

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE ATI TECHNOLOGIES, INC. : CIVIL ACTION  
SECURITIES LITIGATION :  
: :  
: NO. 01-2541

MEMORANDUM

Dalzell, J.

April 28, 2003

In accordance with our duty under Fed. R. Civ. P. 23(e), we here consider the settlement of this consolidated class action involving the common stock of ATI Technologies, Inc. We convened a hearing to consider the fairness of the proposed settlement on April 25, 2003.

The litigation involves the alleged false or misleading statements or omissions that, plaintiffs claim, artificially inflated the price of ATI stock, which fell sharply when the true condition of the company came to light in May of 2000. Plaintiffs thereafter filed their consolidated class action claim of securities fraud under §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 (the "Exchange Act"). There is no point in repeating here what we canvassed at such length about those claims last July. See In Re ATI Technologies Securities Litigation, 216 F.Supp.2d 418 (E.D. Pa. 2002).

After we issued our July 23, 2002 decision that permitted certain of the claims to go forward, we on November 1, 2002 granted plaintiffs' motion for class certification. The class we certified consisted

of all persons or entities who purchased the common stock of ATI Technologies, Inc. on the NASDAQ national market during the period of

January 13, 2000 through May 24, 2000 inclusive. Excluded from the Class are the Defendants or their subsidiaries, members of Defendants' immediate families, any entity in which any Defendant has a controlling interest, and the legal representatives, heirs, successors, or assigns of any such excluded person.

See Nov. 1, 2002 Ord. at ¶ 2.

Immediately thereafter, the parties commenced settlement discussions under the supervision of the Honorable Jacob P. Hart, United States Magistrate Judge. As a result of Judge Hart's mediation skills, the parties quickly reached an agreement in principle, later embodied in a Stipulation and Agreement of Settlement dated January 28, 2003. We thereupon granted preliminary approval of that Agreement, and ordered that notice be sent to the class by first class mail and publication in the national edition of The Wall Street Journal. At the April 25 hearing, class counsel submitted proof of compliance with our Order regarding notice.

In particular, the form and methods of notifying the class of the pendency of this action as a class action, and of the terms and conditions of the proposed settlement, met the requirements of Fed. R. Civ. P. 23. Pursuant to our Order, class counsel mailed 10,236 notices to potential class members or their nominees. Class counsel arranged for the summary notice to be published on February 24, 2003 in the national edition of The Wall Street Journal. Class counsel also satisfied § 21D(a)(7) of the Exchange Act, 15 U.S.C. 78u-4(a)(7), as the Private

Securities Litigation Reform Act of 1995 (the "PSLRA") amended it.

In sum, there is little question that those methods and forms constituted the best notice practicable under the circumstances. They also constituted due and sufficient notice to all persons and entities entitled thereto, and at all events comported with due process.

#### The Settlement and its Fairness

In its most basic aspect, the settlement is straightforward enough. Defendants have transferred \$8 million into a settlement escrow account in full and final settlement of the class action. In return, the class gives the defendants a broad release, and this Court is asked to enter a broad Order that bars the class from prosecuting any further claims against the defendants that relate to what was asserted in the consolidated class action or involve the purchase and sale of ATI common stock during the class period.

Although the notice mentioned that class counsel might seek one-third of this recovery as their counsel fees, to be paid from the \$8 million escrow fund, in fact they here apply for thirty percent, or \$2.4 million, plus reimbursement of their expenses.

With respect to the amount the defendants have remitted, plaintiffs proffered the detailed affidavit of Katharine M. Ryan, Esq. (the "Ryan Declaration"), on the subject

of its fairness. As not a single class member objected to, or opted out from, the settlement, we shall not belabor the fairness factors our Court of Appeals first identified in Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).<sup>1</sup>

After our decision last July, it was evident that the remaining class claims would involve complex legal, financial and engineering issues that would require extensive expert testimony. As a result, many months of discovery inevitably would have followed, protracting the case and making a final resolution, absent settlement, a distant goal. The settlement before us therefore avoids that long delay.

As to the second Girsh factor, it is notable that no class member has objected to, or requested to be excluded from, the proposed settlement. This factor therefore tips heavily in favor of a strong presumption of fairness.

Although formal discovery did not ensue after our July, 2002 decision, the Ryan Declaration details how the parties were able to assess their strengths and weaknesses before they began

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<sup>1</sup> "(1) the complexity, expense and likely duration of the litigation...; (2) the reaction of the class to the settlement ...; (3) the stage of the proceedings and the amount of discovery completed ...; (4) the risks of establishing liability ...; (5) the risks of establishing damages ...; (6) the risks of maintaining a class action through the trial ...; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best recovery ...; and (9) the range of reasonableness of the settlement fund to a possible to a possible recovery in light of all the attendant risks of litigation."

See also, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001).

the mediation with Judge Hart. The Ryan Declaration at ¶ 13 details the thorough investigation plaintiffs' counsel undertook before reaching an agreement to the settlement.

Our decision dismissing certain of plaintiffs' claims demonstrates the considerable risks of establishing liability and damages that plaintiffs were faced. Given the well-publicized weaknesses in all technology stocks in the last three years, proof of damages and market causation would have been a daunting task indeed. It is therefore entirely possible that the class would have recovered nothing at all, or a range of recovery not far from what this bird-in-the-hand supplies.

Balancing all of the Girsh factors, therefore, we have no hesitation in finding the settlement to be fair and reasonable under all of the circumstances.<sup>2</sup>

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<sup>2</sup> As part of the settlement, counsel have proffered to us a proposed form of Order and Final Judgment which introduced the concerns we had with the broad order we partially disapproved in In Re Rite Aid Corporation Securities Litigation, 146 F.Supp.2d 706, 723-32 (E.D. Pa. 2001). Without belaboring the point, in advance of the fairness hearing we identified four areas of concern under our Rite Aid decision, and on April 21, 2003 received the parties' views on the expansive form of order they proffered to this Court.

As we noted in Rite Aid, we are of course disabled under U.S. Const. Art. III from rendering advisory opinions, and the Order we have attached to this Memorandum does no more than adjudicate issues in the actual controversy between the class and the defendants. Since this is a global settlement, it differs from the partial settlement in Rite Aid; the Order we attach may therefore bear a breadth that was not acceptable in Rite Aid.

Thus, although we have removed the redundancies and awkward syntax of the proffered Order, we have in all material respects adopted the substance that is fully detailed in the parties' Stipulation and Agreement of Settlement.



## Counsel Fees

As noted earlier, although the notices to the class mentioned that counsel intended to apply for an award of attorneys' fees up to one-third of the \$8 million settlement fund, they in fact seek thirty percent, or \$2.4 million, for their fees. Similarly, although the class was on notice that counsel could seek reimbursement of out-of-pocket expenses up to \$125,000, they actually requested reimbursement of \$51,318.87. We have no hesitation in approving both requests.

We have in recent years approved the percentage of recovery method of rewarding fees in common fund cases like this one. See, e.g., Rite Aid, supra, 146 F.Supp.2d at 734; In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116 (E.D. Pa. 1994). Indeed, our Court of Appeals has noted in, e.g., In re Cendant Corp., supra, 264 F.3d at 256, that the percentage of recovery method is the preferred mode for fixing counsel fees in common fund class actions.

Our Court of Appeals in Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 194-95 (3d Cir. 2000) identified seven factors for us to consider in our assays of counsel fee requests:

- (1) the size of the fund created and the number of persons benefitted;
- (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
- (3) the skill and efficiency of the attorneys involved;
- (4) the complexity and duration of the litigation;
- (5) the risk of nonpayment;
- (6) the amount of time devoted to the case by plaintiffs' counsel; and
- (7) the awards in similar cases.

Taking the Gunter factors in turn, we first find that a class in excess of 10,000 will benefit from this substantial settlement. As repeatedly noted earlier, none has objected to the amount of the fee request.

As detailed in ¶ 13 of the Ryan Declaration, counsel conducted a thorough investigation of the claims and defenses, and interviewed and subpoenaed many witnesses. At the same time, counsel prepared this case efficiently in advance of the mediation effort of Judge Hart, and did so with great skill.

The class also faced significant risks in this case. There was no governmental inquiry or action to fortify counsel's effort in prosecuting these claims, and our decision of last July is testament to how difficult proving defendants' liability and damages would have been. Put another way, this is a case where it was entirely possible that the class would have received nothing at all from the defendants, and therefore an \$8 million recovery constituted an excellent recovery for the class.

When cross-checked against the lodestar, the percentage of recovery produces a multiplier of only 2.35, far less than the multiplier we approved in Rite Aid. Indeed, referring to the other settlements we considered in Rite Aid, supra, 146 F.Supp.2d at 745, as well as the thirty percent percentage we approved in U.S. Bioscience, supra, 155 F.R.D. at 117-120, the fee request is in all respects fair and reasonable.

The request for reimbursement of out-of-pocket expenses need not long detain us. The Supreme Court established that such

costs and expenses are indeed recoverable, Missouri v. Jenkins, 491 U.S. 274, 284 (1989). Reviewing the expenses detailed, the sums listed were reasonable for a matter as complex as this one, and thus we will approve the full \$51,318.87 request.

We attach an Order embodying the foregoing rulings.

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ORDER

AND NOW, this 28th day of April, 2003, the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested at a hearing on April 25, 2003, and upon the findings of fact and conclusions of law set forth in the foregoing Memorandum, and all capitalized terms used herein having the meanings as defined in the parties' Stipulation and Agreement of Settlement (the "Stipulation") or the foregoing Memorandum, it is hereby ORDERED that:

1. The settlement is APPROVED as fair, reasonable and adequate, and the parties are directed to consummate the settlement in accordance with the terms and provisions of the Stipulation;

2. The Consolidated Amended Class Action Complaint, filed in good faith conformably with the Private Securities Litigation Reform Act of 1995 and Fed. R. Civ. P. 11 based upon publicly available information, is hereby DISMISSED WITH PREJUDICE and without costs, except as provided in the Stipulation, as against the Defendants;

3. Members of the Class and the heirs, executors, administrators, successors and assigns of any of them are hereby PERMANENTLY BARRED AND ENJOINED from instituting, commencing or prosecuting any and all claims, debts, demands, rights or causes of action whatsoever (including, but not limited to, any claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses or liability), whether asserted directly, representatively, or in any other capacity, including both known claims and Unknown Claims<sup>3</sup> (i) that have been asserted in this Action by the Class Members or any of them against any of the Released Parties (as defined below), or (ii) that have been, could have been or could be asserted in any forum in any jurisdiction by the Class Members or any of them against any of the Released Parties which arise out of, or are based upon, or related in any way to (a) the subject matter of this Action, or (b) the purchase of shares of the common stock of ATI on the NASDAQ national market during the Class Period (the

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<sup>3</sup> The parties in their Agreement define "Unknown Claims" to mean (i) any and all Settled Claims that any Plaintiff or Class Member does not know or suspect to exist in his, her or its favor at the time of the release of the Released Parties, including, without limitation, claims that if known by him, her or it might have affected his, her or its decision(s) to settle with and release the Released Parties or not to object to the Settlement and (ii) any and all Settled Defendants' Claims (as defined below) which any Defendant does not know or suspect to exist in his, her or its favor, including, without limitation, claims that if known by him, her or it might have affected his, her or its decision(s) with respect to the Settlement. In fidelity to the parties' Agreement, we adopt that meaning here, and thus the scope and coverage of this Order is not restricted by Cal. Civ. Code § 1542 or cognate laws of other jurisdictions.

"Settled Claims") against any and all of the Defendants, and their past, present and future parent companies, subsidiaries, divisions, related or affiliated entities, successors and predecessors, their respective present and former officers, directors, agents, employees, accountants, attorneys, partners, principals, members, stockholders, owners, servants, subrogees, insurers, co-insurers, reinsurers, and their respective representatives, administrators, successors, transferees and assigns, and any and all persons, natural or corporate, in privity with them, and any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has the controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, heirs, successors in interest, trustees, beneficiaries and assigns of the Defendants (the "Released Parties");

4. Members of the Class and the heirs, executors, administrators, successors and assigns of any of them are hereby deemed to have covenanted not to sue and are PERMANENTLY BARRED AND ENJOINED from suing, directly, derivatively, representatively or in any other capacity, any of the Defendants or Released Parties for any and all claims, rights or causes of action or liabilities whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation of any jurisdiction, including both known claims and Unknown Claims, that have been, could have been or could be asserted in any forum by the Class Members or any other them against any of the

Released Parties which arise out of, or are based upon or relate in any way to, (a) the subject matter of the Action, or (b) the purchase of shares of the common stock of ATI on the NASDAQ national market during the Class Period, in either case, whether or not such Class Members execute and submit Proof of Claim forms;

5. The Defendants, and the successors and assigns of any of them, are hereby PERMANENTLY BARRED AND ENJOINED from instituting, commencing or prosecuting, either directly or in any other capacity, any and all claims, rights or causes of action or liabilities whatever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation of any jurisdiction, including both known claims and Unknown Claims, that have been, could have been or could be asserted in any forum by the Defendants or any of them or the successors and assigns of any of them against any of the Plaintiffs, Class Members or their attorneys embodied in this Stipulation of the implementation or enforcement of this Stipulation or the settlement of the Action (the "Settled Defendants' Claims") against any Plaintiff or Class Members;

6. Pursuant to Fed. R. Evid. 408<sup>4</sup>, neither this Order, nor the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

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<sup>4</sup> See also Stipulation ¶ 35.

(a) offered or received against the Defendants as evidence of, or construed as or deemed to be evidence of, any presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged by Plaintiffs or the validity of any claim that had been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of the Defendants;

(b) offered or received against the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Defendant, or against the Plaintiffs and the Class as evidence of any infirmity in the claims of Plaintiffs and the Class;

(c) offered or received against the Defendants or against the Plaintiffs or the Class as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any reason as against any of the parties to the Stipulation, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provision of the Stipulation (provided, however, that Defendants may refer to the Stipulation to effectuate the liability protection granted them thereunder);

(d) construed against the Defendants or the Plaintiffs and the Class as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(e) construed as, or received in, evidence as an admission, concession or presumption against Plaintiffs or the Class or any of them that any of their claims are without merit or that damages recoverable under the Complaint would not have exceeded the Gross Settlement Fund;

7. The Plan of Allocation is APPROVED as fair and reasonable, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions;

8. Plaintiffs' Counsel are hereby awarded thirty percent of the Gross Settlement Fund in fees, which the Court finds to be fair and reasonable, and \$51,318.87 in reimbursement of expenses, which expenses shall be paid to Plaintiffs' Co-Lead Counsel from the Gross Settlement Fund, with interest from the date such Gross Settlement Fund was funded to the date of payment, at the same net rate that the Gross Settlement Fund earns. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion of Plaintiffs' Co-Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of this Action;

9. This Court retains exclusive jurisdiction over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order, and including any application for fees and expenses incurred in connection with administering and distributing the settlement to the members of the Class; and

10. Without further Order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

BY THE COURT:

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Stewart Dalzell, J.