Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

FACTUM OF KPMG LLP
(Re: Plan Filing and Meetings Order)

March 18, 2021

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PART I – OVERVIEW

1. The Applicants' motion is about calling a meeting of creditors to vote on a partial class action settlement that is masquerading as a plan of compromise and arrangement. The objective appears to be to avoid judicial scrutiny until an unfair plan, approved by a limited subset of stakeholders, has gathered its own self-perpetuating momentum. These submissions identify the proposed Plan's (as defined below) most egregious departures from the established precedents of this Court that collectively make the Plan fundamentally unfair and incapable of sanction. Procedural and substantive fairness require that the Applicants be directed to engage in meaningful negotiations and submit a revised Plan that accounts for the rights and interests of all stakeholders, not just the favoured few.

2. KPMG LLP ("**KPMG**") files this factum in opposition to the motion of CannTrust Holdings Inc., CannTrust Inc., CTI Holdings (Osoyoos) Inc. and Elmcliffe Investments Inc. (collectively, "**CannTrust**") for an order accepting CannTrust's filing of its proposed plan of

compromise and reorganization (as amended, the "**Plan**") and authorizing and directing CannTrust to call, hold and conduct meetings of their creditors to vote on the Plan (the "**Meeting Order**").

3. CannTrust proposes the Plan to resolve its liability as a defendant in multiple proposed securities class actions (collectively the "**Securities Actions**") arising from alleged misconduct by CannTrust personnel. While CannTrust and certain individual directors and officers (together with CannTrust, the "**Settling Defendants**") have negotiated settlements of the Securities Actions with the plaintiffs (the "**Securities Plaintiffs**") a number of other defendants, including KPMG, have not settled (the "**Non-Settling Defendants**").

4. The Plan and Meeting Order place Securities Plaintiffs, holders of equity claims, in a class of their own with a right to vote on the Plan. Settling Defendants will benefit from comprehensive releases from liability. Further, a litigation trust (the "**Securities Claimant Trust**") is to be established and will make distributions to the Securities Plaintiffs in respect of their released claims.

5. As part of the Plan, the Applicants propose that all claims over for contribution and indemnity by Non-Settling Defendants against Settling Defendants (the "**Securities Related Indemnity Claims**") be barred and released with no compensation to the Non-Settling Defendants who would otherwise be entitled to advance such claims. Unlike the Securities Plaintiffs, the Non-Settling Defendants are not permitted to vote on the Plan and will not receive any distributions under the Plan.

6. The Securities Plaintiffs are represented by court-appointed representative counsel who are signatories to a restructuring support agreement (discussed below). The outcome of the vote in the class of parties holding equity claims is predetermined and inevitable. The Plan, as currently constituted, is simply a means through which CannTrust and the Securities Plaintiffs can impose

the terms of their bilateral settlement on parties who are strangers to their deal and who only stand to be unfairly prejudiced by it.

7. The Plan is fundamentally flawed and incapable of sanction. The Plan should not be accepted for filing and the Meeting Order should not be granted, including because:

(i) it allows a subset of equity claims to vote and receive a distribution while denying similarly situated members of the same class the right to vote or receive any distribution. It does so without adjudicating the claims of the Non-Settling Defendants and without giving them a full and fair opportunity to respond to any disallowance of their claims;

(ii) it does not comply with the CCAA; and

(iii) it fails to provide basic protections to the Non-Settling Defendants which are required in any order approving the partial settlement of a class action.

The proposed Plan is, in essence, a settlement between CannTrust and the Securities Plaintiffs. CannTrust seeks to escape substantive scrutiny by framing the settlement as a Plan and seeking to defer questions of fairness to the Sanction Hearing. This tactic should not be permitted where, as here, the Plan is fundamentally unfair. The Applicants should be required to engage in good faith negotiations with all parties to the Securites Actions and arrive at a settlement which is fair to all, including the Non-Settling Defendants, who are entitled to the same protections that are afforded to any non-settling defendant when a partial settlement is reached in a multi-defendant litigation. KPMG requests that this Court decline to accept the Plan for filing and dismiss CannTrust's motion for the Meeting Order.

PART II – SUMMARY OF FACTS

Background

8. CannTrust was a licensed producer of cannabis in Canada.[1] KPMG served as CannTrust's auditor prior to the commencement of CannTrust's CCAA[2] proceeding (the "**CCAA Proceeding**").

9. Following regulatory audits of CannTrust's facilities in June and July 2019 (the "**Health Canada Audits**"), Health Canada determined that CannTrust was growing and storing cannabis contrary to applicable laws.[3] Following the Health Canada Audits, CannTrust's cannabis licenses were partially suspended and the Securities Actions were commenced.[4]

10. KPMG subsequently withdrew its audit reports in connection with CannTrust's financial statements (effective August 8, 2019) further to CannTrust advising that its financial statements should not be relied upon. CannTrust has publicly acknowledged that KPMG was not aware of the information uncovered in the Health Canada Audits when it issued its reports, and that KPMG relied on misrepresentations made by former CannTrust personnel.[5]

The Securities Actions

11. The Proof of Claim filed by KPMG attaches a copy of the statement of claim (the "**Statement of Claim**") commencing an action against, among others, CannTrust and KPMG, in Ontario (the "**Ontario Action**").[6] The Ontario Action is one of thirteen putative class action

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[1] Affidavit of Greg Guyatt sworn March 5, 2021 ("**Guyatt Affidavit**") at para 4.
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").
[3] Guyatt Affidavit at para 4.
[4] Guyatt Affidavit at para 5.
[5] Affidavit of Maria Farache sworn March 17, 2021 ("**Farache Affidavit**"), Exhibit "E".
[6] Farache Affidavit, Exhibit "D".

lawsuits comprising the Securities Actions. Eight of the putative class action lawsuits were commenced in Canada and five were commenced in the United States. In all of the Securities Actions, the Securities Plaintiffs allege, among other things, that CannTrust made misrepresentations in its disclosure to investors related to the findings of the Health Canada Audits.[7]

12. The Securities Plaintiffs' claims against KPMG stem from its alleged role in preparation of the disclosure documents purported to be misleading. None of the claims in the Securities Actions have been proven and no liability is admitted by KPMG. KPMG intends to vigorously defend against the Securities Actions. The claims against KPMG are essentially:

(a) statutory misrepresentation affecting the secondary market pursuant to Part XXIII.1 of the Ontario *Securities Act* and similar provisions in other jurisdictions;

(b) statutory misrepresentation affecting the primary market pursuant to Part XIII of the Ontario *Securities Act*, and similar provisions in other jurisdictions; and

(c) common law misrepresentation.[8]

13. The aggregate damages sought in the Securities Actions are estimated to exceed $500 million.[9]

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[7] Affidavit of Greg Guyatt sworn March 31, 2020 at para 129; Farache Affidavit, Exhibit "D", attaching Statement of Claim at para 3(c).
[8] Farache Affidavit, Exhibit "D", attaching Statement of Claim at para 3.
[9] Supplementary Affidavit of Greg Guyatt sworn March 13, 2021 (the "**Supplementary Guyatt Affidavit**") at Exhibit "C" – Information Statement, page 141.

The CCAA Proceeding

14. CannTrust commenced the CCAA Proceedings on March 31, 2020. A stated purpose of the CCAA Proceeding was to explore a global resolution of the Securities Actions and address the claims against CannTrust in a single forum.[10]

15. KPMG's Proof of Claim in the CCAA Proceeding includes equity claims for contribution and indemnity and claims that are not "equity claims" (as defined in the CCAA) in respect of past and future out-of-pocket defence costs.[11]

16. No substantive determination of KPMG's claims has been made. Under the Plan, KPMG's claim for defence costs is treated as an excluded claim and its equity claims for contribution and indemnity are released without a vote or distribution.

17. On May 8, 2020, this Court granted an order (the "**Mediation Order**") appointing Hon. Dennis O'Connor, Q.C. as an officer of the Court and neutral third party to mediate a global settlement of the Securities Actions and other pending litigation against CannTrust.[12]

18. As the mediation progressed, however, it became apparent that CannTrust no longer intended to arrive at a global resolution, but intended to pursue a partial, bilateral settlement of the claims against CannTrust alone to the exclusion of the Non-Settling Defendants.

The RSA

19. On January 19, 2021, CannTrust and the Securities Plaintiffs entered into a Restructuring Support Agreement (the "**RSA**") reflecting a partial settlement of the Securities Actions to the

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[10] Guyatt Affidavit at para 6.
[11] Farache Affidavit, Exhibit "D".
[12] Mediation Order granted May 8, 2021.

exclusion of the Non-Settling Defendants.[13] Notably, many issues of importance to the Non-Settling Defendants were not addressed at all or were addressed in language so confusing and convoluted that the Non-Settling Defendants could not understand them.

20. On January 27, 2021, KPMG wrote to counsel for CannTrust to express its concerns regarding the RSA, informing counsel to CannTrust that the RSA, as drafted, would unduly prejudice KPMG's procedural and substantive rights. KPMG requested that counsel to CannTrust engage with KPMG to clarify or amend the RSA to appropriately account for the rights of the Non-Settling Defendants.[14] While discussions took place, they did not result in any amendments to the RSA. Subsequent correspondence between the Non-Settling Defendants and CannTrust seeking transparency as to the terms of the Plan and appropriate time to consider it in advance of the impending motion fell on deaf ears.[15]

The Plan[16]

21. On March 5, 2021, the Applicants revealed the Plan for the first time. The Plan creates four classes of creditors – three comprised of general unsecured creditors of each Applicant entity, and one comprised entirely of the Securities Plaintiffs in the Securities Actions.[17] The Non-Settling Defendants are not permitted to vote on the Plan despite holding, among other things, similarly situated equity claims to those of the Securities Plaintiffs.

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[13] Affidavit of Greg Guyatt, sworn January 20, 2021, Exhibit "G" – Restructuring Support Agreement, January 19, 2021.
[14] Farache Affidavit, Exhibit "A".
[15] Farache Affidavit, Exhibits "B", "C".
[16] Capitalized terms not otherwise defined in this section have the meanings ascribed to them in the Plan.
[17] Supplementary Guyatt Affidavit, Exhibit "A" – CCAA Plan, at section 3.2.

22. The version of the Plan served on March 5, 2021 purported to release CannTrust from all Securities Related Indemnity Claims.[18] At the same time, the Plan appeared to assign all claims of CannTrust against any Non-Settling Defendant to the Securities Claimant Trust to be pursued (the "Assigned Claims"). This appeared to include claims for contribution and indemnity in connection with the Securities Actions – claims of the very same nature as those that KPMG and other Non-Settling Defendants would be barred from pursuing against the Settling Defendants pursuant to the Plan.[19]

23. On March 13, 2021, the Applicants served an amended version of the Plan.[20] The amendments are limited, but are argued by CannTrust to alleviate any concerns the Non-Settling Defendants should have with the Plan. KPMG was not consulted on the wording or the substance of any of the amendments.

24. The amended Plan changed claims advanced by the Non-Settling Defendants for defence costs ("**Defence Costs Indemnity Claim**s") in the Securities Action into Unaffected Claims, although, confusingly, such Defence Costs Indemnity Claims remain included in the definition of "Released Securities-Related Claims".[21]

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[18] Guyatt Affidavit, Exhibit "A", Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc., definition of "Released Securities-Related Claims" and section 7.3.
[19] Guyatt Affidavit, Exhibit "A", Plan of Compromise, Arrangement and Reorganization of CannTrust Holdings Inc., CannTrust Inc. and Elmcliffe Investments Inc., definition of "Assigned Claims" and section 4.1.
[20] Supplementary Guyatt Affidavit, Exhibit "A", CCAA Plan.
[21] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, definition of "Released Securities-Related Claims" and section 2.3.

Judgment Reduction Terms

25. The amended Plan provides that certain of the releases in the Plan will be effected "to the extent provided for in the Sanction Order".[22] Elsewhere in the Plan, however, it is stated that the releases are effected by the Plan itself.[23] This is one of many inconsistencies.

26. Finally, the amended Plan adds terms establishing a convoluted judgment reduction mechanism (the "**Judgment Reduction Terms**").[24] For reasons that are set out in detail below, the Judgment Reduction Terms are inadequate and do not remedy the concerns of KPMG and other Non-Settling Defendants about remaining liable for the wrongdoing of Settling Defendants while the Settling Defendants extricate themselves from all liability. By failing to provide basic, routine protections to Non-Settling Defendants, the Judgment Reduction Terms exacerbate rather than relieve the unfairness of the Plan.

27. The Plan remains deficient and contrary to the terms of the CCAA. These are threshold issues that make the Plan incapable of sanction and, accordingly, must be addressed at this juncture.

PART III – ISSUES AND THE LAW

28. The issue before this Court is whether it should grant the Meeting Order proposed by the Applicants. Based on the applicable factors and case law, granting the Meeting Order is neither reasonable nor appropriate in the circumstances.

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[22] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, section 7.3.
[23] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, section 7.2.
[24] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, section 7.3 (2).

i. The Court will not grant a Meeting Order where the proposed Plan is incapable of Sanction

29. The Applicants contend that a motion for a meeting order is a largely procedural step. While this may be true in the majority of CCAA proceedings, this is not the case where a motion for a meeting order attracts significant controversy from affected parties, as in this case.[25]

30. The Court will decline to grant a meeting order where it is clear that a plan, in its proposed form, cannot withstand the scrutiny of the test to sanction it, including whether the plan is fair and reasonable.[26] Application of this standard necessarily involves looking forward to the sanction hearing and assessing whether the plan ultimately has a reasonable chance of success such that it is appropriate to call a meeting of creditors to vote on it.

31. The Court will also decline to grant a meeting order where the plan is premature, subject to ongoing negotiations and, as a result, fails to adequately address a broad range of outstanding issues.[27]

32. For the reasons that follow, the Plan, in its current form, is unfair and unreasonable and requires substantial revision to adequately address Non-Settling Defendants procedural and substantive rights. There is no purpose in directing the Applicants to call and conduct meetings of creditors to vote on a Plan that is incapable of sanction.

ii. The Plan allows a subset of equity claims to vote and receive a distribution while denying similarly situated members of the same class the right to vote or receive any distribution

33. The requested Meeting Order and proposed Plan purport to call a meeting of the Securities Claimants, equity creditors of CannTrust, to vote on the Plan, while denying the Non-Settling

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[25] *Target Canada Co. Re*, 2016 ONSC 316 at para 16 ("***Target***").
[26] *Target* at paras 62, 84; *Crystallex International Corp., Re*, 2013 ONSC 823 ("***Crystallex***").
[27] *Crystallex* at paras 9-14.

Defendants, similarly situated and affected equity claimants, the right to vote or receive any distribution.[28]

34. On this point, KPMG adopts and agrees with the submissions of the Underwriters.[29]

iii. The Plan does not comply with the CCAA

35. The Plan provides that, at the Effective Time, CannTrust will make a cash contribution of $50 million (the "**Cash Contribution**") to the Securities Claimant Trust. Securities Claimants will be entitled to receive distributions from the Securities Claimant Trust. The Plan does not provide for full satisfaction of unsecured claims.[30]

36. The Plan also purports to release directors of certain claims in contravention of section 5.1(2).[31]

37. On this point, KPMG adopts and agrees with the submissions of the Underwriters.

iv. The Plan fails to provide the basic protections ordinarily afforded to non-settling defendants

38. A bar order, or *Pierringer* arrangement, is a common way to facilitate partial settlements between plaintiffs and some defendants in multi-party litigation while maintaining a level playing field for the remaining non-settling defendants. They are regularly employed in both the class action and CCAA contexts in recognition of the fact that effecting partial settlements in multi-

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[28] Supplementary Motion Record dated March 13, 2021, Tab 2, Draft Meeting Order, section E.
[29] Merrill Lynch Canada Inc., Merrill Lynch Pierce, Fenner & Smith, Inc., Citigroup Global Markets Canada Inc., Citigroup Global Markets Inc., Credit Suisse Securities (Canada) Inc., Credit Suisse Securities (USA) LLC, RBC Dominion Securities Inc., Jefferies LLC, Canaccord Genuity LLC (collectively, the "**Underwriters**").
[30] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, sections 3.4 and 3.5.
[31] Supplementary Guyatt Affidavit, Exhibit "A", CCAA Plan, section 7.3(3).

party litigation would otherwise be difficult or impossible, and that the settlement of complex litigation is to be encouraged as a matter of judicial efficiency and public policy.[32]

39. The Judgment Reduction Terms which the Applicants state resolve all concerns of the Non-Settling Defendants are a near impenetrable web of tangled language that creates confusion where clarity is required and complexity where simplicity is essential. The language reads as follows:

> Section 7.3 **Injunctions**
>
> (2) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust in respect of any Securities-Related Claim against a Non-Settlement Party or other Person that is not a Released Party shall be reduced by the amount, if any, that the court or other tribunal adjudicating the Securities-Related Claim determines would have been recovered by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party in respect of such Securities-Related Claim but for the release of such Securities-Related Indemnity Claim pursuant to the CCAA Plan or the CCAA Sanction Order, determined as of the moment before the Effective Time and, for greater certainty, taking into account (i) the Cash Contribution to be made by CannTrust Holdings to the Securities Claimant Trust and (ii) all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a *pro rata* basis.

40. The bar order proposed in the Plan is illusory and therefore unfair. It purports to provide substantive protection to the Non-Settling Defendants but in fact leaves the door open for the Securities Plaintiffs to pursue damages attributable to CannTrust against the Non-Settling Defendants.

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[32] See, for example, In Matter of a Plan of Compromise or Arrangement of Sears Canada Inc., Order (Approval Order) dated August 25, 2020 (CV-17-1184600CL) at paras 10-16 (**"Sears Order"**); Labourer's Pension Fund et. al. v Sino Forest Corporation et. al., Order (Directors Settlement Approval) dated Wednesday November 16, 2016 at paras 24-25; In the Matter of the Plan of Compromise or Arrangement of 1511419 Ontario Inc. (Formerly Known as the Cash Store Financial Services Inc.) et al. dated October 6, 2015 at para 7.6 ("**Cash Store Plan**"); *Hollinger Inc., Re*, 2012 ONSC 5107 at paras 70-71 ("***Hollinger***"); *Ontario New Home Warranty Program v Chevron Chemical Co.*, [1999] OJ No 2245 at paras 69-70 ("***Chevron***").

41. A *Pierringer* arrangement is made up of the following “essential provisions”:

(a) the settling defendant settles with the plaintiff and is released from the action on specific terms;

(b) the plaintiff discontinues its claim against the settling defendant;

(c) the plaintiff continues its action against the non-settling defendant but limits its claim to the non-settling defendant’s several liability;

(d) the settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and

(e) the settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant; and

(f) the plaintiff agrees to indemnify the settling defendant against any claims over by the non-setting defendants.[33]

42. These essential provisions are consistent with, among other decisions, this Court’s approval of a partial settlement in the CCAA proceeding of *Hollinger, Re*, in which it emphasized that a properly crafted bar order must carefully balance the rights of non-settling parties in the ongoing litigation against the overall benefits achieved by a partial settlement.[34] As part of this balancing, Ontario courts recognize that settling defendants reasonably expect the finality of a full and final release and that non-settling defendants must therefore forego their right to claim against them as

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[33] *Endean v St. Joseph’s General Hospital*, 2019 ONCA 181 at para 52; *Sable Offshore Energy Inc. v Ameron International Corp* 2013 SCC 37 at paras 6, 23-26; *Gendron v Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293 at para 97.
[34] *Hollinger* at paras 71, 79.

co-defendants for contribution and indemnity pursuant to section 1 of the Ontario *Negligence Act*.[35]

43. The potential prejudicial impact on non-settling defendants is addressed through “essential provisions” (c) and (d) above. These provisions recognize that if non-settling defendants are to be precluded from claiming contribution and indemnity against settling defendants, they should not also be held jointly and severally liable to the plaintiffs.[36] The Judgment Reduction Terms omit “essential provisions” (c) and (d) above, which strips the bar order of its efficacy for the Non-Settling Defendants and unfairly leaves the Non-Settling Defendants exposed to claims for damages attributable to CannTrust.

(i) *No Proportionate or Several Liability*

44. “Essential provision” (c) of a bar order requires that a Non-Settling Defendants’ ongoing liability to the plaintiff be limited to its several liability. In other words, a Non-Settling Defendant is liable only for the proportion of any damages caused by its own fault, and not for the proportion of any damages caused by the fault of a settling defendant. The Judgment Reduction Terms in the Plan do not include any such limitation.

45. Rather, article 7.3(2) of the Plan states that the Non-Settling Defendants’ ongoing liability to a Securities Claimant or the Securities Claimant Trust will be reduced by any amount that the Court “determines would have been recovered by such Non-Settlement Party or other Person

[35] *Negligence Act*, R.S.O. 1990, c. N.1; *Chevron* at paras 51-56.
[36] *Chevron* at paras 51-56. The Ontario Securities Plaintiffs’ common law claims would ordinarily be subject to section 1 of the Ontario *Negligence Act*, which imposes joint and several liability on co-defendants. As noted above, the Ontario Securities Plaintiffs have also brought claims against KPMG under Part XXIII and XXIII.1 of the Ontario *Securities Act*. Section 130(8) of Part XXIII expressly imposes joint and several liability on co-defendants found liable in regard to a claim commenced under Part XXIII.

pursuant to a Securities-Related Indemnity Claim held by it against a Released Party …" [emphasis added].

46. The term "recovered" suggests that a Non-Settling Defendant's ability to recover payment from a Settling Defendant is a determinative factor in apportioning ultimate liability at trial. However, the *recoverability of damages* has nothing to do with *relative degree of wrongdoing or fault*. Conventional bar order terms confining the plaintiffs' claims against a non-settling defendant to "several liability" address the true unfairness at issue, which is paying for a settling defendant's wrongdoing in the face of a bar order preventing a claim for contribution and indemnity against that settling defendant. Conventional bar order language contained in the orders of this Court does not take irrelevant questions of recoverability into account. There is no reason to depart from conventional language in this case.

47. For example, the bar order endorsed by this Court in the CCAA proceedings of Sears Canada Inc. ("*Sears*") simply and clearly states:

> **THIS COURT ORDERS** that the Plaintiffs' recovery from the Non-Settling Defendants and with which any Former Director is judicially determined to be jointly and severally liable shall be limited to only that proportion of damages attributable to the liability of the Non-Settling Defendants, as finally determined in the Actions.[37] [emphasis added]

48. Similarly, the bar order endorsed by this Court pursuant to the Plan of Compromise and Arrangement in *Cash Store Financial Services Inc., Re* ("*Cash Store*") states:

> Notwithstanding anything to the contrary herein, following the Plan Implementation Date, no Person … shall be permitted to claim from any other Person that portion of any damages that corresponds to the liability of a Released Party, proven at trial or otherwise.[38] [emphasis added]

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[37] Sears Order at para 13.
[38] Cash Store Plan at para 7.6.

49. Article 7.3(2) of the Plan further deviates from required bar order protections by providing that the extent of a Non-Settling Defendant's "judgment reduction" shall take into account (i) "the Cash Contribution to be made by [CannTrust] to the Securities Claimant Trust" and (ii) "all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a *pro rata* basis."

50. It is unclear *how* these amounts are to be "taken into account" or what is intended by reference to a "*pro rata* basis". CannTrust's voluntary settlement payment is not relevant to the Non-Settling Defendants' degree of liability (if any); it simply represents the maximum amount that the Securities Claimants can recover in connection with the Settling Defendants' several liability. Again, the conventional bar order language from the *Sears* and *Cash Store* orders makes it clear that Non-Settling Defendants' exposure will be confined to their several liability and eliminates the guess work and uncertainty surrounding how a judge might ultimately construe the tangled and ambiguous Judgment Reduction Terms in Article 7.3(2) of the Plan

(ii) *Cross-Claims by Settling Defendants Are Not Precluded*

51. "Essential provision" (d) of a bar order requires that a settling defendant agree not to seek contribution and indemnity from a non-settling defendant. Such a provision is absent from the Plan, unfairly prejudicing the Non-Settling Defendants.

52. Article 7.3(1)(iii) of the Plan appears to bar claims by Settling Defendants against "any other Person", including Non-Settling Defendants, if "such other Person makes a claim or might reasonably be expected to make a claim … against one or more of the Released Parties". If the provision ended there, parties that could claim contribution and indemnity from CannTrust would derive a residual benefit from the release. However, the provision goes on to exempt claims of "other Persons" that are "Released Claims" (the "**Exemption**"). The Non-Settling Defendants are

holders of Released Claims and thus can be sued. As a result, this Exemption renders moot any protections the Non-Settling Defendants might otherwise have by allowing cross-claims or claims for contribution and indemnity by the Settling Defendants to continue against the Non-Settling Defendants, while prohibiting those same Non-Settling Defendants from asserting claims "over" against CannTrust.

53. Protection for non-settling defendants against ongoing contribution and indemnity claims is typical of *Pierringer* terms approved by this Court in CCAA and class action contexts. In *Sears*, the bar order approved by this Court contained language similar to that in Article 7.3(1)(iii) of the Plan, *but for* the Exemption. It states:

> **11. THIS COURT ORDERS** that all Persons (regardless of whether or not such Persons are creditors or claimants) … shall be permanently and forever barred… from…making…any Released Claim, including for contribution or indemnity or other relief, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes or asserts, or might reasonably be expected to make or assert, such a Claim, in any manner or forum, against one or more of the Released Parties.[39]

54. Similarly, the bar order endorsed by this Court in approving the Ernst & Young LLP settlement in the Sino-Forest CCAA proceedings states:

> **13. THIS COURT ORDERS** that on the Ernst & Young Settlement Date, any and all claims which Ernst & Young may have had against any other current or former defendant, or any affiliate thereof, in the Ontario Class Action, or against any other current or former defendant, or any affiliate thereof, in any Class Actions…in respect of contribution, indemnity or other claims over which relate to the allegations made in the Class Actions, are hereby fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished.[40]

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[39] Sears Order at para 11.
[40] In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation, Order dated March 20, 2013 at para 13.

55. The unexplained Exemption, which finds no apparent precedent in recent CCAA and class action bar orders approved by this Court, further demonstrates that the proposed bar order in the Plan does not properly safeguard the Non-Settling Defendants' rights in relation to any continued litigation against them.

(iii) *No Agreement to Cooperate by Settling Defendants*

56. The bar order language in the Plan lacks another common and significant protection provided by bar orders approved by this Court in the CCAA and class actions contexts. The ongoing cooperation of settling defendants in multi-party litigation for the purpose of making documents and witnesses available is recognized as an essential procedural safeguard for the benefit of non-settling defendants.

57. While the degree and nature of settling parties' cooperation obligations vary from case to case, it is recognized that assessing the fault of the Settling Defendants is fundamental to the Court's assessment of the claims against the Non-Settling Defendants. To this end, the Settling Defendants will have "relevant evidence pertaining to their own responsibility for the losses suffered."[41] As a result, settling parties have a recognized, ongoing obligation to cooperate in the proceedings against the non-settling parties, including by making documents available to the non-settling parties through a non-party production protocol.[42]

58. In this case, the Plan contains no provisions requiring the Settling Defendants to cooperate in making evidence available to the Non-Settling Defendants. This deficiency must be addressed and resolved before a viable plan can be put to and endorsed by this Court.

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[41] *Hollinger* at para 83.
[42] *Hollinger* at paras 113-116.

(iv) Inadequate Protections Relating to U.S. Litigation

59. Article 4.4 of the Plan purports to preserve an option for U.S. Securities Claimants to pursue claims against the Non-Settling Defendants in Canada under U.S. law. Assuming that is even possible within Ontario's securities class action framework, the terms of the bar order would need to comply with U.S. law as well as Canadian law in order to appropriately protect the interests of Non-Settling Defendants. While the optionality preserved for the benefit of US Securities Claimants prevents the parties from knowing at this point if the bar order will be required to be enforceable under U.S. law, it should be noted that the Plan is also inconsistent with the protections that a U.S. bar order would typically contain in similar contexts.[43]

(v) Further Issues—Assigned Claims and the Securities Claimant Trust

60. The uncertainties and deficiencies in the Judgment Reduction Terms in the Plan are exacerbated by a lack of clarity as to whether and how other aspects of the Plan might affect Non-Settling Defendants – in particular, the contemplated Securities Claimant Trust.

61. If the Plan provided for typical bar order language, any claims over that the Settling Defendants might have against Non-Settling Defendants would be barred and released. It would be beyond doubt that there *are no claims* against KPMG to be "assigned" to the Securities Claimant

[43] Bar orders in the insolvency and class action context in the U.S. typically provide that non-settling defendants' liability is reduced by the greater of (i) the amount paid by or on behalf of the settling defendants for damages; or (ii) the amount corresponding to the aggregate proportionate shares of liability of the settling defendants for damages as determined by the Court at the time of entry of any judgment (based on the jury findings and as required by law), to the full extent provided by applicable securities legislation or any other applicable statutes and common law. See e.g.: *In re Metro. Sec. Litig*., No. CV-04-0025-FVS, 2010 WL 11474100, at para. 10 (E.D. Wash. June 9, 2010). KPMG Partial Book of Authorities ("BA"), Tab 1; *In re Thornburg Mortg., Inc. Sec. Litig*., No. CV 07-815 JB/WDS, 2012 WL 12906319, at para 15 (D.N.M. Dec. 13, 2012), BA Tab 2; *Loc. 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp. 2d 130, 133 (E.D.N.Y. 1999), BA Tab 3; *Carroll v. LeBoeuf, Lamb, Greene & MacRae, L.L.P*., No. 05 CIV. 391 (LAK), 2008 WL 2789766, at 2–3 (S.D.N.Y. July 16, 2008), BA Tab 4.

Trust by CannTrust or other Settling Defendants. If that were the case, KPMG would be disinterested in questions relating to the Securities Claimant Trust.

62. However, as matters currently stand, the Plan only appears to contemplate an unprecedented, asymmetrical bar order that would prevent KPMG from asserting its Securities Related Indemnity Claims against the Settling Defendants but would not prohibit claims over by the Settling Defendants against KPMG. This gives rise to a number of additional troubling uncertainties that directly affect KPMG's interests and the overall fairness of the Plan, including the following:

(a) The definition of "Assigned Claims" in the Plan identifies categories of claims that could be asserted against a range of defendants, but does not identify specific causes of action or allegations specific enough for a stakeholder to understand what potential claims against it are being preserved and assigned to the Securities Claimant Trust. Is it contemplated that claims over by CannTrust against Non-Settling Defendants in connection with the Securities Actions (claims that would be barred under conventional bar order terms) are to be preserved and pursued by the Securities Claimant Trust? The Non-Settling Defendants are entitled to certainty and clarity on this point;

(b) It is unclear how certain types of claims could even be assigned to the Securities Claimant Trust without the defendant's consent;[44]

[44]The assignment of claims to the Securities Claimant Trust raises potential concerns of champerty and maintenance having regard to the governing principles on this issue (see *Insurance Corporation of British Columbia v Fredrikson*, [1988] 1 SCR 1089 at paras 34-40). It is presently unclear whether the Securities Claimant Trust or its beneficiaries have a sufficient commercial interest in CannTrust's claim over against KPMG or whether they are improperly seeking to recover more than they are otherwise entitled to at law at KPMG's expense. Moreover, CannTrust may be seeking

(c) CannTrust proposes to retain a reversionary interest in the Securities Claimant Trust through the return of its $50 million contribution if recovery by the Securities Claimant Trust exceeds $250 million.[45] This unusual provision raises questions as to certainty of intent in the formation of the Trust.[46] Has CannTrust as settlor truly alienated its interests in ongoing litigation against the Non-Settling Defendants? If CannTrust retains an interest, how is that reality reflected in the governance of the Trust? How might this reversionary interest affect CannTrust's role as a witness in future litigation?

(d) The Plan proposes that the Trustees of the Securities Claimant Trust will be partners of the firms who have been appointed as CCAA Representative Counsel (as defined in the Plan).[47] Typically, in cases where a litigation trust has been established to prosecute claims of a debtor, the appointed trustee has been an independent, neutral third party, unrelated to the ongoing litigation.[48] There is no reason to depart from this practice in the present context. If members of the plaintiff class action firms are appointed as Trustees of the Securities Claimant Trust, how will conflicts

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to unduly benefit from successful claims by the Securities Claimant Trust against the Non-Settling Defendants through maintaining its reversionary interest.

[45] Supplementary Guyatt Affidavit, Exhibit "B", CCAA Plan Blackline, section 4.2(d).

[46] See discussion of certainty of intent and revocation in E. Gillese, *The Law of Trusts*, 3d ed., (Toronto: Irwin Law Inc., 2014) at pages 42-43, 83-85, BA Tab 5.

[47] Definition of "Trustees", Supplemental Motion Record of the Applicant, page 86: "Trustees" means the individual lawyers from the firms that have been appointed as CCAA Representative Counsel, in their capacity as the trustees of the Securities Claimant Trust, appointed to the Trust Declaration on the basis contemplated in Section 4.1; section 4.2 of the Plan provides that the Trustees will, on behalf of the Securities Claimant Trust "have the sole authority to prosecute and resolve the Assigned Claims"; Order re CCAA Representatives and CCAA Representative Counsel Appointment Order dated January 29, 2021.

[48] See, for example, the CCAA proceeding of Sears Canada Inc., Amended and Restated Order (Appointment of Litigation Trustee, Lifting the Stay, and Other Relief) dated December 3, 2018 where the Hon. J. Douglas Cunningham Q.C. was appointed as officer of the court to be Litigation Trustee; The Twenty-First Report of the Monitor to the court dated November 16, 2015 in the CCAA proceedings of 1511419 Ontario Inc. describing the appointment of Blue Tree Advisors III Inc. as Litigation Trustee; Sixteenth Report of the Monitor dated January 29, 2013 in the CCAA proceedings of Sino-Forest Corporation at para 11 describing the appointment of Cos Borelli as Litigation Trustee.

arising from their roles as fiduciaries for the beneficiaries of the Securities Claimant Trust and any conflicts arising from compensation arrangements their firms made have in connection with the Securities Actions or other potential conflicts arising from their dual role as client and counsel be addressed?

(e) If Assigned Claims will be litigated at the direction of Trustees who are the plaintiff class action lawyers pursuing the Securities Actions, this will also severely undermine KPMG's right to have any disputes between it and CannTrust in respect resolved by confidential, binding arbitration.

63. The above issues simply compound the uncertainty and unfairness inherent in the Plan.

PART IV – CONCLUSION

64. It is anticipated that the Applicants will characterize the foregoing arguments as "premature", emphasizing that they are not seeking approval of a settlement agreement but are rather pursuing the procedural step of filing the Plan.

65. If this argument is given weight, the Non-Settling Defendants and the Court will undoubtedly be told at the Sanction Hearing that the Plan is a meticulously constructed, interconnected whole that reflects a carefully calibrated bargain between the Applicants (and their handpicked) voting stakeholders and that it is not for the Court to attempt to re-write the deal which has been extensively negotiated and overwhelmingly approved by "creditors." Today, the Non-Settling Defendants will be said to be complaining too early. At the Sanction Hearing, The Non-Settling Defendants will be said to be complaining too late.

66. The issues raised by KPMG and the other Non-Settling Defendants are fundamental and go to the heart of the proposed Plan. Now is the time to require that the Plan be renegotiated to

fairly take into consideration the legitimate rights and interests of all affected parties. By the time the Sanction Hearing arises, that opportunity will have been lost.

PART V – RELIEF SOUGHT

67. For the reasons set forth herein, KPMG respectfully requests that this Court decline to grant the Order sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March, 2021.

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SCHEDULE “A”

LIST OF AUTHORITIES

Cases	
1.	*Target Canada Co. Re*, 2016 ONSC 316
2.	*Crystallex International Corp., Re*, 2013 ONSC 823
3.	In Matter of a Plan of Compromise or Arrangement of Sears Canada Inc., Order (Approval Order) dated August 25, 2020 (CV-17-1184600CL)
4.	Labourer’s Pension Fund et. al. v Sino Forest Corporation et. al., Order (Directors Settlement Approval) dated Wednesday November 16, 2016
5.	In the Matter of the Plan of Compromise or Arrangement of 1511419 Ontario Inc. (Formerly Known as the Cash Store Financial Services Inc.) et al. dated October 6, 2015 at para 7.6
6.	*Hollinger Inc., Re*, 2012 ONSC 5107
7.	*Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] OJ No 2245
8.	*Endean v St. Joseph’s General Hospital*, 2019 ONCA 181
9.	*Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37
10.	*Gendron v Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293
11.	In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation, Order dated March 20, 2013.
12.	*In re Metro. Sec. Litig.*, No. CV-04-0025-FVS, 2010 WL 11474100 (E.D. Wash. June 9, 2010)
13.	*In re Thornburg Mortg., Inc. Sec. Litig.*, No. CV 07-815 JB/WDS, 2012 WL 12906319 (D.N.M. Dec. 13, 2012)
14.	*Loc. 875 I.B.T. Pension Fund v Pollack*, 49 F. Supp. 2d 130 (E.D.N.Y. 1999)
15.	*Carroll v LeBoeuf, Lamb, Greene & MacRae, L.L.P.*, No. 05 CIV. 391 (LAK), 2008 WL 2789766 (S.D.N.Y. July 16, 2008)
16.	*Insurance Corporation of British Columbia v Fredrikson*, [1988] 1 SCR 1089
17.	Eileen Gillese, *The Law of Trusts*, 3d ed., (Toronto: Irwin Law Inc., 2014)
18.	Order re CCAA Representatives and CCAA Representative Counsel Appointment Order dated January 29, 2021.

Cases	
19.	Amended and Restated Order (Appointment of Litigation Trustee, Lifting the Stay, and Other Relief) dated December 3, 2018
20.	The Twenty-First Report of the Monitor to the court dated November 16, 2015 in the CCAA proceedings of 1511419 Ontario Inc.
21.	Sixteenth Report of the Monitor dated January 29, 2013 in the CCAA proceedings of Sino-Forest Corporation

SCHEDULE "B"

TEXT OF RELEVANT STATUTES AND REGULATIONS

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 5.1(2), 6(8)**

Claims against directors — compromise

5.1(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Payment — equity claims

6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

***Negligence Act*, R.S.O. 1990, c. N.1, s. 1**

Extent of liability, remedy over

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

***Securities Act*, R.S.O. 1990, c. S.5, s. 130(8)**

Joint and several liability

130(8) All or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable.

Court File No. CV-20-00638930-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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ONTARIO
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(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

PARTIAL BOOK OF AUTHORITIES OF KPMG LLP
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March 18, 2021

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Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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PARTIAL BOOK OF AUTHORITIES OF KPMG LLP
(Re: Plan Filing and Meetings Order)

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Tab 1

2010 WL 11474100
Only the Westlaw citation is currently available.
United States District Court, E.D. Washington,
at Spokane.

IN RE METROPOLITAN SECURITIES LITIGATION.
This Document Relates to: all Actions.

No. CV-04-0025-FVS
|
Signed 06/09/2010

Attorneys and Law Firms

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ORDER

PRELIMINARILY APPROVING SETTLEMENT BETWEEN THE CLASS AND THE INDIVIDUAL DEFENDANTS

FRED VAN SICKLE, UNITED STATES DISTRICT JUDGE

***1** Having considered the Motion and Memorandum of Plaintiffs, pursuant to Fed. R. Civ. P. 23, for an Order preliminarily approving the proposed settlement (the "Settlement") between the Class and defendants C. Paul Sandifur, Jr., Thomas Turner, Robert Ness, William Snider, Irv Marcus ("the Individual Defendants") in accordance with the terms and provisions of the Settlement Agreement and Release dated April 23, 2010 ("Settlement Agreement").

IT IS HEREBY ORDERED:

1. This Order incorporates by reference the definitions in the Settlement Agreement. Additionally, "Other Defendant" and "Other Defendants" refer to those defendants other than the Individual Defendants that or who were named in the Action (specifically, PricewaterhouseCoopers LLP, Ernst & Young LLP, Roth Capital Partners, Robert K. Potter, Clayton E. Rudd, James V. Hawkins, Gregory S. Strate, Philip W. Sandifur, Samuel Smith, Bruce J. Blohowiak, B. Elaine Hoskin, Gary D. Bracjcich, the Estate of Harold W. Erfurth, Reuel C. Swanson, William A. Smith, John T. Trimble, and Erik E. Skaggs). "Settling Parties" refers to the Class and the Individual Defendants.

2. The Court has personal jurisdiction over all parties to the Action and the Individual Defendants Action, including all Class Members and the Individual Defendants, and subject matter jurisdiction over the Action and the Individual Defendants Action.

3. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

4. In the interest of conserving expenses to the Class, pursuant to the terms of the Settlement Agreement, the Court shall defer approval of the form and manner of providing notice of the Settlement to the Class, and scheduling a hearing for final approval of the Settlement and Settlement Agreement (the "Final Approval Hearing").

5. The Court hereby preliminarily approves the Settlement, as embodied in the Settlement Agreement, as being fair, reasonable and adequate as to the Class Members, subject to further consideration at the Final Approval Hearing.

6. This Order shall become null and void and be without prejudice to the rights of the Settling Parties, all of whom shall be deemed to have reverted to their respective status in the Action and the Individual Defendants Action as of February 21, 2010, if: (i) the Effective Date does not occur; or (ii) the proposed Settlement is terminated or does not become effective for any other reason. In such event, the Settlement Agreement shall become null and void and have no further force and effect, and the Settlement shall be without prejudice and none of its terms shall be effective or enforceable.

7. The Action is stayed as to the Individual Defendants in all respects until further order of the Court, except as may be necessary to implement and effectuate the Settlement and Settlement Agreement.

8. Pending final determination by the Court as to whether the Settlement, as set forth in the Settlement Agreement, is fair, reasonable and adequate and should be finally approved, and whether the Judgment dismissing the Action and the Individual Defendants Action with prejudice as to the Individual Defendants, and whether an order barring any claims for contribution or indemnification against the Individual Defendants should be entered, no Lead Plaintiff nor any Class Member, either directly, representatively or in any other capacity, shall assert, commence or prosecute against any of the Individual Defendants any of the Released Claims in this Action, the Individual Defendants Action or any other proceeding or forum. This injunction is necessary to protect and effectuate the Settlement, this Order, and the Court's flexibility and authority to effectuate the Settlement and to enter judgment when appropriate, and is ordered in aid of the Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

***2** 9. Pursuant to the Settlement Agreement and applicable law, any and all claims arising out of any claims under the federal securities laws released by the Class, including, but not limited to, any claims based upon, arising out of or relating to the claims or allegations that were asserted or could have been asserted by the Class in the Action, the Class Action Complaint, Consolidated and Amended Class Action Complaint, Consolidated and Second Amended Class Action Complaint, Consolidated and Third Amended Class Action Complaint, Consolidated and Fourth Amended Class Action Complaint, or the Individual Defendants Action, (a) by any person against the Individual Defendants, and (b) by the Individual Defendants against any Other Defendant, are hereby permanently barred, enjoined and restrained. This bar shall apply whether or not the Individual Defendants are "covered persons" as defined in 15 U.S.C. § 78u-4(f)(10). Accordingly, without limiting the above, all persons (including any Other Defendant(s) and all persons purporting to act on his, its or their behalf, and all persons purporting to claim by or through him, it or them, whether under a subrogation theory or otherwise) are hereby permanently barred, enjoined and restrained from asserting, commencing or prosecuting against the Individual Defendants any such claims, and the Individual Defendants are hereby permanently barred, enjoined and restrained from asserting, commencing or prosecuting against any Other Defendant any such claims.

10. If any final verdict or judgment, or portion of any final verdict or judgment, under the federal securities laws is obtained by or on behalf of the Class or a Class Member against any Other Defendant over matters for which the Individual Defendants would have been jointly and severally liable, as determined by the jury through special interrogatories allocating any liability for the expertise and non-expertised portions of the registration statements to the Individual Defendants and/or any other Defendant, then such final verdict or judgment, or portion of any final verdict or judgment, over matters for which the Individual Defendants would have been jointly and severally liable, shall be reduced by the greater of: (a) an amount that corresponds to the percentage of fault or responsibility attributed to the Individual Defendants for the alleged loss to the Class or the Class Member as determined by the jury with regard to the portion of the judgment for which the Individual Defendants would have been jointly

and severally liable; or (b) the amounts paid by or on behalf of the Individual Defendants to the Class or the Class Member in connection with the Settlement Agreement.

11. The Court finds that the Settlement represents a reasonable and good faith settlement of all claims arising under state law, federal securities law, federal non-securities law and common law released by the Class under the Settlement Agreement and is sufficient to discharge the Individual Defendants from all such claims. The Court further finds that the Individual Defendants are entitled to protection to the fullest extent permitted by applicable state and federal laws from liability to third parties for contribution or indemnification or any other claim where the claimant's injury is the claimant's liability to the Class. These protections include, without limitation, those provided by Wash. Rev. Code § 4.22.060, Cal. Civ. Proc. §§ 877 and 877.6 and any comparable statute or common law of any other state (the "Additional Contribution Protections"). The Court further finds that, to the extent such Additional Contribution Protections apply, any Other Defendant shall have any final verdict or judgment obtained by or on behalf of the Class or a Class Member against such Other Defendant reduced according to the corresponding judgment reduction provisions applicable under such state law or federal non-securities law, including, but not limited to, those provided by Wash. Rev. Code § 4.22.060, Cal. Civ. Proc. §§ 877 and 877.6 and any comparable statute or common law of any other state.

12. Pursuant to the Settlement Agreement and applicable law, all person(s) (including any Other Defendant(s), and all persons and entities representing them or otherwise acting on their behalf) are permanently barred, enjoined and restrained from asserting, commencing or prosecuting any claim under state, federal or common law against the Individual Defendants, however styled, whether legal or equitable, whether known or unknown, whether for indemnification or contribution or otherwise denominated (including without limitation claims for breach of contract or misrepresentation), where the claim is based on, arises out of or relates in any way to claims or allegations that were asserted or could have been asserted in the Action or the Individual Defendants Action (the "Barred Claims").

***3** 13. Because the Other Defendants, and all persons and entities representing them or otherwise acting on their behalf, are barred from asserting any Barred Claims against the Individual Defendants, any final verdict or judgment obtained by the Class or a Class Member against any Other Defendants shall be reduced in accordance with the judgment reduction provisions under state law, federal non-securities law or common law applicable to such Barred Claims.

14. In the event the Action proceeds to trial as to any Other Defendant: (i) the Class may not use any finding, ruling, order, trial testimony, verdict or judgment or any attribution of fault or responsibility to the Individual Defendants, for any purpose whatsoever against the Individual Defendants in the Action or the Individual Defendants Action or in any other proceeding or forum, or for any other purpose; (ii) any finding, ruling, order, trial testimony, verdict or judgment or any attribution of fault or responsibility to the Individual Defendants, shall not be admissible for any purpose whatsoever as against the Individual Defendants in the Action or the Individual Defendants Action or in any other proceeding or forum, or for any other purpose; (iii) any finding, ruling, order, trial testimony, verdict or judgment or any attribution of fault or responsibility to the Individual Defendants, shall not constitute collateral estoppel or res judicata as to the Individual Defendants in the Action or the Individual Defendants Action or in any other proceeding or litigation between the Individual Defendants and the Class; (iv) the Individual Defendants shall not be estopped from challenging liability in the Action or the Individual Defendants Action or any other proceeding or forum as if no settlement had been negotiated or entered into; (v) the Individual Defendants shall not use or seek to admit any finding, ruling, order, trial testimony, attribution of fault or responsibility to any Other Defendant, verdict or judgment against the Class in the Individual Defendants Action or any other proceeding or litigation between the Individual Defendants and the Class; (vi) any finding, ruling, order, trial testimony, verdict or judgment shall not be admissible for any purpose against the Class in the Individual Defendants Action or in any other proceeding or litigation between the Individual Defendants and the Class; (vii) any finding, ruling, order, trial testimony, attribution of fault or responsibility to any Other Defendant, verdict or judgment shall not constitute collateral estoppel or res judicata as to the Class in the Individual Defendants Action or in any other proceeding or litigation between the Individual Defendants and the Class; and (viii) the Class shall not be estopped from asserting the liability of the Individual Defendants in the Action as if no settlement had been negotiated or entered into.

15. This Order shall not be construed or used as an admission, concession or declaration by or against the Individual Defendants of any fault, wrongdoing, breach, or liability. Nor shall the Order be construed or used as an admission, concession or declaration by or against the Class Representatives or the Class, that their claims lack merit, that their damages are in any way limited, or that the relief requested in the Action or the Individual Defendants Action is inappropriate, or as a waiver by any party of any defenses of claims he, she, or it may have.

***4** 16. The Class shall move the Court for an order approving and directing notice of the Settlement to the Class, and setting a Final Approval Hearing, no later than June 15, 2010, or such continued date as the Class and the Individual Defendants may agree to in writing.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2010 WL 11474100

End of Document

Tab 2

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Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

IN RE THORNBURG MORTGAGE, INC. SECURITIES LITIGATION

No. CIV 07-815 JB/WDS
|
Filed 12/13/2012

ORDER AND FINAL JUDGMENT

JAMES O. BROWNING, UNITED STATES DISTRICT JUDGE

***1** WHEREAS, on the 27th day of August, 2012, a hearing having been held before this Court to determine, *inter alia*: (1) whether the terms and conditions of the Stipulation and Agreement of Settlement dated March 28, 2012 (the "Stipulation") are fair, reasonable and adequate for the settlement of all claims asserted by W. Allen Gage, individually and on behalf of J. David Wrather, Harry Rhodes, FFF Investments, LLC, Robert Ippolito, individually and as Trustee for the Family Limited Partnership Trust, Nicholas F. Aldrich, Sr.; Betty L. Manning; John Learch; and Boilermakers Lodge 154 Retirement Plan (collectively, the "Plaintiffs"), on behalf of the Class, against (I) defendants Garrett Thornburg, Larry A. Goldstone, and Clarence G. Simmons (the "Individual Defendants") and (ii) defendants Anne-Drue M. Anderson, David A. Ater, Joseph H. Badal, Eliot R. Cutler, Paul G. Decoff, Michael B. Jeffers, Ike Kalangis, Owen M. Lopez, Francis I. Mullin III, and Stuart C. Sherman (the "Dismissed Defendants" and together with the Individual Defendants, the "Settling Defendants"), (2) whether judgment should be entered dismissing the Consolidated Amended Class Action Complaint (the "Complaint") on the merits and with prejudice as against the Settling Defendants and all persons and entities who are members of the defined Class who have not requested exclusion therefrom; and (3) whether to approve the proposed Plan of Allocation as a fair and reasonable method to allocate the Net Settlement Fund among Class Members;

WHEREAS, the Notice substantially in the form approved by the Court in the Court's Order Preliminarily Approving Settlement and Providing For Notice ("Preliminary Approval Order") was mailed to all reasonably identifiable Class Members and the Summary Notice substantially in the form approved by the Court in the Preliminary Approval Order was published in accordance with that Order and the specifications of the Court; and

WHEREAS, the Court having considered all matters submitted to it at the hearing and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. All capitalized terms used herein have the same meanings as set forth and defined in the Stipulation.

2. The Court has jurisdiction over the subject matter of the Litigation, Plaintiffs, all Class Members, and the Settling Defendants.

3. The Court finds that the prerequisites for a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the number of Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of the Plaintiffs are typical of the claims of the Class they seek to represent; (d) Plaintiffs and their counsel have and will fairly and adequately represent and protect the interests of the Class; (e) the questions of law and fact common to the members of the Class predominate over any questions affecting

only individual members of the Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of this Litigation. The Class is being certified for settlement purposes only.

***2** 4. Pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, the Court hereby certifies this action as a class action for settlement purposes only, and certifies as the Class all persons and entities who purchased or otherwise acquired Thornburg Mortgage, Inc. ("TMI") common stock and/or preferred stock in the open market and/or in or traceable to the Offerings between April 19, 2007 and March 19, 2008, inclusive and who were damaged thereby. Excluded from the Class are:

a. TMI, the Defendants, the directors and officers of TMI, members of the immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any of the Defendants have or had a controlling interest; and

b. All Persons who excluded themselves by filing timely and valid requests for exclusion in accordance with the Preliminary Approval Order, a list of whom is attached to this Order as Exhibit A.

5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, the Court hereby certifies Plaintiffs as the class representatives for the Class and appoints the counsel previously selected by Lead Plaintiffs as Co-Lead Counsel for the Class.

6. The Court hereby finds that the forms and methods of notifying the Class of the Settlement and its terms and conditions met the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure, Section 21D(a)(7) of the Exchange Act, 15 U.S.C. § 78u–4(a)(7), as amended by the Private Securities Litigation Reform Act of 1995; constituted the best notice practicable under the circumstances; and constituted due and sufficient notice to all persons and entities entitled thereto of these proceedings and the matters set forth herein, including the Settlement and Plan of Allocation. No Class Member is relieved from the terms of the Settlement, including the releases provided for therein, based upon the contention or proof that such Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Class Members to object to the proposed Settlement and to participate in the hearing thereon. The Court further finds that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, were fully discharged. Thus, it is hereby determined that all members of the Class are bound by this Order and Final Judgment except those persons listed on Exhibit A.

7. The Settlement, and all transactions preparatory or incident thereto, is found to be fair, reasonable and adequate, and in the best interests of the Class, and it is hereby approved. Plaintiffs and the Settling Defendants are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

8. The Litigation, the Complaint and all claims included therein, as well as all of the Settled Claims (defined in the Stipulation and in paragraph 9(b) below), are hereby dismissed with prejudice as to the Plaintiffs and the other members of the Class, and as against each and all of the Released Parties (defined in the Stipulation and in paragraph 9(a) below). The Settling Parties are to bear their own costs except as otherwise provided in the Stipulation.

9. As used in this Order and Final Judgment, the terms "Released Parties," "Settled Claims," "Settled Defendants' Claims" and "Unknown Claims" shall have the meanings as provided in the Stipulation and as specified below:

***3** a. "Released Parties" means TMI, the Individual Defendants, the Dismissed Defendants, and any of their current or former, subsidiaries, affiliates, partners, joint ventures, officers, directors, principals, shareholders, members, agents (acting in their capacity as agents), employees, attorneys, insurers, including the Insurer, reinsurers, advisors, accountants, associates and/or any other individual or entity in which any of TMI, the Individual Defendants, or the Dismissed Defendants has a controlling interest or which is related to or affiliated with any of TMI, the Individual Defendants, or the Dismissed Defendants and the current or former legal representatives, heirs, successors in interest or assigns of any of TMI, the Individual Defendants, or the Dismissed Defendants; provided, however, that "Released Parties" does not include any of the Non-Settling Defendants, nor any of their respective parents, successors, subsidiaries, and affiliates and any entity in which any of them have or had a controlling interest and the officers and directors thereof.

b. “Settled Claims” means any and all claims, debts, demands, liabilities, rights and causes of action of every nature and description whatsoever (including but not limited to any claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses or liability whatsoever), whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, whether class or individual in nature, including both known claims and Unknown Claims (as defined below), (*I*) that have been asserted in the Litigation by the Plaintiffs and/or Class Members or any of them against any of the Released Parties; or (*ii*) that could have been alleged, asserted or contended in any forum by Plaintiffs and/or Class Members or any of them, or the successors and assigns of any of them against the Released Parties which arise out of or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint (or any preceding complaints) and which relate to the purchase or acquisition of TMI common stock and/or preferred stock in the open market and/or in or traceable to the Offerings during the Class Period; provided, however, that Settled Claims do not include (*I*) any claims to enforce any of the terms of this Settlement, and any claims that could be asserted in response to such a claim to enforce or (*ii*) any claims against the Non-Settling Defendants.

c. “Settled Defendants' Claims” means any and all claims, debts, demands, liabilities, rights and causes of action of every nature and description whatsoever (including but not limited to any claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses or liability whatsoever), whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or un-accrued, liquidated or un-liquidated, at law or in equity, matured or un-matured, whether class or individual in nature, including both known and Unknown Claims (as defined herein), (*I*) that have been asserted in the Litigation by the Released Parties or any of them against the Plaintiffs, any Class Member or any of their attorneys or (*ii*) that could have been alleged, asserted or contended in any forum by the Released Parties, or the successors and assigns of any of them against the Plaintiffs, any Class Member or any of their attorneys which arise out of or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint (or any preceding complaints) and which relate to the purchase or acquisition of TMI common stock and/or preferred stock in the open market and/or in or traceable to the Offerings during the Class Period; provided, however, that Settled Defendants' Claims do not include (*I*) any claims to enforce any of the terms of this Settlement, and any claims that could be asserted in response to such a claim to enforce or (*ii*) any claims against the Non-Settling Defendants.

***4** d. “Unknown Claims” means any and all Settled Claims which Plaintiffs and/or any member of the Class does not know or suspect to exist in his, her or its favor as of the Effective Date, which if known by him, her or it, might have affected his, her or its decision(s) with respect to the Settlement, and any Settled Defendants' Claims which any Released Party does not know or suspect to exist in his, her or its favor as of the Effective Date, which if known by him, her or it might have affected his or its decision(s) with respect to the Settlement. With respect to any and all Settled Claims and Settled Defendants' Claims, the Settling Parties stipulate and agree that upon the Effective Date, the Plaintiffs, the Individual Defendants, and Dismissed Defendants shall expressly waive, and each Class Member and Released Party shall be deemed to have waived and by operation of the Order and Final Judgment shall have expressly waived, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to Cal. Civ. Code § 1542, which provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.” The Settling Parties acknowledge, and Class Members and Released Parties by operation of law shall be deemed to have acknowledged, that the inclusion of “Unknown Claims” in the definition of Settled Claims and Settled Defendants' Class was separately bargained for and was a key element of the Settlement.

10. Upon the Effective Date of the Settlement, the Plaintiffs and all Class Members, on behalf of themselves, their current and former heirs, executors, administrators, successors, and assigns, shall be deemed to have released and to have forever relinquished and discharged each and every one of the Settled Claims as against the Released Parties, whether or not such Class Members execute and deliver a Proof of Claim.

11. Upon the Effective Date of the Settlement, each of the Released Parties, on behalf of themselves, their current and former heirs, executors, administrators, successors, and assigns, shall be deemed to have released and to have forever relinquished and discharged each and every one of the Settled Defendants' Claims as against the Plaintiffs, any of the Class Members, or their attorneys.

12. Upon the Effective Date of the Settlement, the Settling Parties and anyone acting or purporting to act for any of them, shall be permanently and forever enjoined from prosecuting, attempting to prosecute, or assisting others in the prosecution of, any Settled Claims and Settled Defendants' Claims.

13. The Court hereby finds that the proposed Plan of Allocation is a fair and reasonable method to allocate the Net Settlement Fund among Class Members, and the Court hereby approves the Plan of Allocation.

14. The Court hereby orders that any funds remaining in the Net Settlement Fund by reason of uncashed checks or otherwise following an initial distribution of the Net Settlement Fund to eligible Class Members, after the Claims Administrator has made reasonable efforts to have Class Members who are entitled to participate in the distribution of the Net Settlement Fund cash their distribution checks, shall be distributed to those Class Members who cashed their initial distribution checks and who would receive at least $10.00 from such second distribution, after payment of any unpaid costs or fees incurred in administering the Net Settlement Fund for such second distribution.

15. The Court hereby orders that the amount of any verdict or judgment against any Non-Settling Defendants (as defined in paragraph 1 of the Stipulation of Settlement) based upon, or related to any fact or circumstances involved in or arising out of the Litigation shall be reduced by the greater of: (I) the amount paid by or on behalf of the Settling Defendants to the Class for damages; or (ii) the amount that corresponds to the aggregate proportionate shares of liability of the Settling Defendants and the Released Parties for damages as determined by the Court at the time of entry of any judgment (based on the jury findings and as required by law), to the full extent provided by the PSLRA, or any other applicable statutes and common law.

16. The Court hereby bars all claims by any Person against the Settling Defendants and the Released Parties, or by any of them against any Persons, for contribution, indemnification, or under any other theory, based upon, or related to any fact or circumstances involved in or arising out of the Litigation, with the scope and preclusive effect of this bar order as broad as that permissible under 15 U.S.C. § 78u–4(f)(7) and the common law, to the full extent provided by the PSLRA, or any other applicable statutes and common law.

***5** 17. The Court finds that all parties and their counsel have complied with each requirement of the Private Securities Litigation Reform Act of 1995 and Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

18. The Stipulation and all negotiations, statements, and proceedings in connection therewith, and the fact of the Settlement, shall not, in any event, be construed or deemed to be evidence of an admission or concession by Plaintiffs, any Settling Defendant, any member of the Class, or any other Person, of any liability or wrongdoing whatsoever by them, or any of them, and shall not be offered or received in evidence in any action or proceeding (except an action to enforce the Stipulation and Settlement contemplated thereby), or be used in any way as an admission, concession, or evidence of any liability or wrongdoing of any nature, and shall not be construed as, or deemed to be evidence of, an admission or concession that the Plaintiffs, any member of the Class, or any other Person, has or has not suffered any damage. The Stipulation is not a finding of the validity or invalidity of any claims in the Litigation or of any wrongdoing by any of the Settling Defendants named therein.

19. No Class Member or Claimant shall have any claim against Plaintiffs, Co-Lead Counsel, the Claims Administrator, or any other agent designated by Co-Lead Counsel based on, or in any way relating to, the distributions from the Net Settlement Fund that have been made substantially in accordance with the Stipulation and any applicable orders of the Court. No Class Member or Claimant shall have any claim against the Individual Defendants, the Dismissed Defendants, the Settling Defendants' Counsel, the Insurer, or any of the Released Parties based on, or in any way relating to, the administration of or distributions from the

Net Settlement Fund, the determination, administration, calculation or payment of claims, the administration of the Custodial Account, or any losses incurred in connection therewith, the Plan of Allocation, or the giving of notice to Class Members.

20. Exclusive jurisdiction is hereby retained over the Settling Parties and the Class Members for all matters relating to the Litigation, including (I) the administration, interpretation, effectuation or enforcement of the Stipulation, the Plan of Allocation and this Order and Final Judgment, (ii) hearing and determining any application for fees and expenses by Co-Lead Counsel, and (iii) supervising the administration and distribution of the settlement proceeds to the Class Members.

21. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

22. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

23. The finality of this Order and Final Judgment shall not be affected, in any manner, by rulings that the Court may make on Co-Lead Counsel's application for an award of Attorneys' Fees and Expenses.

***6** 24. In the event that the Settlement does not become final and effective in accordance with the terms and conditions set forth in the Stipulation, then this Order and Final Judgment shall be rendered null and void and be vacated and the Settlement and all orders entered in connection therewith shall be rendered null and void (except as provided in paragraphs K.2, 3, and 4 in the Stipulation), and the Settling Parties shall be deemed to have reverted to their respective status prior to the execution of this Stipulation, and they shall proceed in all respects as if the Stipulation had not been executed and the related orders had not been entered, preserving in that event all of their respective claims and defenses in the Litigation.

EXHIBIT A

<u>REQUESTS FOR EXCLUSION</u>

In re Thornburg Mortgage, Inc. Sec. Litig.

Case No. CIV 07-815JB/WDS

NAME	CITY	STATE
HOWARD S. ISRAEL	BEACHWOOD	OH
PATRICIA J. ISRAEL DRYER	BEACHWOOD	OH
BARRY A. KILINSKI	ROCHESTER	NY
NEIL D. WEISER	EMERALD HILLS	CA
LEO W. WEVER JR	CONWAY	SC
EDWARD B. & VICKI J. GERMANN	HENDERSONVILLE	NC
JOHN L. LEDING	FORT SMITH	AR
EVAN LAMP	SHORT HILLS	NJ
DANIEL BOONE JR.	SANTA FE	NM
MICHAEL M. REILLY	SANTA FE	NM
ARTHUR J. BREAUX III	HOMESTEAD	FL
ELIZABETH ANDERSON HISHON FOUNDATION	ATLANTA	GA
ALICE D. HURST TR	SUN CITY	AZ
FRANCIS R. & PHILOMENA C. SLATTERY	NORRISTOWN	PA
ROBERT TURRILL	LAURENS	SC
LILLIAN C. KAY	ITHACA	NY
WILLIAM N. CHERNISH	NEWFIELD	NY
MARGARET S. CHERNISH	NEWFIELD	NY
JOHN R. PAVIA	TRUMANSBURG	NY
JOHN F. ISENMAN	FESTUS	MO
JUDITH GENOVA	SPENCER	NY
WILLIAM LEE & LINDA B. MYERS JT TEN	ITHACA	NY
ANTHONY C. MASSARO	CROWN POINT	IN
HERB STUBE	PARK CITY	UT
SUZANNE E. WEST	ITHACA	NY
DIANE M. KOZUB	FT WORTH	TX
HAROLD MICHAEL	CAMARILLO	CA
ROBERT H. & MILDRED L. REDDING	LEE'S SUMMIT	MO

LELAND L. SWINEHART	ST ANNE	IL
RICHARD P. & DOROTHY L. FELDMAN	OCEANSIDE	NY
RPF ENTERPRISES, INC.	OCEANSIDE	NY
LINDA L. COOPER	LOCKE	NY
ANNA R. SUSMANN	ITHACA	NY
NORMAN W. LUTTRELL	BELMONT	CA
EMILY RUTH SOREL	SLATERVILLE SPRINGS	NY
CHRISTINE GAFFNEY	WORCESTER	MA
FAY HELMON	ISSAQUAH	WA
DANIEL JAMES DEJOHN	ITHACA	NY
ALAN DIAZ MD	MT VERNON	NY
SUSAN P. WILLEMSEN	ITHACA	NY
JOAN M. HULLAR	TUCSON	AZ
JOHN P. & SARA B. REITHER	GOLD RIVER	CA
BARBARA PRUDHOMME CREDIT SHELTER TR	GOLD RIVER	CA
ROBERT W. SNARE MD & JOYCE E. SNARE	CHIPLEY	FL
ROCCO M. SCANZA	ITHACA	NY
SHERRY L. SCANZA	ITHACA	NY
CHRIS A. FITZPATRICK	HOULTON	ME
JOE L. SIDDON	SPANISH FORT	AL
FU SHENG WU	BELMONT	MA

All Citations

Not Reported in Fed. Supp., 2012 WL 12906319

End of Document

Tab 3

49 F.Supp.2d 130
United States District Court, E.D. New York.

LOCAL 875 I.B.T. PENSION FUND, Louis Smith and Steven Gilman as Trustees of the Local 875 I.B.T. Pension Fund, Plaintiffs,
v.
Sanford E. POLLACK, Burton J. Horowitz, Horowitz and Pollack, P.C., Infinity International Investments Ltd., Mulk Raj Dass, Chloe Peterson, Glenn P. Pellegrin, James T. Kalyvas, Compagnie D'Etudes et de Participations S.A., Nigel Stovin–Bradford, Frederick Gevers, Joachim D'Souza, Stewart N. Altman and Stewart N. Altman and Associates, P.C., Defendants.
Local 875 I.B.T. Pension Fund, Louis Smith and Steven Gilman as Trustees of the Local 875 I.B.T. Pension Fund, Plaintiffs,
v.
Bear, Stearns & Co. Inc., David A. Friedmann, and Mercantile Capital Corporation, Defendants.

Nos. 95 CV 3989 NGMLO, 98 CV 4006 NGMLO.
|
May 11, 1999.

Synopsis
Pension fund that lost $9.3 million paid to purchase “prime” European bank note that later proved nonexistent sued alleged participants in scheme that caused loss. Fund asserted securities fraud claims and claims under Racketeer Influenced and Corrupt Organizations Act (RICO), Employee Retirement Income Security Act (ERISA), and common law. The District Court, Gershon, J., 992 F.Supp. 545granted partial dismissal of ERISA claims Gershon, J., Two defendants moved for approval of settlement which would bar future contribution claims by non-settling defendants. The Court held that the proposed settlement adequately protected the non-settling defendants by allowing reduction in any future judgment against non-settling defendants by use of the proportional share method or the pro tanto method, whichever yielded greater reduction.

Settlement approved.

Attorneys and Law Firms

***131** David M. Schlecker, Anderson Kill & Olick, P.C., New York City, for Plaintiffs.

Celia Goldwag Barenholtz, Robert Mandel, Kronish Lieb Weiner & Hellman LLP, New York City, for Defendant CEPA.

Arthur Felsenfeld, Andrews & Kurth, New York City, for Defendant Bear Stearns.

MEMORANDUM AND ORDER

GERSHON, District Judge.

Plaintiffs and defendants Compagnie D'Etudes et de Participations S.A. ("CEPA") and Bear Stearns & Co., Inc. ("the settling defendants") move for approval and entry of a proposed "Final Judgment and Bar Order" ("the Bar Order") with respect to each of two related actions, 95 CV 3989 ("the Main Action"), and 98 CV 4006 ("the Bear Stearns Action"). These actions[1] seek recovery for damages arising from plaintiffs' investment of $9.3 million of Local 875 I.B.T. Pension Fund assets in a purported bank note. Plaintiffs bring these actions on a variety of legal grounds including Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1861 *et seq.,* the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*[2], and the common law.

In each action, the Bar Order would: (1) dismiss the particular action, including all claims and cross-claims which seek contribution or indemnification, with prejudice as to the settling defendant; (2) bar any future claims against the settling defendant for contribution or indemnification brought by any and all the defendants (except for Gevers in the Main Action[3]), their successors, representatives or assigns in the related actions; (3) preclude the settling defendant from asserting any contribution or indemnification claim against the defendants (except for Gevers in the Main Action) in the related actions; and (4) reduce any verdict plaintiffs may secure against any remaining defendant in any of the related actions by the amount of the settling defendant's settlement payment or by the proportional share of the damages attributable to the settling defendant as may be determined by the court or the trier of fact at trial, whichever is greater. This insures that the non-settling defendants will receive the benefit of *both* the ***132** CEPA and Bear Stearns settlements. In the Bar Order that would be entered in the Main Action, CEPA retains the right to assert any and all counterclaims against any party who is not a Barred Party and/or against any party who is found by any Court not to be subject to the terms of the Bar Order in any action subsequently commenced against CEPA or any of CEPA's past or present representatives, officers, employees (except Frederick Gevers), successors, assigns, *et alia,* regardless of whether the action relates to one or both of the related actions that is the subject of the Bar Order. In the Bar Order that would be entered in the Bear Stearns Action, the Bear Stearns Releasees "shall retain the right to assert any and all counterclaims in any action subsequently commenced against any of the Bear Stearns Releasees regardless of whether said action relates to the Bear Stearns Action or the Main Action." Both Bar Orders also provide that "[t]here being no just cause for delay, this Final Judgment and Bar Order shall be entered forthwith as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure."

The motion for entry of the Bar Order in the Bear Stearns Action is unopposed. In the Main Action, defendant Chloe Peterson, acting on behalf of herself, Mulk Raj Das, and Infinity International Investments Ltd. ("Infinity"[4]) ("the non-settling defendants"[5]), opposes the entry of the Bar Order. The non-settling defendants argue that this court should not approve a settlement containing a Bar Order which would preclude their claims against CEPA, the settling defendant. They claim that the Bar Order, particularly its judgment reduction provision, is based on an erroneous assumption that they have some relative fault in these proceedings, that the proposed Bar Order is unfair and unreasonable and that it violates ERISA. For the reasons set forth below, I find these objections to be without merit.

The non-settling defendants' argument that the Bar Order violates ERISA is without merit because plaintiffs' ERISA claim against CEPA was dismissed in this court's prior decision, *see Local 875 I.B.T. Pension Fund, et al. v. Pollack, et al.,* 992 F.Supp. at 569–70, thus foreclosing contribution or indemnification claims under ERISA against CEPA. The non-settling defendants also express concern that the Bar Order releases CEPA from all future claims against it. However, the non-settling defendants have not identified, either in their pleadings or in their Memorandum in Opposition to the Bar Order, any potential claims that they might have against CEPA.

As to any possible claims[6], the non-settling defendants are adequately ***133** protected by the judgment reduction provision in the Bar Order in the Main Action, which credits the non-settling defendants for amounts contributed to the settlement by CEPA, and the identical judgment reduction provision in the Bear Stearns Action. Each provides that the plaintiffs will reduce any judgment obtained against a non-settling defendant by the greater of (1) the amount of the settling defendant's payment (known as the "pro tanto" method of reduction) or (2) the proportional share of the damages attributable to the settling defendant as may be determined by the court or the trier of fact at trial (known as the "proportionate share" method). The Supreme Court has endorsed the proportionate share method in admiralty suits for damages and expressed its disfavor for use of the pro tanto method, even if supplemented with good faith hearings. *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994). *See also Bragger v. Trinity Capital Enter. Corp.,* 30 F.3d 14, 17 (2d Cir.1994) (noting, after vacating as moot a district court pro tanto bar order entered in a securities fraud action, that it would be "unwise" to leave standing a pro tanto bar order in light of *McDermott*).

The judgment reduction provision in the Bar Orders proposed here adequately protects the non-settling defendants because it provides them the "greater of" the pro tanto and the proportionate share methods. *Cf. In re Masters Mates & Pilots Pension Plan,* 957 F.2d 1020, 1031 (2d Cir.1992) (disapproving of a settlement bar that provided for the "lesser" of the pro tanto and proportionate share judgment reduction methods because the settlement "provide [d] for a judgment reduction that may be less than the amount paid by the settling defendants" and because the district court did not make a "proper determination that the settlement would compensate [the non-settling defendant] fairly for his lost right to contribution."). Here, the concerns expressed by the court in *Masters* do not arise. As the court in *Resolution Trust Corp.,* 925 F.Supp. at 168, found, under New York's settlement bar rule, N.Y. General Obligations Law § 15–108(b),[7] "there is no need for a fairness hearing because even if a plaintiff settles for too little, the non-settling defendant is still entitled to a credit equal to the settling defendant's proportionate share of fault."

The policy in favor of settlement is strong. I find that the judgment reduction provision here preserves the non-settling defendants' rights while assuring that those parties who wish to settle can do so.[8]

CONCLUSION

For the preceding reasons, the motions to enter Bar Orders in the Main Action, 95 CV 3989, and the Bear Stearns Action, 98 CV 4006 are granted. Pursuant to Fed.R.Civ.P. 54(b), the court finds that there is no just reason for delay and the Clerk of Court is directed to enter the Final Judgments and Bar Orders in these two actions.

SO ORDERED.

FINAL JUDGMENT AND BAR ORDER

Plaintiffs Local 875 I.B.T. Pension Fund (the "Fund"), and Louis Smith ("Smith") ***134** and Steven Gilman ("Gilman") as trustees having agreed to a settlement in principal of the second above-captioned action, enumerated 98 Civ. 4006(NG)(MLO) (the "Bear Stearns Action"), as between themselves and defendant Bear, Stearns & Co. Inc., ("Bear Stearns"), only; and

The Fund, Smith and Gilman being plaintiffs in the other above-captioned related action brought in this Court, enumerated 95 Civ. 3989(NG)(MLO) (the "Main Action") (the Bear Stearns Action and the Main Action are collectively referred to as the "Related Actions"), which with the Bear Stearns Action allege that the Fund had suffered economic injury in the principal amount of $9.15 million, plus other damages (the "Economic Injury"), with respect to the Fund's investment in a purported "Prime Bank Note," allegedly as the result of the acts of the defendants in the Related Actions; and

The Fund and Bear Stearns having filed a joint motion (the "Joint Motion") seeking the entry of this Final Judgment and Bar Order with respect to the Related Actions; and

All parties in all the Related Actions having received notice of the Joint Motion; and

Good cause appearing therefor:

NOW THEREFORE, it is HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Bear Stearns Action, including all claims and all cross-claims, are hereby dismissed with prejudice and without costs to any party, as against Bear Stearns only.

2. Each and every one of the defendants in the Bear Stearns Action and the Amended Complaint in the Main Action, and these defendants' successors, representatives, and assigns, and anyone claiming any right through them or under them (individually a "Barred Party" and collectively the "Barred Parties"), are permanently barred and enjoined from presenting, in the Bear Stearns Action, the Main Action, or in any other action, any third-party claim, or any claim for contribution or indemnification, however denominated and regardless of the allegations, facts, law, theories, or principles on which it is based against Bear Stearns, or against any of Bear Stearns' past or present representatives, officers, directors, parent corporations, employees, attorneys or any of their past or present heirs, executors, administrators, predecessors, successors, representatives and assigns (collectively the "Bear Stearns Releasees") on account of any liability or payment by any such Barred Party to any of the plaintiffs in any of the Related Actions, or arising out of the Economic Injury, or arising out of any rights, claims, or causes of action, whether known or unknown, that was, is, or could have been asserted in the Related Actions, or any one of them.

3. Bear Stearns and anyone claiming any right under it or through it, including its successors, representatives and assigns, is permanently barred and enjoined from presenting in the Bear Stearns Action, the Main Action, or in any other action, any third-party claim, or any claim for contribution or indemnification, however denominated and regardless of the allegations, facts, law, theories, or principles on which it is based against the Barred Parties, or any of them, or any of their past or present representatives, officers, directors, parent corporations, employees, attorneys, or any of their past or present heirs, executors, administrators, predecessors, successors, representatives, and assigns, on account of the payment by Bear Stearns to any of the plaintiffs in any of the Related Actions, or arising out of the Economic Injury, or arising out of any rights, claims, or causes of action, whether known or unknown, that was, is, or could have been asserted in the Related Actions, or any one of them.

4. Notwithstanding the terms of paragraphs 2 and 3 above, the Bear Stearns Releasees shall retain the right to assert any and all counterclaims in any action ***135** subsequently commenced against any of the Bear Stearns Releasees regardless of whether said action relates to the Bear Stearns Action or the Main Action.

5. Notwithstanding the dismissal of Bear Stearns from the Bear Stearns Action, if any of the plaintiffs in either of the Related Actions (or any of their successors or assigns) secure a verdict against the Barred Parties, or any of them, in any of the Related Actions, or in any other litigation arising out of the Economic Injury, then the damages recoverable from the Barred Parties or the Barred Party, if any, shall be reduced by the greater of (a) the amount paid by Bear Stearns under the settlement referred to herein or (b) the proportional share of the Economic Injury attributable to Bear Stearns, as may be determined by the Court or the trier of fact at trial.

6. There being no just cause for delay, this Final Judgment and Bar Order shall be entered forthwith as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

FINAL JUDGMENT AND BAR ORDER

Plaintiffs Local 875 I.B.T. Pension Fund (the "Pension Fund"), and Louis Smith ("Smith") and Steven Gilman ("Gilman") as trustees having agreed to a settlement in principal of the first above-captioned action, enumerated 95 Civ. 3989(NG)(MLO) (the "Main Action"), as between themselves and defendant CEPA S.A., named in the complaint as Compagnie d'Etudes et de Participations S.A. ("CEPA"), only; and

The Pension Fund, Smith and Gilman being plaintiffs in the other above-captioned related action brought in this Court, enumerated 98 Civ. 4006(NG)(MLO) (the "Bear Stearns Action"), (collectively, the Main Action and the Bear Stearns Action are referred to as the "Related Actions"), which with the Main Action allege that the Pension Fund had suffered economic injury in the principal amount of $9.15 million, plus other damages (the "Economic Injury"), with respect to the Pension Fund's alleged investment in a purported "Prime Bank Note," allegedly as the result of the acts of the defendants in the Related Actions; and

Plaintiffs and CEPA having filed a joint motion (the "Joint Motion") seeking the entry of this Final Judgment and Bar Order with respect to the Related Actions; and

All parties in all the Related Actions having received notice of the Joint Motion; and

Good cause appearing therefor:

NOW THEREFORE, it is HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Main Action, including all claims and all cross-claims, are hereby dismissed with prejudice and without costs to any party, as against CEPA only.

2. Except for Frederick Gevers, each and every one of the defendants to each and every one of the Related Actions, and their successors, representatives, and assigns, and anyone claiming any right through them or under them (individually a "Barred Party" and collectively the "Barred Parties"), are permanently barred and enjoined from presenting, in the Main Action, the Bear Stearns Action, or in any other action, any third-party claim, or any claim for contribution or indemnification, however denominated and regardless of the allegations, facts, law, theories, or principles on which it is based against CEPA, or against any of CEPA's past or present representatives, officers, directors, parent corporations, units, divisions, shareholders, members, employees (except Frederick Gevers), attorneys and their staff, or any of their past or present heirs, executors, administrators, predecessors, successors, or assigns, on account of any liability or payment by any such Barred Party to any of the plaintiffs in any of the Related Action, or arising out of the Economic ***136** Injury, or arising out of any rights, claims, or causes of action, whether known or unknown, that was, is, or could have been asserted in the Related Actions, or any one of them.

3. CEPA, and anyone claiming any right under it or through it, including its past or present representatives, officers, directors, parent corporations, units, divisions, shareholders, members, employees (except Frederick Gevers), attorneys and their staff, or any of their past or present heirs, executors, administrators, predecessors, successors, or assigns, is permanently barred and enjoined from presenting in the Main Action, the Bear Stearns Action, or in any other action, any third-party claim, or any claim for contribution or indemnification, however denominated and regardless of the allegations, facts, law, theories, or principles on which it is based against the Barred Parties, or any of them, or any of their past or present representatives, officers, directors, parent corporations, subsidiaries, units, divisions, shareholders, employees, or any of their past or present heirs, executors, administrators, predecessors, successors, or assigns, on account of the payment by CEPA to any of the plaintiffs in any of the Related Actions, or arising out of the Economic Injury, or arising out of any rights, claims, or causes of action, whether known or unknown, that was, is, or could have been asserted in the Related Actions, or any one of them.

4. The terms and conditions of paragraphs 2 and 3 hereto do not apply to defendant Frederick Gevers, and it is expressly understood that CEPA may assert claims for contribution and indemnification, as well as independent claims, against Frederick Gevers, including but not limited to claims in connection with CEPA's settlement with and payment to any of the plaintiffs in the Main Action and/or the Economic Injury, and that Frederick Gevers is similarly not barred from asserting claims against CEPA.

5. Notwithstanding the terms of paragraphs 2 and 3 above, CEPA shall retain the right to assert any and all counterclaims against any party who is not a Barred Party and/or against any party who is found by any Court not to be subject to the terms of this Bar Order, in any action subsequently commenced against CEPA or any of CEPA's past or present representatives, officers, directors, parent corporations, units, divisions, shareholders, members, employees (except Frederick Gevers), attorneys and

their staff, or any of their past or present heirs, executors, administrators, predecessors, successors, or assigns, regardless of whether said action relates to the Related Actions, or any of them.

6. Notwithstanding the dismissal of CEPA from the Main Action, if any of the plaintiffs in any of the Related Actions (or any of their successors or assigns), secure a verdict against the Barred Parties, or any of them, in any of the Related Actions, or in any other litigation arising out of the Economic Injury, then the damages recoverable from the Barred Parties or the Barred Party, if any, shall be reduced by the greater of (a) the amount paid by CEPA under the settlement referred to herein or (b) the proportional share of the Economic Injury attributable to CEPA, as may be determined by the Court or the trier of fact at trial.

7. There being no just cause for delay, this Final Judgment and Bar Order shall be entered forthwith as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

All Citations

49 F.Supp.2d 130

Footnotes

1 Additional related actions, *Local 875 I.B.T. Pension Fund, et al., v. Albert DeAngelis, et al.,* 96 CV 5253, and *Ricklin v. DeAngelis,* 97 CV 3471, consolidated at 96 CV 5253, were dismissed pursuant to a Stipulation and Order dated February 4, 1999.

2 Plaintiffs' ERISA claim against CEPA was dismissed in a prior opinion. *See Local 875 I.B.T. Pension Fund, et al. v. Pollack, et al.,* 992 F.Supp. 545, 569 (E.D.N.Y.1998).

3 The proposed Bar Order in the Main Action excludes contribution or indemnification claims by or against Frederick Gevers. In the Amended Complaint, plaintiffs allege that Gevers was an agent of CEPA. Because CEPA is not willing to relinquish either its independent or its third-party claims against Gevers, plaintiffs and CEPA have agreed to exclude Gevers from the effect of the Bar Order. On April 15, 1998, plaintiffs filed a motion for entry of a default judgment against Gevers, which was granted as to liability on July 2, 1998.

4 Pursuant to an order dated December 3, 1997, Stephen Hale, Esq. withdrew as defendant Infinity's attorney and no other counsel has filed an appearance with this court. Although Peterson purports to act on behalf of Infinity, a corporation cannot appear before this court if it is not represented by counsel. *See, e.g., Eagle Assocs. v. Bank of Montreal,* 926 F.2d 1305, 1308 (2d Cir.1991); *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A.,* 782 F.2d 329, 336 (2d Cir.1986).

5 Defendants Pollack, Horowitz and Horowitz & Pollack, P.C., withdrew their opposition to the Bar Order in the Main Action. All claims against defendants Stewart N. Altman, and Stewart N. Altman & Associates, P.C. in this action have been dismissed with prejudice. *See* Stipulation and Order of December 22, 1998.

6 As a matter of law, many potential claims for contribution or indemnification are unavailable. As noted in the text at p. 132, no ERISA claims are available; and there is no right to contribution or indemnification under RICO. *See, e.g., Sequa Corp. v. Gelmin,* 851 F.Supp. 106, 108 (S.D.N.Y.1994); *Friedman v. Hartmann,* 787 F.Supp. 411, 417–18 (S.D.N.Y.1992). N.Y. General Obligations Law § 15–108(b) precludes common law contribution claims by the non-settling defendants, *see infra* p. 133, and the non-settling defendants have not identified any ground for indemnification. *See generally Resolution Trust Corp. v. Young,* 925 F.Supp. 164, 168 (S.D.N.Y.1996); *Stanley v. Bertram–Trojan, Inc.,* 781 F.Supp. 218, 220 (S.D.N.Y.1991).

7 This settlement bar rule, which is identical to the judgment reduction provision at issue here, provides that, when one defendant settles, any remaining defendants are chargeable with the total verdict less the amount attributable to the settling defendant's percentage share, or the amount paid by the settling defendant, whichever is greater.

8 In *TBG, Inc. v. Bendis,* 36 F.3d 916, 926 (10th Cir.1994), the majority of a Tenth Circuit panel expressed concern about whether a district court would have jurisdiction to enter a bar order adopting a proportionate share method where the non-settling defendants had not filed cross-claims for contribution. While that is the case here, I agree with Justice White's concurring opinion in *TBG, Inc.,* 36 F.3d at 933–35, which found authority in the district courts to enforce bar orders and settlement agreements that provide for a proportionate share credit to non-settling defendants.

Tab 4

2008 WL 2789766
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Kenneth CARROLL, et al., Plaintiffs,
v.
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P., et al., Defendants.

No. 05 Civ. 391(LAK).
|
July 16, 2008.

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, District Judge.

***1** Plaintiffs filed the instant action against plaintiffs' former lawyers, accountants, and financial advisors to recover losses allegedly incurred as a result of plaintiffs' investment in an invalid investment and tax strategy. Defendant Graf Repetti & Co., LLP ("Repetti") filed cross-claims for contribution and indemnification against its co-defendants.

The Court stayed this action pending the arbitration of plaintiffs' claims against certain defendants and others.[1] While the arbitration was pending, plaintiffs reached settlement agreements with five groups of defendants/intervenors ("the settling defendants"): (1) defendants LeBoeuf, Lamb, Greene & MacRae, LLP and Graham Taylor (collectively, "LeBoeuf"); (2) defendants Sidley Austin Brown & Wood LLP, SABW Holding LLP, R.J. Ruble, and Family Investment Statutory Trust (collectively, "Sidley"); (3) defendant HarrismyCFO, Inc. ("HMC"); (4) defendant Grant Thornton LLP ("Grant Thornton"); and (5) intervenors STARS Holding Co. and STARS Service Co. (collectively, "STARS"). Before the Court are four motions seeking entry of a bar order.[2]

Facts

The Agreements & Subsequent Motions

Sidley. Plaintiffs and Sidley reached a settlement agreement on July 26, 2007. The agreement provided, *inter alia,* that (1) Sidley would pay the plaintiffs some amount within five business days of the execution of the agreement and (2) the plaintiffs would dismiss this action within three business days of receiving Sidley's payment. On August 3, 2007, plaintiffs notified the court that they "voluntarily dismiss all claims asserted herein against [Sidley] pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, with prejudice."[3] On February 15, 2008, Sidley moved for "Judgment and Bar Order."[4]

Grant Thornton. Plaintiffs and Grant Thornton reached a settlement agreement on August 8, 2007. The agreement provided, *inter alia,* that (1) Grant Thornton would pay the plaintiffs some amount, (2) the plaintiffs released Grant Thornton from any and all claims, and (3) the plaintiffs would dismiss with prejudice the pending arbitration demand. On August 16, 2007, plaintiffs and Grant Thornton stipulated and agreed that the action filed in this court was dismissed with prejudice as to Grant Thornton.[5] On February 22, 2008, Grant Thornton moved for "Judgment and Bar Order ."[6]

LeBoeuf. Plaintiffs and LeBoeuf reached a settlement agreement on August 22, 2007. The agreement provided, *inter alia,* that "[u]pon the federal court's entry of a final court order and judgment ... and dismissing the federal action as to LeBoeuf with prejudice, [plaintiffs] shall notify [the arbitration panel] of the dismissal with prejudice of the Actions as to LeBoeuf. If the motion for bar order is denied by the court ..., this Agreement shall be null and void." On September 10, 2007, LeBoeuf, joined by plaintiffs, moved for "Entry of Final Judgment and Bar Order."[7] Having received no objections to the proposed order, the Court entered the "Bar Order" on October 16, 2007.[8]

***2** *HMC.* Plaintiffs and HMC reached a settlement agreement on November 13, 2007. The agreement provided, *inter alia,* that "[w]ithin five (5) business days of the federal court's entry of a final court order and judgment in the Action ..., the [plaintiffs] shall notify [the arbitration panel] of the dismissal with prejudice of the ... Arbitration as to [HMC]. If the motion for bar order is denied by the court ..., this Agreement shall be null and void." On January 16, 2008, HMC, joined by plaintiffs, moved for "Entry of Bar Order and Final Judgment."[9]

STARS. Plaintiffs and STARS reached a settlement agreement on December 17, 2007. The agreement provided, *inter alia,* that "[w]ithin five days of: (1) the federal court's entry of an order permitting [STARS's] intervention in the Action and (2) a final court order and judgment ... barring all claims for contribution and indemnity and dismissing the federal action as to [STARS] with prejudice, the [plaintiffs] shall notify [the arbitration panel] of the dismissal with prejudice of the [arbitration] as to [STARS]. If either the motion for intervention and/or bar order are denied by the court ..., this Agreement shall be null and void." On January 24, 2008, the Court "So Ordered" a stipulation allowing STARS "to intervene and appear in this Action for the limited purpose of moving the court for a Bar Order and Final Judgment."[10] On February 21, 2008, STARS, joined by plaintiffs, moved for "Entry of Final Judgment and Bar Order."[11]

The Proposed Bar Orders

The substantive terms of the four proposed bar orders are similar to each other and to the bar order entered by the Court as to defendant LeBoeuf. Each would: (1) bar claims for contribution or indemnification (and other claims that seek the same substantive relief) against the settling defendant by the non-settling defendants or others who are or may be liable to plaintiffs, (2) reciprocally bar any such claims by the settling defendant against the non-settling defendants, and (3) reduce a non-settling defendant's liability for any judgment rendered against them by the greater of (a) the settlement amount paid by the settling defendant or (b) the amount corresponding to the percentage of responsibility for plaintiffs' injuries that the trier of fact determines is attributable to the settling defendant.

Defendants Brichke and Repetti object to the proposed bar orders. They complain that (1) the proposed bar orders are overbroad to the extent they would bar indemnification claims, (2) the moving parties have not shown that the proposed settlements are fair and equitable and were negotiated in good faith, and (3) they cannot ascertain their percentage of responsibility for plaintiffs' alleged damages.

Discussion

As an initial matter, the Court is not persuaded by the moving parties' argument that the PSLRA mandates entry of the proposed bar orders. Under the PSLRA, "[a] covered person who settles any private action ... shall be discharged from all claims for contribution brought by other persons" and any judgment entered against a non-settling defendant "shall be reduced by the greater of (i) an amount that corresponds to the percentage of responsibility of that covered person; or (ii) the amount paid to the plaintiff by that covered person."[12] The PSLRA requires the court, upon entry of a settlement, the court to enter an order "bar[ring] all future claims for contribution arising out of the action" by or against the settling covered person.[13] By its terms, these provisions apply when "covered person ... settles any private action," and a "covered person" is "a defendant in any private action arising under this chapter."[14] The action before this Court does not arise under the PSLRA. The settling defendants therefore are not covered persons, and the mandatory bar order provisions of the PSLRA are inapplicable.

***3** A district court has discretion to approve settlement and enter bar orders in non-PSLRA cases.[15] " '[A] district court may properly bar claims of non-settling defendants against settling defendants for contribution and indemnity' ... if [the bar order] ensure[s] fairness to non-settling defendants."[16]

In this case, the proposed judgment reduction provisions are sufficient to ensure fairness to the non-settling defendants. "[W]hen the judgment credit is 'at least the settling defendants' proven share of liability,' a court is assured that a proposed bar order is fair and that the non-settling defendants are adequately protected."[17] Furthermore, the proposed bar orders do not extinguish independent claims-viz. "claims for which damages sought do not consist of 'the non-settling defendant's liability to the plaintiff.' "[18]

Brichke and Repetti contend that the proposed bar orders extinguish impermissibly their claims for indemnification against the settling defendants. As an initial matter, Brichke and Repetti appear to have no viable indemnification claims against the settling defendants.[19] Under both New Jersey and New York law, "a claim for indemnification arises only under an express contract of indemnification, or where one defendant is held vicariously liable for the negligence of another."[20] Brichke and Repetti do not claim to have an express contract of indemnification with any of the settling defendants and the complaint does not seek to hold Brichke and Repetti vicariously liable for the acts of the settling defendants. In these circumstances, where "no viable indemnification claim is possible, a court may issue an order barring such an indemnification claim."[21] In any case, to the extent either Brichke or Repetti has a viable indemnification claim based on its vicarious liability for a settling defendant's conduct, that claim is adequately compensated by the judgment reduction credit.

Brichke's and Repetti's remaining objections regard the fairness and good faith of the settlement proceedings. The Court need not inquire into the fairness and good faith of the settlement because the judgment reduction formula protects the non-settling defendants against collusive or unfair settlement.[22] Nor is the Court persuaded that the settlement is unfair because Brichke and Repetti do not know, at this time, what portion of liability they will bear for the plaintiffs' alleged damages. Their portion of liability and the extent of plaintiffs' damages, if any, will be determined subsequently.

Conclusion

The pending motions seeking bar orders are granted.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2789766

Footnotes

1 All but three of the defendants-Jay A. Bricnke, CPA, LLC, Jay A. Bricnke (collectively, "Bricnke") and Repetti-participated in the arbitration. STARS Holding Co. and STARS Service Co.-intervenors in this case-also participated in the arbitration.

2 DI 175 (motion of plaintiffs and HMC); DI 193 (motion Sidley); DI 205 (motion of Grant Thornton); DI 209 (motion of plaintiffs and STARS).

3 DI 165.

4 DI 193.

5 DI 166. The Court "So Ordered" this stipulation on August 31, 2007.

6 DI 205.

7 DI 167.

8 DI 172.

9 DI 167.

10 DI 179.

11 DI 209.

12 15 U.S.C. § 78u-4(f)(7).

13 *Id.*

14 15 U.S.C. § 78u-4(f)(10)(C).

15 *See, e.g., Allstate Ins. Co. v. Halima,* No. 06 Civ. 1316(DLI), 2008 WL 2673333, at *1 (E.D.N.Y. June 26, 2008); *Sherleigh Assoc. Inc. v. Patron Systems, Inc.,* No. 04 Civ. 907(JFK), 2005 WL 1902844 (S.D.N.Y. Aug. 9, 2005); *Local 875 I.B.T. Pension Fund v. Pollack,* 49 F.Supp.2d 130, 133 n. 2 (E.D.N.Y.1999); *FDIC v. Bober,* Nos. 95 Civ. 9529, 96 Civ. 103, 98 Civ. 6083(JSM), 1999 WL 440779 (S.D.N.Y. June 29, 1999); *Resolution Trust Corp. v. Young,* 925 F.Supp. 164 (S.D.N.Y.1996); *FDIC v. Abel,* No. 92 Civ. 9175(JFK), 1995 WL 716729 (S.D.N.Y. Dec. 6, 1995); *Morin v. Trupin,* Nos. 88 Civ. 5743, 90 Civ. 3475(RWS), 1993 WL 248802 (S.D.N.Y. June 29, 1993).

16 *Allstate Ins. Co.,* 2008 WL 2673333, at *1 (quoting *Denney v. Deutsche Bank A.G.,* 443 F.3d 253, 273 (2d Cir.2006) and citing *Gerber v. MTC Elec. Techs. Co.,* 329 F.3d 297, 305 (2d Cir.2003)); *see also In re Parmalat Sec. Litig,* No. 04 MD 1653(LAK)(DLC), 2007 WL 541466, at *10 (S.D.N.Y. Feb. 22, 2007) (citing *In re WorldCom, Inc. ERISA Litig.,* 339 F.Supp.2d 561, 568 (S.D.N.Y.2004)).

17 *In re Parmalat Sec. Litig.,* 2007 WL 541466, at *11 (quoting *Gerber,* 329 F.3d at 303); *also Allstate Ins. Co.,* 2008 WL 2673333, at *1.

18 *Allstate Ins. Co.,* 2008 WL 2673333, at *2 (quoting *Gerber,* 329 F.3d at 306).

19 There is some disagreement over whether New York of New Jersey law governs indemnification claims. Although Brichke and Repetti argue that New Jersey law should apply, they address only New York law of indemnification. But the Court need not resolve this dispute because New York and New Jersey law of indemnification are the same for all purposes relevant to these motions.

20 *Resolution Trust Corp.,* 925 F.Supp. 164 (applying New York law); *see Ferriola v. Stanley Fastening Systems, L.P.,* No. 04 Civ. 4043(JEI), 2007 WL 2261564, at *2 (D.N.J. Aug. 1, 2007) (applying New Jersey law); *New Jersey Office Supply, Inc. v. Feldman,* No. 89-3990, 1990 WL 74477, at *4 (D.N.J. June 4, 1990) (citing *Ramos v. Browning Ferris Industries,* 103 N.J. 177, 190-91 (1986)) (same).

21 *Sherleigh Assoc. Inc. v. Patron Systems, Inc.,* No. 04 Civ. 907(JFK), 2005 WL 1902844, at *3 (S.D.N.Y. Aug. 9, 2005).

22 *Allstate Ins. Co.,* 2008 WL 2673333, at *1 (quoting *Local 875 I.B.T. Pension Fund v. Pollack,* 49 F.Supp.2d 130, 133 n. 2 (E.D . N.Y.1999)).

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Tab 5

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Court of Appeal for Ontario

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1) Certainty of Intention

To satisfy the certainty of intention requirement, the court must find an intention that the trustee is placed under an imperative obligation to hold property on trust for the benefit of another. Certainty of intention is a question of construction; the intention is inferred from the nature and manner of the disposition considered as a whole. The language employed must convey more than a moral obligation or a mere wish as to what is to be done with certain property. The language used need not be technical, so long as the intention to create a trust can be found or inferred with certainty. The words of request, as well as the entire document as a whole, must be considered in determining whether the requisite intention exists. Two examples will assist in illustrating the certainty of intention requirement and in underscoring the process by which documents are construed.

EXAMPLE 1: **In her will, X leaves all her property to her spouse and states that her spouse is to "pay my debts and raise the family." Is there certainty of intention? That is, must the spouse hold the property in trust for the children?**[2]

EXAMPLE 2: **Y leaves all his property to his spouse and states that if the spouse dies soon after he does, the spouse is to leave all her property "to my people and your people." Is there certainty of intention? Must the spouse hold the property in trust for the two families?**[3]

In Example 1, the court held that the spouse had a life estate and that the remainder was to be held for the children in equal shares. In Example 2, the court held that the spouse took absolutely. In construing the documents, the courts looked at not only the provisions set out in the examples but the whole of the wills. In the first example, there were other statements to the effect that the children were to take their shares upon reaching the age of twenty-one. In the second example, Y had attempted to direct how all the spouse's property was to be dealt with, not only the property he had left her; the court saw this as indicating that the language was precatory and not obligatory in flavour.

What is the result if, on construction, it is found that no certainty of intention exists? To answer this question, one must determine what was intended. If the intention was that the "trustee" receive an outright gift, then the "trustee" will take absolutely rather than as trustee; the rules determining ownership in this situation are those that govern

2 This example is based on *Re Shamas*, [1967] 2 OR 275 (CA).

3 This example is based on *Johnson v Farney*, (1913), 29 OLR 223 (SCAD).

gifts, not trust law. If it was intended that the holder of the property was to have a power of appointment over it, then the persons entitled in default of exercise of the power will take. In this situation, the rules that are relevant are those related to powers, not trusts.

2) Certainty of Subject Matter

The certainty of subject matter requirement has two components. First, a trust must have property that can be clearly identified as its subject matter. Second, the terms of the trust must define the portion each beneficiary is to receive or must vest the discretion to so decide in the trustees.

Even if the language used in the trust instrument illustrates a clear intention to create a trust, no trust exists unless the subject matter of the trust is ascertained or ascertainable. It must be possible to determine precisely what property the trust is meant to encompass. The subject matter is ascertained when it is a fixed amount or a specified piece of property; it is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise. For example, the "residue" of an estate is ascertainable because it has been legally defined as the estate's assets minus debts and legacies.

All property is capable of being the subject matter of a trust. The word "property" includes all equitable and legal interests in realty or personalty. So, for example, an equitable interest under a trust is property and is capable of forming the subject matter of a further trust. So, too, the benefit of a contract is a property right capable of forming the subject matter of a trust.

A trust will fail and the property will result[4] to the creator's estate if the quantum of the beneficial shares is uncertain. However, the requirement of certainty of quantum of the beneficiaries' interest is unusual because the courts have accepted that this kind of uncertainty can be cured. The first "cure" is when the creator gives the trustees the discretion to decide quantum. This authority must be given expressly, since the courts will not imply such a discretion. Second, in appropriate circumstances, the court will rely on the equitable maxim "equity is equality" to cure uncertainty of quantum. A third possible cure for uncertainty was set down in *Re Golay*.[5] In the *Golay* case, a testator directed his executors to give a person "reasonable income from my

4 "Result" means that the trustee will hold the property for the benefit of the settlor and must ultimately return the property to the settlor.

5 [1965] 2 All ER 660 (Ch) [*Golay*].

It is correct to say that, in such circumstances, a debtor may call for the return of the property. However, it is not a true exception to the rule against revocation of trusts. The debtor is free to revoke because no trust is ever created.[3] The courts have held that the necessary intention to create a trust is lacking because the debtor never intended that equitable title pass to the creditors. Rather, the courts have found that such arrangements are intended to benefit the debtors themselves. In the absence of the requisite certainty of intention, no trust is created, the creditors never acquire an interest in the property, and there is, therefore, no reason why the debtor may not revoke.

An alternative explanation for the debtor's right to revoke is that the trust was created with the debtor as beneficiary. The trustee is to pay third parties for the benefit of the debtor. On this analysis, the debtor can wind up the trust and obtain the trust property under the rule in *Saunders v Vautier* because he or she is *sui juris* and the sole beneficiary.

If creditors join as parties to the conveyance, then the debtor is precluded from recovering the funds. So, too, where the creditors have notice of the trust and forbear from suing, because, in essence, the parties have given consideration for the transfer of the property.

If a trust is set up for the benefit of named creditors, the settlor cannot revoke, because the creditors become beneficiaries at the time of the creation of the trust. No communication is necessary, since the particular creditors' rights arise in the normal way.[4]

3) Reserving a Power of Revocation

Three problems may arise as a result of reserving a power of revocation at the time the trust is created. First, it may create problems in relation to intention. When a settlor retains a power of revocation, it is sometimes difficult to know whether the requisite certainty of intention existed. The transfer of property to the trustee may be held to show an intention that an equitable interest pass to a beneficiary until such later time as the settlor decides to revoke. If so, a valid trust with a power of revocation has been created. Such a trust is like a gift made subject to a condition subsequent. However, the power of revocation may suggest that the settlor never intended equitable title to pass. If he or she did not, then the trustee merely holds the funds as agent for the settlor, and no trust arises. To carry through the analogy to a gift, this is equivalent

3 *Bill v Cureton* (1835), 2 My & K 503, 39 ER 1036 (Ch).

4 See *Thomson v Merchants Bank of Canada* (1919), 58 SCR 287, for a discussion of the distinctions between trusts for creditors generally and those for particular creditors.

to cases in which the courts have held that no gift was made because the necessary intention to give was lacking.

A second problem can arise where the settlor retains a power of revocation that can be exercised until death. It is unclear whether, in such circumstances, the trust is testamentary or *inter vivos*. If it is testamentary, then it must comply with the formalities required of wills. In brief, this means that it must be in writing and witnessed. *Inter vivos* trusts are not subject to the same formality requirements; for that reason alone it is important to know from the outset whether a trust is *inter vivos* or testamentary.

To determine whether a trust is *inter vivos* or testamentary, it is necessary to determine whether the instrument is dependent on the settlor's death for "its vigour and effect."[5] If so, it is testamentary; if not, it is *inter vivos*. A power of revocation (unless expressed to be for a limited duration) may be exercised at any time until the settlor's death. At the time of death, the power also "dies," as there is no one who can exercise it thereafter. Thus the question becomes, Is there an *inter vivos* trust that takes immediate effect, but, because of the power of revocation, will not be performed until after the death of the settlor? Or is the trust testamentary, since it is dependent on the settlor's death for its effect?

EXAMPLE: A settlor transferred money to P to be held in trust for himself and "if anything should happen" to the settlor, for his two friends. He reserved the right to call for the return of the money at any time. He died and the question was, Where should the money be paid? To his estate or to the two friends?[6]

A majority of the Alberta Court of Appeal declared this to be a fully constituted *inter vivos* trust. The right to call for the return of the funds was a power of revocation, and not a stipulation as to when the trust was to take effect. Because the trust was a valid *inter vivos* one, it was not struck down for failing to comply with the formalities requirements of wills. The dissent held that because the settlor was entitled to demand the return of the funds at any time, no valid trust was created *inter vivos*, and, further, as the instrument was dependent on the settlor's death for effect, the disposition was testamentary in character and ineffective, for failure to comply with the necessary formalities.

No firm answer can be given as to which of the two constructions will be adopted, since the courts have accepted both.

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5 *Cock v Cooke* (1866), LR 1 P & D 241 at 243 (Ct Prob).

6 *Anderson v Patton*, [1948] 2 DLR 202 (Alta CA).

A third problem that arises from placing a power of revocation in a trust document is that for tax purposes, the settlor is treated as having not alienated the property, so that the income and capital remain the settlor's; any income arising in the trust may be deemed to accrue to the settlor.

An alternative to reservation of a power of revocation in favour of the settlor is to name the settlor as a trustee. This device would not empower the settlor to call for the return of the trust property but would give the settlor a voice in the administration of the trust, without encountering the tax problem outlined above. Of course, the settlor as trustee would be a fiduciary and, therefore, subject to strict limits, including the restriction that decisions be made solely and exclusively in the best interests of the beneficiaries and not according to the settlor's priorities.

4) The Rule in *Saunders v Vautier*[7]

EXAMPLE: A man dies. Under his will, he leaves stock worth £2500 in trust for his great-nephew. He stipulates in his will that his great-nephew is not to be given the stock until he turns the age of twenty-five. The great-nephew reaches the age of majority and, through the assistance of the courts, compels the trustee to transfer the stock to him, plus accrued interest and dividends.

These are the facts of *Saunders v Vautier*. The case created a new right for trust beneficiaries. The proposition of law for which the case stands can be stated as follows: A beneficiary who is *sui juris* and absolutely entitled can require the trustee to make an immediate distribution of the trust property and thereby terminate the trust prematurely.[8] Absolute entitlement means that the beneficiary's interest is vested and represents the full (actual and possible) beneficial interest.

The *Saunders v Vautier* principle has been extended to trusts for more than one beneficiary, whether entitled successively or concurrently, or both, so long as together all beneficiaries account for the full beneficial interest. Even when the principle is used in this extended sense, it is referred to as the rule in *Saunders v Vautier*.

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7 (1841), 4 Beav 115, 49 ER 282, aff'd (1841), 1 Cr & Ph 240, 41 ER 482 (Ch).

8 See an early consideration of the rule by the Supreme Court of Canada in *Halifax School for the Blind v Chipman*, [1937] SCR 196. As discussed below, the rule in *Saunders v Vautier* has been abolished in Alberta and Manitoba through legislation. Where the rule in *Saunders v Vautier* would have otherwise applied, legislation in Alberta and Manitoba makes termination subject to judicial discretion. See *Trustee Act*, RSA 2000, c T-8, s 42; *The Trustee Act*, CCSM c T160, s 59(2). The rule applies throughout the balance of common law Canada.

Court File No. CV-20-00638930-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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