UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE BOARD OF TRUSTEES OF THE CITY OF BIRMINGHAM EMPLOYEES' RETIREMENT SYSTEM, et al.,

Plaintiffs,

v.

COMERICA BANK,

Defendant/Third-Party Plaintiff,

v.

MUNDER CAPITAL MANAGEMENT,

Third-Party Defendant.
_____/

Case No. 09-cv-13201

HONORABLE STEPHEN J. MURPHY, III

OPINION GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS (document no. 134), **AND GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES** (document no. 135)

This is a case brought under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"). Two pension plans, through their boards of trustees, filed a class action complaint against defendants Comerica Incorporated and Comerica Bank ("Comerica") on August 14, 2009. The basis for the action is alleged losses suffered in the securities lending program operated by Comerica when a security issued by Sigma Finance Inc. and Sigma Finance Corp. (collectively, "Sigma") defaulted. On August 16, 2010, the Court consolidated this action with *Bd. of Trustees of the Iron Workers' Local No. 25 Pension Fund, et al. v. Comerica Bank*, No. 10-cv-10206, which had been filed on January 15, 2010, at the joint request of the parties, and upon a finding that the cases involved common issues of law and fact. On September 30, 2010, plaintiffs filed

a consolidated Class Action Complaint against Comerica, asserting claims of declaratory judgment, breach of fiduciary duty under common law, ERISA violations, violations of the Michigan Public Employee Retirement System Investment Act, breach of contract, and breach of the implied covenant of good faith and fair dealing. On March 25, 2011, Comerica filed a third-party complaint against Munder Capital Management ("Munder") which was subsequently amended on April 4, 2011.

A fully executed Stipulation of Settlement ("Settlement Agreement"), ECF No. 122, was filed with the Court on September 27, 2013. Before the Court is Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, ECF No. 134, ("Final Approval Motion") and the Motion for Application of Plaintiffs' Counsel for an Award of Attorney's Fees and Expenses, ECF No. 135.

On October 9, 2013, the Court entered its Order Granting Preliminary Approval of the Class Action Settlement, Approving Form and Manner of Notice and Setting the Date for the Hearing on the Final Approval of Settlement ("Preliminary Approval Order"), ECF No. 131. On November 14, 2011, the Court received a declaration attesting to the mailing of the Notice and publication of the Notice on a website in accordance with the Preliminary Approval Order. The Court has not received any objections from class members.

A hearing ("the Fairness Hearing") was held on December 19, 2013 to determine whether to certify the Settlement Class, grant the Final Approval Motion, and award attorneys' fees and expenses.

THE SETTLEMENT AGREEMENT

The Settlement Agreement provides for a Settlement Amount of $11,000,000 in cash. These cash amounts plus interest constitute the Gross Settlement Fund. That Gross

Settlement Fund is now deposited into an Escrow Account. The Net Settlement Fund, which is the Gross Settlement Fund less any taxes, notice and administration costs, litigation expenses awarded by the Court, attorneys' fees awarded by the Court and other Court-approved deductions will be distributed to class members pursuant to a Plan of Allocation.

The Plan of Allocation provides that class members who do not submit a timely request for exclusion will receive their portion of the settlement as either a cash payment or credit in proportion to their Sigma Deficiency, which the pro rata amount of the total Sigma Loss attributable to each class member. The Sigma Loss is the total amount of principal lost by Comerica collective investment vehicles when Sigma failed to repay the notes it issued ("Sigma Notes") in full, less any prior partial payments made by Sigma's receiver to Comerica and/or its collective investment vehicles. The class members which are Collective Investment Fund and Common Trust Funds ("CIFs") will receive their portion of the Net Settlement Fun in cash to be distributed by the Escrow Agent as special fiduciary. Those who have Paid Sigma Deficiencies, meaning that their Sigma Deficiency had already been satisfied according to Comerica's books and records, will receive their portion of the Net Settlement fund in cash distributed directly by the Escrow Agent. Those with unpaid Sigma Deficiencies will receive their portion of the Net Settlement Fund as a credit to their unpaid Sigma Deficiency. Class members have the opportunity to challenge their designated Sigma Deficiency within 45 days of the mailing providing notice of such calculation, but none have done so thus far.

FINAL CERTIFICATION OF THE SETTLEMENT CLASS

Fed R. Civ. P. 23 sets forth the requirements for class certification. The Court has already preliminarily certified the Class. The class for which plaintiffs seek Final Certification for the purpose of settlement under Rule 23(b)(3) is defined as:

> all participants in Comerica's securities lending program that, through one or more of the investment vehicles offered or managed by Comerica or its affiliates, incurred losses relating to investments in the Sigma Notes and that have not previously released Comerica from all liability related to such losses.

The Court finds that there is no question that the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy apply to the settlement class.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The Sixth Circuit has held that a class of 35 is so numerous as to make joinder of all impracticable. *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974). It is undisputed that, here, the Securities Lending Program had 105 members who suffered Sigma-related losses. These members include pension plans with many individual members. Therefore, the Class is clearly numerous.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. All questions of law or fact are not required to be common, but there must be at least one common question. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996). Numerous issues of law and fact are common to the Class at bar. These issues include whether Comerica breached its fiduciary duties, whether Comerica violated its obligations set forth in its Securities Lending Agreement and Investment Guidelines, whether Comerica breached its implied covenant of good faith and fair dealing, to what extent the Class Members have sustained

damages, and the proper measure of such damages. All Class Members' claims stem from the improper investment of the common, commingled collateral pool. Therefore, the Court concludes that the Class meets the requirement of commonality.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims and defenses of the class." A plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other Class Members, and if his or her claims are based on the same legal theory." *American Med. Sys., Inc.*, 75 F.3d at 1082. "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Id.* Here, the injuries to the Class Members are unquestionably attributable to the acts or omissions of Comerica and liability for this conduct rests on the same legal theories. Comerica admittedly managed the Securities Lending Program on a program-wide basis, and this program-wide management extended to the investment of cash collateral, which was placed in a commingled pool. Accordingly, the claims of the representative plaintiffs are typical of the claims of the Class.

Finally, Rule 23(a)(4) mandates that the representative parties will fairly and adequately protect the interests of the Class. The representatives must have common interests with the members of the class and it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods v. Windsor*, 521 U.S. 591, 625 (1997). Nevertheless,

the adequacy-of-representation requirement "tends to merge" with the commonality and typicality criteria. *Id*. at 626 n. 20. Here, all of the Class Members, including the plaintiffs, had their cash collateral placed into the commingled, commonly-invested pools so that the plaintiffs' and all the Class Members' interests are directly aligned. Therefore, the representation is adequate.

Once plaintiffs have satisfied all the requirements of Rule 23(a), they must further meet one of the conditions of Rule 23(b). Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 632. The predominance requirement is met if the common question is "at the heart of the litigation." *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification", *id.,* and that is the case here. As a result, it is also clear that, in this case, a class action is superior to other available methods, including numerous individual actions, for the fair and efficient adjudication of the controversy, particularly with regard to the settlement. Thus, the Court finds that the Class meets the requirements of Rule 23(b)(3).

Accordingly, the Court will certify the final Class.

PROPER AND ADEQUATE NOTICE

In accordance with Rule 23 and the requirements of due process, the Class has been given proper and adequate notice of the Settlement and Fairness Hearing, the notice

having been carried out in accordance with the Preliminary Approval Order. The Notice and notice methodology implemented pursuant to the Settlement Agreement and the Court's Preliminary Approval Order were appropriate, reasonable, and constituted due, adequate, and sufficient notice to all persons entitled to notice. They also met all applicable requirements of the Federal Rules of Civil Procedure and any other applicable law.

APPROVAL OF THE SETTLEMENT

Pursuant to Fed. R. Civ. P. 23(e)(1)(a), a certified class action settlement requires court approval. "In deciding whether to give final approval to a class action settlement, a court should determine whether that settlement is fair, adequate, and reasonable to those it affects and whether it is in the public interest." *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005). In making this determination, courts consider the following factors:

> (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest.

In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508, 522 (E.D. Mich. 2003). "The Court may choose to consider only those factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case." *Int'l Union v. Ford Motor Co.*, Nos. 05-74730, 06-10331, 2006 WL 1984363, at *22 (E.D. Mich. July 13, 2006). "The district court enjoys wide discretion in assessing the weight and applicability of these

factors." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-05 (6th Cir. 1992).The Court concludes that all of the relevant factors weigh in favor of approval of the Settlement.

I. The Likelihood of Success on the Merits

The Court balances the likelihood of success on the merits against the amount and form of relief offered in settlement. Plaintiffs assert that they could prove the claims asserted, but concede that there is a great deal of risk and there is no guarantee that they would prevail at trial and ultimately collect a larger judgment, particularly if subsequent appeals occurred, for which they believe there would be a strong likelihood. The instant case is made particularly uncertain because it is a complex financial litigation. Furthermore, the defendants here have adamantly denied any culpability throughout the litigation and have demonstrated that they could present defenses to plaintiffs' claims. Plaintiffs candidly acknowledge that these defenses could be valid. In this case, defendants could offer multiple damage theories under which a jury might find that, even if defendants breached their fiduciary duty, damages would be either minimal or nonexistent. A jury could also find that the losses at issue were attributable to factors other than defendants' conduct. Plaintiffs also point out that Courts have entered judgements notwithstanding the verdict and jury verdicts have been overturned on appeal in similar securities lending litigations.

In contrast to all of these unknowns and risks, the parties have now agreed to a substantial settlement. The settlement amount of $11,000,000 constitutes approximately 23% of the Class' maximum total estimated damages. Even in a far more straightforward case, plaintiffs may not be able to recoup such a percentage of their losses.

II. The Risks, Expense, and Delay of Further Litigation

"[T]his Court examines the risks, expense, and delay Plaintiffs would face if they continued to prosecute this complex litigation through trial and appeal and weighs those factors against the amount of recovery provided to the Class in the Proposed Settlement." *Cardizem*, 218 F.R.D. at 523. It is undoubted that the securities claims at issue are particularly complex. As plaintiffs point out, the securities lending claims brought here are more difficult to prove than run-of-the-mill securities fraud claims and the applicable body of law is less-developed. The litigation raises novel issues, which would make its further prosecution particularly risky. This case is further complicated by the presence of claims against a third-party defendant.

In addition, it is undoubted that the action would be fiercely contested by all parties were it allowed to continue. The parties have already conducted discovery, which was lengthy and expensive. This case has also already gone on for four years and it is unclear how much longer it would take to reach a final resolution of all the claims at bar, the Court having taken into account the possibility of a lengthy trial and appeals process.

In contrast, the settlement here provides a substantial and certain benefit to the Class which will be available immediately.

III. The Judgment of Experienced Counsel and the Amount and Character of Discovery

"When significant discovery has been completed, the Court should defer to the judgment of experienced trial counsel who has evaluated the strength of his case." *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 501 (E.D. Mich. 2000) (quoting *Bronson v. Bd. of Educ.*, 604 F.Supp. 68, 73 (S.D. Ohio 1984)); *see Williams v. Vukovich*, 720 F.2d 909, 922-23 (Sixth Cir. 1984). That is the situation here. All counsel are experienced and

sophisticated. Plaintiffs reviewed hundreds of thousands of pages of documents and hundreds of audio recordings obtained in discovery. The parties became well-aware of each other's legal positions when they submitted briefs regarding Comerica's motion to dismiss in 2010 and 2011, which the Court granted in part and denied in part. They also engaged in facilitation and settlement negotiations with a highly respected mediator. In addition, they consulted with experts in the fields of structured finance, securities lending, special investment vehicles, and forensic information technology.

IV. Arm's-Length Negotiations

"Courts respect the integrity of and presume good faith in the absence of fraud or collusion in settlement negotiations, unless someone offers evidence to the contrary." *In re Rio Hair Naturalizer Products Liability Litigation*, No. MDL 1055, 1996 WL 780512, at *14 (E.D. Mich. Dec. 20, 1996). This presumption is conclusive here as no one has presented any evidence of collusion. Furthermore, the record is clear that the parties engaged in extensive negotiations with Judge Layn Phillips, a highly respected mediator with substantial experience with complex actions.

V. Fairness to the Unnamed Class Members

The Settlement and Plan of Allocation are fair to the unnamed class members. As the Court has discussed above, the unnamed class members have obtained a proportion of monetary damages that they would not have received absent the Settlement. The Plan of Allocation results in a fair distribution of the proceeds to all class members. Essentially, all Class Members have been assessed an account deficiency reflecting their pro rata shares of the common pool's Sigma-related loss. Those Class Members who have already left the securities lending program have paid off this deficiency and will receive their pro rata share

of the Settlement Amount in cash. Those Class Members who remain in the program will be provided with an account credit to offset their deficiency which must be fully paid off by the time they actually or constructively leave the program.

VI. Objections

No class member has objected to any aspect of the Settlement or the Plan of Allocation. Additionally, no class member has requested to be excluded from the settlement. Significantly, the record shows that the Washtenaw County Probate Court appointed a special fiduciary for the Settlement for 26 of the Class Members. This special fiduciary has not objected to the Settlement. It is also notable that the Settlement provides that Class Members who do not wish to opt or object may still challenge the calculation of their Sigma Deficiency. Class Members were given their Sigma Deficiency in the Notice and have until January 16, 2014 to file objections regarding the calculation.

Accordingly, this factor further supports the Court's approval of the settlement. *See Kogan*, 193 F.R.D. at 503 ("[T]he Court is greatly persuaded by the fact that none of the class members objected to the settlement agreement.").

VII. Public Interest

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *Cardizem*, 218 F.R.D. at 534 (quoting *Granada*, 962 F.2d at 1205). The Settlement here puts an end to a contentious and protracted litigation, which, absent settlement, could have continued for many more months and possibly several years despite the best efforts of the parties and the Court to expedite the process.

In sum, having considered all of the relevant factors, the Court concludes that the proposed Settlement and Plan of Allocation are fair and reasonable. Accordingly, the Court finds that the proposed Settlement and Plan of Allocation merit final approval.

ATTORNEYS' FEES

Plaintiffs' counsel request that the Court award them $3,261,745.19 in fees, reflecting 30% of the Gross Settlement Fund after the deduction of reimbursed expenses and $127,516.02 in expenses. Counsel have provided declarations in support which explain their work, the time spent on it, and their calculation of the fees they are requesting.

I. The Fee Award

"[I]t is well established that 'a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Cardizem*, 218 F.R.D. at 531-32 (quoting *Boeing Co v. Van Gemert*, 444 US. 472, 478 (1980)). The awards of attorney's fees must be "reasonable under the circumstances." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The Sixth Circuit has recognized the trend in adopting the percentage of the fund method of calculating attorney's fees in common fund cases over the traditional lodestar method for calculating fees. *Id.* at 515. Here, the 30% request appears to be reasonable. Plaintiffs point out that this fee constitutes the median of fee awards for settlements between $10 million and $20 million that were finalized between 1996 and 2012 in a study of securities class actions conducted by National Economic Research Associates ("NERA"). Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review, ECF No. 91-2.

"Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff

class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Cardizem*, 218 F.R.D. at 533 (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996); *Smilie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983)).

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings*, 9 F.3d at 516. As a result, the value of the benefit and the value of the services provided have been considered the two most important factors. *Bowling*, 102 F.3d at 780. Here, the $11,000,000 cash and cash equivalent settlement provides a substantial and certain benefit to the class. This significant monetary settlement obviates many of the criticisms that are often levied against class action litigation, which center around the actual value of the settlement procured for the class members when compared to the hefty fees attorneys often obtain in these cases.

The value of the services here compared to the fee that counsel are seeking is a very important consideration. Counsel for plaintiffs engaged in over 6,300 hours of work in this litigation with a resulting lodestar calculation of $3,329,680.25, and have asked for slightly less than the aggregate lodestar, an amount of $3,261,745.19. The fee requested here appears to be particularly reasonable since counsel have not requested a multiplier, a ratio of the awarded fee to the lodestar to increase the fee, as is often deemed to be appropriate in complex and risky litigation like the case at bar. Plaintiffs' Counsel also prosecuted this action on a wholly contingent basis, fully aware of how complex and contested this litigation

would be and that they could expend a great deal of time and money working on this matter without obtaining any compensation at all.

Court have often found that there are public policy benefits to rewarding attorneys who bring class action cases like the instant one. *See Cardizem*, 218 F.R.D. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society."); *Rio Hair*, 1996 WL 780512, at *17 ("[A]ttorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process."). There are significant public policy benefits in encouraging attorneys to take on a complex financial class action litigation like this one which involves sophisticated issues and the need to consult experts in this changing field.

The prosecution of any complex financial class action presents inherently complex and novel legal issues. As the Court discussed in assessing the adequacy of the settlement, counsel had only a limited body of law addressing securities lending claims to work with here compared to the established corpus of securities fraud law, which is still considered to be very intricate. The presence of third party defendant Munder also added to the difficulty of the instant matter.

In this case, Plaintiffs' counsel are nationally known leaders on the fields of investment class actions and complex litigation. Nationally known, prominent, and extremely capable counsel also represented the defendants and vigorously defended this action. The ability of Plaintiff's counsel to obtain a favorable result for the Class in the face of such formidable opposition provides strong evidence of the quality of their work. Counsel here have practiced at the highest levels of professional competency.

In sum, an evaluation of all the criteria established by the Sixth Circuit weighs in favor of awarding the fee award requested. Therefore, the Court will grant Plaintiffs' Counsel fee application in its entirety.

II. The Expense Award

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *Cardizem*, 218 F.R.D. at 535. Counsel have requested reimbursement for incurred expenses in the aggregate amount of $127,516.02 in prosecuting this litigation. These expenses are fully set forth in the declarations submitted by counsel. The categories of expenses for which counsel seek reimbursement here are the type of expenses routinely charged to hourly clients. They include expenditures for: experts; computerized research; travel; mediation; photocopying; court filing; postage and overnight delivery; telephone; and telecopier. Thus, that the Court will grant Plaintiff's Counsel's expense application in its entirety.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' Final Approval Motion and the Motion for Application of Plaintiffs' Counsel for an Award of Attorney's Fees and Expenses.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: December 27, 2013

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on December 27, 2013, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager