UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TREMONT SECURITIES LAW, STATE LAW AND INSURANCE LITIGATION	:	Master File No.: 08 Civ. 11117 (TPG)
This Document Relates to: All Actions	:	

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR APPROVAL OF DISTRIBUTION OF NET SETTLEMENT FUND

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PRELIMINARY STATEMENT

Settling Class Plaintiffs[1] respectfully submit this Reply Memorandum in further support of their Motion for Approval of Distribution of the Net Settlement Fund to Authorized Claimants ("Motion"). The Motion proposes the distribution of the Net Settlement Fund ("NSF"), the creation of a reserve ("Reserve") and the readmission of certain opt-outs. Lead Counsel believes that approval of the proposed distribution, Reserve creation and requested readmission of opt-outs is in the best interests of the Class, and provides for the fair, equitable and efficient distribution of the NSF to all Authorized Claimants in accordance with the Court-approved Net Settlement Fund Plan of Allocation ("NSF POA"). Moreover, approval of Lead Counsel's request will advance the resolution of issues concerning a plan of allocation for the Fund Distribution Account ("FDA POA"), reduce litigation expense being incurred by Tremont (assets that may otherwise flow to the Class) and save valuable Court resources by streamlining the remaining steps in this lengthy litigation.

Four groups of investors (collectively, the "Objectors") filed responses to Settling Class Plaintiffs' Motion, as set forth below: Austin Capital BMP Fund ("ACM");[2] Calabrese Parties and Boston Class Members Group;[3] Collins Capital;[4] and the "Tremont Fund Objectors."[5] Of

[1] 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), and the Memorandum in Support of Motion for Approval of Distribution of Net Settlement Fund (the "Opening Memo") (ECF No. 1004).

[2] ACM filed its Corrected Response By ACM In Opposition To Motion For Approval of Distribution of Net Settlement Fund (ECF No. 1019) (the "ACM Opp."). Meritage Capital, LLC ("Meritage") joined in ACM's submission (ECF No. 1020).

[3] Antonio Calabrese, Stephen Calabrese, Calco Printing, Inc., Lawrence J. Rothschild, Richard A. Scherr, Family Swimmers, L.P., Arthur Simons, Paul Funk, Joseph Ludwig, Judith Ludwig, Stuart Levey, Deborah Levey, Levey Fishman Trust, Nicholas P. Kardasis IRA and Jean-Marc Chouraqui (collectively, the "Calabrese Boston Group") filed their Memorandum Of Law Of Calabrese Parties And Boston Class Members Group In Partial Opposition To Motion For Approval Of Distribution Of Net Settlement Fund (the "Calabrese Boston Opp.") (ECF No. 1021).

[4] Collins Capital Investments LLC, Collins Capital Master Fund I, LP and Collins Capital Master Fund II, LP (collectively, "Collins Capital") filed their Memorandum Of Law In Opposition To Motion For Approval Of Distribution Of Net Settlement Fund By Settling Class Plaintiffs And Settling Plaintiffs (the "Collins Capital Opp.") (ECF No. 1012).

these four groups of Objectors, only one -- the Tremont Fund Objectors -- contest the distribution of the *unreserved* portion of the Net Settlement Fund.[6] However, even if they have standing to object (doubtful, see n.5), the Tremont Fund Objectors' argument against distribution attaches to the previously Court-approved NSF POA and not to the actual distribution of the NSF. Thus, it is untimely and of no moment here. The Tremont Fund Objectors and Collins Capital also object to the creation of the NSF Reserve, and all Objectors oppose readmission of Settling Plaintiffs to the NSF Settlement Class. Despite their contentions, no Objector has raised significant doubt concerning the fairness or efficiency of the proposed distribution, creation of the Reserve or readmission of opt-outs. Accordingly, their objections to the distribution Motion should be overruled in all respects.

It is worth noting that, while no separate notice requirement exists under the PSLRA or Rule 23 for the making of a distribution motion (which we note almost always includes the creation of a working reserve, procedures for the resolution of claims and often readmission of certain opt-outs), the current Motion was filed by ECF, posted on the websites of all Lead Counsel and on the website of the Claims Administrator. It was also sent to all of the parties participating in the mediation of the NSF and FDA plans of allocation. Following the filing of the Motion, Lead Counsel conducted a series of conference calls with various parties to the mediation and

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[5] George Turner, Bindler Living Trust, Madelyn Haines ("Haines"), William J Millard Trust, Stella Ruggiano Trust and Paul Zamrowski ("Zamrowski") (collectively, the "Tremont Fund Objectors") filed their Objection Relating To Distributions And Allocations Filed In Opposition To The Memorandum In Support For Approval Of Distribution Of The Net Settlement Fund (the "Tremont Objectors Opp.") (ECF No. 1022). Notably, the Second Circuit concluded that Haines and Zamrowski lack standing in ongoing proceedings here because defendants previously offered to pay them the entirety of their compensable damages plus interest. *In re Tremont Law, State Law & Ins. Law Litig.*, 561 F. App'x. 61, 63 (2d Cir. 2014). Bindler, Millard and Ruggiano have not previously appeared by counsel or otherwise in these proceedings.

[6] ACM, and through joinder Meritage, argues that the Court should "[a]t a minimum, . . . adjourn ruling on approval of any distribution of the NSF in order to allow [for requested] discovery . . . ." ACM Corrected Response at 8-9. But, in its alternative request for relief, ACM seeks distribution of the NSF "to those Settlement Class Members with approved claims immediately and without further delay and hold the 20 percent back pending further order of the Court." *Id*. at 11. This latter request is consistent with Lead Counsel's alternative relief proposal herein. *See* Section A, *infra*, and accompanying proposed order attached as Exhibit 1 hereto.

others to answer questions related to the Motion. Among other things, those calls addressed the creation of the NSF Reserve, the readmission of opt-outs and the procedures for distribution.[7]

ARGUMENT

A. The Unreserved Portion Of The Net Settlement Fund Should Be Distributed

As a threshold matter, with the exception of the Tremont Fund Objectors, whose arguments are untimely as discussed in Section D below and who may not have standing in any event as noted in footnote 5 above, no objecting party opposes distribution of at least that portion of the Net Settlement Fund not included in the NSF Reserve.[8] Accordingly, we respectfully request that the Court enter an order: (i) providing for the distribution of the unreserved portion of the NSF and the creation of the NSF Reserve as soon as is practicable; (ii) providing for the distribution of the portion of the NSF Reserve allocable to existing Class members; and (iii) providing for the readmission of the Settling Plaintiffs to the NSF Settlement Class and overruling the objections related thereto.[9] This approach will ensure that at least the undisputed portion of the NSF will promptly be distributed to Class members, regardless of whether any Objector may seek to appeal the Court's ruling addressing creation of the Reserve and readmission of the Settling Plaintiffs to the NSF Settlement Class.

B. The Objections To The Creation Of The NSF Reserve Should Be Overruled

Despite the mistaken contentions of various Objectors, the NSF Reserve is not for the exclusive benefit of the Settling Plaintiffs seeking readmission to the NSF Settlement Class. To

[7] Nevertheless, ACM (a party to the mediation that received a copy of the Motion and participated in several of the above-noted conference calls) still claims a lack of sufficient notice without the benefit of citation or fact -- an objection that should be denied out of hand. *In re Vitamin C Antitrust Litig*., No. 06–MD–1738 (BMC)(JO), 2012 WL 5289514, at *8-9 (E.D.N.Y Oct. 23, 2012).

[8] A significant portion of the NSF Reserve is intended for the benefit of existing Class members (*see infra* Section B.1). None of the Objectors (with the possible exception of the Tremont Fund Objectors) appears to oppose using the NSF Reserve to ensure recovery for these *existing* Class members.

[9] A proposed order conforming to this alternate course of action is attached hereto as Exhibit 1.

the contrary, the NSF Reserve is also designed "to address ***any*** Claims-in-Process ultimately determined to be eligible to participate in the Settlement," ***including the claims of approximately 45 existing Class members*** which the Claims Administrator believes can be perfected but are not yet resolved and other administrative contingencies. Memo in Support at 6 (emphasis added); Amin-Giwner Affidavit at ¶ 29. Indeed, approximately $7 million of the NSF Reserve is intended to address such unresolved claims by existing Class members as well as administrative contingencies. In any event, any funds remaining in the NSF Reserve after the Claims-in-Process distribution is completed will be distributed *pro rata* to eligible NSF Settlement Class members at large. *See* Memo in Support at 6.

C. The Objections To Reinstatement Of The Settling Plaintiffs Should Be Overruled

Readmission of the Settling Plaintiffs to the NSF Settlement Class does not prejudice or materially impact the members of the NSF Settlement Class, will further the fundamental goals of efficient and speedy distribution of the NSF, preserve value for all recovering NSF Settlement Class members (*e.g.*, any amounts remaining in Tremont after completion of the wind down of operations), avoid the substantial delay and expense associated with further proceedings involving the Settling Plaintiffs and remove possible objections to the FDA POA currently the subject of mediation proceedings.[10]

1. Readmission of the Settling Plaintiffs into the Settlement Class will not Prejudice or Materially Impact the Existing Class Members Participating in the Net Settlement Fund

Contrary to the contentions of the Calabrese Boston Group, Collins Capital, ACM and Meritage, permitting the Settling Plaintiffs to rejoin the Settlement Class will not prejudice the Objectors or the other NSF Settlement Class members. In attempting to show prejudice where

[10] Settling Plaintiffs have agreed to "support" an "FDA POA proposal currently under discussion by Lead Counsel." Settling Plaintiffs' Joinder, ECF No. 1006, at 2.

none exists, Objectors speculate that readmission will "[s]ubstantially [d]ilute[] the [r]ecovery of the Settlement Class." *E.g.,*Collins Capital Opp. at 11. In reality, it would do no such thing. Under similar circumstances, courts throughout the country have rejected the argument that class members would suffer prejudice from allowing opt-outs to opt-back into the class because a distribution to opt-ins would dilute the interests of existing class members. To be sure, in large multi-district class actions such as this one:

> [C]ourts have repeatedly allowed putative class members to rejoin a class at the settlement stage. These courts have reasoned that, if a plaintiff who previously opted out 'is permitted back into the settlement class, the remaining members will receive no less than what they would have received had [that plaintiff] never opted out.'

In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-1819 CW, 2013 WL 1222690, at *1 (N.D. Cal. Mar. 25, 2013) (*citing In re Elec. Weld Steel Tubing Antitrust Litig.,* No. 79-4628, 1982 WL 1873, *2-3 (E.D. Pa. June 30, 1982));[11] *see also In re Elec. Carbon Prods Antitrust Litig.*, 447 F. Supp. 2d 389, 397 (D.N.J. 2006) (readmission of opt-out plaintiffs deemed to be "in the best interests of the Settlement Class . . . It cannot be said that any class member relied, to its detriment, on the . . . [P]laintiffs' original decision to opt-out, since that development was contemporaneous with all other decisions and could not have been a factor in the decision of any particular class member to participate"); *Urethane*, 2008 WL 5215980, at *1-2 ("courts have

[11] In *Electric Weld*, in language equally applicable here, the court stated "the members of the *settlement class cannot be said to be prejudiced* if Master Juvenile [an opt-out plaintiff] is permitted to participate in the settlement. When the settlement was initially reached, Master Juvenile was a member of the settlement class and entitled to its share of the fund. If Master Juvenile is permitted back into the settlement class, *the remaining members will receive no less* than what they would have received had Master Juvenile never opted out." *Electric Weld,* 1982 WL 1873 at *3 (emphasis added). Here too, when the parties entered into the Class Settlement, they defined the "Settlement Class" to include investors such as the Settling Plaintiffs (who had not yet formally opted out), placing them among the potential Class members entitled to participate in the NSF. Consequently, if the Court permits the Settling Plaintiffs to re-enter the Settlement Class -- as we respectfully submit it should -- the other Class members will not be disadvantaged because they "will receive the same amount [from the NSF] they would have had [if the Settling Plaintiffs] never opted out to begin with." *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2008 WL 5215980, at *2 (D. Kan. Dec. 12, 2008)

consistently permitted parties to withdraw requests to opt-out of class actions" -- finding no prejudice where there was no reliance on the initial opt-outs).

The reasoning of these cases strongly favors readmission of the Settling Plaintiffs to the Settlement Class. This is a large, complex multidistrict class action. The remaining Class members did not rely to their detriment on Settling Plaintiffs' original opt-out since they chose to participate in the Settlement while Settling Plaintiffs were still potential Class members -- and will receive the same amount they would have received had Settling Plaintiffs not opted out.[12]

Moreover, even with the readmission of Settling Plaintiffs, the NSF Settlement Class is projected to receive more than the estimated recovery provided in the notice sent to NSF Settlement Class members. The notice projected a *pro rata* recovery of 4% of net losses after deduction of fees and expenses. ECF No. 597-1 at 9. The Claims Administrator advises that after readmission of the Settling Plaintiffs, the NSF Settlement Class is projected to receive a *pro rata* recovery of 4.59% of a participant's net losses. While it is true that without readmission, the NSF Settlement Class would receive a slightly higher projected *pro rata* net recovery of 5.18%, the point here is that the NSF Settlement Class is receiving more than even the *pro rata* recovery projected in the notice of settlement, making it impossible that they could suffer any prejudice from readmission of the Settling Plaintiffs -- a fact strongly favoring readmission and the overruling of all related objections.[13]

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[12] There also is no merit to Objectors' suggestion that readmission of the Settling Plaintiffs would contravene agreements reached at the mediation regarding the NSF. *See* ACM Opp. at 5. Of course, discussions during the ongoing mediation are confidential. That said, we note that the consensus reached at the mediation pertained solely to the terms of the NSF POA and the formula ("Net Investment Method" or "Last Statement Method") to be used in calculating the net investment loss of each Settlement Class member eligible to receive distributions from the NSF. The participants never discussed, and therefore did not agree, that the mediated consensus around the Net Investment Method depended on the size of any participant's recovery or any change in recovery resulting from a change in the number of Settlement Class members sharing in the NSF.

[13] *In re Cathode Ray Tube (CRT) Antitrust Litig*, No. CV-07-5944 SC (N.D. Cal. April 1, 2014), relied on heavily by both Collins Capital and ACM, is not to the contrary. In fact, the *Cathode* court cited with approval the recent decision of fellow Northern District of California Judge Wilkins, who permitted readmission. *Id.* at 3-4 (citing

2. Readmission of the Settling Plaintiffs will Facilitate Swift Distribution of the Fund Distribution Account to Class Members, is Consistent with Lead Counsel's Fiduciary Obligations and is an Appropriate Exercise of this Court's Equitable Powers

The creation of a broad consensus (and the elimination of potential objections from a broad cross section of investors) is clearly to the benefit of all investors, a group that includes the NSF Objectors and the NSF Settlement Class. This benefit is confirmed by Settling Plaintiffs who state that their readmission will result in their support of a proposed consensus FDA POA (the subject of the continuing mediation), bringing support for this consensus proposal "to approximately 90% of all Rye and Tremont net investment." Settling Plaintiffs' Joinder, ECF No. 1006, at 2. Such broad-based consensus, in addition to addressing various equitable concerns raised by the current proposals for the FDA POA, would hasten recovery from the FDA for the Settlement Class as a whole. This result is in accord with the clear mandate for Lead Counsel (and the Court) to consider judicial economy, efficiency and speedy recovery for the Class in administering settlement funds. *See*, *e.g.*, *Feder v. Harrington*, 58 F.R.D. 171, 174 (S.D.N.Y. 1972) (stating "there is a public policy favoring settlement" for reasons of judicial economy); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 149 (E.D.N.Y. 2000) (approving a settlement agreement while acknowledging the need to speedily distribute funds to victims).[14]

Contrary to the impression Objectors attempt to create, "courts have consistently permitted parties to withdraw requests to opt out of class actions." *Urethane*, 2008 WL 5215980 at *1. *See also*, *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1261-63 (E.D.N.Y. 1988)

Static Random, 2013 WL 1222690 at *1 (stating that the other Class members would receive no less than what they would have received had the plaintiff never opted out)). Ultimately, the *Cathode* court denied readmission but on very different grounds unique to the *Cathode* litigation and not present here, finding that granting readmission "in this particular MDL could up-end the existing settlements and derail those to come." *Cathode*, slip op. at 7. No such prejudice or risk to the class action process is present here.

[14]As discussed in Lead Counsel's Opening Memo, readmission of the Settling Plaintiffs also brings significant, protracted opt-out litigation to a close. This is important because it helps to preserve limited resources remaining in Tremont which, if any, flow to the Settlement Class after administration and wind up costs.

(allowing opt-outs and late claimants to participate in a settlement fund where it was equitable to do so). Moreover, courts have the authority to grant this relief to permit participation in class action settlements. Indeed, "until the settlement funds are distributed . . . court[s] retain[] [their] traditional equitable powers concerning the settlement." *Urethane*, 2008 WL 5215980 at *1; *Zients v. LaMorte*, 459 F. 2d 628, 630 (2d Cir. 1972) (same). In exercising those powers, courts repeatedly have found that allowing opt-outs to rejoin the class and share in class action settlements achieves one of the goals of Rule 23 of the Federal Rules of Civil Procedure, which is to prevent unnecessary lawsuits over the same issues. *Electric Weld*, 1982 WL 1873, at *2. Plainly, this goal could be achieved here by allowing the Settling Plaintiffs to rejoin the Settlement Class. Their re-entry would facilitate the amicable resolution of nine related cases, seven of which are part of the Tremont multidistrict litigation pending before this Court. In any event, the Court has the authority to modify its prior judgment under Fed. R. Civ. Pro. 60(b)(6) to permit readmission to the Settlement Class of the Settling Plaintiffs and may do so here.

3. The Objectors' Request for Discovery into the Underlying Settlement Mediated by Class Counsel is Misplaced, Unnecessary and would Inappropriately and Unduly Disturb the Confidentiality of the Mediation Process

ACM requests discovery of the confidential settlement agreement that, among other things, provides that the Settling Plaintiffs may seek readmission to the NSF Settlement Class. *See* ACM Opp. at 9. The request should be denied.

At the outset, we note that the underlying confidential settlement resolving nine pending opt-out litigations was negotiated under the broad umbrella of the ongoing mediation. While Judge Phillips was not directly involved in mediating that settlement, Lead Counsel -- who at the Court's request have been playing a mediator's role in trying to build a consensus around the various Plans of Allocation for the NSF and FDA -- were involved in the process. At all times, the

parties to the discussions understood that their discussions would be confidential and protected as part of the ongoing mediation process -- an understanding that Lead Counsel have confirmed in countless other discussions during the mediation process, including in discussions with ACM and Collins Capital. The cases in this Circuit and beyond protecting the confidentiality of the mediation process are legion and make clear that such confidentiality is not to be disturbed absent compelling circumstances not present here. *See*, *In re Teligent, Inc.*, 640 F.3d 53, 57-60 (2d Cir. 2011); *CEATS, Inc. v. Continental Airlines Inc.*, 755 F.3d 1356, 1363 (Fed. Cir. 2014).

Moreover, the only aspect of the mediated, confidential settlement agreement that relates to the NSF Settlement Class is its provision that Settling Plaintiffs may seek readmission. In exchange, Settling Plaintiffs agreed to support the developing consensus proposal related to the FDA POA (which remains a subject of the ongoing mediation before Judge Phillips). No party to the underlying confidential settlement agreement had the power to direct readmission. That equitable power lies solely with this Court. That permissive readmission subject to the equitable powers of this Court -- the only aspect of the underlying confidential settlement relevant here -- was openly discussed in the moving papers. Opening Memo at 9-10. The other mediated, confidential terms agreed to by the parties to facilitate resolution of the nine opt-out actions are simply not relevant to these proceedings and certainly do not provide a basis to disturb the sanctity of the mediation process. *See Electric Weld,* 1982 WL 1873 at *3 (rejecting argument that it would be unfair to permit opt-out plaintiff to rejoin class and share in class settlement because it obtained "additional settlement monies" by settling related opt-out litigation). Moreover, contested discovery proceedings would only protract this litigation, further delaying distribution of both the NSF and the FDA.[15]

[15] ACM also requests discovery of the amount of net recoveries from the Fidelity Bond Litigation that was added to the NSF. ACM Opp. at 8. But Lead Counsel has already disclosed the makeup of the NSF and the total NSF

D. The Remaining Objections To The Distribution Plan Are Unavailing

The Tremont Fund Objectors make several additional arguments regarding the content of the previously Court-approved NSF POA. *See, e.g.*, Tremont Objectors Opp. at 10-16 (challenging the Court-approved NSF POA as arbitrary, irrational and inequitable). Such arguments are untimely on their face, and therefore moot. Indeed, this putative group of objectors did not raise any objections to the NSF POA. The order approving the NSF POA is long since final in all respects and the request for Court approval of the distribution of funds under the approved NSF POA does not provide an opportunity to re-litigate that final order.[16] Accordingly, the Tremont Fund Objectors' opposition must fail.

CONCLUSION

For the foregoing reasons, Settling Class Plaintiffs' Motion for Approval of Distribution of the Net Settlement Fund should be granted and the various objections should be overruled in all respects.

Dated: April 10, 2015
New York, New York

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amount. *See*, Memorandum In Support Of Motion For Approval Of Net Settlement Fund Plan of Allocation And Scheduling Motion For Distribution, ECF No. 988 at 8 (stating the total NSF and describing the inclusion of the net bond recoveries into the NSF). Including the recent $225,000 recovery from the BONY settlement -- which contained an indemnity waiver -- and the net Fidelity Bond recoveries of $13,167,573.56, the total NSF amounts to $75,002,526.03. In any event, the amount of the previously incorporated net bond recoveries are irrelevant to distribution or readmission of the Settling Plaintiffs as those amounts are already reflected in the total approved NSF.

[16] *See* Memorandum of Law in Support of Motion for Approval of Net Settlement Fund Plan of Allocation and Scheduling Motion for Distribution, ECF No. 988, and attached declarations and exhibits (detailing the extensive efforts of Lead Counsel to solicit opinions and concerns from all interested persons and establish a consensus around the NSF POA, and noting the Supreme Court's denial of Haines and Zamrowski's petition for certiorari). The Court has previously held on August 19, 2011 that Objectors Haines and Zamrowsky "lack standing" to pursue any such objections. *See* Final Judgment And Order Of Dismissal With Prejudice Regarding Settlement And Rules 23 And 23.1, ECF No. 604.

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