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15-3011 (L)
In Re: Tremont Securities Law, State Law and Insurance Litigation

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand seventeen.

PRESENT: DENNIS JACOBS, CHRISTOPHER F. DRONEY, Circuit Judges, TIMOTHY C. STANCEU, Chief Judge, U.S. Court of Int'l Trade.*

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* Judge Timothy C. Stanceu, Chief Judge of the United States Court of International Trade, sitting by designation.

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Appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED IN PART AND VACATED AND REMANDED IN PART.**

Appellants, investors in various hedge funds managed by Tremont Group Holdings, Inc. and its affiliates, appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, *J.*), approving a post-settlement plan to allocate the liquidated assets of certain funds (the "Plan of Allocation," or "POA") and awarding attorneys' fees. For the reasons stated below, we affirm the district court's approval of the POA, but vacate and remand for a reduction of the fee award consistent with this order.

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Tremont Group Holdings and its affiliates managed two groups of hedge funds. The first, known as the "Rye Funds," invested all of their assets either with Bernard L. Madoff Investment Securities ("BLMIS") or, in the case of Rye Select Broad Market XL Fund, L.P. ("Rye XL"), in synthetic derivatives intended to mirror the returns of BLMIS. The Rye Funds include Rye Select Broad Market Fund, L.P. ("Rye Onshore"), Rye Select Broad Market Portfolio Limited ("Rye Offshore"), Rye Select Broad Market Insurance Fund, L.P. ("Rye Insurance"), Rye Select Broad Market Prime Fund, L.P. ("Rye Prime"), and Rye XL. Three of these (Rye

Onshore, Rye Offshore, and Rye Insurance) invested directly with BLMIS and were "net losers," meaning they invested more money with BLMIS than they withdrew.

The second group of hedge funds, the "Tremont Funds," were "funds of funds," investing a portion of their assets in the Rye Funds (and therefore indirectly with BLMIS) and the rest in investments unrelated to BLMIS. Appellants largely invested in Tremont Funds.

When BLMIS collapsed in December 2008, investors in the Rye and Tremont Funds filed several putative class actions and derivative complaints against various entities and individuals responsible for the investment of fund assets with BLMIS. These actions were consolidated in 2009, with counsel (referred to herein as "Lead Counsel") appointed to represent all settling investors.

The parties to these consolidated actions settled in February 2011. That "Investor Settlement" created two separate escrow accounts: (1) the Net Settlement Fund ("NSF"), containing $100 million paid by the defendants in exchange for the release of all claims against them[1]; and (2) the Fund Distribution Account ("FDA"), containing all the assets that remained in the liquidated Rye Funds after claims by and against the trustee of the BLMIS bankruptcy estate (the "Trustee")

[1] The NSF has already been distributed and is not at issue in this appeal.

were resolved in separate litigation (the "Trustee Litigation").

In the Trustee Litigation, the three net-loser Rye Funds filed approximately $2.2 billion in claims against the Trustee under the Securities Investor Protection Act ("SIPA"). The Trustee, in turn, sought to claw back approximately $2.1 billion in avoidable transfers made to the Rye and Tremont Funds. In July 2011, a settlement (the "Trustee Settlement") was reached: the Rye and Tremont Funds collectively paid the Trustee $1 billion in cash; in exchange, the Trustee withdrew its avoidance claims against each of them and granted the net-loser Rye Funds roughly $2.2 billion in claims plus a claim for the return of eighty percent ($800 million) of the $1 billion payment pursuant to section 502(h) of the Bankruptcy Code. Thus, after the funds paid the Trustee $1 billion to settle the claw-back claims against them,[2] the net-loser Rye Funds received claims totaling roughly $3 billion.

The FDA is composed almost entirely of those $3 billion in claims. It also includes $32.4 million in cash remaining in Rye XL (a Rye Fund that did not have to contribute to the $1 billion Trustee Settlement). It is

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[2] The $1 billion payment by the funds to the Trustee was collected as follows: the three net-loser Rye Funds contributed a combined $212 million of their own money plus $650 million they borrowed from Fortress Investment Group, LLC ("Fortress"); the Tremont Funds and one of the net-winner Rye Funds (Rye Prime) contributed the remaining $138 million.

expected that a total of around $1.45 billion will eventually flow into the FDA from the Trustee.[3]

The allocation of the FDA was not part of the Investor Settlement. Nevertheless, the parties agreed that a "plan of allocation [would] be approved by the [District] Court," J.A. 285, and the court explicitly retained jurisdiction over the FDA's allocation.

In its 2011 final judgment approving the Investor Settlement, the district court tasked Lead Counsel with responsibility for proposing a plan of allocation. In April 2014, Lead Counsel solicited proposed plans from interested parties and notified them of mediation to resolve the allocation issue. After more than a year of mediation among numerous parties (including multiple appellants), a consensus plan of allocation (the "POA") emerged.

Under the POA – which is supported by investors holding approximately ninety-seven percent of the net equity in the funds – FDA assets are distributed as follows.

First, the $32.4 million that Rye XL contributed to the FDA is returned to Rye XL investors.

Next, the funds are awarded equal priority to the balance of the FDA using a simple formula: (1) each net-loser Rye Fund has a claim (referred to as a "SIPC

[3] As of September 2015, approximately $650 million had already poured into the FDA. Another $650 million was recovered from the Trustee and never reached the FDA because it was used to repay the Fortress loan.

Claim") equal to its portion of the $3 billion Trustee Settlement; (2) each Tremont and net-winner Rye Fund that contributed cash to the Trustee Settlement has a "Virtual SIPC Claim" equal to eighty percent of its Trustee Settlement contribution.

Finally, once the money is allocated to the appropriate funds using the formula described above, each fund's investors will receive a pro rata share of the fund's allocation according to the investor's net equity (*i.e.*, amount lost) in that fund. In other words, only investors who lost money in a given fund due to that fund's investment in BLMIS are entitled to recover anything from the fund. Thus, net-loser investors in any fund will recover a share of that fund's SIPC or Virtual SIPC Claim; and net-loser investors in any net-loser fund will recover a share of that fund's cross-investment in each Rye Fund in which it was invested.

In September 2015, after a three-hour hearing regarding allocation of the FDA, the district court issued a written opinion approving the POA, rejecting an alternative plan proposed by appellant Michael S. Martin, granting Lead Counsel's motion for attorneys' fees, and overruling all objections. Appellants appeal the court's approval of the POA and award of attorneys' fees.

We review a district court's allocation of settlement funds and award of attorneys' fees for abuse of discretion. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir. 1987) (settlement funds); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (attorneys' fees).

1. There are unusual features to this appeal. We are reviewing an allocation of assets that were obtained in unrelated litigation and that are being held in an account created for the purpose of allocation by a settlement that is not being challenged. Further complicating matters, those assets represent the liquidated remains of a group of hedge funds (the Rye Funds) that imploded after Madoff's Ponzi scheme was revealed. Unlike a typical settlement fund distribution plan, the POA is separate from the underlying settlement, involves assets that are already earmarked for the potential recipients (the investors in the liquidated hedge funds), and is the product of mediation between those recipients. These circumstances, however, do not disturb the traditional deference we owe to the district court's equitable allocation of settlement-related funds.[4]

The district court did not abuse its discretion in approving the POA. The POA is fair and reasonable, as was the mediation process that produced it. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (per curiam) ("As a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the

[4] Nor does this peculiar procedural posture deprive the district court of jurisdiction over the FDA's allocation. Although the Investor Settlement did not include a plan of allocation, it authorized the court to adopt such a plan, and the court explicitly retained jurisdiction over "all matters relating to" the Investor Litigation, including allocation of the FDA. J.A. 642.

proposed apportionment is fair and reasonable in light of that information.").

First, the POA reflects the net-loser Rye Funds' superior claim to the proceeds of the Trustee Settlement. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 220 (5th Cir. 1981) ("It is self-evident that if the settlement's adequacy rests on the value of one set of claims, distribution of the settlement should be weighed heavily in favor of plaintiffs whose claims comprise that set."). That settlement granted roughly $3 billion in claims exclusively to these three funds because only they were net-loser BLMIS customers. *See In re Bernard L. Madoff Inv. Secs. LLC*, 654 F.3d 229, 238 (2d Cir. 2011) (limiting SIPA recovery to net-loser BLMIS customers). To be sure, the Tremont and net-winner Rye Funds contributed $138 million to the Trustee Settlement, and that contribution helped enable the net-loser Rye Funds to receive their $800 million section 502(h) claim. But the Tremont and net-winner Rye Funds' $138 million contribution was not selfless: the payment settled the clawback claims against them. And, in any event, that contribution is recognized by the allowance of Virtual SIPC Claims, which are calculated on the same eighty-percent basis as the net-loser Rye Funds' section 502(h) claim.

Second, the POA reflects the net-loser Rye Funds' greater victimization by BLMIS. Unlike the other funds, they invested their entire portfolio with BLMIS and incurred enormous losses.

Third, the Tremont Funds were exposed to Madoff's fraud only through their cross-investments in Rye Funds. Under the POA, Tremont Funds, like all Rye Fund investors, are compensated for their Madoff losses.

Fourth, the POA adopts the net equity principle of allocation that this Court has previously endorsed with respect to Madoff's Ponzi scheme. This principle holds that, because net winners were given money stolen from net losers, only net losers have an equitable right to recovery. *See id*. at 235, 238.

Fifth, the POA respects the separate legal status of the funds. Rather than pool all of the Trustee Settlement proceeds into one pot for distribution directly to the individual investors – as the rejected plan proposed by Martin would do – the POA first allocates the proceeds according to the claims held by the funds. This is appropriate given that the FDA arises from the derivative claims brought on behalf of the funds in the Investor Litigation.

Finally, the POA provides for the priority distribution of $32.4 million to Rye XL's investors in recognition of Rye XL's direct cash contribution to the FDA in that amount.

Thus, in sum, the POA is based on fair and equitable principles. It is the product of protracted, contentious mediation in which numerous Rye and Tremont Fund investors with diverse interests participated through counsel.[5] Attorneys for two of the appellants (Martin and Philadelphia Financial Life Assurance Company) took part in the mediation and advocated on their clients' behalf. The retired federal judge who served as the mediator attested to the inclusive and hard-fought nature of the negotiations, the numerous compromises made, the opportunity for all parties to advance their positions, and the fairness of the POA. And the district court provided ample opportunity for appellants and other interested parties to voice their concerns and submit competing proposals before it decided to allocate the FDA according to the POA.

Given these facts, and the fair terms of the POA (including significant concessions to Tremont and net-winner Rye Fund investors in the form of Virtual SIPC Claims), the district court did not abuse its discretion in concluding that appellants' interests were adequately represented and protected.[6] *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011) ("The Supreme Court's decision

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[5] The Tremont Funds' interests were represented at mediation not only by the several Tremont Fund investors who attended, but also by: (1) Rye Fund investors, who, like the Tremont Funds, were exposed to Madoff's fraud through their investments in the Rye Funds; and (2) investors in Rye Prime, which, like the Tremont Funds, contributed cash to the Trustee Settlement without receiving a claim in return.

[6] Accordingly, the district court's denial of Martin's 2015 motion to certify a subclass of Tremont Fund investors pursuant to Federal Rule of Civil Procedure 23 was not an abuse of discretion. Moreover, because the POA was a mechanism to resolve the derivative (rather than class action) claims in this litigation, Rule 23 is arguably inapplicable.

in *Amchem* . . . allows courts, in assessing the adequacy of representation, to examine a settlement's substance for evidence of prejudice to the interests of a subset of plaintiffs.").

2. The POA allows a recovery only to investors who suffered a net loss in the Madoff Ponzi scheme. Appellants argue that this conflicts with the Investor Settlement, which they claim entitles every investor to recover. Appellants' argument rests on ¶ 1.18 of the Investor Settlement, which defines "Fund Distribution Claimant" as "any limited partner or shareholder in any of the Settling Funds . . . , *each of which shall be entitled to receive a disbursement* from the [FDA]." J.A. 263-64 (emphasis added).

Paragraph 1.18 of the Investor Settlement does not impugn the POA. The Investor Settlement explicitly stated that allocation of the FDA would be decided separately. It is implausible that the parties intended to drastically limit the terms of that allocation through a vague reference to entitlement buried in the definitional section of the settlement.

Viewed in context, ¶ 1.18 is more naturally read as a statement of eligibility, rather than a guarantee of recovery. *See Huertas v. East River Hous. Corp.*, 992 F.2d 1263, 1267 (2d Cir. 1993) ("[A] court may look to certain aids, such as the circumstances surrounding a settlement agreement's formation, when construing it for enforcement purposes.").

3. Philadelphia Financial contends that the POA should be rejected because it conflicts with the funds' governing documents. Many of the funds are limited partnerships whose partnership agreements dictate the allocation of assets, including upon liquidation. The partnership agreements generally require that assets of the fund be distributed proportionally according to the value of each investor's capital account, whereas the POA distributes FDA assets based on an investor's net equity in a given fund.

However, the Investor Settlement rendered the funds' governing documents irrelevant for purposes of allocation. When the funds and their investors signed the Investor Settlement, all assets flowing into the FDA became subject to equitable distribution by the district court. *See* J.A. 285, ¶ 2.23 (explaining that the FDA will be disbursed to the funds' limited partners and shareholders pursuant to a plan of allocation approved by the district court). In other words, because the POA determines how the FDA is distributed to investors, the funds' partnership agreements do not control. And because the partnership agreements would not allocate assets more fairly than the POA (and would risk giving effect to Madoff's fictitious account statements), the district court did not abuse its discretion in ignoring them.

4. Martin claims that the mediation was tainted by secret, collusive side-deals, and that the district court erred in denying his motion for disclosure of all agreements reached during the mediation process. Martin relies on Federal Rule of Civil Procedure ("Rule") 23(e)(3), which requires that parties seeking approval of a proposed class action settlement "file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3).

As an initial matter, Rule 23, which governs class actions, is arguably not controlling here. The FDA, unlike the NSF, resolves the non-class derivative claims in this litigation.

In any event, all mediation attendees signed a confidentiality agreement which covered "all statements of the parties, counsel, and mediators, as well as the materials generated solely for purposes of the mediation." J.A. 1691. Attendees also orally agreed "that the entire mediation process and all communications, negotiations and agreements pursuant thereto were covered with a complete cloak of confidentiality and must remain confidential, including in particular, being off limits from discovery, court papers, arguments or other Court proceedings, absent further agreement by the parties." J.A. 2178.

Rule 23 does not require disclosure of all agreements made during confidential mediation. As we have observed:

> A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

Savage & Assocs. P.C. v. K&L Gates LLP (In re Teligent, Inc.), 640 F.3d 53, 58 (2d Cir. 2011) (citations omitted).

The district court found that there was no reason to believe that any agreements reached during mediation were collusive, and that the need for confidentiality outweighed the need for disclosure. Given the importance of encouraging mediation in this tangled matter, the mediator's testimony regarding the fairness of the negotiations and the evident fairness of the POA, the district court did not err in denying Martin's motion to revoke confidentiality. *See id.* at 59-60 ("Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether.").

5. Appellants (with the exception of Martin) argue that the district court erred in awarding Lead Counsel a fee equal to three percent of the FDA,[7] capped at two-and-a-half times the "lodestar" of counsel's hourly rate multiplied by hours worked.[8] If, as the parties anticipate, the Trustee pays approximately $1.45 billion into the FDA, this cap will likely be triggered and Lead Counsel will receive in excess of $40 million.

"We review a district court's award of attorney's fees for abuse of discretion, which occurs when (1) the

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[7] The three percent is not applied against Rye XL's $32.4 million priority distribution.

[8] The district court also awarded Lead Counsel nearly $1 million in expenses.

court's decision rests on an error of law (such as application of the wrong legal principle) or clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 416 (2d Cir. 2010) (internal citation, quotation marks, and brackets omitted).

In absolute terms, an award of three percent of a common fund is not excessive, as numerous opinions confirm.[9] However, the calculation is guided by several (non-exclusive) factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50 (alterations and quotation marks omitted). Further, fee awards should be approached "with an eye to moderation," and "should be assessed based on scrutiny of the unique

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[9] *See, e.g.*, *In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d 129, 134 (2d Cir. 2008) (affirming fee award equal to 3% of $438 million fund and acknowledging that fee was "toward the lower end of reasonable fee awards"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (affirming fee award equal to 6.5% of $3.38 billion common fund); *Goldberger*, 209 F.3d at 52 (observing that "empirical analyses demonstrate that in cases like this one, with recoveries of between $50 and $75 million, courts have traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%"); *Carlson v. Xerox Corp.*, 596 F.Supp.2d 400, 414 (D. Conn. 2009), *aff'd*, 355 Fed.Appx. 523 (2d Cir. 2009) (summary order) (awarding fee equal to 16% of $750 million common fund).

circumstances of each case, and a jealous regard to the rights of those who are interested in the fund." *Id*. at 53 (internal quotation marks omitted).

The district court concluded that the *Goldberger* factors supported Lead Counsel's requested fee, stating in relevant part:

> In its work on the FDA, [Lead] Counsel has unquestionably put forth great labor. Furthermore, the litigation has been highly complex, involving a great deal of unsettled law, many parties, and a voluminous case history. [Lead] Counsel has displayed great skill in managing these challenges. Objectors uncharitably characterize [Lead] Counsel as mere "administrators" of the FDA. In fact, [Lead] Counsel's driving role in structuring the FDA as part of the [Investor] Settlement, and thereafter working to mediate conflicts and effect a fair and expedient distribution of the funds, has gone well beyond rote administration. In short, the allocation and distribution of the FDA is a complex matter of great importance to many parties, and [Lead] Counsel has performed admirably. . . . [T]his litigation involved unique practical and legal challenges. The outcome of [Lead] Counsel's labor was never certain.

In re Tremont Sec. Law, State Law & Ins. Litig., No. 08-CV-11117, 2015 WL 5333494, at *10, 2015 U.S. Dist. LEXIS 122204 (S.D.N.Y. Sept. 14, 2015).

We do not question the district court's characterization of Lead Counsel's performance or the complexity or importance of this matter. However, we think the court gave insufficient consideration to the lack of contingency risk, and that factor is generally the most important in determining whether to award a lodestar multiplier. *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as perhaps the foremost factor to be considered in determining whether to award an enhancement." (internal quotation marks omitted)).

The district court identified two risks Lead Counsel supposedly faced. Neither supports Lead Counsel's requested 2.5 lodestar multiplier.

The first identified risk was "in bringing the derivative claims that gave rise to the inclusion of the FDA as part of the [Investor] Settlement." *In re Tremont*, 2015 WL 5333494, at *9, 2015 U.S. Dist. LEXIS 122204. This is not a proper consideration in relation to this particular fee award. First, Lead Counsel was already compensated for the risk in bringing the derivative (*i.e.*, state law) claims in the fee award for the August 2011 Investor Settlement. *See* J.A. 617 (stating that the 2011 fee award compensated Lead Counsel for "their respective contributions in the prosecution of the State Law Actions and the Securities Actions"); J.A. 619 (finding that had Lead Counsel "not achieved the Settlement, a significant risk would remain that State Law and Securities Plaintiffs and the State Law and Securities Subclasses may have recovered less or nothing").

Second, Lead Counsel is requesting fees for work completed only *after* the district court approved the Investor Settlement in August 2011.[10] It does not do to multiply the fee award here – which is based on hours worked after the Investor Settlement – in order to compensate a risk that dissipated when the court approved that settlement.

Third, the hundreds of millions of dollars that have been flowing into the FDA were essentially guaranteed by the July 2011 settlement in the Trustee Litigation, a separate case led by separate counsel (who already took their cut) involving money obtained by the Trustee (who is also being compensated). There is no reason to award Lead Counsel a lodestar multiple based on the size of a recovery they did not secure.[11] Nor was there ever a real possibility that the FDA would be so insignificant that Lead Counsel might be deprived of rich compensation for their work relating to it.

The second risk identified by the district court was the "risk[] in defending the Plan of Allocation against objectors." *In re Tremont*, 2015 WL 5333494, at *9, 2015 U.S. Dist. LEXIS 122204. However, Lead Counsel's fee

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[10] More specifically, Lead Counsel is seeking fees for work completed from May 2011 through August 2015. The district court approved the Investor Settlement and the initial fee award in August 2011. However, Lead Counsel submitted the initial fee request in May 2011, which explains why they are now seeking fees from May 2011 to August 2011 in addition to fees for work involving the FDA POA after approval of the settlement.

[11] Although Lead Counsel was responsible for securing the $100 million NSF, they were paid a thirty-percent fee for that.

award is not tied to any particular plan of allocation; rather, it is dependent on the size of the FDA (which is a product of the Trustee's efforts) and the lodestar – which only increased as the number of objections to the POA (and thus Lead Counsel's hours spent defending it) grew. Accordingly, there appears to have been little (if any) risk in defending the POA against objectors, except for the remote possibility that the district court would refuse to approve *any* plan of allocation submitted by Lead Counsel.

Given the lack of contingency risk, a lodestar multiplier cap of 2.5 "cannot be located within the range of permissible decisions." *McDaniel*, 595 F.3d at 416; *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), *abrogated on unrelated grounds by Goldberger*, 209 F.3d at 49-50 ("The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee."). A lodestar multiplier of 2.5 would be considered high for a standard common fund case in this Circuit.[12] At the same time, virtually all the cases that feature a multiplier are

[12] *See, e.g.*, *In re Citigroup Inc. Secs. Litig.*, 965 F.Supp.2d 369, 401 (S.D.N.Y. 2013) (citing data regarding lodestar multipliers in securities class action settlements and observing that a multiplier of 2.8 is "high"); *In re Merrill Lynch & Co. Research Reports Secs. Litig.*, No. 02 MD 1484, 2007 WL 313474, at *23, 2007 U.S. Dist. LEXIS 9450 (S.D.N.Y. Feb. 1, 2007) (ruling that "an award that equates to a multiplier of 2.43 of the lodestar is excessive"); *In re Twinlab Corp. Secs. Litig.*, 187 F.Supp.2d 80, 87 (E.D.N.Y. 2002) (describing counsel's requested multiplier of 3.58 as "inconsistent with post-*Goldberger* courts which have generally refused multipliers as high as 2.03").

those in which, unlike here, the fund was collected by the efforts of counsel with an inherent risk that the litigation would yield less or none.

We therefore remand so that the district court can revise the cap to reflect counsel's limited risk.[13] The specific recalculation, of course, remains subject to the district court's sound discretion. Although a cap of 2.5 times the lodestar is excessive, one equal to the lodestar is not necessarily required.

Accordingly, and finding no merit in appellants' other arguments, we hereby **AFFIRM** the judgment of the

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[13] Appellants George Turner, Bindler Living Trust, Madelyn Haines, John Johnson, William J. Millard Trust, Stella Ruggiano Trust, West Trust, and Paul Zamrowski challenge the lodestar multiplier cap on the additional grounds that the district court relied on time summaries (rather than contemporaneous time records) and Lead Counsel's hourly rates. With respect to time records, although they are ordinarily required, *see Scott v. City of New York*, 626 F.3d 130, 133-34 (2d Cir. 2010) (per curiam), the district court may rely on summaries that are based on voluminous contemporaneous records. *See Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1160 (2d Cir. 1994) ("A review of the submissions made by [counsel] shows that they made contemporaneous entries as the work was completed, and that their billing [summary] was based on these contemporaneous records. We believe this falls sufficiently within the meaning of 'contemporaneous'. . . ."). However, the sparse summaries provided by Lead Counsel are of doubtful adequacy. Therefore, on remand, the district court should require the submission of more detailed summaries that, at the very least, break down the hours worked by year and task. With respect to the district court's use of counsel's hourly rates to calculate the lodestar, we find no abuse of discretion. Given the skill and experience required in this complex securities litigation, we cannot conclude that those rates were unreasonable.

district court with respect to the plan of allocation and **VACATE AND REMAND** with respect to the fee award.

United States District Court,
S.D. New York.

In re TREMONT SECURITIES LAW, STATE LAW AND INSURANCE LITIGATION.

No. 08-cv-11117.
Signed Sept. 14, 2015.

OPINION

THOMAS P. GRIESA, District Judge.

Before the court is a motion to approve the distribution of certain money recovered for the benefit of a class of Madoff investors (the "Settling Class"). Counsel for the Settling Class ("Class Counsel") moves to distribute the money according to a particular Plan of Allocation.

Several parties have objected to Class Counsel's Plan of Allocation. One objector, investor George S. Martin, has also moved the court to approve an alternative Plan of Allocation, and to certify subclasses and order disclosure of certain materials.

Class Counsel's motion to approve its Plan of Allocation is approved. All objections are overruled, and the motion of objector Martin is denied.

Case History

The court assumes familiarity with the extensive record in this case. Nevertheless, a recapitulation is in order.

Defendants in this case are the Tremont funds and related entities. Plaintiffs are investors, or their successors in interest, who suffered because defendants invested their funds with Bernard Madoff.

On March 26, 2009, the court entered an order creating three groups of consolidated actions against defendants: the Securities Actions, the State Law Actions, and the Insurance Actions.

On February 25, 2011, following mediation by retired District Judge Layn R. Phillips, plaintiffs and defendants signed a Stipulation of Partial Settlement. (*See* Dkt. No. 392-1, 2011 Stipulation.) On August 19, 2011, after two fairness hearings, this court signed an order and final judgment dismissing plaintiffs' claims pursuant to the settlement. That settlement (the "Class Settlement") has now survived appeal. *See In re Tremont Sec. Law, State Law, & Ins. Litig.,* No. 11-4030 (2d Cir. Apr. 3, 2014), *cert. denied,* 135 S.Ct. 270 (2014).

Pursuant to the Class Settlement, two vehicles were created to facilitate the compensation of plaintiffs. The first vehicle, the Net Settlement Fund ("NSF"), housed a class action settlement recovery of $100 million, minus certain recoveries and expenses. After a thorough hearing, the court approved a Plan of Allocation for the NSF in an order and accompanying opinion dated June 5, 2015. (Dkt. No. 1072, June 5, 2015 Opinion.) The order permitted the distribution of the NSF to members of the Settling Class. The distribution of the NSF commenced in July 2015.

The second vehicle created pursuant to the Class Settlement, known as the Fund Distribution Account ("FDA"), is now at issue. The FDA consists principally of assets paid by the SIPA Trustee for the liquidation of Madoff's firm (the "Madoff Trustee") to particular funds controlled by the Tremont defendants, called the Rye funds. These assets come to the Rye funds in connection with a separate settlement (the "Trustee Settlement") approved in 2011 by the U.S. Bankruptcy Court for the Southern District of New York. *See Picard v. Tremont Grp. Holdings, Inc.,* Adv. Pro. No. 10-05310 (Bankr. S.D.N.Y. Sept. 22, 2011). The Trustee Settlement permitted three Rye funds to make valuable claims ("SIPA claims")[1] against the Madoff estate, and the FDA provides a mechanism for eligible claimants to receive a portion of the money obtained through those claims. Eligible claimants to the FDA are not identical to members of the Settling Class, although the groups overlap substantially.

The current size of the net recovery to all FDA claimants is approximately $650 million. (Class Counsel Joint Decl. ¶ 47.) However, this amount will grow over time as more money is recovered by the Madoff Trustee and paid against customer claims. The expectations of the market for Madoff customer claims suggest that the ultimate recovery to FDA claimants will grow to approximately $1.446 billion.

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[1] *See* Securities Investor Protection Act (SIPA), 15 U.S.C. § 78aaa-*lll*.

Class Counsel now asks the court to approve a Plan of Allocation for the FDA. Class Counsel's Plan of Allocation distinguishes between investors in different funds so that investors in some funds will receive a substantial recovery from the FDA while investors in other funds will receive little or nothing. The reasons for allocating the FDA in this manner relate to the structure of the Trustee Settlement and the mediation process that resulted in Class Counsel's Plan of Allocation. And these distinctions are, in large part, the source of the objections to Class Counsel's Plan of Allocation. Additional background concerning the Trustee Settlement and the mediation process is therefore warranted.

The Trustee Settlement and the SIPA Claims

On December 15, 2008, the Madoff Trustee was appointed to liquidate the business of Madoffs brokerage under section 5(b)(3) of SIPA. Pursuant to section 78eee(a)(4)(A) of SIPA, the Securities and Exchange Commission consented to a combination of its action with an action by the Securities Investor Protection Corporation ("SIPC") to recover losses for Madoff customers. In the resulting SIPA proceeding, four Rye funds (Madoff-exposed hedge funds controlled by the Tremont defendants) filed SIPA customer claims seeking compensation from the Madoff Trustee for their losses in the Ponzi scheme.

On December 7, 2010, the Madoff Trustee filed claims against the Tremont defendants seeking to recover $2.1 billion in transfers from Madoff. The latter claims might have wiped out any possibility of gains to plaintiffs through the FDA by depleting all resources at defendants' disposal and negating any recovery from the Madoff Trustee. The Class Settlement in this case helped facilitate the Trustee Settlement, which resolved those claims against defendants.

Pursuant to the Trustee Settlement, numerous Tremont and Rye funds contributed a total of approximately $1 billion to the Madoff Trustee. In exchange, the Madoff Trustee waived a total of $2.1 billion in liability for all the settling funds. Additionally, the settlement conclusively allowed valuable SIPA customer claims to three Rye funds: Rye Onshore ($1.6 billion), Rye Offshore ($498 million), and Rye Insurance ($40 million), (Dkt. No. 1130-7, Trustee Settlement ¶ 5.) Further, the Rye Onshore and Rye Offshore funds received increases in the amount of claims, pursuant to 11 U.S.C. § 502(h), corresponding to 80% of the $1 billion contribution to the Trustee Settlement ($800 million). (*Id.*)

Thus, the total amount of the three Rye funds' SIPA claims is nearly $3 billion. These claims, which have already been paid in part but will likely never be paid in full, are the source of the bulk of the money in the FDA.[2]

Different settling funds contributed to the $1 billion Trustee payment in different ways and in different amounts. First, money remaining in various Rye and

[2] The only other source of money in the FDA is a special direct contribution of $36 million by the Rye XL fund. (Dkt. No. 1161, Class Counsel Reply Ex. B.)

Tremont funds' accounts furnished approximately $350 million. The majority of that amount came from the Rye funds' accounts, while about $94 million came from the accounts of the various Tremont funds. (Dkt. No. 1089, Class Counsel Mot. at 5.)

An additional $650 million (rounding out the $1 billion payment to the Madoff Trustee) came from a loan provided by Fortress Investment Group and taken out jointly by the aforementioned three Rye funds – Rye Onshore, Rye Offshore, and Rye Insurance. (*Id.* at 11.)

The Mediation

Over the course of between one and two years, through mediation sessions conducted by retired District Judge Layn Phillips, Class Counsel negotiated various compromises and secured the support of a large majority of FDA claimants for its proposed Plan of Allocation. The resolution of disputes through that mediation has streamlined what might otherwise have been a far more complex litigation.

The participants entered into mediation on an understanding of strict confidentiality. Several objectors now seek to disturb that confidentiality and argue that either the court or the public should review the mediation proceedings. Other parties, writing in support of Class Counsel, urge the court to preserve the confidentiality.

Judge Phillips has submitted a declaration stating that he believes that the confidentiality of the mediation should not be disturbed, the mediation was fair, and Class Counsel's Plan of Allocation represents a reasonable compromise of competing interests and risks. (*See* Phillips Decl. at ¶¶ 20-22.)

I. Class Counsel's Motion to Approve its Plan of Allocation for the FDA

Class Counsel's Plan of Allocation for the FDA can be summarized as follows. First, a priority allocation of more than $32 million will be made from the FDA to the Rye XL fund.[3] The Rye XL fund is situated differently from other funds receiving money from the FDA because it contributed cash directly to the FDA in connection with the Trustee Settlement. Class Counsel stresses that the priority allocation is therefore justified.[4] All claims besides the priority allocation enjoy equal priority.

Class Counsel's Plan of Allocation also creates a category of FDA claims called "virtual SIPC claims." The

[3] It should be noted that before even reaching the FDA, money from the Rye funds' SIPC claims has already been applied to pay off the $650 million Fortress Investment Group loan taken out by Rye Onshore, Rye Offshore, and Rye Insurance. Thus all the money in the FDA is net of that loan repayment.

[4] There is a further issue concerning HSBC's entitlement to Rye XL's priority allocation. HSBC has contended that, pursuant to certain swap agreements it entered into with the Rye XL fund, it is entitled to the Rye XL priority allocation as collateral. However, this issue has now been resolved through a mutually satisfactory agreement between Class Counsel and HSBC that will allow Rye XL investors to receive a substantial part of the priority allocation.

virtual SIPC claims represent concessions to investors in funds that did not receive money pursuant to section 502(h) under the Trustee Settlement, even though they contributed to the payment to the Madoff Trustee. In recognition of that apparently unfair situation, the virtual SIPC claims entitle the contributing funds to the same benefit enjoyed by the Rye Onshore and Rye Offshore funds through their section 502(h) compensation. Namely, the virtual SIPC claims are worth 80% of their holders' contributions to the Madoff Trustee. This means that if the Madoff Trustee paid 100% on all claims, the funds receiving virtual SIPC claims under this Plan of Allocation would recover 80% of their contribution to the Trustee Settlement. Investors in the Rye funds, writing in support of Class Counsel's Plan of Allocation, note that they opposed the creation of virtual SIPC claims in mediation, but ultimately agreed to the compromise. (Dkt. No. 1118, Dolos Mem. at 3.)

With equal priority to the virtual SIPC claims, the money from the SIPA claims assigned to the Rye Onshore, Rye Offshore, and Rye Insurance funds will be distributed to those funds. However, these allocations shall be adjusted to reflect all cross-investments between the funds. For example, certain Tremont funds made investments in Rye funds. Thus, substantial moneys from the Rye Funds' claims will be allocated to various Tremont funds in recognition of their cross-investments. (Dkt. No. 1089, Class Counsel Mot. at 5.)

The result of the plan of allocation is that Rye Onshore, Rye Offshore, and Rye Insurance will receive about

97% of the moneys in the FDA for distribution to their investors.

Once the moneys have been allocated to the appropriate funds, claimants to the FDA will receive a *pro rata* share of each fund's portion of the FDA according to their net investment in the relevant fund. The Garden City Group, the same Claims Administrator that has handled other phases of this litigation, will handle the administrative determination of individual FDA claimants' entitlements.

Class Counsel also seeks a fee of three percent of the net FDA recovery, plus nearly $1 million in expenses. Three percent of the current net FDA recovery amounts to about $18.7 million. That fee is roughly equivalent to Class Counsel's claimed lodestar fee multiplied by 1.09, based upon over 25,000 hours of claimed legal work. However, the Madoff Trustee will almost certainly make very substantial additional payments to the FDA in the future, thus increasing Class Counsel's percentage-basis fee considerably. In the event that the FDA recovery grows very substantially, Class Counsel proposes to cap its lodestar multiple at 2.5. Even with a lodestar multiple capped at 2.5, Class Counsel's fee could conceivably climb well above $40 million if the Madoff Trustee makes the maximum possible payments.

The court has received numerous submissions in support of Class Counsel's motion, and numerous submissions in opposition. The objections contest the fairness of the Plan of Allocation as well as the size of Class

Counsel's fee. One objector, George S. Martin, has also moved for an alternative plan of allocation, as well as related relief including disclosure of mediation materials and certification of subclasses.

Discussion

The court reviews Class Counsel's Plan of Allocation similarly to how it would review the fairness of an actual settlement. A plan of allocation must be fair, reasonable, and adequate. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y.2012); *In re WorldCom. Inc. Sec. Litig.*, 388 F.Supp.2d 319, 344 (S.D.N.Y.2005). "As a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re Citigroup Inc. Sec. Litig.*, 965 F.Supp.2d 369, 385 (S.D.N.Y.2013) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y.1997)). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re IMAX Sec. Litig.*, 283 F.R.D. at 192 (quoting *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 580 (S.D.N.Y.2008)) (quotation marks omitted). Moreover, a reasonable plan may consider the relative strength and values of different categories of claims. *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002).

A. Submissions in Support of Class Counsel's Motion

It is significant that numerous investor groups and interested parties have written the court in support of Class Counsel's Plan of Allocation. These include:

- The Royal Bank of Scotland
- HSBC Bank
- A group of investors comprised of BMIS Funding I, LLC, Sola Ltd., Solus Core Opportunities Master Fund Ltd., Solus Recovery Fund II Master LP, Solus Recovery LH Fund LP, Ultra Master Ltd., and Halcyon Loan Trading Fund LLC
- SPCP Group
- Spectrum Equities, et al. (a group of former opt-out plaintiffs who were readmitted to the class pursuant to the court's June 5, 2015 order)
- The Dolos funds (significant beneficial owners of Rye funds associated with the Fortress Investment Group)

These parties emphasize that Class Counsel's Plan of Allocation is the fair result of arm's-length negotiation. In many cases, they have sacrificed their nominal interests in order to maximize support for a fair Plan of Allocation. These parties make clear that they oppose alternatives to Class Counsel's plan. Numerous other parties have given Class Counsel oral permission to convey to the court their support of the Plan of Allocation.

B. Objections to Class Counsel's Motion

The court has also received live submissions objecting to some aspect of Class Counsel's plan. The submissions come from:

- A group of eight individuals and trusts known as the "Tremont Fund Objectors"
- George S. Martin, an investor in two Tremont funds
- Antonio Calabrese, an investor who suffered losses through Bermuda Life Insurance Company annuity policies that were exposed to the Rye LDC fund
- Insurance company Philadelphia Life, whose customers suffered losses through Philadelphia Life's financial vehicles that were exposed to Rye and Tremont funds
- A group of life insurance companies who support Class Counsel's Plan of Allocation in all respects except that they object to the size of Class Counsel's fee

Class Counsel questions the standing of most of these objectors. Furthermore, it is significant that these objectors represent a very small portion of the interests at stake.

But regardless of their size and standing, the objectors fail to persuade that Class Counsel's plan is anything but fair, reasonable, and adequate. All objections are overruled for the reasons described below.

1. Whether Class Counsel's Plan of Allocation Unjustifiably Disfavors Investors in Funds Other than Rye Onshore, Rye Offshore, and Rye Insurance

George S. Martin, Antonio Calabrese, and the Tremont Fund Objectors all observe that several funds other than Rye Onshore, Rye Offshore, and Rye Insurance contributed significant moneys to the Madoff Trustee. Yet under Class Counsel's Plan of Allocation, the three Rye funds seem to receive a far superior "return" on the moneys they contributed to the Trustee Settlement.

The assertion that Class Counsel's plan disfavors certain funds raises the question of whether the different situations of the different funds justify the vastly different recoveries that Class Counsel's plan would allocate to them.

Class Counsel observes that the three Rye funds that receive the majority of the FDA are uniquely situated in several ways. First, compared to the three Rye funds, the allegedly disfavored funds had much lower exposure to Madoff's fraud, contributed less to the Trustee Settlement, were not direct Madoff customers – and in some cases were actually net winners in the Madoff fraud. Furthermore, the Madoff Trustee awarded SIPA claims – the main source of the funds in the FDA – only to the three Rye funds. It is also significant that the allegedly disfavored funds did not make their contribution to the Trustee Settlement *solely* in hopes of recovering from the FDA – they also received substantial liability releases in exchange for their contributions. Thus the Plan of Allocation's apparently superior treatment of the Rye fund investors' FDA claims is in fact neither preferential nor unreasonable.

Furthermore Judge Phillips has submitted a declaration strongly supporting Class Counsel's plan. He asserts that Class Counsel's Plan of Allocation "reflects a fair and reasonable compromise of the risks presented by this litigation." (Dkt. No. 1160, Phillips Decl. at ¶ 22.) He states further that he believes all parties' interests were adequately heard and represented at the mediation: "Based on my first-hand observations, I can represent to the Court that I have no reason whatsoever to believe that [Class Counsel's Plan of Allocation] was anything other than the product of hard-fought, arm's length negotiations by skilled, experienced and effective counsel." (*Id.*)

Class Counsel's allocation of the money in the FDA between the various funds is fair and reasonable. The objections are overruled.

2. Whether the Mediation Process was Adequate and Whether its Confidentiality Should be Disturbed

Several objectors argue that the mediation process did not afford them an adequate forum to represent their interests. They argue that the court should disturb the mediation's confidentiality and demand disclosure of agreements that were reached during that process.

Some objecting parties cite Federal Rule of Civil Procedure 23(e)(3), arguing that it requires Class Counsel to disclose the details of any deals made in the course of mediation. *Id.* ("The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.").

Judge Phillips explains in his declaration that he orally represented to the mediating parties that "all communications, negotiations and agreements pursuant to [the mediation] were covered with a complete cloak of confidentiality and must remain confidential," including in court papers and proceedings. (Phillips Decl. at ¶¶ 8-9.) He further represented to the parties that he would help maintain the confidentiality by advising the court of the agreement. (*Id.*)

It is safe to assume that the participants reached agreements during the mediation that were not made public, and that have not been described to the court. But there is no reason to believe such agreements were collusive, especially in light of the court's conclusion that Class Counsel's Plan of Allocation allocates resources in a fair and reasonable manner that adequately respects the different situations of the different funds.

Furthermore, Federal Rule of Civil Procedure 23(e)(3) does not require the disclosure of all agreements made in a confidential mediation held to achieve consensus concerning the allocation of a fund like the FDA, whose essential structure was long ago established in a final settlement agreement. It is firmly within the court's discretion to uphold the confidentiality of this mediation and it is warranted under these circumstances.

It would have been preferable for the mediation to produce complete consensus as to the fairness of Class Counsel's plan. However, the objectors' criticism of the mediation is baseless. The mediation was overseen by a respected retired federal judge. It afforded the objectors an opportunity to advocate for different plans of allocation. They availed themselves of this opportunity. And indeed their advocacy resulted in meaningful concessions such as the virtual SIPC claims. Further, the mediation's confidentiality helped Class Counsel serve the best interests of the highest number of FDA claimants and beneficiaries.

Total consensus as to the Plan of Allocation may well have been impossible. Yet something nearly approaching consensus was achieved. Objections to the mediation process are overruled.

3. Whether the Court Lacks Jurisdiction to Approve Class Counsel's Plan of Allocation

Objectors including Philadelphia Life and the Tremont Fund Objectors argue that the court lacks jurisdiction to approve a Plan of Allocation for the FDA for want of a case or controversy. They also allege various other procedural defects, noting that the FDA was not itself initiated in a complaint, but rather was established pursuant to a settlement agreement. They point out that, unlike a typical class action settlement fund, the FDA has claimants who are not members of the class and thus were not parties to the settlement agreement that created the FDA.

These arguments are meritless and were substantially rejected at the time of the Class Settlement in 2011. (*See* Dkt. No. 599, Aug. 8, 2011 Hearing Tr. at 75-78.) This court approved the FDA as an orderly way to preserve assets connected to the Class Settlement. (*Id.* at 76.) Since the finalization of that Settlement, nothing about the FDA has changed that might cast fresh doubt on its procedural propriety. While it is admittedly a unique mechanism, the FDA arises from the derivative claims that Class Counsel included in its underlying complaint. It was established pursuant to the Class Settlement – a matter properly before this court. And that Settlement has survived vigorous challenges in both the District and Circuit courts. Moreover, the settlement approval proceedings and the instant proceedings have provided an adequate opportunity for any interested party to argue that the FDA prejudices its interests.

These objections are overruled.

4. Whether Class Counsel's Plan of Allocation Conflicts with the 2011 Stipulation

Objectors argue that Class Counsel's Plan of Allocation for the FDA conflicts with the terms of the 2011 Stipulation that created the FDA. (*See* Dkt. No. 392-1, 2011 Stipulation.) Specifically, objectors argue that the stipulation created a framework in which investors in *all* settling funds would be entitled to receive distributions from the FDA. (*See id.* at ¶¶ 1.18, 1.19, 1.50, 1.61, 2.20, and 2.21.)

The 2011 Stipulation does not represent that assets in the FDA would be distributed in an equal way among claimants. It indicates that the terms of the allocation will not be precisely settled in advance. However, the 2011 Stipulation does state, at ¶ 1.18, that "any limited partner or shareholder in any of the Settling Funds . . . shall be entitled to receive a disbursement from the Fund Distribution Account." This seems to be in tension with the fact that some funds' investors will receive no FDA disbursement.

Class Counsel avers that ¶ 1.18 was a statement of eligibility to receive a disbursement, not a promise that all partners or shareholders in the defendant funds would receive a disbursement. And indeed, under Class Counsel's Plan of Allocation, the funds whose investors will receive no disbursement were either "net-winners" in Madoffs fraud, or had no exposure to Madoffs fraud. Thus, Class Counsel's construction of ¶ 1.18 is persuasive, especially when weighed with the equitable arguments against providing disbursements to such funds' investors.

It is reasonable that the Plan of Allocation should result in substantial recoveries for investors in certain funds and no recoveries for investors in other funds that were either net winners in Madoff's fraud or had no Madoff exposure. The 2011 Stipulation did not indicate anything to the contrary. These objections are overruled.

5. Whether Class Counsel's Plan of Allocation Disfavors Nonparty Owners of Annuity Policies

Objector Antonio Calabrese contends that the FDA unjustifiably harms beneficial owners – like himself – of annuity policies that were invested in certain Rye and Tremont funds through insurance companies.

Calabrese chose to invest a Bermuda Life annuity policy in the Rye LDC fund. That Rye fund lost most of its money, and Calabrese consequently lost the value of his policy. However, he will not receive a disbursement from the FDA under Class Counsel's plan because the Rye LDC fund did not contribute any money to the Trustee Settlement. Calabrese contends that this is inequitable. He also contends that the FDA will serve scant purpose if, as Class Counsel's Plan of Allocation proposes, its money will flow almost solely to the actual holders of the SIPA claims that are the source of its money. He contends that this court assumed that the FDA would benefit all investors when it approved the fairness of the Class Settlement, and that Class Counsel made incorrect representations to that effect before this court.

Additionally, Calabrese finds it unjust that he is not treated as an "investor" entitled to make an FDA claim, pursuant to Class Counsel's definition. Where, as here, the insurance company does not pursue a claim on behalf of its policyholders, the policyholders are left without a satisfactory remedy. Calabrese points out that some insurance companies could not have pursued claims on behalf of their policyholders because those insurance companies, as holders of an aggregated set of shares on behalf of their policyholders, were "net winners" in the Madoff scheme, even though some of their policyholders were individual losers.

It is well established in this case that the insurance companies, rather than policyholders, are the claimant-investors. It is therefore incumbent upon the insurance companies to defend the interests of their policyholders. And in fact numerous insurance companies participated in the mediation concerning the FDA. All but one of them (Philadelphia Life) declined to object to the substance of Class Counsel's plan. This objection is overruled.

II. Class Counsel's Fee

Class Counsel seeks a fee amounting to the lesser of three percent of the funds distributed through the FDA, or its hourly fees (lodestar) multiplied by 2.5. This formula would yield an immediate fee of about

$18.7 million, or 1.09 times Class Counsel's lodestar. If the Madoff Trustee ultimately pays the $1.446 billion that the market expects, three percent of the recovery would likely exceed 2.5 times Class Counsel's lodestar, meaning that Class Counsel would receive 2.5 times its lodestar. This would likely amount to substantially more than $40 million.

To date, Class Counsel has performed over 25,000 hours of work in connection with the FDA. (Dkt. No. 1161, Class Counsel Reply at 35-36.) Class Counsel has overseen the creation of the FDA, defended it in connection with the Class Settlement, arrived at the Plan of Allocation through mediation and extensive communication with numerous parties, worked with defendants to maximize the FDA recovery, and, not least, defended the Plan of Allocation in the present proceeding. Class Counsel emphasizes that there was risk involved in its work. First, there was risk in bringing the derivative claims that gave rise to the inclusion of the FDA as part of the Class Settlement. Though that risk has now passed, Class Counsel notes that it must still be understood as attendant to its work on the FDA, and that without this work funds other than the three Rye funds would not receive any benefit. Second, Class Counsel has faced certain risks in defending the Plan of Allocation against objectors.

Four objectors now contend that the fee Class Counsel seeks is inappropriate. The objectors frame their attack on Class Counsel's fee request in different ways, but their essential argument is the same: Class Counsel's fee is excessive because (i) there was little risk involved in the FDA recovery since it was not an adversarial recovery against defendants, and (2) Class Counsel already received substantial fees in connection with the distribution of the NSF.

The FDA is unusual because it is not a typical "common fund" recovered from defendants and distributed to a class of plaintiffs. The unique structure and sources of the FDA make it difficult to compare it to a typical class action recovery. Many lines of precedent concerning fee recovery are accordingly rendered inapplicable. Nonetheless, Class Counsel has obviously performed valuable and complex work in administering the FDA recovery and distribution. Many parties have benefited, and Class Counsel is naturally entitled to compensation. *See City of Providence v. Aeropostale, Inc*., No. 11 Civ. 7132, 2014 WL 1883494, at *12 (S.D.N.Y. May 9, 2014).

Ultimately Class Counsel's fee recovery is governed by the rule from *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 47 (2d Cir.2000). Namely, the court must consider the number of hours reasonably billed by Class Counsel and apply to that total a multiplier depending on the following factors: (1) time and labor expended, (2) the magnitude and complexity of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations. *See id.* A percentage-basis fee may be given, but it must be checked against the lodestar analysis above to ensure it is reasonable.

Many *Goldberger* factors militate in Class Counsel's favor. In its work on the FDA, Class Counsel has unquestionably put forth great labor. Furthermore, the litigation has been highly complex, involving a great deal of unsettled law, many parties, and a voluminous case history. Class Counsel has displayed great skill in managing these challenges. Objectors uncharitably characterize Class Counsel as mere "administrators" of the FDA. In fact, Class Counsel's driving role in structuring the FDA as part of the Class Settlement, and thereafter working to mediate conflicts and effect a fair and expedient distribution of the funds, has gone well beyond rote administration. In short, the allocation and distribution of the FDA is a complex matter of great importance to many parties, and Class Counsel has performed admirably. Thus, the first, second, and fourth *Goldberger* factors suggest that a large fee is appropriate.

The fifth factor – the fee's relation to the settlement and public policy – is more difficult to evaluate, because the FDA is an unusual vehicle for the distribution of moneys recovered through bankruptcy and cannot be easily likened to a typical class action settlement recovery. Class Counsel's requested three percent is much smaller than the percentage typically requested as a fee. But that is to be expected because a proportion larger than three percent of the total FDA would amount to an inappropriate windfall. Class Counsel itself has apparently recognized that even three percent will become excessive if the size of the FDA grows considerably, and has accordingly capped the requested fee at a lodestar of 2.5. Still, a lodestar of 2.5 is at the high end of what courts in this Circuit are willing to award. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474 at *23 (S.D.N.Y. Feb. 1, 2007).

As to the sixth factor, it is clear that public policy is well served here by awarding a viable fee. Class Counsel has done excellent work in a case with widespread consequences.

The third *Goldberger* factor, the risk of the litigation, has been called "perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees." *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474 at *16 (citations and internal quotations omitted). This factor is largely covered by what has already been discussed in this opinion. In short, this litigation involved unique practical and legal challenges. The outcome of Class Counsel's labor was never certain.

Weighing all these factors, the court concludes that substantial compensation is warranted, and the fee Class Counsel seeks is justified.

Conclusion

The court finds Class Counsel's Plan of Allocation for the Fund Distribution Account to be fair, reasonable, and adequate. All objections are overruled. The motion of George S. Martin for an alternative Plan of Allocation and related relief is denied.

The court will enter an Order and Final Judgment, to be promptly submitted by Class Counsel, in accordance with this opinion. Upon entry of the Order and Final Judgment, the clerk is respectfully directed to close the motions listed at docket numbers 1054, 1076, 1082, 1088, and 1093 in this case, 08 Civ. 11117.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand seventeen.

Before: DENNIS JACOBS, CHRISTOPHER F. DRONEY, Circuit Judges, TIMOTHY C. STANCEU,* Chief Judge, U.S. Court of Int'l Trade.

In Re: Tremont Securities Law, State Law and Insurance Litigation

ORDER
Docket No. 15-3011

Appellant Mary Catherine Martin, Bindler Living Trust, Madelyn Haines, John Johnson, Stella Ruggiano Trust, George P. Turner, West Trust, William J. Millard Trust and Paul Zamrowski having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court
