest, and it appears that more than half of the expenses can be attributed to expert fees and court costs. In addition, even though there were several lawsuits involved in this litigation, it does not appear that there was a significant amount of overlap in simple administrative expenses including photocopying and postage. Accordingly, counsels' request for expense reimbursement in the amount of $42.128.05 is granted.

CONCLUSION

Based upon the submissions of the parties referenced above and upon the court's findings of fact and conclusions of law as set forth above, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. This Final Order and Judgment incorporates herein and makes a part hereof the Settlement Agreement, dated March 12, 2007.

2. A class for settlement purposes is hereby finally certified consisting of all persons who held common stock of North Fork, and their successors-in-interest and transferees, immediate and remote, at any time during the period March 12, 2006 through December 1, 2006, other than defendants and any person, firm, trust or corporation, or other entity related to or affiliated with any of the defendants.

3. The court finds that the prerequisites set forth in CPLR 901 for the maintenance of this action as a class action have been met for the purposes of this settlement.

4. The court finds that the form and manner of notice given to the class members are the best notice practicable under the circumstances and that notice was in full compliance with the requirements of due process and of CPLR 901, *et. seq.*

5. All class members who have not opted out or been otherwise excluded from the class are forever enjoined and barred from commencing, prosecuting or participating in any action or proceeding based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this action or the "Released Claims" as the Settlement Agreement defines that term in Paragraph 9.

6. Counsel for plaintiffs are hereby awarded attorneys' fees equal to fifteen percent (15%) of

the $20,000,000 plus accrued interest from the date the fund was established until the date of entry of this order and expenses totaling $42,128.05, which sum the court finds to be fair and reasonable, to be paid from the settlement fund pursuant to the terms of the stipulation.

7. The terms and provisions of the Settlement Agreement are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, each of the settling parties and the class members. In approving the settlement, the court specifically considered the objection filed with the court, but determined that under the circumstances, the objection was not a ground for denying approval of the settlement.

8. This action is dismissed: (1) with prejudice and without costs as to the class members who have not opted out or been otherwise excluded from the class and (2) otherwise without prejudice and without costs; provided that this court shall, without affecting the finality of this judgment, reserve exclusive and continuing jurisdiction over this action for the purpose of, among other things, supervising the implementation, interpretation and enforcement of the Settlement Agreement and this judgment.

9. The parties shall carry out the settlement in accordance with the terms of the Settlement Agreement.

The foregoing is the final Order and Judgment of the court. The clerk is directed to enter judgment accordingly. The parties are directed to publish this order and judgment appropriately.

Dated: September 14, 2007

U.S.C.