

1998 WL 1661385

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Pamela K. MARTENS, Judith P. Mione, Roberta O'Brien Thomann, Lorraine Parker, Bette Laswell, Jennifer Alvarez, Marianne Dalton, Patricia Clemente, Simone Schwendener, Cara Beth Walker, Edna Broyles, Robin Tompkins, Stephanie Rodruck, Daniele Saccone, Beverly Trice, Lori Hurwitz, Lydia Klein, Eileen Valentino, Patricia Hanlon, Teresa Tedesco, Mary Ann Cabell, Ardis Vinnecour, and Tracy Gibbs, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

SMITH BARNEY INC., a/k/a Shearson/American Express a/k/a Shearson Lehman Brothers a/k/a Shearson Lehman Brothers Holdings, Inc., Shearson Lehman Hutton a/k/a Shearson Lehman Brothers, Smith Barney/Shearson, Inc., James Dimon, Nicholas Cuneo, the New York Stock Exchange and the National Association of Securities Dealers, Defendants.

No. 96 Civ. 3779(CBM). | July 28, 1998.

Opinion

FINAL ORDER AND JUDGMENT APPROVING CLASS ACTION SETTLEMENT AND DISMISSING CLAIMS

MOTLEY, J.

*1 1. On November 18, 1997, 23 of the 25 named plaintiffs in this action, individually and as Class Representatives, and defendants Smith Barney Inc. and James Dimon, by their respective counsel of record, executed and filed with this Court a Stipulation of Settlement in full settlement of all class and individual claims in this action (the "Action") as against defendants Smith Barney (including its predecessor firms named in the caption), James Dimon and Nicholas Cuneo;

2. The Stipulation of Settlement has not been terminated pursuant to its terms;

3. Class Counsel, who also represent all named plaintiffs in *Alvarez, et al. v. Smith Barney Inc., et al.*, Civil Action 96-3919, pending in the United States District Court for the Northern District of California ("*Alvarez*"), have

represented to the Court that, upon entry of this Final Order and Judgment, they and plaintiffs in *Alvarez* (who are also members of the Class and bound by the Stipulation of Settlement) will forthwith follow the necessary procedures to obtain an Order from the United States District Court for the Northern District of California dismissing *Alvarez* with prejudice, at least as against defendants Smith Barney, James Dimon, John Delahaye, Frank Dworsky and Terrence Ormsbee;

4. On November 21, 1997, this Court entered an Order, *inter alia*, Preliminarily Approving the Settlement and Conditionally Certifying a Settlement Class ("Preliminary Approval Order");

5. Pursuant to the Preliminary Approval Order and the Court's subsequent Order dated December 3, 1997, this Court directed that a Fairness Hearing be held on April 9, 1998 at 10:00 a.m. to consider and determine whether to issue a final order and judgment approving the fairness, reasonableness and adequacy of the Settlement;

6. Pursuant to the Preliminary Approval Order and the Court's subsequent Order dated December 19, 1997, this Court ordered that the Notice of Proposed Settlement of Class Action and Hearing Thereon attached to the Stipulation of Settlement as Exhibit C (the "Class Notice") be distributed by first-class mail to the last known addresses of all members of the Class on or before January 5, 1998. Pursuant to the Preliminary Approval Order and the Court's subsequent Order of December 30, 1997, this Court ordered that the Summary Publication Notice, in a form approved by the Court on December 9, 1997, be published once, no later than January 5, 1998, in those publications identified in Exhibit D to the Stipulation of Settlement except *The Washington Post*;

7. As attested by the affidavits of Michael Rosenbaum and Craig TerBoss sworn to on April 6, 1998, and the affidavit of Eugene V. Clark sworn to on April 6, 1998, all of which were filed with the Court on April 7, 1998, all the provisions of the Preliminary Approval Order as to notice have been complied with;

8. The 38 persons listed on Exhibit A hereto have duly requested exclusion from the Class;

*2 9. The Court has received and considered various objections to the Proposed Settlement;

10. The Fairness Hearing provided for in the Preliminary Approval Order was duly held before this Court on April 9, 1998, at which time all interested persons were afforded the opportunity to be heard, including objectors to as well as proponents of the proposed settlement;

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11. The Stipulation of Settlement was amended on April 9, 1998, supplemented on June 15, 1998, and amended again on July 1, 1998, July 15, 1998 and July 23, 1998;

12. This Court has duly considered all of the submissions, objections and arguments presented with respect to the proposed settlement (“Proposed Settlement”) set forth in the Stipulation of Settlement as amended on April 9, 1998, supplemented on June 15, 1998, and amended again on July 1, 1998, July 15, 1998 and July 23, 1998 (“Settlement Stipulation”);

13. All capitalized terms in this Final Order and Judgment that are not otherwise defined have the same meaning as in the Settlement Stipulation;

NOW THEREFORE, after due deliberation, this Court hereby FINDS, CONCLUDES, ADJUDGES and DECREES that:

14. This Final Order and Judgment Approving Class Action Settlement (“Final Order and Judgment”) is binding on all members of the Class as defined in the Preliminary Approval Order.

15. The Class Notice and Summary Publication Notice fully and accurately informed the members of the Class of all material elements of this action and the Proposed Settlement, and constituted valid, due and sufficient notice to all members of the Class in all respects, complying fully with Rule 23 of the Federal Rules of Civil Procedure and the requirements of Due Process.

16. The Notice of Class Action Settlement Approval annexed as Exhibit 1 to Amendment 3A to Stipulation of Settlement dated November 18, 1997 (“Amendment No. 3A”) is hereby approved by this Court. Within 14 days after entry of this Final Order and Judgment, such Notice shall be mailed, in substantially the form annexed as Exhibit 1 to Amendment No. 3A, to the last known addresses of all members of the Class. Class Counsel is hereby authorized to retain such persons or entities as may be necessary to effect the approved Notice, as provided in the Settlement Stipulation.

17. Within five days after entry of this Final Order and Judgment, Class Counsel and Smith Barney shall submit to this Court for review and approval their summary of the Notice of Class Action Settlement Approval, which shall, in substantially the form approved by this Court, and within 14 days after entry of this Final Order and Judgment, be published in the publications identified in the Amendment No. 3A. Class Counsel is hereby authorized to retain such persons or entities as may be necessary to effect such publication.

18. Smith Barney shall bear all costs reasonably associated with printing, mailing, and publishing the

Notice of Class Action Settlement Approval and the summary thereof as required by Paragraphs 16 and 17 above, including, without limitation, the cost of any outside vendors retained by Class Counsel to aid in effectuating such notice.

*3 19. The Proposed Settlement on the terms and conditions set forth in the Settlement Stipulation is fair, reasonable and adequate, is in the best interests of the Class and should be approved, especially in the light of the benefits to the Class accruing therefrom, the substantial discovery and investigation conducted by Class Counsel prior to the Proposed Settlement, and the complexity, expense, risks and probable protracted duration of further litigation.

20. The Settlement Stipulation and the Proposed Settlement are hereby approved in accordance with Rule 23 of the Federal Rules of Civil Procedure and shall be consummated in accordance with the terms and provisions thereof.

21. Neither the Settlement Stipulation nor the Proposed Settlement itself nor this Final Order and Judgment constitutes an admission by Smith Barney or any other defendant of any liability or wrongdoing whatsoever, or a finding by this Court as to the merits of any claim or defense asserted or that could have been asserted in *Martens*, or of any wrongdoing by Smith Barney or any of the other defendants in *Martens*. Neither the Settlement Stipulation nor the Settlement itself nor this Final Order and Judgment is or shall be used, introduced as or deemed to be an admission in any action or proceeding (including, but not limited to, any Dispute Resolution Process proceeding under the Settlement Stipulation) of any fault, liability or wrongdoing by any person or entity; and neither the Settlement Stipulation, nor any of the negotiations or proceedings related thereto, nor the Settlement itself, nor this Final Order and Judgment, nor any related document or communication, shall be offered or received in evidence as an admission, concession, presumption or inference against any person or entity in any action or proceeding (including, but not limited to, any Dispute Resolution Process proceeding under this Settlement Stipulation) provided, however, that the Settlement Stipulation may be received in evidence in any proceeding in this Court as may be necessary to consummate or enforce the Settlement Stipulation or this Final Order and Judgment.

22. This action is hereby dismissed in its entirety, on the merits and with prejudice, as against defendants Smith Barney, James Dimon, and Nicholas Cuneo, and without costs to any party, except to the extent otherwise expressly provided in the Settlement Stipulation. This Court intends this Final Order and Judgment to be “Final” within the meaning of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

23. All members of the Class who have not duly requested exclusion (*i.e.*, other than those identified on Exhibit A hereto) shall conclusively be deemed for all purposes to have fully, finally and irrevocably waived, released and discharged Smith Barney (which, as defined in Annex A to the Settlement Stipulation, includes, *inter alia*, in addition to Smith Barney Inc., each and all of its past and present predecessors, successors, subsidiaries, parents, affiliates, assigns, auditors, insurers, reinsurers, directors, officers, agents, managing directors, financial consultants, attorneys, all other employees and all other representatives) (“Smith Barney”) as provided in the Settlement Stipulation, including, without limitation, Paragraphs 6.1 through 6.4 of the Settlement Stipulation. All members of the Class who have not duly requested exclusion from the Class (*i.e.*, other than those identified on Exhibit A hereto) are hereby permanently enjoined as provided in the Settlement Stipulation, including, without limitation, Paragraphs 6.1 through 6.4 of the Settlement Stipulation. Nothing in this Paragraph 23 shall release the Firm from any obligations set forth in the Settlement Stipulation.

*4 24. This Court finds that the only members of the Class who have duly requested exclusion from the Class are those listed on the attached Exhibit A. All members of the Class apart from those listed on the attached Exhibit A have not duly requested exclusion therefrom.

25. All members of the Class as well as those persons who have duly requested exclusion from the Class (*i.e.*, those persons listed on the attached Exhibit A) are hereby permanently enjoined fully, forever and irrevocably, from commencing, prosecuting, or otherwise maintaining in any court or forum other than this Court, any claim, action or other proceeding that challenges or seeks review or relief from any order, judgment, act, decision or ruling of this Court in connection with *Martens*. Any violation of the foregoing injunction is punishable as contempt of court, in addition to all other available remedies.

26. This Court approves the application for fees filed by Class Counsel on April 6, 1998 in the following amounts:

- (a) \$6,000,000 to be paid by Smith Barney on the Effective Date;
- (b) \$3,500,000 to be paid by Smith Barney quarterly within two years of the Effective Date; and
- (c) 10% of all claims resolved through the DRP to a maximum of \$2,500,000 to be paid by Smith Barney above any amounts paid by Smith Barney above any amounts paid to class members;

27. This Court approves the application for fees filed by the law firm of Altshuler, Nussbaum, Berzon & Rubin on

April 6, 1998 in the amount of \$50,000.

28. This Court approves the application for incentive payments filed by the Class Representatives and Named Plaintiff Bette Laswell on April 6, 1998 in the aggregate amount of \$1,900,000.

29. Upon the entry of this Final Order and Judgment, the Named Plaintiffs each shall execute and deliver (and shall be deemed to have executed and delivered) to the Firm a Release and a Covenant Not to Sue in substantially in the form annexed to the Settlement Stipulation as Exhibit F. The failure of any Named Plaintiff to execute and deliver such a Release to the Firm shall not, and shall not be deemed to, diminish, reduce or otherwise affect this Final Order and Judgment, including Paragraph 23 of this Final Order and Judgment that all members of the Class other than those listed on the attached Exhibit A have fully, finally and irrevocably released and discharged Smith Barney to the extent provided in the Settlement Stipulation.

30. All other issues not specifically resolved herein, including but not limited to applications by Class Counsel, the individual Class Representatives and Named Plaintiff Bette Laswell for reimbursement of expenses, are hereby severed and reserved for future decision by this Court.

31. In accordance with the Settlement Stipulation, Class Counsel and plaintiffs in *Alvarez* (whom Class Counsel represent, and who are also members of the Class who have not requested exclusion therefrom and are therefore bound by the Settlement Stipulation) are directed to follow all necessary procedures forthwith to obtain an Order from the United States District Court for the Northern District of California dismissing *Alvarez* with prejudice, at least as against defendants Smith Barney, James Dimon, John Delahaye, Frank Dworsky and Terrence Ormsbee.

*5 32. Class Counsel and counsel for Smith Barney shall advise the Court when and if the Settlement Stipulation becomes effective pursuant to its terms.

33. If the Settlement Stipulation is terminated or fails to become effective for any reason, then the parties, including without limitation all Class members, shall be restored to their respective statuses existing prior to the date of the execution of the Settlement Stipulation, without prejudice.

34. Without affecting the finality of this Final Order and Judgment, this Court retains exclusive jurisdiction over the implementation and enforcement of this Final Order and Judgment. Smith Barney, the Named Plaintiffs and Class Representatives, and each member of the Class are hereby deemed to have submitted irrevocably to the exclusive jurisdiction of this Court for any suit, action,

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proceeding or dispute relating to this Final Order and Judgment or the Settlement Stipulation, except to the extent remitted by the Settlement Stipulation for resolution in a different forum.

35. The Court finds, pursuant to Fed.R.Civ.P. 54(b), that there is no just reason for delay, and directs the Clerk to enter this Final Order and Judgment.

Exhibit A

Barkley, Carolyn S.

Beighle, Traci L.

Bhola, Ann Marie

Blake, Stephanie Louise

Burns, Rose Ann

Cassella, Mary

Chanchani, Bharti

Chasin, Joan

Christian, Carol L.

Croom, Jacqueline E.

D'Addona, Valerie

Drummond, Linda L.

Frauman, Ginny J.

Fulp, Tamara G.

Gaffin, Donna D.

Green, Karen

Hartigan, Christine Bourdo

Hill, Melissa

Hong, Stephanie J.

Hunter, Jacquelynne L.

Hutcheson, Kimberly

Kropelnitski, Diane

LaFontaine, Gibson

Laos, Myrna L.

Lev, Judith Wilkens

Manning, Katherine L.

Martens, Pamela Kay

Miller, Audrey M.

Mione, Judith

O'Rourke, Carol

Palette, Karen D.S.

Roddy, DeAnn S.

Smalling, Rita J.

Tan, Michelle

Tieber, Helen J.

Willson, Edwardeen M.

Yau, Christable

Yeager, Elaine M.