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Fairness Hearing

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 IN RE: NYC BUS TOUR ANTITRUST
LITIGATION,

New York, N.Y.

5 This Document applies to: ALL CASES 13 Civ. 0711(ALC)

6 -----x

8 October 20, 2014
10:27 a.m.

9 Before:

10 HON. ANDREW L. CARTER, JR.,

11 District Judge

12 APPEARANCES

13 SUSMAN GODFREY LLP
Attorneys for Plaintiffs
14 BY: WILLIAM CHRISTOPHER CARMODY
DREW D. HANSEN
15 ARUN SRINIVAS SUBRAMANIAN
SETH ARD
16 MEGAN O'HARA EASLEY

17 COVINGTON & BURLING LLP
Attorneys for Defendants
18 Coach USA, Inc. and
International Bus Services, Inc.
19 BY: ANDREW D. LAZEROW

20 PAUL HASTINGS LLP
Attorneys for Defendants TwinAmerica, LLC
21 CitySights LLC and City Sights Twin, LLC
BY: HOLLY HOUSE

23 - also present -

24 Tracey Nobel, Class Representative

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1 THE CLERK: Civil cause for fairness hearing in case
2 number 13 Cv. 711, In Re NYC Bus Tour Antitrust Litigation.

3 Counsel, please state your appearance for the
4 plaintiffs.

5 MR. CARMODY: Bill Carmody, your Honor, with Susman
6 Godfrey, on behalf of the class. And with me, your Honor, I
7 have four other Susman Godfrey lawyers. We have Arun
8 Subramanian. We have Drew Hansen. In the jury box we have
9 Seth Ard and Megan Easley. And, finally, we have one of our
10 class representatives with us today, Tracey Nobel.

11 THE COURT: OK.

12 THE CLERK: And for the defendants.

13 MR. LAZEROW: Good morning, your Honor. Andrew
14 Lazerow on behalf of the Coach defendants.

15 MS. HOUSE: Good morning, your Honor. Holly House, of
16 Paul Hastings, on behalf of Twin America LLC, CitySights LLC
17 and City Sights Twin, LLC.

18 THE COURT: OK. Good morning, everyone.

19 So I received a recent submission from Covington &
20 Burling. I have seen that. Does anyone wish to be heard
21 further on that regarding one of my former clerks that is now
22 employed with Covington & Burling? Does anyone wish to be
23 heard further on that?

24 MR. CARMODY: Not on behalf of the plaintiffs, your
25 Honor.

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1 THE COURT: OK. Just one other thing before I reach
2 my final decision. I just want to find out if there are any
3 other objectors or persons seeking exclusion from the
4 settlement. As of the last status report to the Court, there
5 were no objectors and only four timely requests for exclusion
6 from the settlement class. And although the time for
7 objections and requests for exclusions is past, I am just
8 interested in finding out if there have been any objections or
9 additional requests for exclusion since then.

10 MR. CARMODY: No, your Honor.

11 THE COURT: OK. And is there anyone here in the
12 courtroom seeking exclusion from this class or seeking to opt
13 out?

14 All right. I don't see any hands raised. There are
15 only a few people in the courtroom. Let's continue.

16 One of the questions that I have is regarding the
17 attorneys' fees that are being sought here in this case. I've
18 seen counsel's motion and the accompanying declarations, but
19 let's get a little bit more elucidation as to what was done in
20 this case. This case, while certainly a complicated matter --
21 and I'm not certainly trying to discount the intensity of the
22 plea negotiations -- the settlement negotiations and the other
23 work that was done here, it seems that this case hasn't exactly
24 lingered for a very long time. Counsel is seeking over \$6
25 million in fees. Give me a sense of what was done here in this

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1 case to justify an amount that high.

2 MR. CARMODY: Sure. It's Bill Carmody, your Honor.

3 My partner Drew Hansen can certainly walk you through
4 the Goldberger factors, but in the very big picture, certainly
5 the government initiated this case. We came on and
6 participated in every aspect of this case. And as you can
7 probably see, discovery was extensive. I want to say there are
8 almost 30 depositions that we participated in. We sent out
9 almost as many subpoenas. We certainly took the lead when it
10 came to experts and expert discovery in this case. And we took
11 the lead on the damages end of the case. And in two
12 mediations, obviously the government did not participate in the
13 one before Judge Gorenstein, and ultimately in the settlement
14 conference mediation before Antonio Piazza on the West Coast in
15 San Francisco the government was not participating at all.

16 In terms of overall time, we had a couple of million
17 dollars in fees, and of course we will incur more fees in the
18 administration of this case even after this final hearing. And
19 in terms of out-of-pocket expenses, to date I want to say we
20 have \$863,000 and change, and I think the bulk of that, your
21 Honor, is for expert fees.

22 THE COURT: OK.

23 MR. CARMODY: If you would like, we can walk you
24 through the Goldberger factors, if that would be helpful. And
25 the big picture, your Honor, of our fee request is about

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1 three -- a little over three times our lodestar, which I think
2 in looking at your decision in the Morris case is certainly
3 well within the range of courts in this circuit. You know the
4 number is 2 to 6?

5 THE COURT: Right. Yes, you are looking for a 3.35 --

6 MR. CARMODY: That's what it was. You are exactly
7 right, your Honor, although as we continue to put more time --
8 and of course we are well aware of the administration
9 process -- our lodestar of course will increase and the
10 multiplier will decrease.

11 THE COURT: Thank you. Give me a sense in terms of
12 the expenses with the expert fees, give me a sense roughly of
13 what it is that the experts did here.

14 MR. CARMODY: Sure.

15 And, Drew, do you want to handle that since you --

16 MR. HANSEN: Thank you, your Honor. Drew Hansen,
17 Susman Godfrey.

18 As the Court knows, the heart of any anti-trust case
19 is econometric modeling. So we had an expert economist firm
20 take the several gigabytes of transaction data the defendants
21 have produced, we worked with them to analyze that data and
22 worked on some rough causation, impact and damages models,
23 which the Court saw for illustrative purposes for class
24 certification.

25 This is a reasonably complex and intricate task, and

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1 just because of the way the scheduling worked with our case and
2 the government's case, we were in the vanguard on analyzing the
3 data, writing the models, and doing the preliminary work. So
4 that was enormously time-consuming. And as the Court remembers
5 from the briefing memos, really the heart of the brief is
6 causation, impact and damages, compact the economic modeling.

7 THE COURT: Thank you. Do the defendants wish to be
8 heard on any of this?

9 MR. LAZEROW: No, your Honor.

10 MS. HOUSE: No, your Honor.

11 THE COURT: OK. I'll be right back. Let me think
12 about this for a second.

13 (Pause)

14 THE COURT: Thank you. Let me just inquire a little
15 bit further from plaintiffs regarding the attorneys' fees
16 application. It seems to me one of the things that you are
17 implying is that the fee award that you seek would be
18 appropriate because you are going to incur additional fees.
19 But it seems that Rust is going to be doing the majority of the
20 work from here on out in terms of dealing with the rest of the
21 notices and the class. Give me a sense of what these
22 additional fees might be.

23 MR. CARMODY: Well, you are certainly right, your
24 Honor, Rust will be taking the lead. And if we send out
25 additional notice, we are hoping that if we can get this case

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1 approved today, that would give us a little bit of boost in
2 terms of publicizing that. As you know, the media has widely
3 covered this case. And we would immediately put on the
4 website, you know, the approval, if we are able to get that
5 today. And I think that and along with working with Rust and
6 Kinsella, we can publicize that further and try to boost the
7 claims. Already, I think we've had about \$3.8 million worth of
8 claims already.

9 So while it's absolutely a fact that Rust would be
10 doing more of that work than us, we are certainly working,
11 fielding calls, doing whatever needs to be done to work with
12 class counsel. And I mention -- or, excuse me, with Rust. And
13 I mention it only because the Second Circuit, of course,
14 acknowledges, as this Court has, that when you put in a fee
15 application, the large bulk of the work is done up to the time
16 of the settlement but there is certainly continuing work, and
17 that is all I meant to convey to the Court.

18 THE COURT: So the continuing work that you are
19 discussing here is basically fielding phone calls and placing
20 this on the website. And what else are you talking about?

21 MR. CARMODY: Working with Rust and Kinsella to make
22 sure if we send out additional notice, which we plan to talk
23 with them and then bring back to this Court and of course have
24 the Court approve it, it is working with them and just spending
25 additional time to make sure the final claims process,

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1 everything works out as we hope and expect it will very
2 smoothly.

3 THE COURT: OK. Is there something --

4 MR. HANSEN: Your Honor, if I could just add to that?

5 Obviously we worked intensely with Rust and Kinsella
6 on the initial notice plan. Just because we had spent so much
7 time with the transaction databases, we were able to figure out
8 a way to do individual direct notice and prepopulated claim
9 forms.

10 We have talked with Rust and Kinsella about what we
11 can do if the Court does grant final approval to further
12 promote the settlement whether by additional mailings,
13 additional notices or something like that. That is the kind of
14 work. We anticipate we would do similar work in designing that
15 simulation process with Rust and Kinsella. We had general
16 conversations about that, but that is putting the cart before
17 the horse. And that's what we anticipate doing if the Court
18 would issue an order.

19 THE COURT: All right. Thank you.

20 Do the defendants wish to be heard on this?

21 MR. LAZEROW: No, your Honor.

22 MS. HOUSE: No, your Honor.

23 THE COURT: All right. I think that the plaintiff's
24 attorneys' fee application is close but I think it's still a
25 little bit excessive. I believe that I will cut the percentage

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1 from the 33-and-a-third that's being requested by plaintiffs'
2 counsel to 30 percent. But before I do that, I will give the
3 plaintiffs' counsel an opportunity to address me any further,
4 if they would like.

5 Anything else from plaintiffs' counsel on this?

6 MR. CARMODY: No, your Honor. I mean, I guess --
7 well, maybe a little bit more. Obviously, your Honor, you have
8 broad discretion to do whatever you think is right. The reason
9 why we did request 33 percent is obviously -- it's several
10 reasons. Number one, because the work we did in this case is
11 substantive work and getting the result that I think when you
12 take a look at what we briefed in our class certification
13 briefing, we brought to the table a recovery in the ballpark of
14 two-thirds or so -- almost two-thirds of the actual damages
15 that were quantified.

16 We did that in a way in terms of fees, our normal at
17 Susman Godfrey -- I mean, we have alternative costs. If we are
18 not doing one thing, we have chances to do the other. And our
19 normal fee arrangement for contingent-fee cases is 35 percent,
20 for example. Obviously, in this case we took a chance without
21 any prospect of any recovery on behalf of the class or
22 certainly counsel. We outlaid \$863,000, and, frankly, there is
23 a little bit more that we haven't added in; we are going to eat
24 that. But we spent that kind of out-of-pocket money. There is
25 not a lot of firms that would spend that sort of money to do

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1 the sort of modeling we did to get this class certified.

2 Obviously, we were able to get it settled, and we are seeking a
3 settlement class here before that is done. But, in short, your
4 Honor, I think the fees we're requesting are certainly in line
5 with those in the Second Circuit here and courts -- and also in
6 line with what we do at Susman Godfrey. They are, frankly, a
7 little bit less.

8 So when we talked about submitting a fee application
9 in this case, we certainly discussed internally, you know,
10 should the number be 30, 31, 33? Should it be more. And I was
11 the one on behalf of the firm who suggested, because of all we
12 said and kind of what we had done here to bring this result to
13 the class, that it should be one-third of the common fund that
14 we created.

15 THE COURT: OK. Thank you.

16 Anything else from defense counsel?

17 MR. LAZEROW: No, your Honor.

18 MS. HOUSE: No, your Honor.

19 MR. CARMODY: I guess I would say one last thing, if
20 it please your Honor, if I am permitted to?

21 THE COURT: Sure. Thank you.

22 MR. CARMODY: And it really is more to do with the
23 timing of this. The Court is well aware that the claims
24 deadline is not until January 19th of this coming year. We
25 have asked -- obviously the claims and the final number of

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1 claims submitted wouldn't affect the fee application we
2 submitted. And so we have requested to be paid, you know,
3 earlier, frankly, because we have outlaid this money over the
4 last couple of years, we've outlaid expenses of almost \$900,000
5 and a couple of million dollars worth of time, which we will
6 continue to accrue. So we were hoping, frankly, for accounting
7 purposes in our firm that the Court would sign the fee award --
8 and there has obviously been no objections to it at all -- so
9 we could maybe get that 30-day clock running.

10 THE COURT: Good.

11 OK, counsel, you have convinced me. I will go ahead
12 and award the 33-and-a-third percent for the attorneys' fees,
13 and I will approve the settlement class.

14 Plaintiffs are Natasha Bhandari and Tracey L. Nobel
15 and class members who were persons who were entities that
16 purchased the "hop-on, hop-off" bus tours of defendants Twin
17 America, LLC; Coach USA, Incorporated; International Bus
18 Services, Incorporated; CitySights LLC, and City Sights Twin,
19 LLC in New York City from February 1, 2009 until the date of
20 this Court's preliminary approval order, June 16, 2014.
21 Excluded from the Class are defendants, their present and
22 former parents, subsidiaries, affiliates and employees. Five
23 different lawsuits were filed individually and on behalf of
24 others similarly situated against defendants between
25 December 2012 and March 2013, alleging that defendants engaged

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1 in price fixing and anticompetitive behavior by forming a joint
2 venture, in violation of Sections 1 and 2 of the Sherman
3 Antitrust Act, Section 7 of the Clayton Act, and New York
4 General Business Law.

5 Magistrate Judge Gabriel Gorenstein granted a motion
6 to consolidate those cases in an order dated April 23, 2013.
7 On April 26, 2013, Interim Class Counsel Susman Godfrey LLP
8 filed the Consolidated Class Action Complaint against
9 defendants. Plaintiffs' counsel later filed the First Amended
10 Consolidated Class Action Complaint on November 14, 2013.

11 On May 20, 2014, plaintiff submitted a Motion for
12 Preliminary Approval of a Settlement with Defendants. The
13 Court issued an Order Preliminarily Approving the Class Action
14 Settlement reached by plaintiffs and defendants on June 16,
15 2014. Plaintiffs filed Motions for Settlement for Final
16 Approval of Settlement with Defendants and Attorney's Fees,
17 Expenses, And Service Awards on August 15, 2014.

18 The previously submitted motions to certify class were
19 deemed moot by this Court's August 20, 2014 Order. The Court
20 now certifies the following class under Federal Rule of Civil
21 Procedure 23 for settlement purposes:

22 All persons who, or entities that, purchased
23 Defendants' "hop-on hop-off" bus tours in New York City from
24 February 1, 2009 until the date of the Preliminary Approval
25 Order, June 16, 2014. And excluded from the class, as

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1 indicated earlier, are the defendants, their present and former
2 parents, subsidiaries, affiliates, and employees. This is the
3 same class stipulated to in the Settlement Agreement submitted
4 by the parties.

5 The settlement class meets all of the requirements for
6 class certification under Federal Rule of Civil Procedure 23:
7 There are 3.9 million estimated Class Members and, thus,
8 joinder is impracticable; Class Members raise common issues;
9 Plaintiffs' claims arose from the same factual and legal
10 circumstances that form the bases of the Class Members' claims;
11 there is no evidence that the Plaintiffs' and Class Members'
12 interests are at odds; Class Counsel has substantial experience
13 and expertise in such actions; there are common factual
14 allegations; and Class adjudication of this case is superior to
15 individual adjudication. These factors are sufficient to
16 support certification of the Settlement Class. See Morris v.
17 Affinity Health Plan, Incorporated, 859 F.Supp.2d 611.

18 The Court hereby grants the Motion for Final Approval
19 and finally approves the settlement as set forth in the
20 Settlement Agreement. Federal Rule of Civil Procedure 23(e)
21 requires court approval for class action settlements to ensure
22 that they are procedurally and substantively fair, reasonable,
23 and adequate.

24 To determine procedural fairness, courts must examine
25 the negotiating process which led to the settlement. It is

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1 Wal-Mart Stores, Incorporated v. Visa U.S.A. Incorporated, 396
2 F.3d 96, and D'Amato v. Deutsche Bank, 236 F.3d 78, 85. To
3 determine substantive fairness, courts must determine whether
4 the settlement's terms are fair, adequate, and reasonable, and
5 according to the factors set forth in City of Detroit v.
6 Grinnell Corporation, 495 F.2d at 448, which was overruled on
7 other grounds by Missouri v. Jenkins, 491 U.S. 274 at 285.
8 There is a strong judicial policy favoring settlements of class
9 action suits, and courts must examine the procedural and
10 substantive fairness of settlement agreements keeping this
11 policy in mind.

12 The settlement here is procedurally fair, reasonable,
13 adequate, and not a product of collusion. A "presumption of
14 fairness, adequacy, and reasonableness may attach to a class
15 settlement reached in arm's-length negotiations between
16 experienced, capable counsel after meaningful discovery."
17 Wal-Mart Stores, 396 F.3d at 116.

18 Here, experienced class counsel engaged in settlement
19 negotiations with defendants over the course of several months,
20 including the mediation in front of Magistrate Judge
21 Gorenstein.

22 There is also no evidence of collusion here. Absent
23 fraud or collusion, the Court should be hesitant to substitute
24 its judgment for that of the parties who negotiated the
25 settlement. Hence, the Court finds the settlement agreement

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1 procedurally fair.

2 Regarding substantive fairness:

3 City of Detroit v. Grinnell Corporation, 495 F.2d 448
4 set the factors for determining substantive fairness of class
5 action settlements in this Circuit. The relevant factors in
6 determining the fairness, adequacy, and reasonableness of a
7 class settlement according to Grinnell are:

8 The complexity, expense and likely duration of the
9 litigation; the reaction of the class to the settlement; the
10 stage of the proceedings and the amount of discovery completed;
11 the risks of establishing liability; the risks of establishing
12 damages; the risks of maintaining the class action through the
13 trial; the ability of the defendants to withstand a greater
14 judgment; the range of reasonableness of the settlement fund in
15 light of the best possible recovery; the range of
16 reasonableness of the settlement fund to a possible recovery in
17 light of all the attendant risks of litigation.

18 That's Wal-Mart Stores Incorporated v. Visa U.S.A.,
19 Incorporated, 396 F.3d 96, citing to Grinnell.

20 All right. I have examined all of the factors based
21 on the submissions by the parties, and supplemented to some
22 extent by argument here today, and find that the Grinnell
23 factors support approving the Final Settlement Agreement.

24 Regarding the dissemination of the notice, I am also
25 satisfied that the notice of the distribution comported with

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1 all constitutional requirements, including those of due
2 process. As detailed in the supporting declarations and
3 affidavits, the Claims Administrator reached at least hundreds
4 of thousands of potential class members. Both mailings and
5 emails were sent to potential class members at their last known
6 addresses and followup was done to find those class members
7 with known and unknown forwarding addresses.

8 Again, I find that I grant certification of the
9 Settlement Class and I grant final approval of the Class Action
10 Settlement.

11 Regarding attorneys' fees and expenses, I will grant
12 the application for attorneys' fees and expenses based on the
13 submissions by the parties and supplemented on the record here
14 in open court.

15 Anything else from plaintiffs today?

16 MR. CARMODY: No. Thank you, your Honor.

17 MR. HANSEN: Your Honor, if I may? I'm sorry. We had
18 also requested incentive awards for the class representatives.

19 Maybe Mr. Carmody could address that.

20 MR. CARMODY: I didn't address that. That was part
21 of -- that was in our application for the fee award.

22 THE COURT: Correct.

23 MR. CARMODY: Would you like me to address that, your
24 Honor?

25 THE COURT: No. I grant that as well.

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MR. CARMODY: OK, your Honor.

MR. HANSEN: Thank you.

THE COURT: Anything else from plaintiffs?

MR. CARMODY: No. Thank you, your Honor.

THE COURT: Anything else from defendants?

MR. LAZEROW: No, your Honor.

THE COURT: OK. Thank you very much. Have a good day.

MR. CARMODY: Thank you, your Honor.

MR. HANSEN: You, too.

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