

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

IN RE TREMONT SECURITIES LAW, :
STATE LAW AND INSURANCE :
LITIGATION :

Master File No.:
08 Civ. 11117 (TPG)

-----X

This Document Relates to: All Actions :
:

JURY TRIAL DEMANDED
“ECF Case”

-----X

**MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL
OF DISTRIBUTION OF NET SETTLEMENT FUND**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 2

FACTUAL BACKGROUND..... 4

 A. The Settlement 4

 1. The Net Settlement Fund 4

 B. The Claims Administration..... 5

 1. Claims Processing..... 5

 2. Claims in Process..... 6

ARGUMENT 6

THE DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND SHOULD BE APPROVED 6

 A. DETERMINATIONS BY THE CLAIMS ADMINISTRATOR CONCERNING ELIGIBILITY OF PROOFS OF CLAIM AND CALCULATION OF RECOGNIZED CLAIMS AND DISBURSEMENTS FROM THE NET SETTLEMENT FUND SHOULD BE APPROVED 6

 1. The Claims Administrator’s Determination Of The Eligible Claims Should Be Accepted..... 7

 2. The Ineligible Claims Should Be Rejected..... 7

 3. The Court Should Authorize the Requested Distribution Plan for the Net Settlement Fund 8

 4. The Court Should Authorize the proposed Initial Distribution, NSF Reserve, Claims-in-Process Distribution and Second Distribution 8

 5. Disposition of Any Unclaimed/Uncashed Balance..... 9

 B. THE PROPOSED READMISSION TO THE SETTLEMENT CLASS OF THE SETTLING PLAINTIFFS SHOULD BE APPROVED..... 9

 C. THE CLAIMS ADMINISTRATOR SHOULD BE PERMITTED TO DISCARD CERTAIN RECORDS FOLLOWING A REASONABLE TIME AFTER THE INITIAL DISTRIBUTION 10

CONCLUSION..... 10

Settling Class Plaintiffs¹ respectfully submit this Memorandum in support of their Motion for Approval of Distribution of the Net Settlement Fund (“NSF”)² to Authorized Claimants.³ The Motion is supported by the accompanying Affidavit of Stephanie Amin-Giwner of The Garden City Group, Inc. (the “Claims Administrator” or “GCG”), sworn to on February 27, 2015. (“Amin-Giwner Aff.”) The proposed Distribution is consistent with the Net Settlement Plan of Allocation (“NSF POA”) (ECF No. 988-1), which was approved by Order dated December 22, 2014 (ECF No. 994).

Lead Counsel also propose readmission to the Settlement Class of 146 parties (the “Settling Plaintiffs”) who had previously opted out, and the creation of an NSF Reserve in order *inter alia* to accommodate claims of the Settling Plaintiffs and other contingencies, as in the best interests of the Settlement Class.

Settling Class Plaintiffs respectfully request that the Court enter the [Proposed] Order Granting Settling Class Plaintiffs Motion for Approval of Distribution of Net Settlement Fund, a copy of which is attached hereto as Exhibit A.

¹ The Settling Class Plaintiffs include: (i) Arthur E. Lange Revocable Trust, Arthur C. Lange, Neal J. Polan, HFM Charitable Remainder Trust, Eastham Capital Appreciation Fund LP and NPV Positive Corp. for the State Law Actions; (ii) Arthur M. Brainson (on behalf of the Arthur M. Brainson IRA R/O), Yvette Finkelstein and Group Defined Pension Plan & Trust for the Securities Subclass; and (iii) Chateau Fiduciare, S.A., as Trustee of the Map Trust, The Geoffrey Rabie Credit Shelter Trust, the Joanne Brenda Rabie Credit Shelter Trust, the Harriet Rutter Klein Revocable Trust and the Matthew L. Klein Irrevocable Family Trust for the Insurance Subclass.

² Capitalized terms not defined herein shall have the meanings attributed to them in the Stipulation of Partial Settlement, dated as of February 23, 2011 (the “Stipulation”). (ECF No. 392-1)

³ Pursuant to paragraph 1.4 of the Stipulation, an “Authorized Claimant” is any “Settlement Class Member entitled to disbursement from the Net Settlement Fund pursuant to the Plan of Allocation.”

PRELIMINARY STATEMENT

On April 5, 2011, the Court issued an Order Directing Notice and Setting Final Fairness Hearing in Connection With Motion for Approval of Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice Order"), in which the Court, among other things, ordered that the Settlement Class receive the Notice of Pendency of Consolidated Actions, Motion for Final Approval of Proposed Settlement, Hearing on Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice"). On June 28, 2011, the Court issued an Order Approving Issuance of Supplemental Notice (the "Supplemental Notice Order"), in which the Court, among other things, approved mailing to the Class of the Supplemental Notice of Pendency of Consolidated Actions and Hearing on Motion for Final Approval of Proposed Settlement, Motion for Final Approval of Plans of Allocation and Motion for Attorneys' Fees and Expenses (the "Supplemental Notice").

Since then, Plaintiffs' Settlement Class Counsel and the Claims Administrator have worked diligently to provide notice to the Class and to administer the Settlement consistent with the Stipulation and the Court's August 19, 2011 Final Judgment and Order of Dismissal with Prejudice Regarding Settlement and Rules 23 and 23.1 (the "Final Approval Order"). (ECF No. 604)

Various appeals were filed. The last appeal was finally dismissed on October 6, 2014.

Lead Counsel and several Interested Parties participated in extensive mediation before retired U.S. District Court Judge Layn R. Phillips (the "Mediator") (including numerous telephonic exchanges among the Mediator, class counsel and/or the parties and various meetings, including extensive mediations sessions) on July 28th and 29th, 2014 (the "Mediation"), during which consensus was reached among all Interested Parties as to the language of the NSF POA.

As noted, the NSF POA was approved by Order dated December 22, 2014. (ECF No. 994)

In February 2015, pursuant to the ongoing mediation process, the Settling Plaintiffs which had opted out of the Settlement agreed in principle with Defendants and Lead Counsel to seek to opt back in to the Settlement.

Lead Plaintiffs believe the proposed readmission of the Settling Plaintiffs and the NSF Reserve to be in the best interests of the Class. Readmission would streamline the FDA mediation and plan of allocation process (which benefits the Class and all other investors) by securing a waiver of objections and related support from a broad cross section of investors in various funds.

It also brings to a close substantial opt out litigation that is otherwise using valuable Tremont resources which, under the Class Settlement, to the extent remaining would flow to the Class post-administration and wind up.

GCG has done a preliminary review of the Settling Plaintiffs' claims information, which preliminary review GCG has shared with counsel for the Settling Plaintiffs. The proposed NSF Reserve (20% of the NSF or \$15,001,603) is designed *inter alia* to accommodate payments to the Settling Plaintiffs and other contingencies. The proposed NSF Reserve has been approved in principle by counsel for the Settling Plaintiffs. Payment from the NSF Reserve will be pursuant to the Plan of Distribution.

With regard to the FDA POA, a full consensus among all Interested Parties has not yet been reached, but mediation efforts among Interested Parties continue in good faith. We expect to report back to the Court within the next few months with an update on the ongoing mediated FDA POA discussions.

GCG proposes a Distribution Plan that provides *inter alia* for an Initial Distribution, an NSF Reserve, a Claims-in-Process Distribution and Second Distribution. As noted, the Distribution Plan includes a 20% NSF Reserve in order to address claims by the Settling Plaintiffs that ultimately are determined to be eligible to participate in the Settlement, and for other contingencies.

Plaintiffs' Settlement Class Counsel respectfully request that the Court enter the proposed Order submitted herewith.

FACTUAL BACKGROUND

A. The Settlement

1. The Net Settlement Fund

The Settlement provides for, among other things, the creation of a fund consisting of \$100 million in cash ("Initial Settlement Amount") together with the Fidelity Bond Recovery, the Remaining Tremont Funds and any recovery from the assigned claims, plus interest (the "Gross Settlement Fund"). (Stipulation ¶ 1.20.)

The current cash balance of the Net Settlement Fund, including *inter alia* accrued interest and the addition of a net recovery from the Fidelity Bond Litigation, is \$75,008,016.84.⁴

If the Court grants the instant motion, this amount (less any reserve) would be available for distribution to Settlement Class Members who are not otherwise excluded from the Class and who have submitted a valid Proof of Claim and Release Form (the "Proof of Claim" or "Claim")

⁴ The Settlement provided that recovery, net of fees and expenses and the 8.2% allocation to the insurance action, from the NSF's 50% interest in the Fidelity Bond Recovery and from any assigned claim would be added to the NSF. In addition to the net settlements from the Fidelity Bond Recovery, Plaintiffs' Settlement Class Counsel litigated the assigned claim against the accountants for certain of the Rye Funds to a final resolution adverse to the Settlement Class. The assigned claim against Bank of New York Mellon, the former fund administrator for certain of the Rye Funds, was settled, after being dismissed in the lower Court and while on appeal.

to the Claims Administrator – *i.e.*, Authorized Claimants. Each Authorized Claimant shall be allocated a percentage of the NSF based upon the NSF POA and the relationship that each Authorized Claimant’s Claim bears to the total of all Authorized Claimants’ Claims.

B. The Claims Administration

1. Claims Processing

All Settlement Class Members wishing to participate in the Settlement were required to submit completed Proofs of Claim, as well as the documentation required to substantiate the transactions set forth in their Claims. To date, the Claims Administrator has received 737 Claims. (*See* Amin-Giwner Aff. at ¶¶ 2-4)

As the Claims Administrator received Claims, it performed a detailed review of each Claim, including the supporting documentation submitted therewith, for completeness. In general, the Claims Administrator’s review identified: (i) fully supported and valid Claims; and (ii) Claims that were partially or wholly deficient (collectively, “Deficient Claims”). (*See id.* at ¶¶ 12-17.) In reviewing Claims, the Claims Administrator implemented and executed several measures designed to assure the quality of the process and to detect any fraudulent Claims. These administrative protections are discussed in detail in paragraphs 18-23 of the Amin-Giwner Affidavit.

A significant portion of the time spent administrating this Settlement was devoted to working with Claimants with Deficient Claims and providing them with sufficient notice and an opportunity to remedy such deficiencies (the “Deficiency Process”). Claim deficiencies typically result from missing documentation, incomplete transaction data, conflicting transaction data or the Claimant’s failure to sign the Proof of Claim. The Claims Administrator has contacted those

claimants whose claims remained deficient, advised them of the deficiency and worked with them to help them cure their claims. (*See id.* at ¶¶ 13-17.)

The Claims Administrator has completed its review and the deficiency process with respect to the vast majority of the Proofs of Claim received. The Amin-Giwner Affidavit makes recommendations as to the disposition of these claims. (*See id.* at ¶¶ 26-28.)

2. Claims in Process

As noted, the Settling Plaintiffs, who had previously sought exclusion from the Settlement Class, have reached an agreement in principle with Defendants and Lead Counsel jointly to seek Court permission for readmission into the Settlement Class. Lead Counsel believe this is in the best interests of the Settlement Class. (Amin-Giwner Aff. at ¶ 24.)

Accordingly, GCG has proposed a Distribution Plan, which provides for an Initial Distribution and a Claims-in-Progress Distribution, with a Second Distribution and potential further distributions if cost-effective. (Amin-Giwner Aff. at ¶ 29.) The Distribution Plan also provides for a 20% Net Settlement Fund Reserve (“NSF Reserve”), to address any Claims-in-Progress ultimately determined to be eligible to participate in the Settlement and other contingencies. The Distribution Plan will provide a *pro rata* distribution of the Net Settlement Fund to all Authorized Claimants. (*Id.*)

ARGUMENT

THE DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND SHOULD BE APPROVED

A. DETERMINATIONS BY THE CLAIMS ADMINISTRATOR CONCERNING ELIGIBILITY OF PROOFS OF CLAIM AND CALCULATION OF RECOGNIZED CLAIMS AND DISBURSEMENTS FROM THE NET SETTLEMENT FUND SHOULD BE APPROVED

Settling Class Plaintiffs respectfully request that the Court adopt the Claims Administrator’s administrative determinations concerning accepted and rejected Claims.

1. The Claims Administrator’s Determination Of The Eligible Claims Should Be Accepted

The Claims Administrator has determined that 536 filed Claims are eligible to participate in the Class Distribution. (See Amin-Giwner Aff. at ¶ 4.) A summary schedule of these accepted Claims is provided in Exhibit D-1 to the Amin-Giwner Affidavit. For privacy reasons, the summary schedules attached to the Amin-Giwner Affidavit do not contain the names, addresses, Taxpayer ID numbers or Social Security numbers of Authorized Claimants. Settling Class Plaintiffs and Plaintiff’s Settlement Class Counsel respectfully request that the Court adopt the Claims Administrator’s determination to include the eligible Claims in the Class Distribution.

2. The Ineligible Claims Should Be Rejected

The Claims Administrator has determined that a total of 156 of the 737 Claims received must be administratively rejected for the following reasons:

<u>Number of Claims</u>	<u>Reason for Rejection</u>
34	Claim Did Not Fit the Definition of the Class
36	Duplicate Claim
43	Deficient Condition on Claim Never Cured After Claimant Received Deficiency Notice Concerning Claim
43	Claim Did Not Result in a Recognized Claim

Exhibit D-2 to the Amin-Giwner Affidavit lists all the rejected or ineligible Claims and shows the reasons why these Claims were rejected in claim number order. Again for privacy reasons, the list of ineligible Claims provides only the Claim number and reason for ineligibility. Settling Class Plaintiffs and Plaintiffs’ Settlement Class Counsel respectfully request that the Court accept the Claims Administrator’s determination to reject the ineligible Claims.

As noted, the Claims Administrator will process the Claims-in-Process using the same standards.

3. The Court Should Authorize the Requested Distribution Plan for the Net Settlement Fund

As set forth herein and in the Amin-Giwner Affidavit, Plaintiffs' Settlement Class Counsel and the Claims Administrator will effectuate Distribution of the NSF consistent with the Court's prior Orders and the NSF POA.

The Claims Administrator will determine each Authorized Claimant's payment from the NSF (the "Settlement Payment") by calculating each Authorized Claimant's *pro rata* share of the NSF under the NSF POA. This calculation will be determined by comparing the Authorized Claimant's total Recognized Claim under the NSF POA with the total Recognized Claim of all valid Claims submitted (which is \$1,342,929,318.99 (*see id* at ¶28)), and multiplying that percentage by the total dollar value of the NSF at the time of Distribution in order to calculate payment amounts. (*See id.* at ¶28-29.)

4. The Court Should Authorize the proposed Initial Distribution, NSF Reserve, Claims-in-Process Distribution and Second Distribution

The Distribution Plan provides for an Initial Distribution, a Claims-in-Process Distribution and a Second Distribution, and further potential distributions to the extent cost-effective. (Amin-Giwner Aff. at ¶ 29.)

The Distribution Plan also provides for a 20% Net Settlement Fund Reserve ("NSF Reserve"), in order to address Claims-in-Progress ultimately determined to be eligible to participate in the Settlement and other contingencies. (*Id.*)

Lead Counsel submits that this structure is in the best interests of the Settlement Class, and should be approved.

5. Disposition of Any Unclaimed/Uncashed Balance

In order to encourage Authorized Claimants to cash their Class Distribution checks promptly and to avoid or reduce future expenses relating to uncashed checks, Plaintiffs' Settlement Class Counsel and the Claims Administrator propose that all Distribution checks bear the notation "CASH PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT CASHED BY [DATE 120 DAYS AFTER ISSUE DATE]." (*See id.* at ¶ 29 (b)(4).)

Consistent with the Court-approved NSF POA, if any funds remain in the NSF after the Initial Distribution and Claims-in-Process Distribution and after GCG has made reasonable and diligent efforts assisting Authorized Claimants with cashing their Class Distribution checks, GCG will conduct a Second Distribution. In the Second Distribution, any net balance remaining in the NSF one year after the Initial and Claims-in-Process Distributions will be re-distributed to Authorized Claimants who have not yet been paid in full and have cashed their checks from the Initial and Claims-in-Process Distributions. (*See id.* at ¶ 29(d).)

If any funds shall remain in the NSF six months after such Second Distribution, there will be a further redistribution of the NSF if cost effective. If this is not cost effective, then such balance, after payment of any unpaid costs, fees and taxes, shall be donated to a non-sectarian, not-for-profit 501(c)(3) organization recommended by Lead Counsel, after consultation with the Settling Class Plaintiffs, and approved by the Court. (*See id.* at ¶ 29(e)).

B. THE PROPOSED READMISSION TO THE SETTLEMENT CLASS OF THE SETTLING PLAINTIFFS SHOULD BE APPROVED

As noted, in February 2015, the Settling Plaintiffs, which had earlier opted out of the Settlement, agreed in principle with Defendants and Lead Counsel to seek to opt back into the Settlement Class. (*See id.* at ¶ 24).

Readmission would streamline the FDA mediation and plan of allocation Process.

It also brings to a close substantial opt out litigation that is otherwise using valuable Tremont resources which, under the Class Settlement, to the extent remaining would flow to the Class post administration and wind up.

As noted, GCG did a preliminary review of the Settling Plaintiffs' claims information, which preliminary review GCG has shared with counsel for the Settling Plaintiffs. The proposed NSF Reserve (20% of the NSF or \$15,001,603) is designed *inter alia* to accommodate payments to the Settling Plaintiffs and other contingencies. The proposed NSF Reserve has been approved in principle by counsel for the Settling Plaintiffs. Payment from the NSF Reserve will be pursuant to the Plan of Distribution.

C. THE CLAIMS ADMINISTRATOR SHOULD BE PERMITTED TO DISCARD CERTAIN RECORDS FOLLOWING A REASONABLE TIME AFTER THE INITIAL DISTRIBUTION

Settling Class Plaintiffs respectfully request that: (i) the Claims Administrator may discard paper copies of Proof of Claim forms and all supporting documentation not less than one year after the Distribution of the NSF; and (ii) the Claims Administrator may discard copies of such materials maintained in electronic form not less than three years after the Distribution of the NSF. (*See, id.* at ¶ 31)

CONCLUSION

For the foregoing reasons, Settling Class Plaintiffs respectfully request that the Court enter the [Proposed] Order Granting Settling Class Plaintiffs' Motion for Approval of Distribution of the Net Settlement Fund.

Dated: February 27, 2015
New York, New York

ENTWISTLE & CAPPUCCI LLP

/s/ Andrew J. Entwistle
Andrew J. Entwistle
Arthur V. Nealon
Robert N. Cappucci
Adam Sgro
280 Park Avenue, 26th Floor West
New York, NY 10017
(212) 894-7200
(212) 894-7272 (fax)
aentwistle@entwistle-law.com

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Reed R. Kathrein

Reed R. Kathrein
Lee Gordon
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
(510) 725-3000
(510) 725-3001 (fax)
reed@hbsslaw.com

Co-Lead Counsel for the State Law Actions

BERNSTEIN LIEBHARD LLP

/s/ Jeffrey M. Haber

Jeffrey M. Haber
Stephanie M. Beige
10 East 40th Street
New York, NY 10016
(212) 779-1414
(212) 779-3218 (fax)
haber@bernlieb.com

Lead Counsel for the Securities Actions