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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY
CHANCERY DIVISION
DOCKET NO. C-000045-16

ROBERT STROUGO, on behalf of himself and all others similarly situated,

Plaintiff,

v.

OCEAN SHORE HOLDING COMPANY, ROBERT PREVITI, STEVEN BRADY, CHRISTOPHER FORD, FREDERICK DALZELL, DOROTHY MCCROSSON, JOHN VAN DUYNE, SAMUEL YOUNG, and OCEANFIRST FINANCIAL CORPORATION,

Defendants.

APPROVED FOR PUBLICATION

January 10, 2019

COMMITTEE ON OPINIONS

Decided: September 26, 2017

Gustavo F. Bruckner (Pomerantz LLP), Marc L. Ackerman & Evan J. Smith (Brodsky & Smith, LLC), attorneys for plaintiff.

James R. Birchmeier (Birchmeier & Powell LLC), Stephen E. Hudson, & Hillary D. Rightler (Kilpatrick Townsend & Stockton LLP), attorneys for defendants Ocean Shore Holding Company, Robert Previti, Steven Brady, Christopher Ford, Frederick Dalzell, Dorothy McCrosson, John Van Duyne, and Samuel Young.

Rodman E. Honecker & Robert J. Luddy (Windels, Marx, Lane, & Mittendorf, LLP), attorneys for defendant OceanFirst Financial Corporation.

MENDEZ, A.J.S.C.

This matter comes before the court upon plaintiff's motion for final approval of a class action settlement under Rule 4:32-2. The underlying action arises out of a merger in which defendant, OceanFirst Financial Corporation ("OceanFirst") acquired defendant, Ocean Shore Holding Company ("Ocean Shore") in a deal worth approximately $145 million. Plaintiff, an Ocean Shore stockholder, brought suit against defendants alleging that Ocean Shore's board of directors ("Board") breached their fiduciary duty in approving the merger. Plaintiff and defendants reached a settlement, which was non-monetary. It required defendants to release "Supplemental Disclosures" so that stockholders could be better informed when voting on the merger. Defendants also agreed to pay plaintiff's attorneys' fees in the amount of $210,000 and $10,000 in costs.

Plaintiff's present motion for final approval of the settlement as well as fees and costs is unopposed by defendants. Plaintiff seeks to have this court: (1) approve the proposed settlement as fair, reasonable and adequate; (2) certify the proposed Class and certify plaintiff Strougo as representative for the Class; (3) appoint Pomerantz LLP as Class Counsel; (4) grant plaintiff's application for an award of attorneys' fees of $210,000, reimbursement of expenses and

costs of $10,000, and grant plaintiff Strougo an incentive award of $1,000, to come out of the proposed attorneys' fees award.

This case presents novel issues related to the determination of class action settlement approval pursuant to Rule 4:32-2. For the reasons stated in this opinion, the court grants plaintiff's motion. The court is satisfied that this matter is appropriate for a class action and plaintiff may represent the interests of the proposed Class. The court grants Class certification. Regarding the proposed settlement, the court formally adopts the application of the Girsh factors and determines the settlement is fair, reasonable and adequate. Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975). The court also holds that the non-monetary settlement in this case provides a material benefit to the Class.

FACTUAL BACKGROUND

On July 13, 2016, Ocean Shore and OceanFirst, two publicly traded financial service companies, announced in a joint press release they had entered into a merger agreement. Under this agreement, each Ocean Shore share would be exchanged for $4.35 in cash and .9667 shares of OceanFirst stock. Plaintiff, Robert Strougo, owned 900 shares of Ocean Shore stock at the time the merger was announced. On July 26, 2016, plaintiff, on behalf of himself and other Ocean Shore stockholders, filed a class action complaint against Ocean Shore,

Ocean Shore's Board,[1] and OceanFirst. The complaint alleged that the Board breached their fiduciary duty by approving the transaction and that OceanFirst aided and abetted the Board's breach.

The proposed Class consists of all individuals who owned or beneficially held shares of Ocean Shore common stock in the period from July 13, 2016, through the date the merger closed, November 30, 2016.[2] There are approximately 6.4 million outstanding shares of Ocean Shore common stock. Plaintiff's counsel investigated the allegations, including a review of press releases, analyst reports and related filings with the Securities and Exchange Commission ("SEC"). Plaintiff's counsel also consulted with Mary O'Connor, a valuation expert, who provided information regarding valuation and pricing, the process leading to the merger, and the adequacy of corporate disclosures made to Ocean Shore stockholders.

Settlement and Supplemental Disclosures

On August 12, 2016, plaintiff served his first request for production of documents. On August 25, 2016, in connection with the merger's approval

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[1] The Board consisted of Robert Previti, Steven Brady, Christopher Ford, Frederick Dalzell, Dorothy McCrosson, John Van Duyne, and Samuel Young.

[2] Excluded from the Class are defendants and their immediate family members, any entity in which any defendant has a controlling interest, and any successors-in-interest thereto.

process, Ocean Shore and OceanFirst filed an S-4 Registration Statement (the "Original Registration Statement") with the SEC, which was disseminated to Ocean Shore stockholders. After reviewing this statement, plaintiff amended the complaint to also allege the Original Registration Statement was misleading and omitted material information. Shortly thereafter, the parties commenced settlement discussions and agreed to a stay of the action while discussions were ongoing. On September 20, 2016, in lieu of plaintiff filing a motion, Ocean Shore agreed to provide confidential non-public discovery on an expedited basis. On September 26, 2016, plaintiff issued a settlement demand letter seeking, among other things, to have defendants release previously undisclosed information omitted from the Original Registration Statement. Ocean Shore responded with proposed additional disclosures and the parties subsequently agreed on the content of "Supplemental Disclosures" to be released to the stockholders.

Plaintiff highlights three categories of information contained in the Supplemental Disclosures that they claim materially benefitted stockholders. The first includes details regarding the analyses conducted by Ocean Shore's financial advisor, Sandler O'Neill + Partners ("Sandler O'Neill"). Shortly before defendants announced the merger, Sandler O'Neill provided a "fairness opinion" to Ocean Shore's Board for the purpose of evaluating the proposed

merger. The Board reportedly relied on this fairness opinion in recommending that stockholders approve the merger. Some "metrics" Sandler O'Neill used in conducting the fairness opinion analyses were not available in the Original Registration Statement. The Supplemental Disclosures included additional information on the valuation of the two companies, such as the total assets, the percentage of loans to deposits, leverage ratio, return on average assets, and other significant financial details for both Ocean Shore and OceanFirst. Also, the Original Registration Statement did not include some data on individual multiples for each independent merger transaction. This information was later made available by the Supplemental Disclosures.

The second category of information involves net income projections with respect to Ocean Shore done by the buyer, OceanFirst. These disclosures provided Ocean Shore stockholders with insight into Ocean Shore's future financial performance for the years 2016–2021 from the buyer's perspective.

The third category of information involves process and potential conflicts of interest. In the Supplemental Disclosures, defendants made additional disclosures concerning discussions between Ocean Shore's CEO, Steven Brady, and OceanFirst's CEO about continued employment and consulting arrangements for Brady and other Ocean Shore executive officers at OceanFirst. The Supplemental Disclosures also revealed more information about Sandler

O'Neill, including fees Sandler O'Neill received from Ocean Shore in connection with the transaction, information about its role as a broker-dealer, information about its business relationship with OceanFirst, and fees paid to it by OceanFirst.

As part of the settlement, on October 6, 2016, Ocean Shore and OceanFirst filed an amendment to the Original Registration Statement that included these Supplemental Disclosures. A few days later, the parties signed a Memorandum of Understanding reflecting a principal agreement to settle. Defendants filed a finalized amendment to the S-4 Registration Statement incorporating the Supplemental Disclosures on October 17, 2016. On November 22, 2016, the merger was approved by majority vote of the Ocean Shore stockholders. The transaction closed November 30, 2016.

Following the merger's consummation, plaintiff conducted confirmatory discovery. Defendants produced additional internal confidential documents. Plaintiff deposed Brady, Ocean Shore's former CEO and lead negotiator on the merger. Plaintiff also deposed Catherine Lawton, a representative of the Board's financial advisor, Sandler O'Neill. The parties subsequently finalized a proposed settlement providing for $210,000 in attorneys' fees with $1,000 of that amount going to plaintiff as an incentive award for bringing the action. Seven attorneys and paralegals from Pomerantz LLP spent a total of 410.5 hours on the case. Two partners and an associate from Brodsky & Smith, local counsel

for plaintiff, spent a total of thirty-four hours on the case. The agreement also provided for $10,000 in expenses. The bulk of expenses were expert fees.

Plaintiff motioned for preliminary approval of the settlement on June 27, 2017. The court granted preliminary approval, scheduled a fairness hearing, and set forth the timing and method for providing notice to the Class. The firm of Donlin, Recano & Company Inc. ("DRC") was retained to provide notice. As of August 17, 2017, DRC had mailed a total of 3532 copies of notice to beneficial stock owners and "nominees"[3] who held Ocean Shore common stock at any time during the class period. The Notice has been given to the Class in the manner directed by the preliminary approval order. Proof of the mailing of the Notice has been filed with the court, and a full opportunity to be heard has been offered to all parties to the action, the Class, and persons in interest. The notice included a summary of the terms of the settlement. It also informed stockholders that they had the right to object to the settlement and provided the date, time and location of the then pending fairness hearing.

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[3] The exact number of Class members is unknown because many shares are held through brokerage firms, banks, custodians, sub custodians and other "nominees" on behalf of the beneficial holders. These nominees were given a choice. They could either provide DRC with the number of individual stockholders they owned shares on behalf of and DRC would send copies that the nominee could mail to their clients, or nominees could provide DRC with a list of names and addresses and DRC would mail the notice to the stockholder directly.

In a letter to the court dated August 7, 2017, Jay Hershberg, a purported stockholder,[4] objected to the settlement, claiming other Class members should be entitled to additional compensation. The letter referenced the pending date of the fairness hearing. Hershberg reiterated these objections in a second letter dated September 1, 2017. There were no other objectors. The matter was argued to the court on September 14, 2017. Neither Hershberg nor any other stockholder attended the hearing. Defendants support plaintiff's motion for approval of the settlement.

DISCUSSION

I. The Court Certifies the Class Pursuant to Rule 4:32

Class actions in this state are governed by Rule 4:32-1(a), which states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In other words, for a proposed class to be certified it must meet the four requirements of numerosity, commonality, typicality and adequacy of representation.

[4] Hershberg never provided proof that he was a member of the Class.

A. Numerosity

"There is no precise number that distinguishes between a class that satisfies the condition of numerosity and one that does not." Fink v. Ricoh Corp., 365 N.J. Super. 520, 557 (Law Div. 2003). It has been held that a Class of eighty-one property owners was sufficient to meet the numerosity requirement. See Saldana v. City of Camden, 252 N.J. Super. 188, 193 (App. Div. 1991). There are over 6.4 million outstanding shares of common stock in Ocean Shore. At least 3532 copies of notice were distributed. While the precise number of members in this case is presently unknown, it is clear that joinder of all members would be impracticable and therefore the numerosity requirement is met.

B. Commonality

Rule 4:32-1(a)(2) requires that there be questions of law or fact common to the Class. A single common question may be sufficient. See Delgozzo v. Kenny, 266 N.J. Super. 169, 185 (App. Div. 1993). Issues common to the Class in the present case include, whether defendants violated the fiduciary duties owed to Class members and whether the consideration that was paid for the Ocean Shore shares pursuant to the merger was fair and reasonable. These issues are sufficient to satisfy the commonality requirement.

C. Typicality

The claims of a putative class representative are typical if they "have the essential characteristics common to the claims of the class." In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (1983) (quoting 3B James W. Moore et al., Moore's Federal Practice ¶ 23.06-2 (2d ed. 1982)). The typicality requirement ensures that the interests of the class and the class representative are aligned so that the class representative, by furthering his own goals, is also furthering the goals of the class. See Goasdone v. Am. Cyanamid Corp., 354 N.J. Super. 519, 530 (Law Div. 2002). Here all claims arise from the same events and are based on the same legal theories. As stockholders, the alleged breach of fiduciary duty impacted plaintiff and other Class members in essentially the same way. Typicality is satisfied.

D. Adequate Representation

Determining adequacy of representation requires that two factors be established: "(a) plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Delgozzo, 266 N.J. Super. at 188. Here, there is no apparent conflict between plaintiff and the Class members. Also, plaintiff's counsel, Pomerantz LLP, has significant experience litigating class action cases of this type. The fourth and final requirement under

Rule 4:32-1(a) is also satisfied. Having completed the analysis of all four factors, the court certifies the Class pursuant to Rule 4:32.

II. The Court Approves the Proposed Settlement and Holds that it is Fair, Reasonable, and Adequate

Settlement has long been preferred to litigation, and public policy suggests upholding good faith settlements, even without strong regard to the underlying consideration. See Pascarella v. Bruck, 190 N.J. Super. 118, 125 (1983). "Settlement spares the parties the risk of an adverse outcome and the time and expense—both monetary and emotional—of protracted litigation. Settlement also preserves precious and overstretched judicial resources." Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253-54 (2013) (citations omitted). "There is a clear public policy in this state favoring settlement of litigation." Herrera v. Twp. of S. Orange Vill., 270 N.J. Super. 417, 424 (App. Div. 1993). That said, a class action settlement, which binds individuals not before the court, creates unique due process concerns. Accordingly, parties cannot settle a class action without court approval.

"The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." R. 4:32-2(e)(1)(C). "The basic test for court approval of a settlement