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| **Schumacher v NeoStem, Inc.** |
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| 2014 NY Slip Op 50919(U) |
| Decided on June 13, 2014 |
| Supreme Court, New York County |
| Ramos, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on June 13, 2014

Supreme Court, New York County

**William Schumacher, On Behalf of Himself and All Others Similarly Situated, Plaintiff,**

**against**

**Neostem, Inc., ROBERT L. SMITH, M.D., RICHARD BERMAN, STEVEN S. MYERS, DREW BERNSTEIN, ERIC H.C. WEI, ANDREW PECORA, M.D., FACP, MARTYN D. GREENACRE, SHI MINGSHENG, and EDWARD C. GEEHR, M.D., Defendants.**

653285/12

For plaintiff: Juan Monteverde, Esq., of Faruqi & Faruqi LLP

For defendants: Natalie Dallavalle, Esq., of Lowenstein & Sandler

Charles E. Ramos, J.

Plaintiff William Schumacher moves for the entry of final order and judgment (a) certifying the above-captioned action as a class action, for purposes of settlement only, on behalf of a class (Class) consisting of all persons or entities who were record or beneficial ownerships of the common stock of NeoStem Inc. (Neostem) on August 24, 2012; (b) approving the terms and conditions of the Stipulation of Settlement, entered into by the parties on March 28, 2013 as fair, reasonable, and adequate for the settlement of all claims asserted in the above-captioned class action; (c) dismissing the above-captioned action with prejudice, extinguishing and releasing all the Settled Claims; and (d) awarding plaintiff's counsel attorneys' fees and expenses in the sum of $477,817.16.

Defendants oppose solely with respect to plaintiff's request for an award of attorneys' fees.

**Background**

Plaintiff filed this action in September 2012 based upon allegations that the individual defendants breached their fiduciary duties owed to the Class by disseminating a proxy statement that was materially misleading and incomplete, and that [*2]Neostem aided and abetting the individual defendants' alleged breaches. Plaintiff alleged that the proxy did not disclose the consideration and effects of a certain proposal, a recommendation by the board that shareholders approve an amendment, and restatement of Neostem's 2009 equity compensation plan which pertained to executive compensation. On September 20, 2012, plaintiff moved for expedited discovery, and a preliminary injunction seeking to enjoin proposal 3.

Over the course of two days, the parties engaged in settlement discussions. On September 27, 2012, the parties reached an agreement-in-principle to settle the action, subject to Court approval.[FN1]

Between September 25, 2012 and November 30, 2012, defendants provided additional documents, and on December 20, 2012, plaintiff took the deposition of a member of Neostem's board and compensation committee. Thereafter, the parties negotiated the stipulation of settlement.

In March 2013, plaintiff moved for an order scheduling a hearing on class certification, approval of the class action settlement, approval of request for an award of attorneys' fees and expenses, and approving the form of notice. The Court set a final fairness hearing for September 11, 2013.

Plaintiff's counsel, Faruqi & Faruqi, LLP represents that the total number of hours spent on this litigation was 455.25 and seeks a multiplier of 1.75, totaling $477,817.16 (Monteverde Aff., ¶ 24). Plaintiff's counsel represents that this amount is reasonable in light of the substantial benefits achieved for the [*3]Class through the settlement, and the efforts that Faruqi undertook to bring about those benefits.This Court was initially unable to evaluate the reasonableness of the fee request based upon the summary provided, and directed plaintiff's counsel to submit detailed billing records *in camera*.

Defendants oppose the award of attorneys' fees and argue that a reduction is warranted because the hours expended were duplicative, unjustified, unnecessary and excessive.

Upon review of the billing records and for the reasons set forth below, the Court determines that the hours expended by plaintiff's counsel were not reasonable.

**Discussion**Under CPLR 909, attorneys for a class that has been successful (through judgment or settlement) may be awarded reasonable attorneys' fees. When granting fees, a trial judge has broad discretion in deciding whether, and in what amount attorneys' fees should be awarded (*White v Auerbach*, 500 F2d 822, 828 [2d Cir 1974]). Generally, the "Lodestar" method is employed to calculate reasonable attorney's fees, which is calculated by multiplying the reasonable hours expended on the action by a reasonable hourly rate (*Matakov v Kel-Tech Const., Inc.*, 84 AD3d 677 [1st Dept 2011]).

Class counsel must establish through competent evidence that its fees were consistent "with customary fees charged for similar services by lawyers in the community with like experience and of comparable reputation," or were reasonable (*Matakov*, 84 AD3d 677).

In the event that the court finds that an attorney spent excessive or unreasonable hours, it may exclude that amount from the calculation (*Nager v Teachers' Retirement Sys. of City of New York*, 57 AD3d 389 [1st Dept 2008], *lv denied* 13 NY3d 702 [2009]).

Plaintiff filed a complaint and an order to show cause, and the parties reached an agreement in principle within seven days of filing. Thereafter, the parties exchanged documents, conducted one deposition, and negotiated and drafted settlement documents.First, many of the entries reflect duplication of services (*see Becker v Empire of Am. Fed. Sav. Bank*, 177 AD2d 958 [4th Dept 1991]). For instance, of the six attorneys that billed time to this case, a partner and an associate

each billed a total of 22.50 hours for drafting the complaint alone, while two more partners billed an additional 19.2 hours each for editing the complaint. Plaintiff's counsel also billed an additional 6.75 hours for two paralegals to compile and deliver courtesy copies of motion papers to chambers.

Counsel for a prevailing party must exercise "billing judgment," that is, "act as he would under the ethical and market [*4]restraints that constrain a private sector attorney's behavior in billing his own clients" (*Hensley v Eckerhart*, 461 US 424 [1983]). From reviewing the billing records, is evident that a great deal of the expenses could have been avoided (*see Matakov*, 84 AD3d at 677).Moreover, plaintiff's counsel has not established by clear and convincing evidence that the time expended was necessary to achieve the results obtained (*Hensley*, 461 US at 440). While it is widely acknowledged that a securities class action is by its very nature a "complex animal," the complexity of the underlying issues of executive compensation do not appear extraordinary (*see e.g. In re IMAX Securities Litig.*, 2012 WL 3133476, *8 [SD NY 2012]).

Defendants point out that while plaintiff was investigating this matter, plaintiff's counsel issued twenty other press releases, six of which involved investigations related to the approval of executive compensation or stock option plans (at issue in this action) (Exhibits A-C, annexed to the Dallavalle Opp. Aff.). Thus, it appears likely that this matter overlapped with the investigations performed on other companies.

Defendants also highlight that the complaint in this action is nearly identical to complaints that plaintiff's counsel filed in three other lawsuits in 2012, with only the names of the parties and the content of the proxy statements changed (*see* Exhibits E-G, annexed to the Dallavalle Opp. Aff.).

In one of these actions, *Helene Hutt v Martha Stewart Living Omnimedia Inc., et al* (651249/12) (hereinafter, Martha Stewart action), assigned to this Court, plaintiff's counsel presented an uncontested attorneys' fees application after settlement of the proposed class action seeking a total of $205,167.50 for 425.25 hours; plaintiff's counsel did not seek to apply a multiplier, as in this case. Ultimately, this Court reduced the amount of fees sought and awarded $150,000 to plaintiff's counsel.

As in this matter, plaintiff moved by order to show cause in the Martha Stewart action for a preliminary injunction and served discovery requests. However, in the Martha Stewart action, the defendants removed the action to the United States District Court for the Souther District of New York, and plaintiff moved to remand the action, which was granted. Thereafter, the parties reached a settlement in principle, following by confirmatory discovery and the taking of one deposition

(Exhibits N-Q).

Plaintiff's counsel does not explain why its request for attorney's fees in this case is drastically higher, $477,817.16 for 455.25 hours of work, compared to its request of $205,167.50 for 425.25 hours of work in the Martha Stewart action. The issues in both actions are identical, whereas the Martha Stewart action involved more motion practice. Further, the cases cited to by plaintiff's counsel which awarded substantial fees are more [*5]complex and distinguishable.

Nor does plaintiff's counsel persuasively demonstrate that it is entitled to a multiplier. A court may apply a multiplier to the lodestar figure to account for factors such as the risk of litigation and the performance of the attorneys (*Goldberger v Integrated Resources, Inc.*, 209 F 3d 43, 49-50 {2d Cir 2000]).

Ultimately, the degree of a plaintiff's success is the "most critical factor" in determining the reasonableness of a fee award (*Lunday v City of Albany,* 42 F 3d 131, 134-34 [2d Cir 1994]).

Here, defendants continue to deny that plaintiff's claims have merit or that they engaged in any improper conduct, and maintain that they settled in order to avoid further litigation that would be protracted and expensive.

Plaintiff's counsel has undoubtedly achieved value for the Class insofar as certain additional corporate governance measures regarding the approval of executive compensation will now be implemented. Nonetheless, the settlement does not afford a monetary relief to plaintiff's shareholders, and thus, the benefit to the shareholders is limited.The approximately $465,000 in attorneys' fees that plaintiff's counsel seeks for 455.25 hours worked, applying a 1.75 multiplier totals approximately $1,043.38 per hour. Applying a multiplier as plaintiff's counsel seeks would achieve an unwarranted windfall, particularly in light of the duplication of hours, the likely overlap with other matters plaintiff's counsel was investigating, and the limited success achieved (*see Nager*, 57 AD3d at 390; *Estruch v Volkswagen AG,* 177 AD2d 943; [4th Dept 1991], *lv denied* 79 NY2d 759 [1992]).

Therefore, the Court is eliminating the multiplier sought by plaintiff's counsel, and reducing the attorney's fees to $125,000.

This shall constitute the decision of the Court. Order signed.

Dated: June 13, 2014

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J.S.C.

## Footnotes

**Footnote 1:**Under the settlement, Neostem agreed (1) to recommend at the 2013 annual shareholder meeting that its shareholders approve a resolution that will required holding the shareholder vote on the Neostem's executive compensation as prescribed by Dodd-Frank annually instead of every three years; (2) to adopt a resolution that the Board's compensation committee will not recommend that the company's shareholders approve Neostem's executive compensation without first consulting an independent compensation consultant; (3) to adopt a resolution that the Board's compensation committee will provide to the Board a report or summary of any advice received by any independent compensation consultant retained in connection with Neostem's executive compensation; (4) to adopt a resolution that the Board's compensation committee shall consist of at least four members if the Board's membership consists of greater than seven members; and (5) to enforce the aforementioned corporate measure for three years and allocate an aggregate of $100,000 from its operating budget to be available during the next three years to fund the foregoing measures.

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