(2005)

KATHI COOPER, et al., Plaintiffs,
v.
THE IBM PERSONAL PENSION PLAN, Defendant.

Civil No. 99-829-GPM.

United States District Court, S.D. Illinois.

January 10, 2005.

FINAL ORDER AS TO SUBCLASS 3

G. PATRICK MURPHY, Chief District Judge.

This matter came before the Court on the Class Plaintiff's motion for final approval of class action settlement with respect to Subclass 3, preliminarily approved by this Court on October 28, 2004. Pursuant to the Court's Preliminary Approval Order and the Notice provided to the Class, the Court conducted a fairness hearing under Federal Rule of Civil Procedure 23(e) on January 10, 2005. The Court has reviewed the materials submitted by the parties and heard arguments presented at the hearing. The Court finds and orders as follows:

1. The Court finds that this action satisfies the requirements of Rule 23, for the reasons set forth in its prior certification order, and further finds that Subclass 3 has at all times been adequately represented by the Named Plaintiff and Class counsel.

2. The Notice approved by the Court was provided by first class direct mail notice to the last known address of each individual identified as a potential settlement class member. In addition, follow-up efforts were made to send the Notice to individuals whose original notice was returned as undeliverable. The Notice adequately described all the relevant and necessary parts of the proposed settlement agreement. *In the Matter of VMS Ltd. Partnership Sec. Litig.,* 26 F.3d 50, 51-52 (7th Cir. 1994); *In the Matter of VMS Ltd. Partnership Sec. Litig.,* 1992 WL 203832 at *4 (N.D. Ill. 1992); *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370 (9th Cir. 1993).

3. The Court finds that the Notice given to the Class fully complied with Rule 23, was the best notice practicable, satisfied all constitutional due process concerns, and provides the Court with jurisdiction over the Class members. *Eisen v. Carlisle and Jacqueline,* 417 U.S. 156, 177-78 (1974); *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985).

4. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

5. The Court has considered and applied the factors set forth in *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 312 (7th Cir. 1980), and has concluded that the settlement is fair, reasonable, and adequate. *Armstrong,* 616 F.2d at 312. Specifically, the Court finds the risk of continued litigation and the delay occasioned thereby strongly supports the proposed settlement.

6. Also supporting the settlement is the favorable response of the Settlement Class members. Out of approximately 16,286 individuals identified as potential Class members who were mailed the Notice, only four of the Class members objected to the proposed settlement on the grounds that it was inadequate.

None of these objectors appeared at this hearing for final approval. Because the Court finds the settlement adequate, the Court overrules the objections.

7. The only other "objections" to the proposed settlement were three requests to be excluded from it. Two of these requests to be excluded were based on the Class member's belief that he had not been wronged by **IBM**, and one was based on the Class member's belief that a prior release disqualified him from benefitting from the settlement. Because the Settlement Agreement does not provide for opting out of the settlement, and because such an opt-out would be inappropriate under Federal Rule of Civil Procedure 23(b)(2), these requests are also overruled and the requests for exclusion are denied.

8. The motion for settlement approval with respect to Subclass 3 (Doc. 285) is GRANTED, and the settlement is hereby APPROVED in its entirety.

9. A permanent injunction, without the necessity of a bond, is hereby issued against Class members from prosecuting parallel actions.

10. The motion for attorney fees and costs (Doc. 284) is likewise GRANTED. Specifically, the Court finds based on the evidence presented by Class counsel, and the Court's awareness of the market, that the 29% fee and costs award requested is at or below the market rate for this and similar litigation, is fully supported by the Seventh Circuit's decisions in *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001) (*Synthroid I*), and is otherwise appropriate. *See also* *In re Synthroid Marketing Litig.*, 325 F.3d 974 (7th Cir. 2003) (*Synthroid II*). The Court is further aware that Class counsel are nationally recognized experts in ERISA **pension** benefit cases and have testified that they have not and would not accept a similar case on any basis other than a contingency fee basis.

In addition, Class counsel presented evidence and argument, and the Court agrees, that an auction for legal services in this litigation would have produced a percentage at or higher than the 29% fee requested, and that the large claimant criterion here supports the 29% fee requested by Class counsel. The *Synthroid II* Court noted that the sophisticated third-party payors (the insurance companies) in that litigation negotiated a flat 22% rate even after the risk of the litigation had passed and a recovery was assured. 325 F.3d at 976 and 978 (explaining the 22% rate was agreed to "after a good deal of the risk had been dissipated" and that the TPPs still "had to offer 22% to sign up lawyers on a contingent fee."). Applying this reasoning to this case, the risk attendant with this litigation and the difficulty locating experienced counsel to accept such litigation clearly support a 29% fee.

Thus, the undisputed evidence is that the market for legal services for this litigation is a contingency fee contract and that such contracts typically call for a fee of at least one-third of any recovery. Class counsel is awarded 29% of the aggregate Settlement Fund (as defined in the Settlement Agreement) as and for their fees and costs, to be paid from the **Plan** as an administrative expense. Defendants are ordered to distribute the fee to Class counsel per the Settlement Agreement.

11. The Named Plaintiff, Matthew Hillesheim, is hereby awarded an incentive fee of $15,000 for his time and effort in pursuing this litigation, to be paid out of the attorney fee award.

12. The **IBM** **Plan** is ordered to distribute the settlement proceeds under the terms of the Settlement Agreement.

13. All motions relating to the claims of the members of Subclass 3 are rendered moot.

14. The claims of Subclass 3 are hereby DISMISSED with prejudice, with this Court retaining jurisdiction to enforce the settlement terms.

15. Finally, the Court finds that Subclass 3 involves different claims by different people, and there is no overlap between Subclass 3 and the other Subclasses. The claims of Subclass 3 are unrelated to the claims of Subclass 1 and Subclass 2, and entry of final judgment as to the claims of Subclass 3 would allow prompt payment to the members of Subclass 3 while the parties work to resolve the more complicated issues presented by Subclass 1 and Subclass 2. Accordingly, the Court expressly finds that there is no just reason for delaying the entry of judgment as to these claims, and the Clerk is DIRECTED to enter final judgment as to the claims of Subclass 3.

IT IS SO ORDERED.