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Superior Court of CA,
County of Santa Clara
2014-1-CV-266866
Reviewed By: R. Walker

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In Re FireEye, Inc. Securities Litigation

Consolidated Action, Including:

IBEW Local Union 363 v. FireEye, Inc.
Platt v. FireEye, Inc.

Case No.: 1-14-CV-266866 (Lead Case)

[Consolidated With:
Case No. 1-14-CV-268110]

ORDER AFTER HEARING ON AUGUST 4, 2017

Final Fairness Hearing

The above-entitled matter came on regularly for hearing on Friday, March 10, 2017 at 9:00 a.m. in Department 19 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. The Court reviewed and considered the written submission of all parties and issued a tentative ruling on March 9, 2017. No party contested the tentative ruling; therefore, the Court orders that the tentative ruling be adopted and incorporated herein as the Order of the Court, as follows:

This is a consolidated securities class action against defendant FireEye, Inc., its individual executives and directors, and the underwriters of FireEye's second public offering of securities on March 6, 2014 (the "Offering"), in which FireEye sold 14 million shares.

Currently at issue are motions by plaintiff and class representative DeKalb County Employees Retirement Plan (1) for final approval of a class action settlement and (2) for attorney fees, expenses, and lead plaintiff's service award. The motions are unopposed.

I. Factual and Procedural Background

In the operative FAC, plaintiffs allege that FireEye is a security company providing automated threat forensics and dynamic malware protection against cyber threats. (FAC, ¶ 2.) According to plaintiffs, FireEye's September 20th, 2013 initial public offering price was $20 per share, trading up to $36 per share by the close of its first day. (*Id.* at ¶ 3.) After going public, FireEye allegedly made several positive statements about its technology in public filings and announcements, all of which caused the price of FireEye shares to rise to a record-closing high of $95.63 on March 5, 2014. (*Id.* at ¶¶ 4-5.)

Meanwhile, however, FireEye's top executives and directors planned to dump over eight million shares of their personal holdings into the market through the Offering, to reap nearly $700 million in insider selling proceeds. (FAC, ¶ 6.) Plaintiffs allege that the associated March 6th, 2014 Registration Statement[1] continued to tout the company's business, products and performance, including claims that FireEye's platform provided a "comprehensive" and "complete" solution for cybersecurity threats with "negligible" false-positive rates, and that FireEye's software has the ability to "identify and block" known and previously unknown cybersecurity threats. (*Id.* at ¶ 8.) The Registration Statement also contained representations concerning the purported benefits of recently-acquired cybersecurity software firm Mandiant Corporation as a "significant opportunity [for FireEye] to leverage the inherent synergies between products and services." (*Id.* at ¶¶ 4-5, 8.) Plaintiffs allege that these representations were materially misleading in the following ways:

[1] The FAC identifies the "Registration Statement" as the original February 3rd, 2014 Form S-1 and the March 3rd and 6th, 2014 amendments thereto. (FAC, ¶ 6.)

- FireEye's "virtual machine" was not a "complete solution" because it was not as capable as more traditional signature-based Intrusion-Prevention Systems ("IPS") software at detecting known threats, so customers would have to use both FireEye's product and IPS;

- FireEye products generated numerous "alerts" that were false or which failed to contain enough information to help customers identify the problem;

- FireEye software was likely to perform poorly in head-to-head testing by influential and well-regarded independent software testing company NSS Labs;

- FireEye was experiencing difficulties integrating Mandiant into its business;

- The implementation of FireEye's business plans would require it to increase its expenditures, particularly on research and development, at a tremendous rate, with the result that the Registration Statement's claim that "profitability was becoming more achievable" was materially incorrect and misleading; and

- The Offering was timed to occur just before FireEye would have to disclose a significant slowdown in product revenue growth, a significant increase in operating costs, and significantly diminished prospects for profitability in the foreseeable future.

(FAC, ¶ 9.)

Plaintiffs allege that a March 13th, 2014 *Bloomberg Businessweek* magazine article exposed FireEye's involvement in the Target Corporation data breach that occurred in late November 2013 and resulted in roughly 40 million credit card numbers being stolen from Target's computer systems. (FAC, ¶ 11.) According to the *Businesweek* report, FireEye's "complete solution" had been installed at Target, but Target had "turned off" the automatic "kill" features because of concerns about the technology's ability to identify and attack only dangerous malware without inadvertently shutting down important computer systems that were not being attacked or that were otherwise not at risk. (*Ibid.*) Similarly, on March 13, 2014, *Reuters* reported that the "vast majority" of FireEye's customers had turned off the automatic

kill function because of such concerns. (*Ibid.*) In response to the Target data breach and media coverage, FireEye's share price fell over $4.00 from $79.93 on March 13 to $75.87 on March 14. (*Ibid.*)

Then, on April 2, 2014, NSS Labs reported that FireEye's threat-detection products had scored "below average" in security effectiveness compared to five other security companies and received the worst score of all systems tested in overall breach detection. (FAC, ¶ 12.) In response, FireEye shares fell $10.14 to close at $54.86. (*Ibid.*)

On May 6, 2014, FireEye announced its first quarter results for 2014, with revenue far below analysts' estimates and slowing demand for core products, forcing it to rely on its lower margin, service-based offerings, which could not provide the same level of profitability. (FAC, ¶ 13.) In response to further disclosures of significant weaknesses in FireEye's business, shares fell sharply, closing at $28.65 on May 7, 2014. (*Id.* at ¶ 15.)

These shareholder actions were subsequently filed and consolidated. The operative FAC asserts three causes of action for violations of Sections 11, 12(a)(2), and 15 of the Securities Act, respectively. The first and second causes of action are brought against FireEye and the individual defendants (collectively, the "FireEye Defendants"), as well as the underwriters of the Offering (the "Underwriter Defendants"). The third cause of action is brought against the individual defendants only.

In August 2015, the Court largely overruled defendants' demurrers to the FAC, and in September 2015, it denied the FireEye Defendants' motion to require an undertaking. Plaintiff moved for class certification, and after multiple rounds of briefing, the Court granted the motion in part on July 11, 2016. Due to issues with tracing shares purchased in the secondary market to the Offering, the Court limited the class to those who purchased shares directly "in" the Offering, and certified the class.

In 2016, the Court denied FireEye's motion for judgment on the pleadings for lack of jurisdiction and denied defendants' motion for terminating sanctions without prejudice. FireEye filed a petition for writ of prohibition or mandate from the Court of Appeal with regard to the motion for judgment on the pleadings, which was denied. It subsequently filed a petition for review with the Supreme Court of California, which was also denied. In December 2016, the FireEye Defendants filed a petition for writ of certiorari with the Supreme Court of the United States, which remains pending but will be withdrawn in the event the parties' settlement is approved.

The parties have now reached a settlement, which the Court preliminarily approved on March 10, 2017. The Court amended the class definition for settlement purposes, and the settlement class is now defined as:

> all persons or entities who purchased shares of FireEye common stock in FireEye's March 6, 2014 secondary public offering (the "Secondary Offering"), and were damaged thereby. Excluded from the Class are Defendants; their respective successors and assigns; the past and current executive officers and directors of FireEye and the Underwriter Defendants; the members of the immediate families of the Individual Defendants; the legal representative, heirs, successors, or assigns of any excluded person, and any entity in which any of the above excluded persons have or had a majority ownership interest. Also excluded will be any person or entity that validly requests exclusion from the Class.

Plaintiff now moves for final approval of the settlement and an award of fees, costs, and a service award.

II. Legal Standard for Approving a Class Action Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through

arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

II. Analysis

The terms of the settlement are as follows. The $10.25 million non-reversionary gross settlement will be distributed in accordance with a plan of allocation developed in consultation with plaintiff's damages expert, as described in the notice. In exchange, class members who do not opt out of the settlement will release "all claims (including but not limited to 'Unknown Claims') … that have been or could have been asserted in the Action or could in the future be asserted in any forum …, which both (a) arise out of, are based on, or relate in any way to any of the allegations, acts, [etc.] involved, set forth, alleged or referred to, in the Action, or which could have been alleged in the Action, and (b) arise out of, are based on, or relate to the purchase acquisition, holding, disposition or sale of any shares of FireEye common stock in or pursuant to the Secondary Offering." (Stipulation, § 1(w).) Class members are required to submit proofs of claim to receive their settlement payments.

Subject to the Court's final approval, plaintiff's counsel will seek an award of attorney fees not to exceed 1/3 of the settlement, plus up to $500,000 in litigation costs. The lead plaintiff will seek an incentive award of up to $7,500. Administrative fees are estimated at $115,000. Any balance remaining in the settlement fund six months after the initial date of

distribution will be reallocated among authorized claimants, with any further remainder donated to Legal Services of Northern California.

According to the administrator, in March 2017, notice packets were distributed to the 410 potential class members reflected on the class list, as well as to 974 brokerage firms, banks, institutions, and other third-party nominees contained in the administrator's nominee database. The summary notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. Through June 2017, the administrator received an additional 11,508 requests for direct mailing of notice packets, as well as requests from nominees for 17,790 notice packets for forwarding to their customers. As of July 27, a total of 30,912 notice packets have been mailed.

The claims submission deadline was July 8. As of July 27, over 30,000 claims have been received, accounting for an estimated 8.3 million of the 14 million shares sold in the Offering. Since not all of these shares were actually damaged, the administrator estimates that the response rate is over 60 percent of shares eligible to recover from the settlement. The administrator has received no objections and no requests for exclusion from the class.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to the class's claims. It finds no reason to deviate from this finding now, particularly considering there are no objections to the settlement. The Court thus finds that the settlement is fair and reasonable for purposes of final approval.

Plaintiff seeks a fee award of $3,416,667, or one-third of the gross settlement, which is not an uncommon contingency fee allocation. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff provides a lodestar figure of $7,220,988.50, based on 11,951.5 hours expended on the case by attorneys with billing rates from $380 to $950 per hour, as well as other professionals. The lodestar results in a negative multiplier. While the billing rates and time billed by some partners who worked on the case are on the high end, the

time spent on the case and the billing rates are otherwise reasonable, and the settlement provides real value to the class. As a cross-check, the lodestar supports the percentage fee requested, particularly given that there are no objections to the attorney fee request. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

Plaintiff also requests $415,306.60 in costs, below the estimate that was provided at preliminary approval. The costs appear to be reasonable based on the summaries provided. The administrator has incurred $92,132.90 in unreimbursed fees and expenses to date, below the estimated $115,000 total administrative expenses. The incurred expenses are approved. Plaintiff shall submit a supplemental declaration documenting any additional administrative expenses actually incurred for approval by the Court.

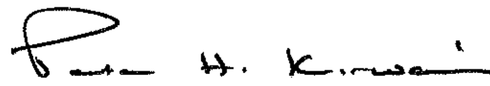
Finally, the lead plaintiff requests a service award of $7,500. Plaintiff's counsel has submitted a declaration detailing the lead plaintiff's work on this matter supporting the requested award, which includes preparing and sitting for a deposition. The requested service award is approved.

III. Conclusion and Order

The motion for final approval is GRANTED.

IT IS SO ORDERED.

Dated: 8/7/17



Honorable Peter H. Kirwan
Judge of the Superior Court