

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC.)	MASTER FILE NO:
SECURITIES LITIGATION)	1:07-CV-725-CC
)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I. INTRODUCTION

Lead Plaintiffs Glickenhau & Co. and Carpenters Pension Trust Fund for Northern California ("Plaintiffs") submit this application for preliminary approval of a proposed Settlement in this securities class action brought on behalf of purchasers of Beazer Homes USA, Inc. ("Beazer") common stock between January 27, 2005 and May 12, 2008 inclusive ("Class Period"), who were damaged thereby. Plaintiffs assert claims against Beazer, four of its top executives, Ian J. McCarthy ("McCarthy"), James O'Leary ("O'Leary"), Michael T. Rand ("Rand"), and Michael H. Furlow ("Furlow") (the "Individual Defendants"), and its auditor, Deloitte & Touche LLP ("Deloitte") (collectively, "Defendants"). The Settlement will resolve all of Plaintiffs' claims against Defendants during the Class Period.

Under the terms of the Settlement, Defendants will pay \$30.5 million in cash (the "Settlement Fund"). The terms of the Settlement are set forth in the Stipulation

of Settlement dated as of May 4, 2009 (“Settlement Stipulation”).¹ The Settlement is the result of extensive arm’s length negotiations among the parties with the substantial assistance of the Honorable Daniel J. Weinstein, a highly respected retired Judge with significant experience in the mediation of complex class actions. Lead counsel believes that the Settlement is an excellent result for the Class.

In determining whether preliminary approval is warranted, the issue before the Court is whether the Settlement is within the range of what might be found fair, reasonable, and adequate, so that notice of the Settlement should be given to Class Members, and a hearing scheduled to consider final settlement approval. The Court is not required at this point to make a final determination as to the fairness of the Settlement. As stated in the Manual for Complex Litigation (Fourth) § 13.14, at 172 (Moore’s ed. 2004):

First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

The Manual for Complex Litigation (Fourth) defines the Court’s duty as follows:

Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members. . . . The fairness hearing notice

¹ A proposed order granting the relief requested herein (the “Notice Order”) is attached to the Settlement Stipulation as Exhibit A. The Stipulation, including all its exhibits, is attached to the Motion for Preliminary Approval of Class Action Settlement as Exhibit 1.

should alert the class that the hearing will provide class members an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms.

Id. § 21.633, at 321-22.

Because the Settlement meets the foregoing criteria and is well within the range of what might be approved as fair, reasonable, and adequate, Plaintiffs ask this Court to enter an Order: (1) granting preliminary approval of the Settlement; (2) certifying a class for settlement purposes; and (3) directing that the Class be given notice of the pendency of this action and the Settlement, in the form and manner proposed by the parties.²

II. BACKGROUND OF THE LITIGATION

On or after March 29, 2007, three class action complaints were filed in the United States District Court for the Northern District of Georgia, Atlanta Division (the “Court”), as class actions on behalf of persons who purchased the common stock of Beazer. By order of the Court dated August 8, 2007 (“Order”), the three actions were consolidated and styled *In re Beazer Homes USA, Inc. Securities Litigation*, Civil Action No. 1:07-CV-725-CC (the “Litigation”).

² At the final Fairness Hearing, the Court will consider the motion for final approval of the Settlement and entry of the parties’ proposed final order and judgment and Plaintiffs’ application for an award of attorneys’ fees and reimbursement of costs. The dates in the Notice Order, including the deadlines for notice, opt outs and exclusions, will be keyed to the date that is selected for the Fairness Hearing.

By the same August 8, 2007 Order, Plaintiffs Glickenhau & Co. (an institutional investment advisor firm) and Carpenters Pension Trust Fund for Northern California (a fund providing retirement benefits for members of the United Brotherhood of Carpenters and Joiners of America in 46 Northern California Counties) were appointed Lead Plaintiffs and their choice of counsel, Bernstein Liebhard LLP, Chitwood Harley Harnes LLP, and Milberg LLP, was approved by the Court.

The operative Complaint in the Litigation is the Amended and Consolidated Class Action Complaint for Violations of the Federal Securities Laws filed on June 27, 2008 (the “Complaint”). The Complaint alleges claims for violation of Sections 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Securities and Exchange Commission Rule 10b-5 promulgated thereunder against all Defendants and for violation of Sections 20(a) and 20A of the Exchange Act against Defendants McCarthy, O’Leary, Rand and Furlow.

On November 3, 2008, Defendants filed four motions to dismiss the Complaint. On January 30, 2009, Plaintiffs filed a motion to strike two exhibits that were submitted with the motion to dismiss of Defendants Beazer, McCarthy, and O’Leary, and on February 6, 2009, Plaintiffs filed their operative responses in opposition to the motions to dismiss. On February 12, 2009, Defendants Beazer, McCarthy, and O’Leary filed their response in opposition to Plaintiffs’ motion to

strike. On March 2, 2009, Defendants filed their reply briefs in further support of their respective motions to dismiss, and Plaintiffs filed a reply brief in further support of their motion to strike.

On April 6 and 7, 2009, a mediation was held in California at the JAMS Resolution Center under the supervision of an independent mediator, the Honorable Daniel J. Weinstein (Ret.). An agreement in principle was reached on April 10, 2009.

III. PRELIMINARY SETTLEMENT APPROVAL

A. The Standard For Preliminary Approval of a Settlement Agreement

Settlements of class actions are “highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.” *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (citations omitted). As a matter of public policy, courts in the Eleventh Circuit favor the settlement of class action and shareholder litigation. *See In re United States Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (“public policy strongly favors the pretrial settlement of class action lawsuits”); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993) (quoting *Bennett v. Behring Corp.*, 96 F.R.D. 343, 348 (S.D. Fla. 1982)). As explained by the Court in *Bennett*:

This policy has special importance in class actions with their notable uncertainties, difficulties of proof, and length. Settlement of complex cases contribute greatly to the efficient utilization of scarce judicial resources and

achieve the speedy resolution of justice for a “just result is often no more than an arbitrary point between competing notions of reasonableness.”

118 F.R.D. at 538 (citations omitted).³

Federal Rule of Civil Procedure 23(e) provides that any compromise of a class action must receive court approval. When considering a proposed class action settlement, courts routinely apply a two-step approach. In the first step -- often called preliminary approval -- the court reviews the proposed settlement for obvious deficiencies, schedules a fairness hearing, and directs that the class be provided with notice of the proposed settlement and the hearing. *See In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (“In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice.”). In the second step, the court considers the final approval of the proposed settlement at a formal fairness hearing where arguments and evidence may be presented in support of, and in opposition to, the settlement. *See NASDAQ*, 176 F.R.D. at 102; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14.

³ *See also In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 370 (S.D. Ohio 1990) (“Preliminary approval of a proposed settlement is based upon the court’s familiarity with the issues and evidence as well as the arm’s-length nature of the negotiations prior to the proposed settlement, ensuring that the proposed settlement is not illegal or collusive.”) (citations omitted).

Preliminary approval of a class action settlement lies within the sound discretion of the court. *See In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000); *Behring Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). When considering the proposed settlement, the court must “make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.633. *Cf. Sterling v. Stewart*, 158 F.3d 1199, 1203-1204 (11th Cir. 1998); *In re NASDAQ*, 176 F.R.D. at 102. It is well-settled that a settlement should be approved if it is “fair, adequate, reasonable, and free of fraud or collusion.” *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). The court is not required to make a final determination that the settlement is fair and reasonable, nor will any class member’s substantive rights be prejudiced by granting preliminary approval. “The Court’s function now is ‘to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.’” *See In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (quoting *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980)).

As set forth below, Lead Plaintiffs and their counsel respectfully submit that the proposed Settlement merits preliminary approval and warrants notice apprising Class Members of the Settlement and the scheduling of a final fairness hearing.

B. The Proposed Settlement Falls Squarely Within the Range of Reasonableness and Merits Preliminary Approval

1. The Settlement Agreement Resulted From Mediation and Arm's-Length Negotiations

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's length negotiations. *See* 2 Herbert Newberg & Alba Conte, *NEWBERG ON CLASS ACTIONS* § 11.41 at 11-88 (3d ed. 1992); *see also* *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.632-21.633. Such negotiations between counsel possessed of “experience and ability . . . necessary to effective representation of the class’s interests,” ensure fair resolution. *Id.* *See also In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000); *Domestic Air Trans.*, 148 F.R.D. at 312-13. It is also well-established that significant weight should be attributed to the belief of experienced counsel that settlement is in the best interests of the class. *See In re Domestic Air Trans.*, 148 F.R.D. at 312-13 (“In determining whether to approve a proposed settlement, the court is entitled to rely upon the judgment of the parties’ experienced counsel.”).

With the assistance of Judge Weinstein at the April 6-7, 2009 mediation, Lead Plaintiffs, by their counsel, have conducted extensive arm's-length settlement negotiations with counsel for Defendants with respect to a compromise and settlement of the Action with a view to settling the issues in dispute and achieving the best relief possible consistent with the interests of the Class.

Lead Plaintiffs' counsel have concluded that the settlement of this litigation on the terms and conditions set forth in the Settlement Stipulation is an excellent result for the Class and clearly fair, reasonable and adequate. This conclusion is based on analysis of the legal and factual issues presented; review of SEC filings and other publicly available information; extensive factual investigation; analysis of the risk, expense, and delay of continued litigation, particularly in light of insolvency concerns; counsel's past experience in litigating similar complex class actions; and the serious disputes among the parties concerning the merits and damages.

2. The Settlement Has No Obvious Deficiencies, Such as Preferential Treatment of the Lead Plaintiffs Or Excessive Compensation For Attorneys

The proposed Settlement has no obvious deficiencies. It provides for payment of \$30.5 million in cash ("Settlement Fund"), which constitutes a significant and certain recovery for the Class members at a relatively early stage of the litigation. The Settlement provides no preferential treatment for the Lead

Plaintiffs, who will receive distributions from the Settlement proceeds calculated in the same manner as the distributions to all other Class members.

Moreover, the Settlement does not mandate excessive compensation for Plaintiffs' Co-Lead Counsel. Plaintiffs' Co-Lead Counsel intend to apply for an award of attorneys' fees of 25% of the \$30.5 million settlement fund and for reimbursement of expenses in the approximate amount of \$550,000, plus interest (*see* Notice (Ex. A to Settlement Stipulation) at ¶ 17). The 25% fee requested is well within the range of fee awards in similar cases in this District and Circuit as well as in courts nationwide. Any award of fees and expenses is subject to Court approval.

3. The Settlement Falls Within The Range of Possible Approval

As explained above, the proposed \$30.5 million Settlement was reached after arm's-length negotiations among the parties through consideration of the advantages and disadvantages of continued litigation. Plaintiffs' Co-Lead Counsel, who have a great deal of experience in the prosecution and resolution of complex class action securities litigation, have carefully evaluated the merits of this case and the proposed Settlement. Even if the matter were to proceed to trial, Plaintiffs' Co-Lead Counsel know from experience that the apparent strength of a plaintiff's case is no guarantee against a defense verdict. Furthermore, even if a judgment were obtained against Beazer, the Individual Defendants and Deloitte at trial, the recovery might

be no greater, and indeed might be less, than the \$30.5 million provided by the proposed Settlement.

If the Settlement is granted final approval, the \$30.5 million (plus interest) will first be applied to notice and administration costs, expenses and any award of attorneys' fees and costs to Plaintiffs' Co-Lead Counsel, and remaining administration expenses. Lead Plaintiffs propose that the balance of the settlement fund – the Net Settlement Fund – be distributed among all Class Members who submit timely and valid proofs of claim – Authorized Claimants – pursuant to a Plan of Allocation set forth in the proposed Notice.

The proposed Plan of Allocation is based on Plaintiffs' theory of the case and reflects Plaintiffs' contention that the price of Beazer common stock was artificially inflated during the Class Period by various amounts as certain disclosures were made. Moreover, there is no reason to doubt the fairness of the proposed Plan of Allocation for purposes of preliminary approval. Even at the final-approval stage, “[a]n allocation formula need only have a reasonable, rational basis [to warrant approval], particularly if recommended by ‘experienced and competent’ class counsel.” *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001).

In light of the above considerations, the proposed Settlement as a whole falls within the range of possible final approval. The Court should therefore grant

preliminary approval of the Settlement and direct that notice of it be given to Members of the Class.

IV. NOTICE TO THE CLASS

Federal Rule of Civil Procedure 23(c)(2)(B) says, “[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Rule 23(e)(B) similarly says, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.”

Here, a detailed printed notice, in a form based upon the model promulgated by the Federal Judicial Center, is proposed to be mailed to all of Beazer’s record shareholders during the Class Period, and to nominee holders such as banks and brokerage firms. In addition, a summary notice will be published in The Wall Street Journal and transmitted over the *Business Wire*.

The due process clause requires that in a class action, notice of the settlement and an opportunity to be heard must be given to absent class members. *Cf. Mashburn v. Nat’l Healthcare Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) (“This Court is of the opinion that the notice given to members of the plaintiff class by publication and by mail, as aforesaid, complied with all the requirements of due process, all requirements of Rule 23 of the Federal Rules of Civil Procedure, and

constituted the best notice practicable under the circumstances.”) Thus, the proposed method of notice comports with Rule 23 and the requirements of due process. *See, e.g., In re Domestic Air Trans. Antitrust Litig.*, 141 F.R.D. 534, 550-51 (N.D. Ga. 1992) (providing that notice by mail to those class members who could be identified and by publication only to those who could not be identified satisfies due process requirements).

Here, the parties have negotiated the form of a notice (the “Notice”) to be disseminated to all persons who fall within the definition of the Class and whose names and addresses can be identified from Beazer’s transfer records. The parties further propose to supplement the mailed Notice with a summary notice (the “Summary Notice”), published in The Wall Street Journal and transmitted over the *Business Wire*. The Notice and Summary Notice are attached to the Settlement Stipulation as Exhibits 1 and 3 to Exhibit A.

As for the content of the Notice, Rule 23(c)(2)(B) provides:

The notice [to a Rule 23(b)(3) class] must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,

- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

Where notice is being sent in connection with a proposed settlement, the notice must also inform class members of the terms of the settlement and their options with respect thereto. *See Domestic Air Trans.*, 141 F.R.D. at 553-555; *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-05 (5th Cir. 1997).

Furthermore, where a settlement notice is being sent in a securities class action, the Private Securities Litigation Reform Act requires the notice to state (1) “[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis”; (2) “[i]f the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement from each settling party concerning the issue or issues on which the parties disagree”; (3) a statement indicating which parties or counsel intend to make . . . an application [for attorneys’ fees or costs], the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought”; (4) [t]he name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members . . .”; (5)

and “[a] brief statement explaining the reasons why the parties are proposing the settlement.” 15 U.S.C. § 78u-4(a)(7). In addition, the notice must have a cover page summarizing the above information. *See id.*

The proposed form of Notice describes the nature, history and status of the litigation; sets forth the definition of the Class; states the class claims and issues; discloses the right of people who fall within the definition of the Class to exclude themselves from it, as well as the deadline and procedure for doing so and warns of the binding effect of the settlement approval proceedings on people who stay in the Class. In addition, the Notice describes the Settlement and sets forth the \$30.5 million amount of the settlement fund and the portion that Lead Plaintiffs propose to distribute among the Class, both in the aggregate and on an average per-share basis; sets forth the proposed Plan of Allocation; states the parties’ disagreement over damages; sets out the maximum amount of attorneys’ fees and expenses that Plaintiffs’ Co-Lead Counsel intend to seek in connection with final settlement approval, including the maximum amount of the requested fees and expenses determined on an average per-share basis; provides contact information for Plaintiffs’ Co-Lead Counsel; and summarizes the reasons the parties are proposing the Settlement. The Notice also discloses the date, time, and place of the formal fairness hearing, and the procedures for commenting on the Settlement and

appearing at the hearing. The contents of the Notice therefore satisfy all applicable requirements.

Accordingly, in granting preliminary settlement approval, the Court should also approve the parties' proposed form and method of giving notice to the Class.

V. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement and enter the proposed Preliminary Order in Connection with Settlement Proceedings, submitted herewith.

Respectfully submitted this 5th day of May, 2009.

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Local Rule 7.1 Certification

Counsel for Plaintiffs hereby certify that the text of the foregoing has been prepared with Times Roman 14 point, one of the fonts and point selections approved by the Court in Local Rule 5.1B.

Dated: May 5, 2009.

/s/ Martin D. Chitwood
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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2009 I electronically filed the foregoing “PLAINTIFFS’ MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT” with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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