

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

WARD KLUGMANN, Individually and on)
behalf of all others similarly situated,)

Plaintiff,)

v.)

Civil Action No. 8:09-CV-00005-PJM

AMERICAN CAPITAL, LTD., MALON)
WILKUS, JOHN R. ERICKSON,)
IRA WAGNER, SAMUEL A. FLAX, and)
RICHARD E. KONZMANN,)

Defendants.)

**MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR AN ORDER APPROVING
THE FINAL DISTRIBUTION OF THE SETTLEMENT FUND AND APPROVING PAYMENT
OF SETTLEMENT ADMINISTRATION COSTS**

On behalf of the Settlement Class,¹ Plaintiffs Charles E. Mendinhall, Ron Miller, Joseph J. Saville, Kent Nixon and Nina van Dyke (collectively, “Plaintiffs”) respectfully request that this Court enter the [Amended Proposed] Order Approving the Final Distribution of Settlement Fund and Approving Payment of Settlement Administration Costs (the “Distribution Order”), which will:

- (1) Approve the procedures used and actions taken by the Garden City Group (“GCG”) and Settlement Class Counsel for the administration of the Settlement as described herein and in the Amended Affidavit of Jason Zuena In Support of Motion for Distribution of the Net Settlement Fund (“Zuena Affidavit”), attached as Exhibit 1 hereto;
- (2) Approve the fully or partially valid claims of Class Members (the “Authorized Claimants”) identified in the lists of Timely Authorized Claimants and Late Postmarked but Otherwise Authorized Claimants, included in Exhibit C to the Zuena Affidavit;

¹ Unless otherwise indicated, all capitalized terms have the same meanings as set forth in the Stipulation of Settlement dated February 9, 2012 (the “Stipulation” or “Stipulation of Settlement”).

- (3) Approve the rejection of claims determined to be deficient by GCG, as set forth in the list of Rejected or Ineligible Claims, included in Exhibit C to the Zuena Affidavit;
- (4) Approve the payment of unreimbursed fees and costs incurred by GCG, in the amount of \$754,884.04, as set forth in Exhibit D to the Zuena Affidavit;
- (5) Direct that distribution of the balance of the Net Settlement Fund be made to the those claimants whose claims are approved by the Court (“Authorized Claimants”);
- (6) Direct that distribution checks to Authorized Claimants shall bear the notation “Non-Negotiable After 180 Days,” and that no check shall be negotiated in the Net Settlement Fund more than 200 days after the date of the check;
- (7) Direct that if any balance remains in the Net Settlement Fund after six (6) months from the date of distribution of the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise), Settlement Class Counsel shall, if feasible, direct GCG to reallocate such balance among Authorized Claimants who deposited the checks sent in the initial distribution in an equitable and economic fashion. In the event that the amount of money remaining in the Net Settlement Fund is insufficient to justify the cost of a second distribution to Authorized Claimants, Settlement Class Counsel shall seek Court approval for an alternative distribution;
- (8) Allow destruction of claim forms, along with all related correspondence, one year after the final distribution of the Net Settlement Fund to Authorized Claimants and destruction of the Payable Claims and Non-Payable Claims Listings and the computer database (compiled from the claim forms and related correspondence) three years after the final distribution to Authorized Claimants.
- (9) Release and discharge GCG, Plaintiffs, Settlement Class Counsel, Defendants, Defendants’ Counsel and/or any persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Proof of Claim forms from any and all claims arising out of such involvement, and bar all Settlement Class Members from making any further claims against the Settlement Fund beyond the amount allocated to them pursuant to this Motion.

Defendants’ Counsel have advised Settlement Class Counsel that Defendants do not oppose this Motion.

BACKGROUND

On February 9, 2012, the parties executed the Stipulation, which settled this case for \$18 million. The Stipulation was filed with the Court in conjunction with the Parties’ Stipulation for Entry of an

Order Preliminarily Approving the Settlement (Dkt. No. 78). On February 22, 2012, this Court entered a Preliminary Approval Order (Dkt. No. 79), which was amended on March 14, 2012 in response to Plaintiffs' request (Dkt. No. 81). The Order preliminarily approved the Settlement and certified a Settlement Class, set a date for a final hearing and directed that notice be given to the Settlement Class.

As approved by the Court in the Preliminary Approval Order, Settlement Class Counsel retained GCG as the Claims Administrator to complete notice to the Class, to process the Proof of Claim forms submitted by Class Members and to distribute the Net Settlement Fund to Class Members whose claims have been accepted.

On May 10, 2012, Plaintiffs filed a Motion For Approval Of Class Action Settlement and a Motion for Attorneys' Fees (Dkt. No. 83). On June 5, 2012, Plaintiffs filed a Report on Requests for Exclusion from the Settlement Class and Objections to the Proposed Class Action Settlement (Dkt. No. 84).

The Court held a fairness hearing on June 7, 2012, and on June 13, 2012 issued an Order certifying the Settlement Class, approving the Settlement and Plan of Allocation and dismissing the action with prejudice (Dkt. No. 87). The Order also awarded attorneys' fees and expenses and approved reimbursement of Plaintiffs' expenses, and payment of the Claims Administrator's costs and expenses as of April 30, 2012. These payments were made in accordance with the terms of the Order. As of April 30, 2013, the amount of cash in the Net Settlement Fund was \$11,177,344.86.

Plaintiffs now respectfully seek Court approval to distribute the Net Settlement Fund.

SUMMARY OF THE CLAIMS

As of May 31, 2013, GCG has received and processed over 43,000 Proof of Claim forms in accordance with the terms of the Stipulation. The Zueno Affidavit, attached as Exhibit 1 hereto,

summarizes the disposition of these claims. Exhibit C to the Zuena Affidavit is a recapitulation of the claimed, disallowed and allowed Recognized Losses for all claims, timely and untimely, filed as of 5:00 p.m. on May 31, 2013.

Of the 41,388 timely-filed claims received to date, GCG determined that 21,691 were valid in whole or in part. The collective recognized loss for all of the valid, timely-filed claims is \$185,854,020.31. Zuena Affidavit, at ¶¶ 15-19. Of the 2,167 untimely-filed claims received, GCG determined that 1,258 were otherwise valid in whole or in part. The collective recognized loss for all of these otherwise valid, but untimely filed, processed claims is \$9,410,473.44. *Id.*

Of all of the claims received to date, GCG determined that 20,606 claims were deficient, for the following reasons:

1. 9,726 claims did not fit the definition of the Class.
2. 66 claims were duplicates of claims already filed.
3. 2,375 claims contained deficiencies which were never cured after notice to the Claimants.
4. 8,439 claims resulted in no recognized loss under the Court-approved Plan of Allocation.

Zuena Affidavit, at ¶ 20.

As set forth in Exhibit A (Samples of Deficiency and Rejection letters) to the Zuena Affidavit, each Claimant who filed a deficient claim, either in whole or in part, was sent a deficiency letter with an opportunity to “cure” the deficiency(s), which many claimants did. Zuena Affidavit, at ¶¶ 8-12. Claimants were also notified that they could challenge the Claims Administrator’s rejection of all or part of their claim, and request court review of that determination. *Id.* at ¶ 11. Only one claimant has made and maintained a request that the Court review the rejection of his claim. *Id.* at ¶ 12.

REQUEST FOR APPROVAL OF SETTLEMENT ADMINISTRATION FEES AND COSTS

GCG, under the direction of Settlement Class Counsel, was hired to mail copies of the Notice of Pendency and Settlement of Class Action, including the Proof of Claim, to Class Members, to cause the publication of the Summary Notices, to process all claims submitted by Class Members, to prepare the tax returns for the Settlement Fund, and to distribute the Net Settlement Fund to Authorized Claimants. As noted above, this Settlement required mailed notice to over a quarter million Class Members, and processing of more than 40,000 claims. GCG's unreimbursed fees and expenses amount to \$754,884.04. Zuena Affidavit, ¶25 and Exh. D. Plaintiffs respectfully requests that the Court authorize the payment of this amount from the Settlement Fund. If the Court grants this request, the balance of the Net Settlement Fund available for distribution will be approximately \$10,422,460.82.

REQUEST FOR APPROVAL OF PAYMENT OF CLAIMS

Plaintiffs respectfully requests that the Court approve the acceptance of all the pending 21,691 fully or partially valid claims which were timely filed in accordance with this Court's February 22, 2012 Preliminary Approval Order. The collective recognized loss of these 21,691 claims is \$185,854,020.31. Since the amount of the Net Settlement Fund (less GCG's requested administrative expenses), is \$10,422,460.82, payment of these claims, and ONLY these claims, would mean that each Settlement Class Member with an Approved Claim would receive approximately 5.6 percent of their recognized loss.

GCG has determined that of 2,167 untimely-filed claims received to date, 1,258 were otherwise valid in whole or in part. The collective recognized loss for all of the otherwise valid, but untimely filed, claims is \$9,410,473.44. Zuena Affidavit, at ¶¶ 15-19. If these claims are paid in addition to the timely-filed late claims, each claimant will receive approximately 5.3 percent of their recognized loss,

rather than 5.6 percent if the distribution is made only to Settlement Class Members who filed timely claims.

Paragraph 7.3(b) of the Stipulation provided that Settlement Class Counsel have “discretion to accept late-submitted claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund is not delayed thereby.” Since the payment of late claims will not appreciably change the percentage recovery of the Settlement Class as a whole, Settlement Class Counsel respectfully request that the Court approve payment of these claims on the same basis as the payment of timely claims. Further, Settlement Class Counsel recommend that the Court deny all claims that may be received by the Claims Administrator after the date of this Motion.

REQUEST FOR APPROVAL OF GCG’S DENIAL OF CLAIMS

Plaintiffs respectfully request that the Court approve GCG’s determination that approximately 20,606 claims should be denied, on the following bases:

1. 9,726 claims were filed by persons and entities that did not match the definition of the Settlement Class. The Settlement Class is comprised of:

All Persons who purchased the publicly-traded common stock of ACAS between October 31, 2007 and November 7, 2008, inclusive. Excluded from the Settlement Class are Defendants, members of Defendants’ immediate families, any entity in which any Defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded persons (all solely in their capacity as such and not otherwise). Also excluded from the Settlement Class are those Persons who make Requests for Exclusion that are approved by the Court.

Almost all of the 9,726 claims which did not meet this definition involved shares that were not purchased during the Settlement Class Period. Zueno Affidavit, ¶ 20.² Some claims were also

² The Settlement Class definition was limited to those who *purchased* during the Settlement Class Period in accordance with the U.S. Supreme Court’s decision in *Blue Chip Stamps v. Manor Drug*

filed on behalf of persons or entities that were claiming losses in securities other than those of American Capital. *Id.* Accordingly, these claims are not covered by the proposed settlement and should not be paid.

2. The Proof of Claim form provided to all Settlement Class Members specified the documentation needed to support a claim. While most claimants provided the necessary records, some did not. GCG contacted those whose documentation was inadequate and requested that the additional documents be provided. Many claimants responded to these follow-up requests and perfected their claims. However, 2,375 claims contained deficiencies which were never cured after notice to the Claimants. *Id.* Accordingly, GCG had no basis to conclude that these claimants had any recognized losses under the Plan of Allocation, and thus the claims should not be paid.

3. Sixty-six claims were duplicates of other claims that were filed, and thus should not be paid. *Id.*

4. Finally, 8,439 claims were filed by persons who purchased shares during the Settlement Class Period but who had no recognized loss under the Plan of Allocation. This generally occurred for one of two reasons: Either they actually made a profit on their trades in American Capital stock, or they sold all of their shares before the corrective disclosure at the end of the Settlement Class Period. *Id.*³ Such claimants cannot recover under the Plan of Allocation, which was written to conform to the Supreme Court's ruling in *Dura Pharmaceuticals, Inc. v. Broudo*,

Stores, 421 U.S. 723 (1975).

³ The Claim filed by the single Settlement Class Member who has requested Court review of the denial of his claim falls into this latter category: all of his shares of American Capital stock were sold prior to the end of the Settlement Class Period. Zuena Affidavit, ¶ 13.

544 U.S. 336 (2005), which requires a Plaintiff to have suffered a loss which is traceable to the alleged fraud.

REQUEST FOR BAR DATE ON FURTHER LATE-FILED CLAIMS

Settlement Class Counsel respectfully request that the Court order that no claims received by the Claims Administrator after 5:00 p.m. Eastern time on May 30, 2013 be considered for payment in the initial distribution requested herein. Any further submissions would require review, possibly follow-up to correct deficiencies, and a recalculation of all payments recommended for payment in this Motion – during which time still more claims could be filed. At this stage, accordingly, accepting further late claims will, in the opinion of Settlement Class Counsel, delay the distribution of Net Settlement Funds under Paragraph 7.3(b) of the Stipulation.

RELEASE OF CLAIMS

Plaintiffs respectfully requests that GCG, Plaintiffs, Settlement Class Counsel, Defendants, Defendants' Counsel and/or any persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Proof of Claim forms be released and discharged from any and all claims arising out of such involvement (the "Released Persons"), and that all Settlement Class Members, whether or not they are to receive payment from the Settlement Fund, be barred from making any further claims against the Settlement Fund or the Released Persons beyond the amount allocated to them by GCG pursuant to this Motion.

REQUEST FOR DISPOSITION OF CLAIMS ADMINISTRATOR'S RECORDS

Plaintiffs also request that the Distribution Order provide that one year after the final distribution of the Net Settlement Fund to the Authorized Claimants, GCG may destroy all claim forms and related correspondence. GCG would, however, retain all other administrative records, including copies of the

Payable Claims and Non-Payable Claims Listings and the computer database used to create these lists, for a period of three years after the final distribution of the Net Settlement Fund to the Authorized Claimants.

CONCLUSION

Settlement Class Counsel respectfully requests that the Court enter the [Amended Proposed] Order Approving the Distribution of the Settlement Fund and Approving Payment of Settlement Administration Costs.

Respectfully submitted:

Dated: May 31, 2013

BROWER PIVEN

A Professional Corporation

/s/ Yelena Trepetin

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