

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR THE FIRST DISTRIBUTION OF SETTLEMENT FUNDS**

I. INTRODUCTION

Plaintiffs, through Co-Lead Counsel, respectfully request approval to take several of the final steps in this class action litigation, including the task of distributing settlement funds to class members who have submitted claims that have been approved by the Court-appointed claims administrator, Garden City Group (the “Claims Administrator”).

Over the past ten months, the Claims Administrator, assisted by Co-Lead Counsel and economic consultants from the Berkeley Research Group (“BRG”), have worked to review and process all claims filed pursuant to the settlement in this matter. GCG and BRG have reviewed these submissions to determine whether the credit default swap (“CDS”) transactions entered into by each claimant qualify for compensation under the settlement, pursuant to the Court-approved Plan of Distribution.¹ All of the qualifying transactions, along with information about how they are valued for purposes of the settlement, are being posted to the settlement website, and each claimant is able to access its secured individual portal to review the Claims Administrator’s determinations as to its claims. The Claims Administrator has notified nearly all claimants of the outcomes of their challenge submissions via email, with the last of these notices to be provided by November 23, 2016.

With each claimant’s qualifying transactions now identified, BRG will be able to calculate the *pro rata* share of the Net Settlement Fund² to which each class member is entitled. Plaintiffs are therefore ready to pay claims to class members pursuant to the settlement and the

¹ Dkt. No. 503, Ex. A (Plan of Distribution); Dkt. No. 557 (Apr. 25, 2016 Opinion and Order approving, *inter alia*, the Plan of Distribution). The Plan of Distribution has been available on the settlement website (www.CDSAntitrustSettlement.com) since January 11, 2016.

² As defined in the Plan of Distribution, the “Net Settlement Fund” is “the \$1,864,650,000 fund including any interest earned and net of any Court-approved attorneys’ fees, expenses, and incentive awards.” *See* Dkt No. 503, Ex. A ¶ 1. The Net Settlement Fund currently exceeds \$1.6 billion.

Plan of Distribution. As detailed in the declaration of Stephen J. Cirami, submitted herewith, 7,555 claimants submitted valid claim forms and 146 additional claimants submitted valid challenge transactions.³ Decl. of Stephen J. Cirami in Support of Pls.’ Mot. for the First Distribution of Settlement Funds ¶ 4, Nov. 17, 2016 (“Cirami Decl.”). As expected, many claimants will receive very sizeable payments, with 219 claimants, for example, receiving at least \$1 million in settlement compensation.

Many class members have repeatedly impressed upon Co-Lead Counsel their strong desire to receive settlement payments by the end of 2016. In order to achieve this goal for the class, we respectfully request that the Court enter an order concerning the following:

First, Plaintiffs seek approval of the immediate distribution of the Net Settlement Fund for all approved claims, subject to a limited set-aside of funds sufficient to cover contingencies in connection with any challenges to the final determinations of the Claims Administrator that are raised to the Court pursuant to the process discussed below.⁴ Because Plaintiffs expect only a modest portion of the overall Net Settlement Fund will need to be set aside, this process should ensure that the vast majority of the Net Settlement Fund will be paid out to class members by the end of the year.

Second, Plaintiffs seek approval of a streamlined process for claimants to bring to this Court any challenges to the Claims Administrator’s claims determinations. At the April 15, 2016

³ These numbers are subject to change in the course of the final reconciliation process, but we do not expect any changes to be substantial.

⁴ As discussed further below, once the deadline for the filing of appeals to this Court has passed and it is clear which claimants, if any, have appealed to the Court, Co-Lead Counsel, the Claims Administrator, and BRG will determine how much of the Net Settlement Fund should be set aside to cover (i) any adjustments to claims that could result from successful appeals, (ii) the anticipated remaining fees and expenses of the Claims Administrator and BRG for the remainder of the claims process, and (iii) the amount of any taxes owed on interest earned on the settlement funds.

hearing on final approval of the settlement, the Court noted that any class members that disagreed with the final determination of the Claims Administrator would have an opportunity to “appeal to the court.” Final Approval Hr’g Tr. at 50:18-19, Dkt. No. 563, Apr. 15, 2016. The Court thus “retain[ed] jurisdiction to hear disputes arising from the claims administration process, including determinations of the Administrator regarding additional Covered Transactions.” Order at 2, Dkt. No. 553, Apr. 18, 2016.

To achieve this goal in an expedient fashion, Plaintiffs propose that any claimant objecting to a final determination by the Claims Administrator be permitted to file an appeal to this Court within ten days of the Court’s approval of this proposed schedule, as reflected on the Proposed Order submitted herewith. This deadline will be posted on the settlement website and communicated to claimants by email where possible. Plaintiffs further propose that Plaintiffs (and Co-Lead Counsel) have fourteen days to respond to any appeals. The Court would then be in a position to resolve the challenges on the papers or with the benefit of a hearing.

Following resolution of any appeals, the final step in this matter will entail the distribution of the remaining settlement proceeds, including both (i) funds in the set-aside after any appeals are resolved and (ii) funds that were unclaimed by claimants after a period of at least three months. Plaintiffs will return to the Court at a later date for approval of the final distribution of settlement funds, which should exhaust the settlement fund and end this litigation.

II. BACKGROUND

Plaintiffs filed a Motion for Preliminary Approval of Settlement with All Defendants and Preliminary Certification of a Settlement Class on October 16, 2015. *See* Dkt. No. 443. In connection with that motion, Plaintiffs filed a proposed plan for notice to class members. *See*

Dkt. No. 444 at 28-29. The Court granted Preliminary Approval of the Settlement and the proposed notice procedure on October 29, 2015. *See* Dkt. No. 465.

After the Court granted Preliminary Approval of the Settlement, Co-Lead Counsel and the Claims Administrator mailed the court-approved settlement Notice to each of the 13,923 class members. Decl. of Stephen J. Cirami ¶ 2, Dkt. No. 505, March 29, 2016 (“Mar. Cirami Decl.”). Co-Lead Counsel were able to identify virtually all of the class members through a comprehensive database of CDS transactions obtained during discovery from the Depository Trust Clearing Corporation (“DTCC”).

The Notice detailed the terms of the settlement, the Released Claims, class members’ right to object (and the mechanism for doing so), Co-Lead Counsel’s maximum possible request for an award of attorneys’ fees and expenses, and class members’ right to exclude themselves from the settlement (and the procedure for doing so). The Notice also set forth the deadline by which class members had to file their claims, as well as the deadline by which class members had to give notice of their decision to exclude themselves from the settlement. Notice Packet at 6, 7, Dkt. No. 505, Ex. A, Apr. 1, 2016. Finally, the Notice publicized the CDS Class Action website, www.CDSAntitrustSettlement.com. *Id.* at 9.

On April 1, 2016, Plaintiffs moved for Final Approval of Settlement with All Defendants, Approval of Plan of Distribution, and Certification of Settlement Class. *See* Dkt. No. 502. On April 18, 2016, in connection with that motion, the Court approved the settlements and issued an Order Approving the Plan of Distribution. *See* Dkt. No. 553.

The court-approved Plan of Distribution describes in detail how the Claims Administrator, with the help of Co-Lead Counsel and BRG, would compute each class member’s *pro rata* share of the Net Settlement Fund. Mem. of Law in Supp. of Mot. for Final Approval at

24-25, Dkt. No. 503. On a general level, the amount of damages assignable to each claimant is computed on a transaction-by-transaction basis, primarily using the catalog of transactions in the DTCC database and bid/ask spread information obtained from Defendant Markit during discovery. Class members were also able to submit “challenge transactions” for consideration by the Claims Administrator to supplement those transactions captured in the DTCC database.

Pursuant to the directions set forth in the Notice, delivered to class members by January 11, 2016, class members were to submit their claims and challenge transactions by May 27, 2016. The class website details what information must be included in a challenge submission and in what format. Mar. Cirami Decl. at 7.

The Claims Administrator timely received 5,801 electronic claims, 1,680 paper claims, and 2,600 challenge submissions. Declaration of Loree B. Kovach Regarding Challenges and Late Claims Received to Date ¶ 3, Dkt. No. 569, Oct. 27, 2016 (“Kovach Decl.”); Cirami Decl. ¶ 4. A small number of challenges were submitted after the deadline. At the request of Co-Lead Counsel, the Court ordered that these late claims and challenges be included in the settlement. Order, Dkt. No. 570, Oct. 31, 2016.

Over the course of the past six months, Co-Lead Counsel, the Claims Administrator, and BRG have worked diligently to analyze each of the 2,600 challenges, which included a total of 1,132,091 “challenge” transactions, to determine whether they are covered transactions under the settlement. Cirami Decl. ¶¶ 4, 14. This has been a complex and time consuming process. Kovach Decl. ¶¶ 9-20.

Although the information required for a challenge submission is detailed on the class website, class members in many instances failed to include critical pieces of information. *Id.* ¶ 14. In such instances, the Claims Administrator made reasonable efforts to help class members

cure the outstanding issues, *id.* ¶¶ 14-17; class members were given at least one week to resolve these issues, Cirami Decl. ¶ 9.

In the end, 551,951 additional transactions were approved for inclusion in the settlement, either in the first instance or after the class member rectified any outstanding issues. *Id.* ¶ 14. Of the 2,556 challenge submissions, 1,917 had one or more transactions accepted. *Id.*

Of the transactions that were rejected, 44% were rejected on the basis that they were determined to be foreign transactions outside the scope of the settlement. *Id.* ¶ 15. The Claims Administrator, for example, rejected a transaction between a foreign class member domiciled and located outside the United States and a foreign Defendant on this basis *unless* the class member was able to demonstrate the transaction was connected to United States commerce. *Id.* ¶ 11. Separately, approximately 18% of the rejected transactions were rejected because they were part of a bulk sale agreement between a class member and a Defendant without the use of market pricing. *Id.* ¶ 15. In addition, 148 challenge submitters did not correct outstanding issues identified by the Claims Administrator in a timely manner and were therefore rejected. *Id.* ¶ 10.

Upon request, class members whose challenges had been rejected were provided with explanations for the rejections. *Id.* ¶ 18. The Claims Administrator has notified all but a few class members as to whether their challenge transactions have been accepted or rejected. *Id.* ¶ 17. By November 23, 2016, the Claims Administrator will have notified all class members as to whether their challenge transactions have been accepted or rejected. *Id.*

III. FIRST DISTRIBUTION OF THE NET SETTLEMENT FUND

Pursuant to the Plan of Distribution set forth in the Court-approved Notice, the Settlement Fund, net of previously-awarded attorneys' fees and expenses, has been held in escrow pending completion of the claims-administration process and approval by the Court of payment of the Claims Administrator's final fees and expenses. Because the Claims

Administrator has now finished processing all claims and provided notice to class members of the resolution of nearly all challenge submissions, Plaintiffs request that the Court authorize distribution of the Net Settlement Fund, aside from the set-aside fund discussed in Section IV, *infra*, to eligible class members.

It is also appropriate at this time to discharge any and all claims against persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the claims submitted herein, or otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund.

IV. SET-ASIDE FUND

In order to distribute funds now, as desired by many class members, the Claims Administrator must account for the possibility that any appeals to the Court of one or more class members will be successful, thereby entitling such claimants to an additional *pro rata* share of the Net Settlement Fund based on the subject transactions. Accordingly, Plaintiffs request that the Court to authorize the Claims Administrator to set aside a portion of the settlement funds (the “Set-Aside Fund”) to cover any future claims adjustments.

Once the deadline for the filing of appeals to this Court has passed and it is clear which claimants, if any, are appealing the final determinations of the Claims Administrator, the Claims Administrator, working with Co-Lead Counsel and BRG, will make a conservative determination of how much of the Net Settlement Fund should be set aside to cover contingencies arising from those appeals. At that time, Co-Lead Counsel will also estimate the amount needed for final claims administration work and the amount of any taxes owed on interest earned on the settlement funds. Once the Set-Aside Fund is established, the remainder of the Net Settlement Fund will be promptly paid out to class members (typically by directly wiring funds to pre-identified bank accounts). Since the Set-Aside Fund itself will likely be a modest

portion of the overall Net Settlement Fund, this process should achieve the goal of paying out the vast majority of the Net Settlement Fund to class members by the end of 2016. The remainder of the Net Settlement Fund will be paid out at a later date.

V. PROCEDURE FOR CLAIM APPEALS

Plaintiffs propose the following schedule to govern any appeals to this Court by class members from the final determinations of the Claims Administrator:

- Any appeals must be filed with this Court within ten days of entry of the attached Proposed Order; and
- Plaintiffs will file responsive briefs within fourteen days of the deadline for filing appeals.

Plaintiffs believe this schedule appropriately balances the ability of class members to challenge any adverse rulings with the fair, efficient, and timely distribution of class funds. Upon approval, the Claims Administrator will promptly provide claimants with notice of this schedule by email and by posting it on the settlement website.

VI. CONCLUSION

As set forth in the Proposed Order submitted with the filing of this Motion for Distribution of Settlement Funds, Plaintiffs respectfully request that the Court:

1. Authorize the First Distribution of Net Settlement Funds to class members, excluding the Set-Aside Fund;
2. Discharge any and all claims against persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the claims; and
3. Set a briefing schedule for any appeals to this Court from the final decisions of the Claims Administrator.

Respectfully submitted,

DATED: November 17, 2016

**QUINN EMANUEL URQUHART &
SULLIVAN, LLP**

By: /s/ Daniel L. Brockett

Daniel L. Brockett
Steig D. Olson
Sascha N. Rand
Jonathan Oblak
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
danbrockett@quinnemanuel.com
steigolson@quinnemanuel.com
sascharand@quinnemanuel.com
jonoblak@quinnemanuel.com

Jeremy D. Andersen
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Fax: (213) 443-3100
jeremyandersen@quinnemanuel.com

Lead Counsel for Plaintiffs

PEARSON, SIMON & WARSHAW, LLP

By: /s/ George S. Trevor

Bruce L. Simon
Clifford Pearson
George S. Trevor
44 Montgomery Street, Suite 2450
San Francisco, California 94104
Telephone: (415) 433-9000
Fax: (415) 433-9008
bsimon@pswlaw.com
cpearson@pswlaw.com
gtrevor@pswlaw.com

Co-Lead Counsel for Plaintiffs