

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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RIGOBERTO SANDOVAL,
individually and as a
representative of a class of
similarly situated plan
participants and beneficiaries,
on behalf of the
EXELA 401(k) PLAN,
the successor-in-interest of the
NOVITEX ENTERPRISE SOLUTIONS
RETIREMENT SAVINGS PLAN

No. 3:17-CV-1573 (MPS)
APRIL 21, 2021
2:01 P.M.
TELEPHONIC STATUS CONFERENCE

Plaintiff,

vs.

EXELA ENTERPRISE SOLUTIONS, INC.,
NOVITEX ENTERPRISE SOLUTIONS
EMPLOYEE BENEFITS COMMITTEE
and DOES NO. 1-10, Whose Names Are
Currently Unknown,

Defendants

- - - - - x

450 Main Street
Hartford, Connecticut

BEFORE: THE HONORABLE MICHAEL P. SHEA, U.S.D.J.

1 APPEARANCES:

2 FOR THE PLAINTIFF:

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15 FOR THE DEFENDANTS:

16 O'MELVENY & MYERS, LLP
17 1625 Eye Street, NW
18 Washington, DC 20006
19 BY: MEAGHAN VERGOW, ESQUIRE

20 MURTHA CULLINA
21 265 Church Street, 9th Floor
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23 BY: TERENCE JOHN BRUNAU, ESQUIRE

24 COURT REPORTER: Julie L. Monette, RMR, CRR, CRC
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produced by computer.

1 2:01 P.M.

2 THE COURT: Good afternoon. This is Michael Shea.
3 We're on the record in Sandoval versus Novitex Enterprise,
4 17-CV-1573. Can I please have appearances of counsel starting
5 with the Plaintiff's counsel.

6 MR. MILLER: Yes, good afternoon, Your Honor. This is
7 James Miller for the Plaintiff and with me my colleagues Kolin
8 Tang and Alec Berin.

9 THE COURT: Good afternoon.

10 MS. VEGOW: Good afternoon, Your Honor. Meaghan Vegow
11 from O'Melveny & Meyers. And I am joined by Terence Brunau of
12 Murtha for Defendants.

13 THE COURT: All right. Good afternoon.

14 So I have reviewed the parties' or the papers filed in
15 connection with the Motion for Preliminary Approval of the
16 Settlement Agreement and for Initial Certification of the Class
17 for Settlement Purposes. And as you noted from the docket, I
18 had a couple of -- or a few questions or concerns. So I
19 propose that we simply kind of walk through the items that I
20 placed on the docket.

21 The first one concerned language in Sections 7.1 and
22 7.2 of the Settlement Agreement, which, at least as I read it,
23 seemed to indicate that the parties contemplated that the Court
24 would somehow consider the award -- potential award to the
25 named Plaintiff and an award of attorneys' fees separate from

1 its consideration of the overall settlement.

2 And as I said in the notice, I'm not sure I see that's
3 possible for the reasons indicated in the notice. But I'm
4 happy to have the parties explain to me perhaps that I'm
5 misreading it or that it is possible. So why don't we start
6 with Plaintiff's counsel.

7 MR. MILLER: Yes, Your Honor. This is James Miller.
8 Thank you for, you know, providing these questions beforehand
9 because we've had an opportunity to consult with counsel for
10 Defendant, and I think we are largely in agreement, if not
11 entirely in agreement, with respect to the points.

12 On this first question with respect to the case
13 contribution award and attorneys' fees, I think we all agree
14 that the Court is absolutely correct that the adequacy of the
15 settlement in its entirety cannot be considered without
16 considering the potential impact of attorneys' fees and any
17 case contribution award. And it may be just ambiguity in the
18 language that we have provided.

19 What we were trying to communicate in that section is
20 that if the Court determined that the settlement was adequate,
21 that it was not inclined to award the amount of the case
22 contributions, the case contribution award or the amount of the
23 attorneys' fees sought or for that matter award anything at
24 all, that that would not impair approval of the settlement.

25 From the Plaintiff's perspective, we think that the

1 adequacy of the settlement should be that in light of the
2 potential award of case contributions or even attorneys' fees,
3 such that what we were trying to communicate in that section is
4 that if the Court is able to approve the settlement without
5 making that award, that if the Court determined that the amount
6 of fees or case contribution award being sought was not
7 appropriate, that that would not impair the settlement from
8 being effectuated.

9 THE COURT: Okay. So in other words, I guess if I
10 understand you correctly, what you're saying is that if the
11 Court were to determine that the amount of -- the amount of
12 attorneys' fees requested or the case contribution award
13 requested were, for example, excessive and said I'm not going
14 to award that much, that determination by itself would not
15 require the Court to conclude that the entire settlement had to
16 be -- had to be rejected. But the Court could still say, for
17 example, oh, I think the Settlement Agreement looks fair and
18 reasonable, but -- well, I guess I could do two things under
19 the way you've put it, if I'm understanding correctly.

20 One, I could say the settlement looks fair and
21 reasonable but I'm going to award something less either in case
22 contribution award or attorneys' fees, or I suppose I could
23 say, well, the settlement would be fair and reasonable -- it
24 isn't fair and reasonable as is, but it would be if a portion
25 of what the Plaintiff's lawyers are seeking as fees were added

1 to the amounts that would accrue to the planned beneficiaries.

2 Am I understanding you correctly, that essentially
3 what you're saying is that in no way do you want the attorneys'
4 fees or case contribution award to get in the way of the
5 Court's assessment of the settlement and that, if necessary,
6 the Court could condition approval of the settlement on
7 essentially taking some of the fees and giving it to the class?

8 By asking that question, in no way should you infer
9 that that's my intent or that I'm even contemplating that. I'm
10 just trying to understand what you're saying.

11 MR. MILLER: Yes, Your Honor. I think you've got it
12 exactly right. I think that because this is a common -- I'm
13 sorry. This is James Miller again.

14 Because this is a common-fund settlement, you know,
15 candidly, there's always tension because the fees and the case
16 contribution award are coming from the pot of money that would
17 otherwise be down for the plan and the participants. So that
18 is exactly correct, that we would not want the fees and the
19 case contribution award to ever get in the way of the
20 settlement. And if the Court were to determine the amount was
21 not appropriate, to condition preliminary approval on a lower
22 amount hopefully being sought.

23 I would just like to alert Your Honor, it's not clear,
24 you know, we recognize that this is, you know, candidly,
25 because of the size of the plan and because of the trimming of

1 the claims by the Court, this is not the largest case in the
2 world, and because of the amount of the recovery, we are only
3 seeking opportunity to seek 25 percent of the award inclusive
4 of expenses. So that is quite unusual. Usually the benchmark
5 is 25 percent for attorneys' fees plus expenses.

6 But in recognition of the relatively small size of
7 this settlement and with the interest of making sure that an
8 appropriate amount of recovery goes to the plan and
9 participants, that is why we limited the amount being sought
10 because we didn't want fees and expenses to diminish the
11 recovery in the appropriate amount in our view.

12 THE COURT: Okay. All right. Fine. And I take
13 it that -- I haven't heard from defense counsel, but I take it
14 you are okay with both Plaintiff's counsel's remarks and my
15 interpretation of the agreement?

16 MS. VERGOW: Yes, Your Honor. Thank you. This is
17 Meaghan Vegow. I think you described it -- you described
18 accurately the parties' intention and the way, you know, in
19 which any concerns about the fairness of the overall amount
20 could be addressed, that is, by toggling the fee and expense
21 award.

22 THE COURT: Okay. What I will do is I will order a
23 transcript of this call to be placed on the docket, and then I
24 will likely -- yeah, I will order that transcript also to be
25 posted to the -- to the Administrator's website as well so that

1 the class members can see this discussion.

2 Okay. Let's go to the next one. I think that
3 satisfies my concerns with respect to the first one.

4 The next one has to do with the independent fiduciary,
5 and I sort of spelled out my concern there too. And it may be
6 that I was overreading the agreement. I'm not sure the
7 agreement actually says that the Court cannot see the
8 independent fiduciary's determination. I just couldn't tell
9 what the parties have in mind. And so let me -- maybe I should
10 start with defense counsel on that one.

11 MS. VERGOW: Sure, Your Honor. Again, this is Meaghan
12 Vegow. And to start where you ended, Your Honor, I think
13 you're right. It was not the parties' intention in any way to
14 withhold the intended fiduciary's report from the Court. We
15 just neglected to make specific allowance for that in the
16 agreement.

17 We did provide that the report would be, you know,
18 finalized in advance of preliminary -- excuse me -- or the
19 final approval hearing, and it is our intention that the Court
20 would have the opportunity to review that before making an
21 ultimate determination with respect to the, you know, the
22 fairness of the settlement. So to the extent there's ambiguity
23 about that, you know, we can confirm that it is our intention
24 that the Court would have the opportunity to review the
25 independent fiduciary's findings before making a final

1 decision.

2 In terms of, you know, why it's structured the way it
3 is at all, you know, here the Settlement Agreement is
4 contemplating that the plan will release the claims asserted
5 against Defendants, and that is technically a prohibited
6 transaction if we were to approve it. We cannot, you know, get
7 the plans released without the independent determination of
8 someone acting in a fiduciary capacity that the release is fair
9 and reasonable for the plan. So that's why it's structure in
10 this way.

11 It's there specifically to address the conditions of
12 the Prohibited Transaction Exemption published by the
13 Department of Labor specifically for this purpose, PTE 2003-39.
14 So, you know, it's really there as an independent check to
15 confirm that the plan is able to release the claims that were
16 brought in this action.

17 And, you know, in terms of the timing, you know, it's
18 typical for the independent fiduciaries to conduct, you know,
19 their own broad review. They may interview counsel for the
20 parties. They may review record materials. They may review
21 materials that will be gathered pursuant to the Settlement
22 Agreement.

23 So, you know, that will all be information that, you
24 know, through the lens of the fiduciary report, the Court will
25 have access to as well. But in our experience it's fairly

1 typical to give them -- to get that process started, and, you
2 know, it's fairly onerous once the parties have, you know,
3 received preliminary approval at least to continue, you know,
4 the processes described in the Settlement Agreement.

5 THE COURT: And does the independent fiduciary produce
6 some type of a report?

7 MS. VERGOW: Yes, Your Honor.

8 THE COURT: Okay.

9 MS. VERGOW: They will produce a report, and we will
10 submit that to you --

11 THE COURT: Okay.

12 MS. VERGOW: -- so that you will be able to, you know,
13 consider it before you make a final determination with respect
14 to the settlement.

15 THE COURT: All right. And is there any reason that
16 report should not be filed on the docket?

17 MS. VERGOW: Your Honor, it's possible that it will
18 contain confidential information. I can't say in advance that
19 it won't. So we would ask, I guess, your indulgence to review
20 it and make an assessment whether the report includes any
21 confidential information. It's entirely possible that it won't
22 and that that will be no issue at all, but I think we'd
23 appreciate the chance to review it.

24 THE COURT: Oh, sure. You can certainly review it.
25 I'm not in a position to say no to that. I think it should be

1 filed on the docket one way or the other.

2 If there is information that satisfies the standard in
3 the Second Circuit for sealing or redacting material from the
4 report because it's proprietary or concerns sensitive health
5 information or something -- or sensitive account numbers in a
6 case like this, then certainly you would file a motion to seal
7 with that in compliance with our local rule and Second Circuit
8 precedent. And as long as I find that it meets the standard
9 for sealing, then I would grant the motion to seal.

10 But I think under all circumstances it needs to be
11 filed on the docket because if it's going to be part of my
12 approval -- something that I consider in my approval decision,
13 then it's a so-called judicial document, and under Second
14 Circuit precedent, it would have to be filed on the docket.
15 All right.

16 All right. So I'm happy to take your representations
17 on that. I guess there is a question about timing. I don't
18 have the agreement in front of me. I thought it said something
19 like that it had to be submitted to the Defendant 30 days
20 before the fairness hearing? Is that right?

21 MS. VERGOW: Yeah, I think that's correct, Your Honor.

22 THE COURT: All right. Should we then set a time for
23 it to be filed either under seal or not? I leave the decision
24 whether to file a motion to seal with it to counsel. But, you
25 know, I'd rather not get it two days before the hearing. I'd

1 like it, you know, say, 14 days before the hearing. Is that
2 satisfactory?

3 MS. VERGOW: That should be fine, Your Honor. Thank
4 you.

5 THE COURT: All right.

6 MR. MILLER: Your Honor, this is James Miller. I may
7 be putting the cart before the horse, but Ms. Vegow and I met
8 yesterday and, you know, tweaked some of the deadlines from the
9 approval order. And what we had tweaked, which would be
10 consistent throughout the agreement, is that the independent
11 fiduciary report would be provided to the parties no later than
12 45 days before the final approval hearing.

13 THE COURT: Okay.

14 MR. MILLER: And that the report would be submitted to
15 the Court no later than 42 days before the hearing.

16 THE COURT: Fine. That's fine.

17 MR. MILLER: And then -- and, Your Honor, I agree with
18 Ms. Vegow's comments that it's always conceivable that
19 something proprietary could be in the report, but I have never
20 had a settlement in which we had not submitted the independent
21 fiduciary's report to the Court --

22 (Court reporter asked for clarification.)

23 THE COURT: I'm sorry. Can I ask Plaintiff's counsel
24 to repeat himself or speak up because the court reporter is
25 having trouble with that last part.

1 MR. MILLER: I'm sorry, Your Honor. It's not my
2 phone. It's me. I'm too soft-spoken. Is this better?

3 THE COURT: Yes.

4 MR. MILLER: I was just saying, Your Honor, that in my
5 experience we have not had an instance where it's been a
6 necessity to submit the independent fiduciary's report under
7 seal; so we don't anticipate that will happen. But obviously,
8 we'll meet and confer with Ms. Vegow unless in the case
9 something unusual arises in the context of the report.

10 THE COURT: Okay. That seems satisfactory to me.

11 So the next item concerned Rule 54(b). This is really
12 just a procedural point. I doubt it's going to be an issue.
13 But I saw that the parties were invoking Rule 54(b), and I made
14 an assumption that that's because there are these extra
15 Defendants. Is there any reason the Court should not -- again,
16 should I ultimately approve the settlement after the fairness
17 hearing, is there any reason the Court should not enter final
18 judgment as to all claims and all parties?

19 MR. MILLER: Your Honor, this is James Miller.
20 Plaintiff and Defendants are in agreement that it should be
21 just the judgment entered 54 as to all claims and all
22 parties.

23 THE COURT: Okay.

24 MR. MILLER: We can eliminate the reference to 54(b).

25 THE COURT: Okay. That's fine.

1 And then you saw my specific comments on the notice.
2 They're really minor points. Is there any -- we don't have to
3 really get into those unless counsel had questions about any of
4 that.

5 MR. MILLER: Your Honor, this is James Miller. I
6 think that we don't -- I don't think we have any questions and
7 are probably in agreement with the changes. We do note that
8 Your Honor has correctly noted we had an error in the timeline
9 with respect to the Recordkeeper sending names and addresses of
10 class members and the deadline noted for the class. And so we
11 corrected that in the Revised Preliminary Approval Order and
12 apologize for that error.

13 THE COURT: All right. So -- and then lastly, what
14 about Rule 23(b)(1)(A)? I note I did do some research. It
15 looks like most of the cases within the Second Circuit that
16 have certified these types of classes have done so under Rule
17 23(1)(B). You certainly don't need both. But if somebody
18 wants to argue why it should be certified under Rule
19 23(b)(1)(A), I'm happy to hear that now.

20 MR. MILLER: Your Honor, this is James Miller. We
21 think that the Court can certify under either (b)(1)(B) or
22 (b)(1)(A). You know, certainly we believe that (b)(1)(B) is
23 satisfied because, you know, we allege that the Defendant --

24 THE COURT: I'm sorry. You dropped your voice there.
25 We allege that (b)(1)(B) is satisfied because?

1 MR. MILLER: I'm sorry. Because the Plaintiffs allege
2 that the Defendants have refused to act on the grounds
3 applicable to the entire plan and to the participants.

4 With respect to 23(b)(1)(A), we believe it's in the
5 Court's discretion to do so simply because the nature of
6 fiduciary claims is such that you never want a fiduciary, in
7 this case the Defendant, to be in a position where they have
8 any kind of inconsistent and varying degrees of obligation to
9 participants. And so where that really arises from, Your
10 Honor, is under Section 502(a)(2) of ERISA.

11 When the participants bring these claims, they bring
12 them on behalf of the plan of the whole, and so as a result,
13 certification in ERISA context often occurs under (b)(1)(A) as
14 well because there's a divider to not impose different
15 fiduciary obligation upon Defendants vis-a-vis one participant
16 versus the other. So, for example, in *Vellali vs. Yale*, Judge
17 Thompson certified an ERISA class under 23(b)(1)(A). The cite
18 for that is 333 F.R.D. 10, 2019 case from the district.

19 But that's probably a long-winded way of me saying,
20 Your Honor, that we think you can certify under either
21 (b)(1)(B) or (b)(1)(A) or both. But from the Plaintiff's
22 perspective, we don't have any disagreement if the Court
23 concludes that it's more appropriate to certify under
24 (b)(1)(B).

25 THE COURT: Just one question about that. We don't

1 have to prolong this because, as you say, it's not a discussion
2 that has any real consequences. But I'll check the Judge
3 Thompson decision.

4 The language of (b) (1) (A) sort of suggests that I
5 guess it doesn't require but it sort of suggests a scenario
6 where the settlement involves injunctive relief, in other
7 words, not imposing inconsistent obligations. But I'll
8 certainly check the Judge Thompson decision. I might be wrong
9 about that. Maybe I'm reading it too narrowly.

10 All right. So I'll give it some thought. We don't
11 have to discuss it further.

12 So just procedurally, is the parties' plan then to
13 file a revised proposed order with regard to at least the
14 timeline and any other changes they think are necessary based
15 on our discussion here?

16 MR. MILLER: Yes, Your Honor. This is James Miller.
17 With the Court's permission, what we'd like to do is file a
18 renewed motion for preliminary approval tomorrow and then
19 provide a revised settlement agreement and exhibits addressing
20 all of the changes outlined in the Court's Order. And we can
21 also provide a redline version of these documents so that the
22 Court can see the changes in each document between the original
23 submission and the renewed submission. We think that that is,
24 you know, frankly, the cleanest way to approach it so, assuming
25 there's changes that are satisfactory to the Court, we can then

1 post clean settlement documents, if you will, on the settlement
2 administration website and there's not any confusion between a
3 hold-over language in the original papers that may be changed
4 in the preliminary approval order or notices or otherwise.

5 THE COURT: That sounds great to me. So I appreciate
6 that, and I'll wait for the renewed motion. And I'll make it a
7 priority.

8 All right. Well, that's all I have. So thank you all
9 for calling in.

10 MS. VERGOW: Thank you, Your Honor.

11 MR. MILLER: Thank you. We really appreciate it.

12 (Proceedings concluded at 2:25 p.m.)

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C E R T I F I C A T E

I, Julie L. Monette, RMR, CRR, CRC, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ JULIE L. MONETTE

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