UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POLICE RETIREMENT SYSTEM OF ST. LOUIS, on behalf of itself and similarly-situated plaintiffs,

Plaintiff,

v.

GRANITE CONSTRUCTION INCORPORATED, JAMES H ROBERTS, JIGISHA DESAI, and LAUREL J KRZEMINSKI,

Defendants.

No. C 19-04744 WHA

ORDER RE MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

INTRODUCTION

In this securities class action, the parties seek preliminary approval of a settlement (including its plan of allocation). Because the proposal offers adequate relief, preliminary approval is **GRANTED.**

STATEMENT

A prior order herein summarized the facts and early procedural history of this suit (Dkt. No. 98). Since then, a January 2021 order certified the Rule 23 class. It included all persons or entities who purchased or acquired defendant Granite Construction Incorporated's common stock from April 30, 2018, through October 24, 2019, inclusive (Dkt. No. 127).

In February 2021, shortly after lead plaintiff the Police Retirement System of St. Louis filed its amended complaint, Granite filed a Form 10-K with the Securities and Exchange Commission that restated its financial statements and related disclosures for the years ending December 31, 2017, and 2018, as well as for the first three quarters of the year ending December 31, 2019. In addition, Granite restated "selected financial data" for the years ending at the close of 2015 and 2016 (Dkt. Nos. 176 at 6; 139-1).

Plaintiff moved for partial summary judgment in March 2021. That motion remains partially briefed. Shortly after the motion was filed, the parties requested and received a backward expansion of the class period, which now spans February 17, 2017, through October 24, 2018, inclusive (Dkt. Nos. 138, 69, 159).

In October 2019, intervenor Arash Nasseri initiated a putative, parallel class action in Santa Cruz County Superior Court. The corresponding complaint alleges only Section 11 claims arising out of the merger. At all material times, the state-court amended complaint alleged that Granite acquired the Layne Christensen Company, which motived Granite to airbrush its balance sheets and thereby inflate the value of its stock. The suit alleges violations under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933. Nasseri has moved for class certification in state court. *See* Plaintiff's Amended Complaint for Violation of the Securities Act of 1933 at ¶¶ 9–10, 18–21, 25, 37, 73, 88, 143–53, 204, 212, 298, *Nasseri v. Granite Construction Inc., et al.*, No. 19-3208 (Cal. Sup. Ct. Sept. 15, 2020).

Meanwhile, Granite and lead plaintiff paused its briefing on summary judgment to mediate with Magistrate Judge Spero in March and April 2021. After three sessions, they arrived at a settlement. Plaintiff filed a motion for preliminary approval, along with a stipulation of settlement, on April 30 (Dkt. No. 176). On May 14, 2021, as a class member in the instant action, Nasseri objected to the settlement, moved to intervene, and moved for appointment as co-lead plaintiff, all on the grounds that the plan of allocation should award more to the Section 11 claimants. His counsel, Jason Forge of Robbins Geller, LLC, further moved for appointment as co-lead counsel. The Retirement System, Granite, and Nasseri returned to Judge Spero and agreed to increase the portion of the settlement going to the Section 11 sub-class. They

proposed a "multiplier," *i.e.*, the ratio of the claimants' respective portions of the settlement, of 2.2 (Dkt. No. 220 at 3–4). They further moved for preliminary approval of the revised settlement, with its new plan of allocation.

A prior order herein granted Nasseri's motion to intervene, denied his motion for appointment as a class representative, and denied his counsel's motion for appointment as a co-lead counsel (Dkt. No. 232).

Separately, the Court expressed concern about the appropriateness of the 2.2 multiplier. After consultation with the parties, the Court appointed Bruce Ericson as a special master to determine the correct multiplier. Attorney Ericson settled on a multiplier of 2.21 (Dkt. No. 258). The parties had no objections (Dkt. No. 261).

This order follows full briefing, several hearings (telephonic due to COVID-19), supplemental briefing, and a special master's report.

ANALYSIS

"The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks." *Officers for Just. v. Civ. Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 623 (9th Cir. 1982). With that in mind, this order must now determine "whether the settlement is fundamentally fair, adequate and reasonable." *Id.* at 625. So too the plan of allocation. *Vataj v. Johnson*, No. 19-CV-06996-HSG, 2021 WL 1550478, at *10 (N.D. Cal. Apr. 20, 2021) (Judge Haywood S. Gilliam, Jr.).

In sum, *first*, this order finds that the $129 million settlement is fair and reasonable. This is a large settlement that deserves approval. The proposed scope of waiver is adequately narrow. The proposal also does not include a fee award, which is left to the Court's discretion. The $129 million settlement is preliminarily approved.

Second, notice to the class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). The parties' brief notice appears adequate, however, it must be distributed

via first-class mail and, where possible, via email to class members. The exterior of the envelope for the mailing notice shall state "Important Class Action Notice" and shall clearly identify the mailing as coming from the United States District Court, Northern District of California, Honorable William Alsup, 450 Golden Gate Avenue, San Francisco, CA 94102, with the return address as Epiq Class Action and Claims Solutions, Inc., c/o _____, PO Box XXXXX, _____, ____ XXXXX-XXXX.

Second, the plan's opt-out provision appears adequate now that the parties have eliminated the burdensome requirements they at first proposed (*see* Dkt. No. 262, Exh. B).

Third, with respect to the plan of allocation, this order accepts Attorney Ericson's recommended 2.21 multiplier and now briefly discusses his reasoning. By way of background, Section 11 and 10(b) claimants must both prove a material omission or misrepresentation and economic loss. Section 10(b) claimants, however, must also prove more: scienter, connection, reliance, and loss causation. As a result, Section 11 claims are generally worth more, though fewer individuals qualify to bring them.

Lead plaintiff initially presented the Court with a study of securities settlements from 2011 to 2020 by Cornerstone Research, which estimated that the median settlement in Section 11 suits had been 1.6 times higher than the Section 10(b) settlements. Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements*, CORNERSTONE RES. 1, 7 (2020). Attorney Ericson surveyed a much larger sample of average and median multipliers than had the Cornerstone study. He concluded that 1.6 was not the most useful industry standard to use as a "starting point" in this suit. Among his many reasons, he noted: the sample size for the Section 11 claims had likely been too small for statistical significance; Section 11 claimants' settlements appeared to increase with the size of the overall statutory damages (*e.g.* 7.4% overall, but 10.4% for damages between $50 million and $149 million, into which range our proposed settlement falls); other scholars had reached different conclusions about the appropriate multiplier than had the Cornerstone study (*e.g.* 12.4% mean and 11% median, compared with 7.4% median in the Cornerstone study); and examining Cornerstone's own research back to 2011, the multipliers

ranged from as low as 1.5 (2017) to as high as 2.59 (2012) (*see generally*, Dkt. No. 258 at 9–13). Attorney Ericson concluded that the baseline multiplier should be more than 1.6.

Next, Attorney Ericson considered factors unique to our case to arrive at the correct multiplier. Most notably, Granite's accounting restatement represented an outsized boon to the Section 11 claimants. The restatement provided all the fodder they would need to establish that Granite had previously, and materially, misled investors. Furthermore, our Section 11 claimants would only need to prove that a misleading omission and/or misrepresentation materially affected shareholders on one day: the day on which Granite shareholders voted to merge with Layne Christiansen. Our Section 10(b) claimants, in contrast, would have to prove materially misleading omissions and/or misrepresentations over their *two- and one-half-year* class period (*see id*. at 1–2). Next, the Section 10(b) claimants, unlike the Section 11 claimants, would have to prove loss causation as to a series of disclosures, which would likely prove particularly difficult for disclosures predating July 2019 (*see id.* at 3). In contrast, Section 11 claimants need not prove loss causation. Granite could attempt to disprove loss causation as an affirmative defense, but Attorney Ericson opined that Granite would struggle to do so, since in the period relevant for the Section 11 claims, Granite's stock prices declined while related indices increased (*ibid*.).

Ultimately, Attorney Ericson rated both sets of claims as above average. He ranked the Section 11 claims, however, as stronger than usual, relative to the Section 10(b) claims. Reflecting this, he chose 2.21 as the fairest multiplier. In part, he credits the 2.2 multiplier proposed by the parties because he views the current effort to settle as reasonable and as accounting for risks and benefits of both subclasses (*see id*. at 13–14).

This order **ADOPTS** this conclusion. It also preliminarily **APPROVES** the parties' proposed plan of allocation using a multiplier of 2.21.

CONCLUSION

The proposed settlement and plan of allocation appears adequate at this stage, so preliminary approval is **GRANTED** subject to final approval. In the interim:

1. Epiq shall send the approved class notice via first-class mail and email (if available) to the class by **OCTOBER 25.**

2. Last day for members to opt out of settlement shall be **December 3.**

3. The last day for any motions for attorney's fees and costs shall be **December 15.**

4. Class members' objections to any or all of the proposed settlement, attorneys fees, or costs shall be due **JANUARY 5, 2022.**

5. The parties' replies to the objections shall be due **JANUARY 12, 2022.**

6. The parties shall move for final approval by **FEBRUARY 2, 2022**.

7. The parties' declarations attesting to the provision of class service is due **FEBRUARY 21, 2022**.

8. The final approval fairness hearing shall take place at **8:00 A.M. on FEBRUARY 24, 2022**.

9. Defendants shall also comply with all requirements of the Class Action Fairness Act.

IT IS SO ORDERED.

Dated: October 6, 2021.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California