UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARY K. JONES, et al.,

Plaintiffs,

v. 10 CV 3864 (AKH)

PFIZER, INC., et al.,

Defendants.

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New York, N.Y.
February 26, 2015
2:50 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

ROBBINS GELLER RUDMAN & DOWD LLP
Attorneys for Plaintiffs
BY: MICHAEL DOWD
TED PINTAR
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Attorneys for Defendants Alan Levin and Harry McKinnell
BY: GARY HACKER

THE DEPUTY CLERK: Jones v. Pfizer.

Counsel, please state your appearances for the record.

MR. DOWD: Good afternoon, your Honor. Michael Dowd, Ted Pintar, and Henry Rosen, for the plaintiffs.

THE COURT: Good afternoon.

MR. FARINA: Good afternoon, your Honor. Steven Farina and Amanda MacDonald, for Pfizer.

THE COURT: Hello. Be seated.

There are a number of issues that I'd like to address. The context is the motion by lead plaintiff and the class representative for preliminary approval of the settlement. Let's start with the substance of the issue and then move on to other matters.

Mr. Dowd?

MR. DOWD: Your Honor. You want me to just address the reasons for the preliminary approval?

THE COURT: Yes.

MR. DOWD: I think that at this stage, your Honor, the issue before the Court is, is this within the range of what would be determined to be a fair, reasonable, and adequate settlement to the class? We submit, your Honor, that the $400 million recovery in this case certainly falls within the range of what should be determined to be fair, reasonable, and adequate.

Among the criteria that the Court should look at are

issues such as was it a serious prosecution of the case, were counsel informed? As this Court knows better than anyone, this case had been pending for over five years, we are a week away from trial. We couldn't be better informed when we made the decision to settle this case.

The next sort of factor that courts look at is, was there any evidence of collusion? There's certainly no evidence of collusion here. As the Court knows, there were probably 35 motions that were pending on the day this case settled. It was a hard fought litigation. There was no collusive activity between the parties. During the settlement negotiations, there was a mediator. Frankly, we had three in-person sessions with the mediator over probably a 16-month period. In addition, we had numerous phone calls. Both defendants met separately with the mediator, we met separately with the mediator. So there was certainly no collusion, and without the assistance of the mediator, it probably would not have happened.

I think that, your Honor, that basically sums up why it is a settlement that deserves preliminary approval.

I know --

THE COURT: Sorry.

MR. DOWD: -- that at final approval, the Court looks at the Grinnell factors. I'm happy to walk the Court through those because I know that sometimes in this circuit, the courts will look for those as sort of a guideline of the type of

issues to consider. I'm happy to do that if the Court would like.

THE COURT: It will be helpful, but I'll tell you this -- a question: There's no question in my mind that counsel were fully informed, that they negotiated at arm's length, that they negotiated very hard, and the mediator was someone who was sophisticated and highly capable. What I don't have is some indication of the value that counsel placed on the case. $400 million seems like a lot of money. You tell me that the average could be as low, depending how you figure it, makes it a very low settlement. What is the number?

MR. DOWD: 14.8 cents per share. Your Honor, that's measured against the most we could have recovered, the maximum --

THE COURT: Let's talk about realistically. What kind of value did you figure for the settlement?

MR. DOWD: Yes, your Honor, I'm happy to address those issues, and I can explain it to you. I know that one of the questions the Court had was the denominator we used to figure out the 14.8. I can get to all of those.

Your Honor, I think the case --

THE COURT: I'm not saying it isn't a good settlement. I need to understand it.

MR. DOWD: No, I understand, your Honor, and I am happy to address it.

Your Honor, the way we figured damages in this case, the only thing that's in our expert report is a per-share number. As the Court recalls, the stock dropped. The residual stock drop was a dollar 90 in this case. However, in one of the main issues that was litigated in this case was that Pfizer announced a number of different things on January 26, 2009, in addition to the criminal fine and civil penalties that they paid in connection with the off-label marketing. As the Court may recall, there were like six different things in there, and the defendants said --

THE COURT: It's not unusual.

MR. DOWD: Yep.

And the defendants said that's what drove the dollar 90 drop. Our expert looked at it and said, I agree that, you know, they cut the dividend, that lops off like 30 cents of that drop. You have to attribute at least 30 cents to that. And there were a couple of other things that our expert looked at and said we attribute it to that.

He ultimately concluded that he believed the damages that related purely to the fine itself were 34 cents per share. That was just for the fine.

He also opined --

THE COURT: How much?

MR. DOWD: 34 cents per hour for the fine.

And then he opined that there would be an additional

hit to Pfizer's reputation, and he put that portion of the drop as 92 cents. So the total drops per share were a dollar 26. So the 14.8-cent number, the 14-cent, 15-cent number, is compared to the maximum recovery we could have got, which was a dollar 26 per share. And that's all in his expert report, it's all litigated, and it's in the Daubert briefing as well. So that was ultimately the per-share recovery. The way we got the 14.8 cents, your Honor, is because that's -- the PSLRA requires you to do it on a per-share basis.

THE COURT: Before you go that far, Mr. Dowd, this is a case of nondisclosure or materially misleading disclosure. That which was disclosed was false and fraudulent because of the failure to come forward with other facts. And the facts that were not presented were those having to do with the failure to what, disclose the regulatory problems the company had because of its unlawful use of drugs, unlawful marketing of drugs?

MR. DOWD: Yes, your Honor.

THE COURT: So please try to tie it into that now. The cut dividend --

MR. DOWD: Oh, no, your Honor --

THE COURT: -- could have been because of just ordinary business problems --

MR. DOWD: No, absolutely.

THE COURT: -- or if could have been owing to the

paralysis within the company because of the criminal and SEC investigations going on.

MR. DOWD: Right. What we say flowed per share from the fraud was the 34 cents for the fine and the 92 cents from the reputational hit Pfizer would take from the criminal part.

THE COURT: Or a dollar 26.

MR. DOWD: So together they add up to a dollar 26. The rest of it -- the rest of the dollar 90 from between a buck 26 and a dollar 90, we even agreed that wasn't related to the criminal problem.

THE COURT: Why did you discount the cut dividend?

MR. DOWD: They cut the dividend because they were buying Wyeth, your Honor. They were acquiring Wyeth, and so they needed to cut the dividend because they needed cash.

THE COURT: They needed cash.

MR. DOWD: So that had nothing to do with our --

THE COURT: Were there any other factors leading into the dollar 92 diminution of value?

MR. DOWD: Yes, your Honor. There was a change in some tax rate, and I don't understand the details of it. The tax rate, our expert put that drop at about 34 cents, he put the cost of the dividend at 22 cents, and then Pfizer made announcements about how the strengthening of the U.S. dollar was going to affect them, and they put that at about 6 cents.

THE COURT: So the operating number, then, is a dollar

26?

MR. DOWD: Exactly, your Honor.

THE COURT: If you won the case, that's what you would have won?

MR. DOWD: Per share, yes, your Honor.

THE COURT: So you settled for a fraction of that?

MR. DOWD: Yes, your Honor.

THE COURT: About 11 percent?

MR. DOWD: I think it was -- I put it at it's 11.75 percent, just short of 12.

THE COURT: That's pretty much low.

MR. DOWD: I don't think it is all at, your Honor. I think that -- first of all, you say it's low, that's assuming that we win, and that's assuming that --

THE COURT: I know that, but --

MR. DOWD: That's assuming that we get 92 cents for damages in reputational value. I think that was going to be a difficult issue to prove. I think if you ask Mr. Farina, he'd say he was going to beat us on it. I don't agree with him. We were ready to try it and do it, but I don't know that we would have gotten that.

THE COURT: What else was in the mix that would have explained the loss of reputation?

MR. DOWD: Well, your Honor, the loss of reputation is our damages expert's analysis of part of that drop.

THE COURT: I understand, but to get to a dollar 92 --

MR. DOWD: If you were the defendants, you might say, well, some people reacted negatively to Wyeth, the Wyeth acquisition, and the stock dropped because of that, not because of the criminal fine. They would say, well, the cut of the dividend wasn't 22 cents, it was a lot more than that.

THE COURT: Were there any people who were critical of Pfizer for the Wyeth deal?

MR. DOWD: Yeah, I believe there were, your Honor. There were certainly people that thought they were going to adopt the wait-and-see.

One of the big arguments the defendants make in this case is that there were 16 analyst reports that came out after they announced the earnings on January 26th, and only four analysts even mentioned the fine. Only four of them mentioned the fine out of 60. Now, we believe there was newspaper activity that we thought would have helped us with the jurors, but that was one of the defendants' main arguments. But, yes, analysts did think they paid too much for Wyeth.

THE COURT: I remember the hearing we had on the motion to dismiss, and I remember reading the complaint and the impact of the poor marketing, the unlawful marketing, was strong in my mind. The valuation that comes in at 11.75 doesn't impress me, Mr. Dowd. When I was litigating, I didn't litigate cases for the plaintiff's side except for some. One

would think that you don't go to litigation unless you have a much higher percentage of expectation, and to see it coming this way is disappointing. Maybe it's the way you considered the denominator in this fraction, so go into that now.

MR. DOWD: Yes, your Honor. And just if I could respond to that, your Honor. You're using 11.75 percent that is the maximum number we ever could have gotten in front of a jury. I could look at it and say, the damages related to the fine are about 900 million, and then I could turn around and tell people I got 45 cents on the dollar, 44 cents on the dollar. So it all depends how you look at it, and I think that's an important fact. I think it's a great settlement, and I know this case as well as anybody in this room, and I think it's a terrific settlement for this class.

Your Honor, I'd just point out one thing to you: When that stock dropped, January 26, 2009, there wasn't a case filed. There wasn't a case filed in February 2009, March 2009, April 2009. This Court knows when there's a major stock drop, cases get filed. They get filed within weeks, cases are filed. The only people that filed the Pfizer case were us. Sixteen months after the stock drop was the first case that got filed.

The other plaintiffs' firms didn't want to deal with the loss causation issues that we had to sort through. They didn't want to drop 800 million bucks in out-of-pocket expenses to get this far. I think that this is not a case where there

was a rush to the courthouse door to file it or to do it. And we did it, we took that risk, and I think it's a tremendous recovery for a case that most other plaintiffs' attorneys looked at when the stock drop happened and said we're not doing it. So I think, in fairness, the Court should consider that.

As to the denominator, your Honor, our expert is part of our mediation efforts even though he did the per-share recovery. He also looked at the number of damaged shares, he did like a trading analysis, and the number of damaged shares, by his calculation, was 2,697,000,000.

THE COURT: 2 million?

MR. DOWD: 2,697,000,000 shares.

And so that's what the 400 million is divided by the number of damaged shares. That's how he did that calculation. And then you still come out to -- if you take the dollar amount, you still come out to 11.75 either way you do it.

But I do think, in fairness --

THE COURT: So give me those numbers again.

MR. DOWD: Yes, your Honor. The number of damaged shares, by his analysis, were 2.697 billion.

THE COURT: How did he come to that number?

MR. DOWD: He used the standard two-trader model to do his analysis to come up with those numbers for us to use internally. It's not in his expert report because we weren't presenting any aggregate damages numbers, but he used the

standard two-trader model.

THE COURT: It gives a false picture -- you use it in your proposed notice, and it gives a proposed -- it gives what I think is a misleading picture of discouragement. 400 million stands out as a substantial amount, but to many people who have seen too many of these settlements, 14.8 cents per share, it's not worth doing anything.

MR. DOWD: Well, your Honor, I think --

THE COURT: It discourages people from making claims.

MR. DOWD: If you look at it, your Honor, the stock drop -- the dollar drop that day was only a dollar eight. Our damages, by our best, most aggressive analysis, were a dollar 26. I mean, those are the damages. It's not a case where the stock dropped $20 or $30.

THE COURT: But we're still learning in previous cases -- in relationship to number of shares issued and outstanding, how many Pfizer shares were there issued and outstanding at the time?

MR. DOWD: Your Honor, I looked at it recently. I want to say it was like 7 billion towards the end of the class period.

THE COURT: Mr. Farina may know.

MR. FARINA: I think that's about right. I think that's about right, your Honor.

MR. DOWD: 7 billion, I believe.

MR. FARINA: 6-1/2, maybe.

THE COURT: 6-1/2 billion shares outstanding.

MR. FARINA: The only thing I would add, your Honor, is that the 14 cents assumes that everyone claims, which never happens. So the actual recovery will be higher for the people that claim.

THE COURT: I understand that, but I think you should neither do something that's too pessimistic or too optimistic. Leave out the toos, you should not do anything that's pessimistic or optimistic, but what's reasonable. And there should be a range, and I don't know enough about this area to know how to calculate that range.

MR. DOWD: Well, your Honor --

THE COURT: Maybe you need to expand the disclosure on this particular point. I think it gives a bad picture to claimants. They'll say why should I bother, I had a hundred shares, what am I going to get, $14?

MR. DOWD: I think, your Honor, some of it is -- the PSLRA requires you to do it that way. And we don't monkey around with the average recovery per share, we use the same number of damaged shares that we used when we were telling the defendants, you know, like this is what the case is at. And I know that there were cases in the past where plaintiffs' firms, when the PSLRA was first enacted, they tried to figure out the claim rate and say, well, you know, only 50 percent of the

people are going to claim, and then they put like 28 to 30 cents in a notice like this per share. You can't do it. There's cases that say that's just flat out not allowed. We do note for people that it could be more if people -- not as many people claim, but you can't monkey with it under the PSLRA.

THE COURT: Those who claim are those who bought during the period?

MR. DOWD: Yes, your Honor, and held.

THE COURT: And there's a sliding scale that you have, and I need you to explain that, also. How do you come up with 2.697 billion?

MR. DOWD: It's a trading model, your Honor. He takes the numbers, and he crunches them, they do all their calculations, and they come up with how many shares they think are damaged.

THE COURT: Well, it's the shares purchased less the shares sold during the trading period.

MR. DOWD: Well, it's really just the shares that were purchased and the shares that were held through January 26, 2009. There's only one drop --

THE COURT: That's correct.

MR. DOWD: -- so it's not a multiple drop case where you have to worry about that. So they do calculations trying to figure out, you know, based on the volume of the stock, and institutional investor data, and all that kind of stuff that

goes into their calculations, and they try to figure out where does it come out. And it comes out at 2-point, you know, 697 billion shares.

THE COURT: So what's the definition of that, people who bought and held?

MR. DOWD: Yes. Number of shares that bought and held.

THE COURT: And we don't know how many of those who bought sold some or all of their purchased shares?

MR. DOWD: Well, if they bought, and they sell, somebody else buys, right? So in the end -- yeah, it's not a case where you have multiple drops, and people are getting a different amount. Everybody in the class is getting the same allocation. It's a buck 26 wherever you are.

THE COURT: So 2.697 billion is the total number of shares that were purchased during the class period?

MR. DOWD: It's the total number of damaged shares.

THE COURT: Well, what is the damaged shares?

MR. DOWD: The damaged shares should be the shares that were purchased and held.

THE COURT: By people other than those exempted from the benefit?

MR. DOWD: Yes.

THE COURT: Well, maybe we need to use that definition. And can we quantify or estimate what percentage of

falloff there is in making the claim?

MR. DOWD: You'd have a fight, your Honor, from everybody on the planet as to what percentage of fall. We tell people there could be a fallout.

THE COURT: There usually is.

MR. DOWD: Here's the problem: If you talk to defendants, damage analysts, and I am just being honest with you, they'd say it's like 30, 35 percent claim rates. If you ask me, I think that is absolutely wrong. I think that now institutional investors claim. Maybe only 33 percent of the class members claim, but I'm willing to bet you 80 percent of the dollars, 75 percent of the dollars get claimed, and there's a big difference there.

THE COURT: So if 80 percent of the dollars get claimed, we're talking about something like $250 million disbursed out of a 400 million settlement?

MR. DOWD: No, no, because --

THE COURT: Sorry, that's wrong.

MR. DOWD: That's wrong because you're going to distribute the whole 400 million. They don't get any back.

THE COURT: Right. But some of the people will get --

MR. DOWD: They'll just get more if they bought more shares. That's all it goes by, how many shares you bought --

THE COURT: Is it known --

MR. DOWD: -- less shares sold, your Honor.

You have to realize that, too. You can't just say the number of shares bought and held through the end, because then sometimes you have people that sell, too. That have sales that go out.

THE COURT: I understand. Can you use any experience in, say, the last five large stockholder settlements or resolutions come up with any experiential number?

MR. DOWD: I can try, your Honor. Defendants' experts do it every year and put it usually somewhere around 35 percent, from what I've seen. I just personally don't agree with it. I know a fair amount about claims.

THE COURT: You talk about a range. You have one part of the range, they have another part. In the experts' reports here, is there an equitable value to the claims in the experts' reports that were introduced earlier in the case?

MR. DOWD: To figure out how many people will claim? No, they don't have any reason to do that, neither side. Neither side, because our guy is just figuring out causation and the damage per share. He doesn't even look at the claims. I can certainly go back and look at the academic literature. I think that it will be a lot lower than my personal experience, but that's me.

THE COURT: Do you have any teaching on that, Mr. Farina?

MR. FARINA: Your Honor, this is something that is

disputed. I think Mr. Dowd is correct that what they put in the notice is what people do now and what people -- what the courts have said should be done. It's extremely conservative because the recovery per share will be higher than that because not everyone's going to claim. So whether a third of the people claim or 75 percent of the people claim, it will increase the recovery for those that do. And there isn't great information on what that number is, and --

THE COURT: In the background of what you've done in this case, whether through consultants or through experts retained to testify, have you received any damage estimates that depend on the number of people who may claim?

MR. FARINA: No, your Honor. Our damages expert said that damages were zero because the stock dropped for all of the other reasons. No one cared about the settlement, they cared about the --

THE COURT: I understand. You need to place a value on the case. And one aspect of value is how many people show up at the end to make a claim. There will be fewer if you settle than if you try the case, but you must have had that number. How many people will show up to settle, to opt in with a claim?

MR. FARINA: Well, your Honor, it's an opt-out class.

THE COURT: How many people will make a claim?

MR. DOWD: I can tell you this, your Honor, just in my

experience, the defendants would normally tell us only 33 percent of the people are going to claim, so we should start bargaining off of that number. I would tell them, I think at least two-thirds or 75 percent of the people are going to claim. So if you get a bargain, you get a bargain off of those type of numbers.

We can put something like that in, your Honor, a sentence, but it's dangerous.

THE COURT: Mr. Farina, you must have had such a valuation?

MR. FARINA: Well, the way this is always negotiated by the plaintiffs, we don't get a reduction based on the number of people who claim, we don't get any money back.

THE COURT: But you placed a value before you started to mediate?

MR. FARINA: We placed a value on the potential exposure. Their expert said it was X --

THE COURT: And one part of the potential exposure is how many people will claim.

MR. FARINA: That's after a trial and after people have to submit evidentiary forms --

THE COURT: Correct.

MR. FARINA: -- in a contested proceeding.

THE COURT: Correct. So you're going into a contested proceeding, trial is a week off, and you want to know what's my

exposure.

MR. FARINA: Well, the actual -- the theoretical exposure was what their expert put up as the number. We thought that was grossly inflated. We think they're actually getting far more than they should have gotten.

So having said that, in terms of how many people will actually claim after a trial, your Honor, truthfully it's happened so few times, that there's very little experience, and Mr. Dowd is one of the few people who's actually gone through that second set of proceedings, but there would actually -- having gone to trial, and had plaintiffs prevailed, that actually would not have fixed the damages. There's a separate set of adjudications that are based on the class members coming forward with claims.

THE COURT: I'm aware of all this.

MR. FARINA: And we just don't know what that number would have been. And Mr. Dowd is correct that that is something that plaintiffs and defendants fight about. There's not a whole lot of empirical information.

THE COURT: When I did this work, and I retained Lexicon for it, they had numbers. They had numbers in terms of what was the likelihood of the number of people showing up and making a claim.

MR. FARINA: Well, in Household, how many people --

MR. DOWD: Well, the problem is, you never know who

doesn't claim.

MR. FARINA: Right.

MR. DOWD: I can tell your Honor, I can go get you research -- academic research from defendants' experts --

THE COURT: How about we say this: After you give this number, attorneys experienced in the field estimate that as few as X may claim and as many as Y may claim?

MR. DOWD: Yes, we can absolutely do that.

THE COURT: If you did a band like that, there would be some more information.

Look, there's two things here about this. Although 400 million sounds like a lot, we have 6-1/2 billion shares, and 400 million looks less. And if you use the number of what is the average depending on the total people who bought and held throughout the class period, you come to 14.8 cents, which it doesn't reflect your contribution to the case.

MR. DOWD: I understand what you're saying, your Honor. I appreciate it.

THE COURT: And it does not adequately give useful information to people who want to ask themselves, should I opt out, should I opt in, should I be included in this, should I get my accountant to run up a claim. I want this notice to be meaningful.

MR. DOWD: That's fine, your Honor. We can add a sentence like that. We can put "at the Court's request, the

parties say." Because the problem is, I don't want to run afoul of the Second Circuit when they say Dowd tried to --

THE COURT: I don't want to. I want to do what's meaningful.

MR. DOWD: I understand. And we can add a sentence like that, absolutely. And we can just talk to Mr. Farina about the numbers that they used from -- it's usually -- we can check with Lexicon, but it's usually Cornerstone in New York.

MR. FARINA: I think if we can do a range, we could probably agree. I don't think we would ever agree on a number, but we could probably agree on a range.

THE COURT: All right, great. I think the number is good. It's very good, I think.

MR. DOWD: Thank you.

THE COURT: And before I give preliminary approval, there's a lot of other things I've got to go over with you, but I wanted to do that first.

MR. DOWD: Yes, your Honor.

THE COURT: I know the case to some degree, not nearly as much as you do, but I think this was a nice result.

MR. DOWD: Thank you, your Honor.

THE COURT: Let's talk about the question of the accuracy of this notice, and then we'll come back and talk about the issue of whether there should be another run of opt-outs.

So I got a number of letters apropos of the old notice that I'm going to share with you. And I saw this notice, and I made some comments, and we had it marked up to some degree, and I am going to share that with you as well.

Under Rule 23, the notice must clearly and concisely state in plain, easily understood language the nature of the action. I don't think there's ever been a disclosure in the notice, the first one or this proposed one, describing what the lawsuit is about. It's a lawsuit about violation of securities laws. That doesn't tell much.

MR. DOWD: Your Honor, we understood that was one of the Court's questions. We added two paragraphs to the summary of the litigation --

THE COURT: I'm going to end up in a way that's going to allow you to redo it, but I wanted to make clear what my concerns were.

MR. DOWD: Understood.

THE COURT: So there's got to be an understanding, what is the -- summarizing the lawsuit, summarizing the defenses and the real issues so people understand it. To put it plainly, Mr. Dowd, I want people to understand your achievement, and they can't understand the achievement unless they know what this is all about, they know it in terms of what you did allege and what you were worried about in ways that people can understand. And this also reflects the vigor of the

defenses that Mr. Farina would present. It was not an open-and-shut case. It meant a lot of work and a lot of luck in terms of how a jury might dispose of this case. So that's another point.

There's also, in terms of this notice, a lot of legalese. There's several pages of definitions, and I fail to understand why they're necessary. There's a summary of all the different steps in the litigation, which, again, are rather meaningless. I don't know that people are interested in when you make motions, and what the efforts were on the motions, and how much discovery you did. You did a lot of work, and I think you can describe that in a way that is understood. Anyway, I will distribute some copies of this in a moment.

Next, let me get into the issue of the question of whether this first notice should be preclusive of any other.

Just to recite the history: The lawsuit was filed May 11, 2010. I certified the class March 29, 2012, which as things go with these kinds of cases, was early. The notices of pendency of the case began to be mailed December 5, 2014. That's two and a half years later. And during the Christmas season, and in the end of the opt-out period provided in the notice of January 20, 2015, not all people received adequate notice.

To give you a sample, we received four letters. One person wrote on the back of the notice sent to him: "This type

of legal action should be thrown out. Only the lawyers make a killing. The consumer pays for these lawsuits. This is why people want tort reform." I don't want notices like this. My name is on here, also.

"Dear Judge Hellerstein, yesterday, January 21, at about 4:00 p.m., United States Postal Service delivered a notice that stated I would be a member of a class of plaintiffs in the above action unless I submitted a request for exclusion postmarked no later than January 20." That's the day before. "It is true that had I received the notice timely, I would not have requested exclusion. Nevertheless, it's probable that others received the notice late and were deprived of the opportunity to be excluded of the class. I understand that it is in the interests of both parties to have as few exclusions as possible. However, sending late notices, whether deliberate or sloppy, is not just." One has to agree with that.

Another letter: "I'm making a complaint about service to potential class members of a notice of pendency of class action. The notice had no information concerning what the class action was about except a vague reference to violations of the federal securities laws. The notice says I can visit your courthouse if I want a copy of the pleading at my expense." We know how extensive the docket sheet is here and how difficult it is for a layperson to do that. It doesn't make sense.

He continues: "I received it in my mail 4:00 p.m. Friday, January 16. I was required to mail a request of exclusion by January 20, just one working day, with the 19th a holiday. If I hadn't been sick, I would have been in West Virginia at a friend's place during this holiday weekend and wouldn't even have seen this notice until Tuesday evening. I'm required to use my own resources, stamp an envelope -- yes, I'm that cheap -- to request exclusion or else I'll be bound by a judgment I never agreed to participate in. Why can't the plaintiffs at least provide a self-addressed and media postcard? It costs nothing if not mailed. What right have these people to suck me into their lawsuit without my explicit written permission? I mailed my request for exclusion at the same time this letter was mailed. How can I verify that I will actually be excluded? Since the plaintiffs will obviously not want to send me anything verifying receipt of my exclusion demand --" I'll leave the rest.

Another letter: "The notice was dated November 17, but received by me only on January 14. The notice contains no real information concerning the lawsuit other than the statement that it is an action alleging violations of certain federal securities laws. While I have found the complaint online, there has been little else available. For example, I did not find the defendants' answer. To ask a class member to opt in or out without providing even the de minimis information

is both unreasonable and unfair. As a presiding judge, I request that this be remedied before any decision is required of a class member."

And then there's a complaint about the consequences of opting out requirements, which the writer says is illogical and unfair. He wants an order that class members be given adequate informational disclosures and not requiring class members to make any opt-in or opt-out decision till both the case reach the reasonable stage upon which an informed decision can be made and meaningful detailed disclosure is provided.

So this all should be shared.

I have no way to know how generalized this complaint is, but the specifics ring a bell. And I thought to myself that I have to look more carefully at the notice that is suggested than otherwise would be the case.

I really don't know what to do. By saying we will have another opt-out period, we, in effect, say that something that was done by the attorneys and ordered by the Court was an inadequate piece of work, but I think, looking back, looking at the time it took to get the notice out, the complaints about when people actually received knowledge of what was going on and the lack of adequate information in the notice, that in retrospect, we all did a bad job. And when you do a bad job, you've got to rectify it.

So I think I persuaded myself that there should be

another notice, but before I put it to any kind of ruling, I'd like to get Mr. Dowd's and Mr. Farina's comments.

Mr. Dowd? Either one.

MR. DOWD: Your Honor, I certainly understand. And I know that with the notice, when I read the summary of the litigation, I thought we should have said more about what the case is about. I mean, I understand I've read some of those letters, too. And I think part of the problem is that when it's a joint document, and you're two months before trial or even a year before trial, it's pretty tough for the sides to agree on how you should describe the case. And I think --

THE COURT: That's my job, isn't it?

MR. DOWD: But it's a factor, your Honor.

THE COURT: And I was told that one of the reasons it took so long is because there were too many disagreements.

Look, I took this job when I retired, after I retired from my law firm, and I am here to make rulings. That's my job. And for the most part, I'm able to do that. So if something is ordered, and it's trouble for the counsel to get together on what has to be done, come to the Court. That's our job. I'd be available for you, I will available for you. I wasn't available with the summary judgments, but that was a bit purposeful.

Right now, we need to get a good notice out.

MR. DOWD: It's completely discretionary. If you want

to do it, your Honor, you can do it. And I know that Mr. Farina has some concerns. I think they've already agreed to accept some of the late notices that have come in. To date, there's about 200 of them that are late.

THE COURT: That's not a good idea, either.

MR. DOWD: Right, requests for exclusion.

But here's my concern about it, and I will just tell the Court: There's the IndyMac case in the Second Circuit, and IndyMac says that the American pipe tolling of a class action, right, American Pipe says you toll the statute of limitations while a class action case is pending, so that class members can opt out later or file their own case if something goes wrong in the class action or after they get notice. And IndyMac says, in the Second Circuit two years ago, you know what, American Pipe only applies to the statute of limitations, it does not apply to the statute of repose. And IndyMac is a Section 11 case under the 1933 act, your Honor, but --

THE COURT: One-year statute, right?

MR. DOWD: It's one and three, so statute of repose is three years.

And they say, that's it, statute of repose, three years runs, you're done if you didn't bring your own case, and the only protection you have is class action.

So there have been plaintiffs' attorneys -- and I am sure there will be others -- who will say, well, Section 11

isn't Section 10(b), it has some language that says in no event in the statute of repose, and they will say, well, there was no standing for some of the securities in the IndyMac case. I think those are going to be very, very difficult arguments for a plaintiff's attorney to make.

And I think last year, Judge Sweet, in this courthouse, issued an opinion in a Bear Stearns litigation, it's 995 F. Supp. 2d 291, and I think it was February of last year, and Judge Sweet says there's absolutely no difference between the statute of repose under Section 11 and 10(b). I mean, there are different terms, it's five years as opposed to three years, but he says there's no distinction drawn in IndyMac that would allow you to make that argument. And the class members in the Bear Stearns case had standing from the class action from the get-go in the class action case.

So if these people opt out right now, anyone who's opted out requests --

THE COURT: They have no remedy?

MR. DOWD: -- exclusion, they probably have no remedy. I'm sure there will be guys smarter than me --

THE COURT: The only out that I see is the delay in sending out the notice.

MR. DOWD: But I don't think that helps them. The five years ran in 2014. You know, it's a statute of repose. It is what it is. They should have brought their own claim.

That's what the Second Circuit would say, I believe, and certainly what Judge Sweet has already said.

And that's my only concern, your Honor, is that they could opt out and be DOA. I think in the Second Circuit --

THE COURT: Well, they haven't filed for lawsuits up to now.

MR. DOWD: Right.

THE COURT: So I'm not sure whether that's the most cogent criteria.

MR. DOWD: It's been six years.

THE COURT: What's your observations, Mr. Farina?

MR. FARINA: Well, your Honor, I agree with Mr. Dowd on the IndyMac point. There's no rational reason why anyone would opt out. Mr. Dowd also pointed out that Robbins Geller was the only firm that filed a lawsuit, and it took them 16 months to file.

So it wouldn't be rational for anyone to opt out. From our perspective, though, preserving the integrity of the class is important, and it was a negotiated term. We have the right to blow up the settlement, to terminate the settlement, and go back to your Honor to try this case in the event that a certain number of people opt out of the class. And we have that right, and we'll exercise it if we have to.

So it's important to us that we would be buying complete peace here, which means we can't have a bunch of

opt-outs with follow-on litigation, and that is a pretty typical provision to have what's called a blowup provision, and we have one. So it is important to us, and we bargained for this, that we settle the class with the class maintaining its integrity. And there's abundant case law in the Second Circuit and elsewhere that says that that is in the interests of the parties, it's in the interests of the class, it's in the interests of the courts.

THE COURT: So should there or should there not be another class notice?

MR. FARINA: Your Honor, there should be a notice to tell people about the settlement, and that will allow people to object if they have a problem with the settlement, and that's what the cases say, but there should not be another opt-out.

We're processing opt-outs right now. They just had an opportunity to opt out. People stayed in the class, they would have been bound if the plaintiffs had lost. They would have been bound if the plaintiffs had recovered less than the plaintiffs sought. They are bound by the settlement. That's what all the cases say.

THE COURT: So if we have another opt-out provision, we would be saying that those who opted out have a chance to reconsider and opt in?

MR. FARINA: Well, we've already said that if people want to make claims, having opted out, they've changed their

mind in light of the fact that there's now a recovery that they can share in, we've agreed, and it's in the notice, that they can opt back in by submitting a claim form. But to allow another round of opt-outs, which could fragment the class and could lead to a termination of the settlement, I don't think is in anyone's interests, including the class's.

THE COURT: If there's enough people that don't want the settlement, maybe there shouldn't be a settlement.

MR. FARINA: Then they can object, and that's what the courts said. But if you opt out, you don't have a claim, your claim is time-barred.

THE COURT: An objection is a totally different set of considerations.

MR. FARINA: Absolutely.

THE COURT: And this is, in effect, an example of democracy. Shareholders can decide, look, I don't want to be bothered by this settlement, and I'm opting out. Whatever I do, I do, whatever I don't do, I don't do, but I don't want to be bound. We have not given that right, adequate protection.

MR. FARINA: They had that right, your Honor, and --

THE COURT: They did not have it because the notice was not mailed when it should have been mailed, the opt-out period was too short, and the description of what was involved was inadequate. So I believe.

I'm going to rule that this new notice will have to

cover this point. I have not thought it through enough, and I think you folks need to. If the clients want to blow up the settlement, so be it, I'll try the case pretty quickly. This will not be subject to long delays. If they want to try the case, we will try the case.

MR. DOWD: Your Honor, if you want us to put in the second opt-out language, is what I'm hearing you say, can we at least also add a sentence telling people that they better consult with a lawyer before they do that because of that IndyMac? I'm just worried about putting people in peril.

THE COURT: I think it's all got to be discussed.

MR. DOWD: Right. Okay.

THE COURT: It's all got to be discussed. Those who opt out thinking that they will have their own lawsuit should consider the case of so-and-so with their lawyers --

MR. DOWD: Okay, fair enough.

THE COURT: -- and other considerations. So that's my ruling.

I'm distributing copies of the letters that I read out and copies of our markup of the proposed notice. There's not adequate time, really, for you to consider this. I think perhaps maybe we should meet next week, and we can have a more definite set of proposals, hopefully jointly, because I think there's a joint interest in doing this the right way.

Does that make sense?

MR. FARINA: That is fine, your Honor.

MR. DOWD: Yes, your Honor.

THE COURT: How about 2:30 on March 5? Does that give you enough time?

MR. DOWD: Yes, your Honor.

THE COURT: Mr. Farina?

MR. FARINA: I have an argument in Delaware the following day, but that should be fine. I'm assuming I can get out of here and take a train to Delaware. So that's fine.

THE COURT: I think so. Okay, March 5 at 2:30.

In the notice, Mr. Dowd, can you quantify in some way how much work you put in the case?

MR. DOWD: Yes, your Honor.

THE COURT: You have a percentage there in terms of an approximate amount of time?

MR. DOWD: Yes, your Honor. I'm going to have to do an approximation. We tried to explain this to chambers. Our expenses are going to be lower than 8.2, ultimately, because Mr. Rosen and I are going through them and cutting stuff out. And then our time is -- I just cut out a ton of time in the last two or three weeks where I reduced people's hours day by day, and they're still inputting that, but I can put an estimate in. A lodestar estimate, is that what you mean?

THE COURT: Yes.

MR. DOWD: I can do that.

THE COURT: That's fine.

Go back to the notice. On page 16 through 18 -- 16 and 17, you have closing prices on every trade date in the period. Why do you need that?

MR. DOWD: Your Honor, that's actually -- it's not every day in the period. That's that 90-day look-back that the PSLRA requires, so that's why that's in there. I don't think the 90-day look-back affects any of the per-share distributions in this case at all.

THE COURT: If you're going to do a range, I think it would be more useful. Explain, of course, how you get to a dollar 26.

MR. DOWD: Right.

Your Honor, I may have to look and see if you have to put those numbers in there under the --

THE COURT: If you have to, you'll do it.

There's a number of activities that are reserved for the Court. Can the company that you've retained -- what is their name?

MR. DOWD: Gilardi?

THE COURT: Yes.

-- make those determinations subject to appeal to me?

MR. DOWD: What determinations, your Honor?

THE COURT: I'm looking at page --

MR. DOWD: You mean ultimately when they process --

THE COURT: Page 18 and on, yes. "The Court has reserved jurisdiction to allow, disallow, or adjust a claim of any class member on equitable grounds."

There's two ways of doing this because Gilardi is going to make the initial determination, and then sometimes there's -- someone is appointed to handle appeals, and that decision can be final or you can have appeal to the Court. There usually aren't many, but sometimes there are, but provided, I think, that they make the first determination.

Okay. Thanks very much.

MR. FARINA: Thank you, your Honor.

MR. DOWD: Thank you, your Honor. Appreciate it.

THE COURT: Off the record.

(Discussion off the record)

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