

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO, INC. SECURITIES LITIGATION	:	05 Civ. 8626 (JSR)
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**LEAD PLAINTIFFS’ MEMORANDUM IN SUPPORT OF
MOTION FOR SUPPLEMENTAL DISTRIBUTION ORDER**

Lead Plaintiffs, RH Capital Associates LLC and Pacific Investment Management Company LLC, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, respectfully submit this memorandum in support of their motion for entry of the [Proposed] Supplemental Distribution Order in the above-captioned action (the “Action”).¹

Following completion of the Initial Distribution of the Net Settlement Funds, conducted between May 27, 2011 and August 4, 2011 and the Claims-in-Process Distribution, conducted between October 21, 2011 and December 20, 2011, the Claims Administrator, The Garden City Group, Inc. (“GCG”), is now prepared to conduct a second distribution of the remaining amounts in the Net Settlement Funds to Authorized Claimants. The conduct of the Second Distribution has already been authorized by this Court’s Order Approving Distribution Plan entered May 2, 2011 (Dkt. No. 793) (the “Initial Distribution Order”). However, in connection with the Second Distribution, Lead Plaintiffs seek entry of a Supplemental Distribution Order that would (i)

¹ Unless otherwise indicated, all terms with initial capitalization used herein shall have the meanings ascribed to them in the accompanying Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Supplemental Distribution Order (“Cirami Declaration” or “Cirami Decl.”), the Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Approval of Distribution Plan, dated April 18, 2011 (Dkt. No. 790) (the “Initial Cirami Declaration”), or the Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Approval of Payment of Claims-In-Process, Late Adjusted Claims, and Late Submitted Claims, dated September 21, 2011 (Dkt. No. 811) (the “Supplemental Cirami Declaration”).

approve the payment of certain late claims that were submitted after the filing of Lead Plaintiffs' most recent distribution motion but that are otherwise eligible for payment (the "Additional Late Submitted Claims"), (ii) approve the payment of certain claims that were previously rejected in their entirety, but whose deficiencies were cured by the submission of additional documentation after the filing of the most recent distribution motion (the "Additional Late Adjusted Claims"), (iii) approve GCG's reduction of the Recognized Loss Amounts for certain claims based on the claimants' provision of additional information reducing the value of the claims (the "Claims Adjusted Downward"), and (iv) permit the payment of currently deficient Additional Late Submitted Claims if cured as well as any additional claims submitted after the date of the Cirami Declaration that would be eligible for payment but for their late submission, to the extent there are available funds to do so. If entered, the Supplemental Distribution Order will, *inter alia*, adopt the administrative recommendations of GCG regarding the Additional Late Submitted Claims, Additional Late Adjusted Claims, and Claims Adjusted Downward and GCG's proposal with respect to the treatment of other late submitted claims as set forth in the Cirami Declaration, and will approve a modification of the plan for the distribution of the Net Settlement Funds as set forth in the Cirami Declaration.

BACKGROUND

Between 2007 and 2010, Lead Plaintiffs entered into six separate settlements with defendants in the Action, all of which were approved by the Court (collectively, the "Settlements").² Together, these Settlements represent a complete resolution of all claims

² The Settlements were with (i) BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft, entered on February 13, 2007, (ii) Sandler O'Neill & Partners L.P., entered on October 10, 2008, (iii) the Settling Underwriter Defendants, entered on April 20, 2010, (iv) Thomas H. Lee and affiliates and the members of Refco's audit committee, entered on March 29, 2010 and amended on May 3, 2010, (v) Joseph J. Murphy,

brought in this consolidated Action that were not dismissed by the Court as a result of the defendants' motions to dismiss. Pursuant to the Settlements, the defendants collectively deposited \$367.3 million into escrow for the benefit of the Settlement Class. Additionally, Lead Plaintiffs and Lead Counsel have recovered more than \$58 million in Restitution Funds for the benefit of the Settlement Class.

On May 2, 2011, the Court entered the Initial Distribution Order, which approved Lead Plaintiffs' proposed plan for distribution of the Net Settlement Funds to Authorized Claimants. In accordance with the Initial Distribution Order, GCG issued 3,187 payments in the aggregate amount of \$337,783,825.52 to Authorized Claimants between May 27, 2011 and August 5, 2011 (the "Initial Distribution").³ Cirami Decl. ¶ 2.

Pursuant to the Initial Distribution Order, a reserve in the amount of approximately 5% of the Net Settlement Funds was established for Claims-In-Process that were ultimately determined to be eligible to receive distributions if approved by the Court, as well as for other contingencies that may arise (the "Reserve"). Cirami Decl. ¶ 3. On September 30, 2011, the Court issued an Order Approving Payment of Eligible Claims-in-Process, Late Adjusted Claims, and Late Submitted Claims (Dkt. No. 812) (the "Claims-in-Process Distribution Order"). *Id.* In accordance with the Claims-in-Process Distribution Order, GCG conducted a Claims-in-Process

Dennis A. Klejna and William Sexton, entered on September 30, 2010, and (vi) Grant Thornton LLP, entered on October 18, 2010. The Settlements with Murphy, Klejna and Sexton and Grant Thornton LLP are referred to collectively as the "Later Settlements."

³ Of these payments, 3,085 were issued on May 27, 2011 and 102 were delayed as a result of the motion filed by the Refco Private Actions Trust ("PAT") seeking to modify the plan of distribution with respect to certain payments that had allegedly been assigned to the PAT. Cirami Decl. ¶ 2. The Court entered an Order on July 27, 2011 resolving all remaining issues concerning the PAT assignments (Dkt. No. 805). All delayed payments to Authorized Claimants were issued on or before August 5, 2011, and a \$1,371,722.05 wire payment to the PAT was made. *Id.*

Distribution between October 21, 2011 and December 20, 2011 using funds from the Reserve to bring the eligible Claims-in-Process, Late Adjusted Claims, and Late Submitted Claims into parity with the claims that were paid pursuant to the Initial Distribution Order. *Id.* In connection with the Claims-in-Process Distribution, GCG issued 54 payments in the aggregate amount of \$7,500,916.77 to Authorized Claimants between October 21, 2011, and December 20, 2011. *Id.* ¶ 4.⁴

Following this Claims-in-Process Distribution, as with the Initial Distribution, GCG monitored the status of Authorized Claimants' checks. Cirami Decl. ¶ 5. To ensure that the maximum number of checks were cashed, GCG performed extensive follow up with Authorized Claimants whose checks were initially uncashed, either because those checks were returned to GCG as undeliverable, or because the Authorized Claimant simply had not cashed the check. For Authorized Claimants whose checks were returned as undeliverable, GCG searched for new addresses via the United States Postal Service National Change of Address database and, where appropriate, via internet search techniques. *Id.* Where new addresses were located, GCG updated the mailing database accordingly, and reissued distribution checks to Authorized Claimants at the new addresses. *Id.* GCG also followed up by phone with certain Authorized Claimants whose checks were uncashed or returned as undeliverable. *Id.* ¶ 6.

In total, GCG has issued 3,241 payments to Authorized Claimants and two (2) payments to the PAT for total proceeds of \$346,787,229.27 (\$345,284,742.29 was distributed to Authorized Claimants and \$1,502,486.98 was transferred to the PAT). Cirami Decl. ¶ 7. As of

⁴ Of these payments, 47 were issued on October 21, 2011. Cirami Decl. ¶ 4. Payment on seven (7) claims, which were identified as potential PAT claims, were deferred at the direction of the Court until any potential objections were resolved. *Id.* All seven (7) deferred payments were issued to Authorized Claimants on or before December 20, 2011, and a \$130,764.93 wire payment to the PAT was made. *Id.*

June 11, 2012, payments for total proceeds of \$343,796,180.85, or 99.9% of the \$343,804,860.63 distributed to Authorized Claimants in the Initial Distribution and in the Claims-in-Process Distribution (net of the returned funds described below), have been cashed by Authorized Claimants. *Id.* As of June 11, 2012, nine (9) distribution checks, representing proceeds of \$8,679.78, remain uncashed, either because the checks were returned to GCG as undeliverable or because the checks were simply not cashed by the Authorized Claimants. *Id.* In addition, \$203,028.27 remained in the Distribution Account because of downward adjustments to three claims. *Id.* Also, \$1,479,881.66 was returned to the Distribution Account because the payments were: (i) unwanted; (ii) duplicates of other claim filings; (iii) for clients of brokerage firms who had closed their accounts and could not be located by the brokerage firms; or (iv) for claims that were filed in error and withdrawn. *Id.* Thus, the balance in the Distribution Account currently is \$1,691,589.71. *Id.*

At the time that Lead Plaintiffs moved for entry of the Claims-in-Process Distribution Order, the amount remaining in the Reserve was approximately \$31.5 million, comprised of \$17.85 million in Restitution Funds initially held in reserve and approximately \$13.66 million in additional Restitution Funds that were received from the government between the entry of the Initial Distribution Order and the motion for the Claims-in-Process Distribution Order. In connection with the Claims-in-Process Distribution, \$7,631,681.70 was distributed from the Reserve to Authorized Claimants and the PAT. Since that time an additional \$600,904.66 in Restitution Funds was received. A total of \$26,140,217.54 remains in the Net Settlement Funds (\$1,691,589.71 in the Distribution Account and \$24,448,627.83 in the Current Reserve) as of June 11, 2012.

**THE COURT SHOULD APPROVE PAYMENT OF
THE ELIGIBLE ADDITIONAL LATE SUBMITTED CLAIMS**

The Court-ordered deadline for filing of Proofs of Claim with respect to the Later Settlements was March 15, 2011. *See* Initial Cirami Decl. ¶ 5. In the Initial Distribution Order and in the Claims-in-Process Distribution Order, the Court granted Lead Plaintiffs' request to treat late-submitted, but otherwise valid, Proofs of Claims as eligible claims. *See* Initial Distribution Order ¶ 3.a.; Claims-in-Process Distribution Order ¶ 3.d. Since the submission of the Supplemental Cirami Declaration, dated September 21, 2011, GCG has received and processed eleven (11) newly submitted claims (the "Additional Late Submitted Claims"), four (4) of which would be eligible for payment, but for their late submission.⁵ Cirami Decl. ¶¶ 8-9. If approved, the total payments to the Additional Late Submitted Claims, applying the same proration factors used in the Initial Distribution, would be \$122,073.63. *Id.* at ¶ 9.

It is respectfully submitted that, as it did in its previous orders, the Court should permit payment of the late submitted but otherwise eligible claims. The late submission of these Additional Late Submitted Claims did not delay the distribution of payments to other Authorized Claimants and the funds remaining in the Net Settlement Funds following the completion of the Initial Distribution and the Claims-in-Process Distribution are more than adequate to pay these claims. Indeed, in addition to funds remaining in the Net Settlement Funds as a result of the original Reserve, additional Restitution Funds received prior to the Claims-in-Process Distribution and uncashed or returned checks, an additional \$600,904.66 in Restitution Funds has been received from the government since the Claims-in-Process Distribution was conducted.

⁵ The four (4) otherwise eligible Additional Late Submitted Claims are listed on Exhibit A to the Cirami Declaration. The remaining seven (7) claims received after the date of the Supplemental Cirami Declaration are currently deficient. Cirami Decl. ¶ 10. As discussed in the Cirami Declaration, it is proposed that, if these claims are cured, they will be paid, to the extent possible, out the funds remaining after the Second Distribution is complete. *Id.*

**THE COURT SHOULD ALLOW PAYMENT OF
THE ADDITIONAL LATE ADJUSTED CLAIMS**

In its previous orders, the Court approved the Claims Administrator's recommendation to reject certain claims that had been deemed ineligible. Since the submission of the Supplemental Cirami Declaration dated September 21, 2011, the Claims Administrator has received additional documentation from claimants that cures the deficiencies in three (3) claims that had previously been rejected in their entirety (the "Additional Late Adjusted Claims"). Cirami Decl. ¶ 11. If approved for payment by the Court, the Additional Late Adjusted Claims, applying the same proration factors used in the Initial Distribution, would be entitled to payments totaling \$9,559.60. *Id.* Because late claims were accepted in the previous orders and additional late claims are being recommended for payment on this motion, and because there are ample funds remaining in the Net Settlement Funds to pay the additional amounts, Lead Plaintiffs respectfully request that the Court authorize that payments be made with respect to the Additional Late Adjusted Claims.⁶

**THE COURT SHOULD APPROVE GCG'S DETERMINATIONS
WITH RESPECT TO THE CLAIMS ADJUSTED DOWNWARD**

After the entry of the Initial Distribution Order, but before the distribution of checks, the Recognized Loss Amounts calculated for two claims were adjusted downward by GCG based on the claimants' provision of additional information reducing the value of the claims. Cirami Decl.

⁶ The Additional Late Adjusted Claims are listed on Exhibit B to the Cirami Declaration. One of the Additional Late Adjusted Claims (Claim No. 1011778), appears on the list provided by the Trustee of the PAT as a person or entity that assigned a portion of its recovery in this Action to the PAT. Cirami Decl. ¶ 12. If this claim is approved for payment, Lead Counsel proposes to follow the procedures established by the Court in its Order Modifying Distribution Plan dated June 2, 2011 (Dkt. No. 800), which were used in connection with the Initial Distribution and Claims-in-Process Distribution. Specifically, GCG will defer payment of this claim until the Trustee has notified the claimant that a portion of its net settlement proceeds is subject to an assignment to the PAT, and until the claimant has had a 30-day period in which to serve a written objection. If there is any objection and it cannot be resolved by counsel for the Trustee, the Trustee shall submit it to the Court for resolution.

¶ 13. Additionally, after the entry of the Claims-in-Process Distribution Order, but before that distribution, one claim was determined to be a duplicate of another approved claim. *Id.* The distributions made to the two claimants whose claims were reduced were the lower adjusted amounts and no payment was made with respect to the claim found to be a duplicate. *Id.* The three claimants with Claims Adjusted Downward, which are set forth on Exhibit C to the Cirami Declaration, were informed of the reduction of their Recognized Loss Amounts and have not disputed the reductions. *Id.* Lead Plaintiffs respectfully request that the Court approve GCG's determinations with respect to these claims.

**THE COURT SHOULD APPROVE PAYMENT OF
THE CLAIMS ADMINISTRATOR'S UNPAID FEES AND EXPENSES**

The Claims Administrator was responsible for, among other things, mailing and publishing notice to the Settlement Class, and was (and still is) responsible for processing the claims and allocating and distributing the settlement proceeds to eligible claimants. As set forth in the Cirami Declaration, GCG has been paid a total of \$634,806.04 for its work performed on behalf of the Class through August 31, 2011, which includes the \$11,377.50 that GCG estimated that it would incur after August 31, 2011 in preparation of, and to conduct, the Claims-In-Process Distribution. Cirami Decl. ¶ 14. GCG has now submitted an invoice, attached as Exhibit D to the Cirami Declaration, reflecting its actual fees and expenses incurred from September 1, 2011 through May 15, 2012, which total \$32,663.25. *Id.* Thus, deducting the advance of \$11,377.50 already paid to GCG, GCG has not been paid \$21,285.75 for the work it performed on behalf of the Class from September 1, 2011, 2011 through May 15, 2012. *Id.* GCG also estimates that it will incur an additional \$22,500 in fees and expenses to distribute the Catch-Up Payments and to conduct the Second Distribution. *Id.* Lead Plaintiffs respectfully request that the Court approve

payment of these fees and expenses already incurred or expected to be incurred in connection with the Catch-Up Payments and Second Distribution.

**THE COURT SHOULD APPROVE THE MODIFICATION
OF THE DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUNDS**

Lead Plaintiffs respectfully request that, should the Court concur with GCG's determinations concerning the Additional Late Submitted Claims and Additional Late Adjusted Claims, the Court should approve the proposed modification of the distribution plan for the Net Settlement Funds as set forth in paragraph 16 of the Cirami Declaration. The proposed modification authorizes the payment of the Additional Late Submitted Claims and Additional Late Adjusted Claims, provides that Authorized Claimants who fail to cash their previous distribution check and do not request a reissued check by the date of the Supplemental Distribution Order will forfeit their recovery from the Settlements, approves the payment to GCG discussed above, and orders GCG to conduct the Second Distribution after these payments are made. Cirami Decl. ¶¶ 16.a.-e. The proposed modification also provides that currently deficient Additional Late Submitted Claims, if cured, as well as any claims submitted after the date of the Cirami Declaration which the Claims Administrator deems eligible for payment but for their late submission, shall be paid so as to bring them into parity with the previously-paid claims, to the extent sufficient funds remain in the Net Settlement Funds after completion of the Second Distribution, without the need for further Court approval.⁷ *Id.* ¶ 16.f. Such procedure shall be followed with respect to any additional late claims that may be received until the Net Settlement Funds are exhausted or such time as GCG and Co-Lead Counsel determine that

⁷ To the extent any such claims are rejected in whole or in part by the Claims Administrator, the claimants will be afforded an opportunity to seek judicial review. For claimants who do not dispute the Claims Administrator's determination of their Recognized Loss Amounts, however, Lead Plaintiffs wish to avoid burdening the Court with further motions for approval of such administrative determinations.

further redistribution is not cost-effective in accordance with paragraph 3.h.ii of the Initial Distribution Order. *Id.* Finally, the proposed modification to the distribution plan clarifies that the release of claims against Lead Plaintiffs, Lead Counsel, the Claims Administrator or any other agent retained by Lead Plaintiffs or Lead Counsel in connection with the administration of the Net Settlement Funds as set forth in the Initial Distribution Order extends to cover any and all claims arising out of recommendations made with respect to Claims-in-Process, Late Submitted Claims, Late Adjusted Claims, Additional Late Submitted Claims, Additional Late Adjusted Claims and Claims Adjusted Downward, as well as all actions taken pursuant to the Claims-in-Process Distribution Order and the Supplemental Distribution Order as well as any subsequently approved or rejected claims. *Id.* ¶ 16.i. In all other respects, the distribution plan approved by the Court in the Initial Distribution Order, as amended by the Order Modifying Distribution Plan dated June 2, 2011, would remain in effect. *Id.* ¶ 16.h.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the proposed Supplemental Distribution Order be entered.

Dated: New York, New York
June 18, 2012

Respectfully submitted,

GRANT & EISENHOFER P.A.

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