

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

In re BANK OF AMERICA CORP.
SECURITIES, DERIVATIVE, AND
EMPLOYEE RETIREMENT INCOME
SECURITY ACT (ERISA) LITIGATION

Master File No. 09 MD 2058 (PKC)

ECF CASE

This Document Relates To:

Consolidated Securities Action

**MEMORANDUM IN SUPPORT OF LEAD PLAINTIFFS'
MOTION FOR APPROVAL OF ADDITIONAL
DISTRIBUTIONS FROM NET SETTLEMENT FUND**

Dated: August 29, 2017

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Lead Plaintiffs, the State Teachers Retirement System of Ohio; the Ohio Public Employees Retirement System; the Teacher Retirement System of Texas; Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V.; and Fjärde AP-Fonden, respectfully submit this memorandum in support of their motion for entry of the proposed Order Approving Additional Distributions from Net Settlement Fund (the “Additional Distributions Order”).¹

As explained further herein, if entered by the Court, the Additional Distributions Order will, among other things, (i) approve the administrative recommendations of the Court-appointed Claims Administrator, Garden City Group, LLC (“GCG”)² with respect to Late Claims, the acceptance of which was authorized by the Court’s Post-Distribution Issues Order (ECF No. 1027); (ii) provide for the modification of the Initial Distribution Order to permit the reissuance of certain stale-dated checks and the acceptance of additional Claims when general re-distributions to previously Authorized Claimants is no longer cost effective; and (iii) approve payment to GCG of its additional fees and expenses incurred in the ongoing administration of this Settlement.

I. BACKGROUND

By Order entered March 1, 2012 (the “Notice Order”) (ECF No. 531), the Court certified this Action to proceed as a class action. An agreement of settlement was subsequently reached and, on November 30, 2012, Lead Plaintiffs and Defendants entered into the Stipulation (ECF No. 767-1)

¹ Unless otherwise indicated herein, all terms with initial capitalization shall have the meanings ascribed to them in the Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Approval of Additional Distributions from Net Settlement Fund (“Cirami Additional Distributions Declaration” or “Cirami Additional Distributions Decl.”); the Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Approval of Recommendations Regarding Post-Distribution Issues and Modification of Distribution Order to Allow the Acceptance of Late Claims (“Cirami Post-Distribution Issues Declaration” or “Cirami Post-Distribution Issues Decl.”) (ECF No. 1025); the Declaration of Stephen J. Cirami in Support of Lead Plaintiffs’ Motion for Approval of Distribution Plan (“Cirami Declaration” or “Cirami Decl.”) (ECF No. 1001); and the Stipulation and Agreement of Settlement dated November 30, 2012 (“Stipulation”) (ECF No. 767-1).

² GCG was formerly known as The Garden City Group, Inc.

setting forth the terms of the Settlement which represented a complete resolution of the Action (the “Settlement”). Pursuant to the terms of the Settlement, \$2,425,000,000 was deposited in escrow for the benefit of the Class. By Order entered December 4, 2012 (the “Preliminary Approval Order”) (ECF No. 771), the Court preliminarily approved the Settlement.³

On April 9, 2013, the Court entered the Judgment Approving Class Action Settlement (ECF No. 871), granting final approval to the Settlement. Various appeals followed and on November 5, 2014, the United States Court of Appeals for the Second Circuit (the “Court of Appeals”) affirmed this Court’s approval of the Settlement. Once the Effective Date of the Settlement occurred, Lead Plaintiffs moved for entry of an order approving the proposed Distribution Plan for the distribution of the Net Settlement Fund to Authorized Claimants (ECF Nos. 999-1001). On May 4, 2015, the Initial Distribution Order was entered, and on June 26, 2015, the Initial Distribution (which covered Claims received through November 5, 2014) occurred. In the Initial Distribution, over \$2,029,715,000 was distributed to Authorized Claimants. Cirami Additional Distributions Decl. ¶ 2.

Given the extraordinary nature of this administration, both in terms of the amount to be distributed and the number of Claims received – GCG processed 719,771 Claims that were received through November 5, 2014 (Cirami Post-Distribution Issues Decl. ¶ 2)⁴ – the proposed Distribution Plan and Initial Distribution Order provided for a post-distribution process for Authorized Claimants who believed that an error had occurred in the calculation of their Recognized Claim or the amount of their Initial Distribution check, and for Claimants who had submitted a Claim but had not had any

³ The Court approved the retention of GCG as the Notice Administrator pursuant to the Notice Order, and, pursuant to the Preliminary Approval Order, the Court also approved the retention of GCG as the Claims Administrator for the Settlement of the Action.

⁴ Co-Lead Counsel had instructed GCG to defer processing any Claims received after November 5, 2014, the date on which the Court of Appeals issued its decision affirming this Court’s approval of the Settlement, and the Initial Distribution Order provides for the continuing deferral of the processing of those Claims (*see* Initial Distribution Order ¶ 3(j)).

communication from the Claims Administrator. *See* Initial Distribution Order ¶¶ 3(e) and (f). The processing of the more than 42,000 communications received pursuant to the post-distribution process as well as communications from other Class Members and potential Class Members subsequent to the Initial Distribution was completed and, on November 14, 2016, Lead Plaintiffs filed their Motion for Approval of Recommendations Regarding Post-Distribution Issues and Modification of Distribution Order to Allow the Acceptance of Late Claims (“Post-Distribution Issues Motion”) (ECF Nos. 1023 - 1025).

On December 21, 2016, the Court entered its Post-Distribution Issues Order pursuant to which, on January 17, 2017, GCG issued 292 payments in the aggregate amount of \$5,785,131.92. *Cirami Additional Distributions Decl.* ¶ 5.⁵

In the Post-Distribution Issues Order, the Court modified the terms of the Initial Distribution Order to allow the acceptance and processing of Late Claims (*i.e.*, all Claims received or cured since the cut-off date for the Initial Distribution (November 5, 2014) through August 31, 2016). The processing of those Claims has now been completed and Lead Plaintiffs respectfully ask the Court to enter the proposed Additional Distributions Order approving GCG’s recommendations with respect to the Late Claims.⁶

⁵ The Post-Distribution Issues Motion included 17 Claims with Unresolved Calculation Disputes. In order not to delay payments to other Claimants covered by the motion, the resolution of these Claims was covered by a separate order. On January 18, 2017, the Court entered its Order Regarding Calculation Disputes in which it approved the Claims Administrator’s recommendation to reject all of the disputed claims (ECF No. 1028).

⁶ Under the terms of the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation ¶¶ 16, 21, and 25.

II. LATE CLAIMS

At the time of the filing of Lead Plaintiffs' Post-Distribution Issues Motion, the Late Claims had not yet been processed. *See* Cirami Additional Distributions Decl. ¶ 7. Once the Court entered the Post-Distribution Issues Order, GCG began processing the Late Claims in accordance with the terms of the Stipulation and the Court-approved Plan of Allocation. The processing of those Claims has now been completed. *Id.* at ¶ 8.

The Post-Distribution Issues Order provides that once all claims administration procedures with respect to the Late Claims were completed, GCG's recommendations should be presented to the Court and those Claimants whose Late Claims are approved for payment shall be paid their distribution amount on a *pro rata* basis, to the extent possible, that would bring them into parity with other Authorized Claimants that were paid in the Initial Distribution or pursuant to the Post-Distribution Issues Order. Post-Distribution Issues Order at ¶ 3(i). *See also* Cirami Additional Distributions Decl. ¶ 7.

Since November 5, 2014 through August 31, 2016, GCG received 13,526 Late Claims. Cirami Additional Distributions Decl. ¶ 8. Of the 13,526 Late Claims received, GCG has determined that 10,867 should be accepted in whole or in part and 2,659 should be rejected because they are either ineligible, wholly deficient, or have no Recognized Claim when calculated in accordance with the Court-approved Plan of Allocation. Cirami Additional Distributions Decl. ¶ 9.

Consistent with the terms of the Stipulation (*see* ¶ 26(d)), GCG mailed rejection letters to the Claimants whose Late Claims were determined to be deficient or ineligible describing the defect(s) in their Claims and, if the defect was curable, stating what was necessary to complete the Claim. All rejection letters specifically advised the Claimant that he, she or it had the right, within twenty (20) days after the date of mailing of the rejection letter, to contest the rejection of the Claim and request

Court review of GCG's determination. With respect to the 2,659 Late Claims that are recommended for rejection, there are no outstanding requests for Court review of GCG's determination. Cirami Additional Distributions Decl. ¶ 9.

Lead Plaintiffs respectfully request that the Court approve GCG's administrative determinations accepting and rejecting the Late Claims as set forth in the Cirami Additional Distributions Declaration.

III. ADDITIONAL DISTRIBUTIONS FROM NET SETTLEMENT FUND

The Late Claims will be paid from the funds remaining in the Reserve and from uncashed and returned checks. Based on the amount of funds available, if the Court approves GCG's recommendations with respect to the acceptance and rejection of the Late Claims, the payment to each Claimant with an approved Late Claim will put the Claimant in parity with Claimants paid in the earlier distributions. Cirami Additional Distributions Decl. ¶ 12.

Once the distribution amounts for any Claimants whose Claims are approved for payment pursuant to this motion have been calculated, and after deducting those amounts and the fees and expenses approved pursuant to the Initial Distribution Order and this motion, GCG will be able to calculate the *pro rata* share of the balance remaining in the Net Settlement Fund of all Authorized Claimants who received a distribution in the Initial Distribution, the January 2017 Distribution, and those Claimants whose Claims are approved for payment pursuant to this motion. GCG will, simultaneously with the distribution of payments to Late Claims, conduct the Second Distribution to those Claimants who are eligible to receive a payment in the Second Distribution in accordance with the terms and provisions applicable to that distribution as set forth in the Initial Distribution Order.

Lead Plaintiffs and GCG recommend two modifications to the Distribution Plan that are consistent with the goal of compensating as many Class Members as possible: (i) permitting the

reissue of replacement checks from prior distributions as long as the next planned re-distribution is not delayed; and (ii) permitting the acceptance of additional Claims and modifications to previously submitted Claims after it is no longer cost effective to conduct further re-distributions to previously Authorized Claimants.

With respect to the requested modification extending the time for check reissues, Lead Plaintiffs believe that, as long as check reissue requests do not delay any subsequently planned distributions, in balancing the equities, the Initial Distribution Order should be modified so as to allow the reissuing of replacement checks. With respect to the Initial and January 2017 Distributions, the proposed modification would apply to requests that are received up through and including five (5) business days after entry of this Order.⁷ With respect to the payments being made to Late Claims, the Second Distribution, and any subsequent distributions that may occur, reissuance of checks to Claimants from the last distribution that occurred should be permitted as long as the request for the reissue is received by the Claims Administrator no later than 60 days prior to the next planned distribution. Cirami Additional Distributions Decl. ¶ 18(a).

With respect to the acceptance of new Claims or modifications to previously submitted Claims that were or are received after August 31, 2016 (the Court-approved deadline for the acceptance of Late Claims), Lead Plaintiffs believe that, when it is no longer cost effective to conduct further re-distributions of the Net Settlement Fund to previously approved Authorized Claimants, Co-Lead Counsel should have the discretion to decide if any such Claims and modifications should be accepted before there is a donation of residual funds to 501(c)(3) organizations as provided for in the Initial Distribution Order (*see* Initial Distribution Order ¶ 3(k)(2)). If any of those Claims and modifications are accepted, to the extent they are eligible for

⁷ In order to assure that the reissuance of checks does not delay distributions, GCG suggests that the void date on reissues be 30 days from the date of issue.

payment or additional payment under the terms of the Court-approved Plan of Allocation and the Initial Distribution Order, they will be paid their *pro rata* share of the balance remaining in the Net Settlement Fund after the payment of all Court-authorized fees and expenses pursuant to the Initial Distribution Order, to put them in parity with other Authorized Claimants to the extent possible. Cirami Additional Distributions Decl. ¶ 18(b).

IV. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

As detailed in Lead Plaintiffs' papers in support of their Motion for Approval of Distribution Plan, the Post-Distribution Issues Motion, and in support of this motion, this notice and administration process has been extremely large and complex. As set forth in the Cirami Additional Distributions Declaration and Exhibit B thereto, since February 1, 2015 through July 31, 2017, GCG's fees and expenses total \$2,598,147.59, which includes its estimate of \$1,106,161.67 to conduct the Late Claims and Second Distributions.⁸ See Cirami Additional Distributions Decl. ¶¶ 14, 15. Lead Plaintiffs respectfully request that the Court approve all of GCG's fees and expenses set forth in the Cirami Additional Distributions Declaration.

V. CONCLUSION

For the foregoing reasons, it is respectfully submitted that Lead Plaintiffs' Motion for Approval of Additional Distributions from Net Settlement Fund should be approved, and the proposed Order approving the motion should be entered.

⁸ Should GCG's estimate to conduct the Late Claims and Second Distributions exceed its actual cost to conduct the distributions, the excess shall be returned to the Net Settlement Fund and will be available for subsequent distribution to Authorized Claimants. Conversely, if the estimate to conduct the Late Claims and Second Distributions is less than the actual cost, GCG shall, in accordance with the provisions of the Initial Distribution Order, recoup the overage prior to the next distribution contemplated in the Distribution Plan.

Dated: August 29, 2017

Respectfully submitted,

**BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP**

By: /s John Rizio-Hamilton
Hannah G. Ross
John Rizio-Hamilton
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

KAPLAN FOX & KILSHEIMER LLP

Robert N. Kaplan
Frederic S. Fox
850 Third Avenue, 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7714

**KESSLER TOPAZ MELTZER
& CHECK, LLP**

David Kessler
Gregory M. Castaldo
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Co-Lead Counsel

#1104366