

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE REGIONS MORGAN KEEGAN SECURITIES, DERIVATIVE and ERISA LITIGATION)	MDL Docket No. 2009
)	Judge Samuel H. Mays, Jr.
This Document Relates to:)	Magistrate Judge Diane K. Vescovo
<i>In re Regions Morgan Keegan Open-End Mutual Fund Litigation,</i>)	
No. 2:07-cv-02784-SHM-dkv)	

**LEAD PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED
MOTION FOR APPROVAL OF DISTRIBUTION OF NET SETTLEMENT FUND**

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INTRODUCTION

Pursuant to the terms of the Settlement¹ and Plan of Allocation of the Net Settlement Fund approved by the Court on August 2, 2016, and Rule 23 of the Federal Rules of Civil Procedure, Lead Plaintiffs Estate of Kathryn S. Cashdollar, Dajalis Ltd., Jeanette Landers, H. Austin Landers, and Frank D. Tutor, on behalf of the Class (collectively, “Lead Plaintiffs”), respectfully submit this memorandum of law in support of their motion for approval of the initial distribution of the Net Settlement Fund established as a result of the Settlement.

By this motion, Lead Plaintiffs seek the following: (1) approval of the administrative determinations of Garden City Group, LLC (“GCG”), the Court-authorized Claims Administrator, in consultation with Lead Counsel, accepting and rejecting Claim Forms submitted by Class Members and other persons to the Net Settlement Fund; (2) authorize GCG to deem timely those claims that are otherwise eligible but were submitted after the October 6, 2016 claim-submission deadline but received no later than July 19, 2017; (3) authorize an initial distribution of the Net Settlement Fund to Class Members whose claims have been accepted, with subsequent re-distributions to those who have cashed their checks until it is no longer economically feasible to conduct distributions; (4) direct that claims received after July 19, 2017 shall not be accepted for any reason; (5) authorize the establishment of a reserve of five percent of the Net Settlement Fund to address any

¹ Capitalized terms not otherwise defined herein have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated January 19, 2015 (ECF No. 415-1, the “Settlement Agreement”). All “ECF” references herein are to Docket No. 07-cv-02784.

unanticipated contingencies; (6) authorize GCG to destroy paper Claim Forms and all related documents one year after the initial distribution of the Net Settlement Fund and electronic claims data three years after final distribution of the Net Settlement Fund; and (7) authorize payment to GCG of its outstanding fees and expenses in connection with the services performed and to be performed in administering the Settlement and carrying out the initial distribution of the Net Settlement Fund, in the amount of \$820,606.61.

Pursuant to the Settlement Agreement, Defendants have no role in the distribution of the Net Settlement Fund or the relief sought by this motion. *See* Settlement Agmt. ¶ 7 (“Defendants and Defendants’ Counsel shall have no responsibility for, interest in, or liability whatsoever with respect to: (i) any act, omission, or determination of Plaintiffs’ Counsel, the Escrow Agent or the Claims Administrator, or any of their respective designees or agents, in connection with the administration of the Class Settlement or otherwise; (ii) the management, investment, or distribution of the Class Settlement Fund; (iii) the Plan of Allocation; (iv) the determination, administration, calculation, or payment of any claims asserted against the Class Settlement Fund . . .”).

For the reasons given below and in Lead Plaintiffs’ accompanying submissions, Lead Plaintiffs request that all of GCG’s determinations be approved and that this motion be granted in its entirety.

PROCEDURAL HISTORY

On August 1, 2016, this Court held a Fairness Hearing to determine, among other things: (i) whether the proposed Settlement of this Action on the terms and conditions provided in the Settlement Agreement was fair, reasonable and adequate and should be

approved by the Court; (ii) whether the proposed Plan of Allocation of the Net Settlement Fund was fair and reasonable and should be approved by the Court; (iii) whether a final judgment and order of dismissal should be entered; and (iv) to consider Lead Counsel's application for an award of attorneys' fees and payment of its expenses. ECF No. 434 (minute entry).

On August 2, 2016, the Court entered a "Final Approval Order and Order Approving Motion for Attorney's Fees and Expenses." ECF No. 435. The Order: (i) granted final approval to the Settlement and dismissed the Action and all Released Claims with prejudice; (ii) approved the Plan of Allocation of the Net Settlement Fund; (iii) approved Lead Counsel's request for attorneys' fees and expenses; and (iv) retained continuing jurisdiction over implementation of the Settlement. *Id.*

No appeals from these orders having been filed, the Settlement has reached its Effective Date as defined in paragraph 38 of the Settlement Agreement and the Net Settlement Fund may be distributed to eligible Class Members.

Disposition and Balance of the Net Settlement Fund to Date

As of December 23, 2015, the \$125 million Settlement Amount was fully funded in the Escrow Account and began earning interest for the benefit of the Class consistent with terms of the Settlement Agreement. *See* accompanying supporting Declaration of Vernon J. Vander Weide, dated July 27, 2017 ("Vander Weide Decl.") ¶ 2.

Pursuant to the Court's August 2, 2016 Order, attorneys' fees in the amount of \$37,500,000.00 and litigation expenses in the amount of \$792,560.50 were deducted from the Escrow Account. *Id.* ¶ 3. As authorized by the Settlement Agreement, the Claims

Administrator has been paid \$500,000.00 to date for its work related to providing notice of the Settlement and administering the Settlement. *Id.* ¶ 4. This work is described in detail in the accompanying supporting Affidavit of Angela Ferrante of GCG, dated July 26, 2017 (“Ferrante Aff.”).

As of July 24, 2017, the balance of the Net Settlement Fund was \$86,719,660.07. Vander Weide Aff. ¶ 5. GCG has now completed its claims review and calculation processes. The balance in the Net Settlement Fund, minus the outstanding fees and expenses of GCG requested in this motion and minus the five percent reserve, is ready for an initial distribution to Authorized Claimants on a *pro rata* basis in accordance with the Court-approved Plan of Allocation.²

The results of the claims process discussed below confirm that the Settlement is a favorable result for Class Members. The 14,523 Class members who submitted eligible Claim Forms (including those eligible claims that were submitted late) have a total of \$264,857,626.67 in Recognized Claims pursuant to the Plan of Allocation. Ferrante Aff. ¶ 40. The gross Settlement Amount of \$125 million thus reflects a recovery of approximately 47.2 percent of these total Recognized Claims. Based on the amount in the Net Settlement Fund that will be distributed, eligible Class Members stand to receive approximately 32.4 percent of their Recognized Claims.

² A portion of the Net Settlement Fund will first be paid to the Funds Shareholders as a result of the Derivative Settlement. The distribution amounts that will be deducted from the Net Settlement Fund and paid to the Funds Shareholders are set forth in ¶¶ 37 and 61-62 of the Ferrante Aff.

As discussed below, Lead Plaintiffs respectfully request that the Court authorize a distribution to eligible Class Members and grant the related relief.

ARGUMENT

I. THE COURT SHOULD ACCEPT GCG'S ADMINISTRATIVE DETERMINATIONS AND AUTHORIZE DISTRIBUTION OF THE NET SETTLEMENT FUND

A. Overview of Results of Review and Processing of Claim Forms

Pursuant to the Settlement Agreement and the Preliminary Approval Order, Class Members wishing to participate in the Settlement were required to submit Claim Forms by May 6, 2016. ECF No. 420, at 40. That deadline was extended to October 6, 2016 for certain accounts. ECF No. 431.

As set forth in detail in the Ferrante Affidavit, all Claim Forms received through July 19, 2017, totaling 17,084 claims, have been carefully reviewed and processed and Recognized Claims have been calculated in accordance with the Plan of Allocation. Ferrante Aff. ¶¶ 12-19. GCG has prepared detailed administrative reports listing:

1. *Timely Authorized Claimants* (14,500): Claim Forms that are valid, sufficiently documented, and were postmarked or otherwise received by GCG no later than the October 6, 2016 claim-submission deadline (Ferrante Aff. Ex. C-1, ¶¶ 39-41);
2. *Late Authorized Claimants* (23): Claim Forms submitted between October 7, 2016 and July 19, 2017, inclusive, but are otherwise valid and sufficiently documented (*Id.*, Ex. C-2, ¶¶ 40-41);

3. *Rejected Claims* (2,561): Claim Forms rejected as ineligible because, among other things, they cannot be cured (principally because the claimant did not have a Recognized Claim), are duplicative, are insufficiently documented notwithstanding an opportunity to cure the deficiency, or were not submitted by Class Members (*Id.*, Ex. C-3, ¶¶ 42-43);

GCG, in consultation with Lead Counsel, recommends that the distribution of the Net Settlement Fund be carried out in accordance with these administrative determinations, such that the 14,523 total Authorized and Late Claims are accepted and the 2,561 total Rejected Claims (including the Disputed Claims) are rejected.

B. Review and Deficiency Procedures

Among the 17,084 Claim Forms received, 9,605 were submitted in hard-copy and 7,479 in electronic form by large institutions using GCG's electronic filing team ("Electronic Institutional Claims"). Ferrante Aff. ¶¶ 10-17.

GCG sorted communications received at the case-dedicated P.O. Box into Claim Forms and administrative mail, such as correspondence. GCG reviewed and responded to all correspondence promptly. *Id.* ¶¶ 13-19. Claim Forms and associated documentation were logged in and assigned unique claim numbers. Claim Forms were subject to several layers of quality assurance reviews throughout their processing. *Id.* ¶¶ 32-37.

The transaction data associated with the Open-End Funds was transmitted by Morgan Keegan to GCG, and GCG used this data to calculate each Class Member's loss for each of the Open-End Funds. This was done to reduce the filing burden on Class

Members, most of whom were provided with a pre-populated claim form showing, in summary form, their “Recognized Loss Amount” for each of the three Open-End Funds in which they had invested and how that “Recognized Loss Amount” was calculated— “Invested Amount” less “Recovered Amount”, which equaled the “Compensable Loss” that was increased by the “Index Adjustment.” The “Recognized Loss Amount[s]” for one or more of the three Open-End Funds in which the claimant had invested were reduced by any distributions received by the claimant from the SEC Fair Fund and States’ Fund settlements to produce the “Recognized Claim” for each claimant. All of these terms are defined in the Plan of Allocation. The claim form for a claimant who is also a “Funds Shareholder” also showed that their Recognized Claim is reduced by the amount of the “Funds Distribution” that they are to receive as a result of the Funds’ settlement. These pre-populated forms enabled claimants, if they agreed with the calculated Recognized Claim, to file their claims without having to support their claims with years of account statements. Of the 17,084 claims submitted, 320 disagreed with the pre-calculated Recognized Claim, and of such claims, 191 submitted account statements to prove their claim. Ferrante Aff. ¶ 10.

Electronic Institutional Claims typically contain thousands of transactions. GCG’s Electronic Filing Team coordinated and supervised the receipt and handling of all Electronic Institutional Claims, which were reviewed and analyzed to ensure proper submission of data. Thereafter, the Electronic Institutional Claims were coded with messages to identify and classify Electronic Institutional Claims and any deficiency or ineligibility conditions that existed within them. *Id.* ¶¶ 15-19. Electronic claims were

subject to several layers of quality assurance testing and auditing to ensure their accuracy.
Id. ¶¶ 17-19.

After processing the claims, GCG undertook substantial efforts to provide claimants a fair opportunity to cure deficiencies in claims or to advise them that their claims were intrinsically ineligible. *Id.* ¶¶ 28-31 & Ex. A thereto (sample notices). Through July 19, 2017, GCG has mailed 874 Notices of Conditional Rejection of Your Entire Claim and 126 Notices of Conditional Rejection of Part of Your Claim. *Id.* ¶ 29.³ Claimants' responses to partial or complete rejection notices were scanned into GCG's database. The responses were then carefully reviewed and evaluated by GCG's team of processors. *Id.* ¶¶ 30-31.

Claimants who received a determination of ineligibility or deficiency were given twenty (20) days to contest that determination and seek summary resolution by this Court. Certain large accounts required substantial additional administration to reconcile the data received from Morgan Keegan with that provided by the claimant. To date, no claimants have requested court review.

³ The difference between the number of Conditional Rejection letters and the 2,573 total rejected claims noted below is largely due to claims where GCG was able to combine multiple submissions into a final claim(s) due to transfers between accounts. These combinations resulted in the originating submission becoming moot with the final claim(s) encompassing the full account information. In addition, this difference also includes certain electronically filed claims with either no transactions provided or without a recognized loss in the Class Shareholders. Ferrante Aff. ¶ 42 n.6.

C. Claims Recommended for Acceptance and Rejection

1. Authorized Claims

Among the 17,084 total Claim Forms received through July 19, 2017, GCG has determined that 14,523 claims, with aggregate Recognized Claims under the Plan of Allocation of approximately \$264,857,626.67, are eligible to receive a payment from the Net Settlement Fund. Ferrante Aff. ¶ 40. Among these 14,523 Claim Forms, 14,500 claims, with aggregate Recognized Claims of approximately \$264,138,064.58, were postmarked or otherwise received on or before the original October 6, 2016 claim-submission deadline. *Id.* ¶ 40 & Ex. C-1. In accordance with GCG's determinations, these 14,504 claims should be accepted as Authorized Claimants.

2. Late Claims

The other 23 Claim Forms recommended for payment, with aggregate Recognized Claims of approximately \$719,562.09, would be eligible to receive a payment but for the fact that they were postmarked or otherwise received by GCG after the submission deadline but before the finalization of the administration. Ferrante Aff. ¶ 40 & Ex. C-2. In the interest of fairness, these Late Claims should be deemed timely and included in the Settlement distribution. This Court has broad discretion to accept late claims in a class action settlement. *See In re Exxon Valdez*, 289 F. App'x. 204, 206 (9th Cir. 2008); *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977); *see also Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 395 F. App'x. 743, 744 (2d Cir. 2010) ("A district court overseeing a settlement distribution has inherent power to accept late claims."). The purpose of this equitable power is to balance the goals of timely settlement distribution and the consideration due to late-

arriving class members. *See Zients v. LaMorte*, 459 F.2d 628, 63031 (2d Cir. 1972) (“[W]here, as here, all the equities are on the side of the claimants, the fund has not been distributed and the administration of the fund would be insignificantly hampered by allowing these few late claims, appellants should be permitted to participate in the fund.”); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 321 (3d Cir. 2001). Courts routinely allow late claims to be included in securities class action settlements. *See In re Crazy Eddie Sec. Litig.*, 906 F. Supp. 840, 845 (E.D.N.Y. 1995) (“[T]here is an implicit recognition that late claims should ordinarily be considered in the administration of a settlement.”).

Allowing this modest number of Late Claims to participate in the Net Settlement Fund will not materially reduce the amount to be distributed to Authorized Claimants, and will not impede or delay administration of the Settlement. The aggregate Recognized Claims of the 23 Late Claims totals only 0.27 percent of the aggregate Recognized Claims of all 14,523 eligible claimants. Ferrante Aff. ¶ 40.

However, there must be a final cut-off date after which no additional Claim Forms may be accepted so that the calculations may be finalized and the distribution accomplished. Lead Plaintiffs accordingly request that the 23 Late Claims be deemed timely and accepted, and that the Court order that no claim received after July 19, 2017, a date near the filing date of this motion, will be accepted for any reason. *See Id.* ¶¶ 41, 45. This is fair and reasonable to the Class as a whole.

3. Rejected Claims

Among the 17,084 total Claim Forms received through July 19, 2017, GCG determined that 2,561 are ineligible to receive a payment from the Net Settlement Fund. Ferrante Aff. ¶ 42 & Ex. C-3 thereto.

More than 69.4 percent of these 2,561 Claim Forms (specifically, 1,777) either have no Recognized Claim or are duplicative of another claim. *Id.* ¶ 41. Most of the remainder (579) were deficient and never cured. *Id.* The remaining 8.0 percent of the Rejected Claims (205) were submitted by persons who either did not fit the definition of the Class or were Excluded Persons. *Id.*

Three (3) claimants continue to dispute GCG's determination of ineligibility and have called upon the Court to resolve the claims. *Id.* ¶¶ 48-50 and Ex. D-1 and D-2 thereto. These three claimants are disputing the determination that they are excluded from the class as Excluded Persons as such term is defined in the Settlement Agreement. *Id.* An explanation of each dispute and the rationale for determination is set forth in the Ferrante Affidavit. Copies of each Disputing Claimant's claim and related material, redacted to preserve the confidentiality of personal information, are annexed to the Ferrante Aff. as Exhibits D-1 and D-2.

Two (2) claimants continue to dispute GCG's determination of ineligibility and have called upon the Court to resolve the claims. *Id.* ¶¶ 52-54 and Ex. E-1 and E-2 thereto. The two claimants are disputing the determination that their Proofs of Claim do not calculate to a Recognized Claim pursuant to the Court-approved Plan of Allocation. *Id.* An explanation of each dispute is set forth in the Ferrante Affidavit. Copies of each Disputing

Claimant's claim and related material, redacted to preserve the confidentiality of personal information, are annexed to the Ferrante Aff. as Exhibits E-1 and E-2.

Lead Plaintiffs respectfully request that the Court approve GCG's determinations rejecting these claims.⁴

II. THE COURT SHOULD AUTHORIZE A FIVE PERCENT RESERVE FUND

Lead Plaintiffs respectfully request that the Court authorize GCG to establish a five percent reserve from the Net Settlement Fund. The reserve will ensure that funds are available to adjust any inadvertent errors in payments to Authorized Claimants upon sufficient proof and to make other equitable adjustments to claims submitted by July 19, 2017, upon a sufficient showing. The reserve would be excluded from the initial distribution of the Net Settlement Fund and then included in a second distribution to the extent it is not needed.

Providing for a reserve in large settlements is a common administrative practice and ensures that funds are available in the unlikely event an Authorized Claimant comes forward with a large adjusted claim. *See Ferrante Aff.* ¶ 58. In a Settlement of this size, the likelihood of uncashed and returned settlement checks make it virtually certain that a second distribution will be economically feasible and necessary. Accordingly, it is prudent to hold back a reserve to ensure that any unforeseen distribution issues can be remedied, and to include the reserve in a second distribution six months after the initial distribution

⁴ Lead Plaintiffs are serving all Disputing Claimants with a copy of this motion. Each Disputing Claimant will receive a copy of this brief, the Ferrante Affidavit (without its voluminous exhibits), plus the exhibit concerning their dispute.

is completed. *Id.* ¶ 60. For similar reasons, keeping this amount in reserve will not complicate the administration. *Id.*

III. THE COURT SHOULD AUTHORIZE PAYMENT OF THE CLAIMS ADMINISTRATOR'S OUTSTANDING FEES AND EXPENSES

Under the Settlement Agreement, and as stated in the Notice, Notice and Administration Expenses and Taxes are paid out of the Settlement Fund. *See* Settlement Agmt. ¶¶ 13, 19-21. GCG was retained with the authorization of the Court to execute the notice program and administer the claims process for the Settlement. Paragraph 22 of the Settlement Agreement provided for \$500,000 to be paid to the Claims Administrator without further approval of the Court to pay Notice and Administration Expenses actually incurred. Invoices have been submitted to Lead Counsel by GCG and that amount has been paid to GCG. *Ferrante Aff.* ¶ 67.

In addition, GCG has submitted additional detailed invoices to Lead Counsel showing \$820,606.61 in outstanding fees for services rendered and disbursements for expenses incurred. *Id.* and Ex. F thereto.

Lead Plaintiffs submit that these fees and expenses are reasonable. GCG was responsible for a wide variety of administrative matters in this large and complex Action and Settlement, including: (1) creating electronic databases and computer programs for claims processing; (2) arranging for the printing and mailing of the Notice to potential Class Members, which included pre-populated claim forms to make filing claims easier

than in the typical class settlement;⁵ (3) arranging for the publication of the Summary Notice; (4) providing telephone and e-mail assistance to claimants; (5) reviewing and analyzing 17,077 Claim Forms; (6) calculating claimants' Recognized Claims; (7) sending notices of rejection to claimants; (8) communicating with claimants concerning the determination of their claim; (9) preparing and filing income tax returns in connection with the Settlement Fund; and (10) assuming Court authorization, preparing and mailing initial distribution checks to all Authorized Claimants. *See generally* Ferrante Aff.

Accordingly, Lead Plaintiffs respectfully request that the Court authorize payment of \$820,606.61 to GCG out of the Settlement Fund.

IV. THE COURT SHOULD APPROVE GCG'S DOCUMENT RETENTION PLAN

Lead Plaintiffs respectfully request that the Court approve GCG's document retention plan, under which GCG will destroy (i) all paper copies of Claim Forms and paper supporting documentation one year after the initial distribution and (ii) all electronic copies of Claim Forms, and related material, three years after all funds in the Net Settlement Fund have been distributed. *See* Ferrante Aff. ¶ 68. This is a standard procedure that preserves claimants' confidentiality and privacy while providing ample time to address any administrative issues that conceivably may arise during and after distribution of the Net Settlement Fund.

⁵ This effort resulted in a higher than normal 35% participation in the class settlement. Ferrante Aff. ¶¶ 9, 20, 41.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant this motion in its entirety and issue the proposed Order submitted herewith.

DATED: July 31, 2017

Respectfully submitted,

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s/ Jerome A. Broadhurst

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, the foregoing document was filed with the Clerk of Court by using the CM/ECF system, which system will send a notice of the electronic filing of same to the following:

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