

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

IN RE KIT DIGITAL, INC. SECURITIES
LITIGATION

Civil Action No.
12-CV-4199 (AT)

**LEAD PLAINTIFF'S MEMORANDUM OF
LAW IN SUPPORT OF UNOPPOSED MOTION FOR
AN ORDER AUTHORIZING DISBURSEMENT OF THE NET SETTLEMENT FUND**

INTRODUCTION

Settlement of this action was approved by the Court in the Final Approval Order and Judgment, dated December 20, 2013 (“Final Judgment”) (attached hereto as Exhibit 1; Dkt. 103). Pursuant to the Final Judgment, the Court retained continuing jurisdiction over the implementation of the Settlement, including the “administration” and “effectuation” of the Settlement. Final Judgment ¶ 23.¹

Pursuant to the Court’s Preliminary Approval Order, Garden City Group, Inc. (“GCG” or the “Claims Administrator”), disseminated Notice to Class members who purchased or acquired KIT digital stock during the Class Period. After issuing the Notice, GCG received 6,022 Claims, 5,790 of which were timely submitted by the February 12, 2014 deadline, and 232 of which were late. GCG worked with Class members who had deficient Claims in an effort to cure their deficiencies. Only 2 Claimants currently dispute Lead Counsel and GCG’s determination of their Claims. As discussed below, both of these Claims should be rejected. *See infra* at 3-4.

Lead Counsel, on behalf of Lead Plaintiff the Houston Municipal Employees Pension System (“HMEPS”), and the Class, now seeks to distribute² the Net Settlement Fund to members of the Class.³ Lead Counsel also submits that, because there has been no prejudice to Claimants

¹ All capitalized terms not defined herein shall have the same meanings as set forth in the Stipulation of Settlement, dated July 30, 2013 (the “Stipulation”).

² Lead Counsel has conferred with counsel for Defendants, who do not oppose this motion.

³ The Class is defined as:

All Persons who purchased or otherwise acquired KIT stock during the Class Period, and who were allegedly damaged thereby. Excluded from the Class are Defendants, the officers and directors of the Company, members of the Individual Defendants’ immediate families, and any Person, firm, trust, corporation, officer, director, or other individual or entity in which any Defendant has, had, or will have a controlling interest or which is related to or affiliated with, through ownership of a controlling interest or common ownership of a controlling interest, any Defendant; also excluded from the Class are the legal representatives, heirs, administrators, successors-in-interest, or assigns of any such excluded party.

who submitted timely Claims, and because the number of Claimants who submitted late Claims is very small, the late Claimants discussed below should be included in the distribution of the Net Settlement Fund.

I. DETERMINATION OF AUTHORIZED CLAIMS

A. Only 2 of 6,022 Claimants Presently Contest Their Claims

Pursuant to the Notice, the deadline to submit a Proof of Claim and Release Form (“Claim Form”) was February 12, 2014. *See* Notice of Pendency of Class Action and Proposed Settlement, Settlement Fairness Hearing, and Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses, attached as Exhibit B-1 to the Stipulation. A total of 6,022 claims, including timely and untimely claims, were submitted. *See* Affidavit of Stephen Cirami, sworn to on November 21, 2014 (“Cirami Aff.”) ¶ 31.

Pursuant to the Stipulation and the Court’s prior orders, GCG, under the supervision of Lead Counsel, has determined which Claims submitted by Claimants are Authorized Claims. *See* Cirami Aff. ¶¶ 34, 38.

As stated in the Cirami Affidavit, the Claims Administrator established procedures for identifying and handling Claims that were deficient in whole or in part. If a Claim was determined to be wholly deficient (*e.g.*, the Claimant omitted documentation supporting the entire Claim or the Claim was determined not to have a Recognized Loss when calculated under the Court-approved Plan of Allocation), the Claims Administrator mailed to the Claimant a “Notice of Conditional Rejection of Your Entire Claim Letter,” which described the defect(s) with the Claim and the steps, if any, that could be taken to cure the deficiency(ies). The Claimant was notified that a failure to correct the deficiency would result in a recommendation

that the Claim be disallowed. If a Claim was determined to be partially deficient (*e.g.*, the Claimant omitted documentation supporting part of the Claim, or the Claimant failed to provide all transactional information), the Claims Administrator mailed to the Claimant a “Notice of Conditional Rejection of Part of Your Claim Letter,” which described the defect(s) with the Claim and the steps necessary to complete the Claim. Claimants were advised that the failure to cure would result in eligibility only to the extent the Claim was complete and documented. Cirami Aff. ¶¶ 15-24.⁴

Pursuant to the foregoing procedures, GCG sent 4,172 Deficiency Letters to Claimants who submitted a Claim. Of the 4,172 deficiency notices, 219 were Notice of Conditional Rejection of Part of Your Claim Letters and 3,953 were Notice of Conditional Rejection of Your Entire Claim Letters. Cirami Aff. ¶¶ 16, 17. Of the 4,172 deficiency letters, 266 Claimants contacted GCG, and 256 Claimants provided supplemental information, thus curing their deficiency with their claim. *Id.* ¶ 17. At this time, only two Claimants contest Lead Counsel and GCG’s determinations concerning their claims. As discussed below, the Court should approve Lead Counsel and GCG’s rejection of these two Claims.

1. Claimant No. 1

The first Claimant disputing rejection of his Claim submitted a Claim Form indicating that he bought 5,500 shares of KIT common stock on the Prague Stock Exchange in the currency Czech Korunas. Cirami Aff. ¶ 38(a). Under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010), claims under Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), like those here, do not apply to stock bought on foreign exchanges, such as the Prague

⁴ The Notice of Conditional Rejection of Your Entire Claim Letter and the Notice of Conditional Rejection of Part of Your Claim Letter are collectively referred to as the “Notice of Conditional Rejection” or the “Deficiency Letters”. See Cirami Aff. ¶ 17.

Stock Exchange. Accordingly, the Court should approve Lead Counsel and GCG's rejection of Claimant No. 1's Claim.

2. Claimant No. 2

The second Claimant disputing rejection of his Claim filed a Claim stating that he bought 6,000 shares of KIT common stock between May 5, 2010 and August 12, 2010 – but sold these shares between September 13, 2010 and October 8, 2010 – before any of the alleged corrective disclosures. *Cirami Aff.* ¶ 38(b); Notice at 5. Under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005), a viable claim under Section 10(b) of the Exchange Act generally requires a corrective disclosure and subsequent stock drop. Here, Claimant No. 2 bought and sold KIT stock before the truth allegedly began to be disclosed on March 14, 2012. *See Cirami Aff.* ¶38(b). Thus, Claimant No. 2 did not suffer any loss in connection with the alleged fraud. Accordingly, like that of Claimant No. 1, Claimant No. 2's Claim was also properly rejected.

B. Untimely but Otherwise Authorized Claims

The determination whether to allow the participation of late claimants in a class action settlement is essentially an equitable decision within the discretion of the court. *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS)(SMG), 2009 WL 803382, at *6 (E.D.N.Y. Mar. 25, 2009) (allowing late claimants to participate in the settlement “[b]ecause there is no showing of delay or prejudice”). As shown by the accompanying *Cirami Affidavit*, in addition to the 5,790 timely, 232 untimely, but otherwise valid Claims have been submitted. *Cirami Aff.* ¶ 31. These Claims represent a total Recognized Loss of \$632,884.38, out of a total Recognized Loss for all accepted Class members, whether timely or untimely, of \$250,754,316.67. *Id.* ¶ 33 and Ex. B-2 thereto. Because the untimely filing of these Claims has not caused significant delay to the distribution of the Net Settlement Fund or otherwise prejudiced any Claimant, and because the late claims comprise such a miniscule percentage (.25%, *see Cirami Aff.* ¶ 34) of total

claims, Lead Counsel requests that the Court approve payment of the untimely but otherwise proper Claims that GCG received through October 17, 2014. *See* Cirmi Aff. ¶¶ 7, 9; *In re Gilat*, 2009 WL 803382, at *6.

II. REQUEST FOR THE CLAIMS ADMINISTRATOR'S FINAL FEES AND EXPENSES

The deadline for submitting Claims, February 12, 2014, has passed. The Claims Administrator has now processed all Claims and has determined its fees and expenses for such processing and for distribution of the Net Settlement Fund – which will occur following the issuance of the proposed order submitted herewith. Cirmi Aff. ¶¶ 4, 47 and Ex. C thereto. The total amount of the Claims Administrator's fees and expenses relating to the administration of the Settlement Fund, which includes, without limitation, the amounts for giving notice of the Settlement to the Class, processing claims, paying taxes on the Settlement Fund, and distributing the Net Settlement Fund to the Claimants, is expected to be \$9,847.60. *See id.* ¶50. *See also* Cirmi Aff. ¶¶ 5-30 (describing complex and extensive work by Claims Administrator).

To date, the Claims Administrator has been paid \$147,022.63 in fees and expenses. Cirmi Aff. ¶ 50.⁵ GCG has an unpaid balance of \$78,676.96, which includes the \$9,847.60 necessary to conduct the coming distribution. Because the work remaining to be done by the Claims Administrator was, and is, necessary for the benefit of the Class, and because the Claims Administrator's fees and expenses, as stated in the Cirmi Affidavit, are reasonable, Lead Counsel requests that the Court approve payment of GCG's remaining fees and expenses of \$78,676.96.

⁵ The Stipulation provided (*see* Stipulation ¶ 74) for the payment of monies from the Settlement Fund incurred by the Claims Administrator for the costs of notice (mailing and publication) and claims administration.

III. DISTRIBUTION OF THE NET SETTLEMENT FUND

Pursuant to the Stipulation and the Plan of Allocation set forth in the Court-approved Notice, the Settlement Fund, net of previously-awarded attorneys' fees and expenses, has been held in escrow by Lead Counsel, as Escrow Agent, pending completion of the claims administration process, approval by the Court of payment of the Claims Administrator's final fees and expenses, and approval by the Court of the Claims Administrator's determinations regarding any disputed or late-filed Claims. *See* Stipulation ¶¶ 56-68, 77.⁶ Because the Claims Administrator has now finished processing all Claims, Lead Counsel requests that the Court authorize distribution of the Net Settlement Fund to eligible Class members as provided in the Notice sent to the Class in connection with the Settlement.

In order to allow the full and final distribution of the Net Settlement Fund, it is necessary to bar any further claims against the Net Settlement Fund and to provide that all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted herein, or otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, be released and discharged from any and all claims arising out of such involvement beyond the amount allocated to them. Accordingly, it is respectfully requested that the Court bar any further claims against the Net Settlement Fund and release and discharge from any and all claims beyond the amount allocated to them arising out of the claims administration, all persons involved in the review, verification, calculation, tabulation,

⁶ Pursuant to the Stipulation, after payment from the Settlement Fund of taxes, and (previously awarded) Court-approved attorneys' fees, attorneys' expenses and Claims Administrator's fees and expenses, the Net Settlement Fund is to be distributed by the Claims Administrator, under the supervision of Lead Counsel, in accordance with the Stipulation and the Plan of Allocation, or such further approval and further orders of the Court as may be necessary or as circumstances may require.

or any other aspect of the processing of the claims submitted herein, or otherwise involved in the administration of the Settlement Fund or the Net Settlement Fund.

IV. DISPOSITION OF ANY UNCLAIMED/UNCASHED BALANCE

Experience shows that not all of the payments to be distributed to accepted Class members will be cashed promptly. In order to encourage Class members to promptly cash their distributions and to avoid or reduce future expenses relating to unpaid distributions, Lead Counsel proposes that all the distribution drafts bear the following notation: “CASH PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT CASHED WITHIN 120 OF DAYS AFTER ISSUE DATE.”

Lead Counsel further requests that any balance remaining in the Net Settlement Fund six (6) months after the initial distribution, whether by reason of un-cashed drafts or otherwise, be used to make a second distribution of uncashed funds to accepted Class members who cashed their checks from the initial distribution and who would receive at least \$10.00 from such second distribution, after payment of the estimated costs or fees to be incurred in administering the Net Settlement Fund and in making this second distribution, if Lead Counsel determines that such second distribution is economically feasible. Stipulation ¶ 65. After six (6) months following a second distribution, or if a second distribution is not undertaken, any funds remaining in the Net Settlement Fund will be donated to a nonsectarian, not-for-profit, 501(c)(3) organization in the public interest designated by Lead Plaintiff. *See id.* ¶ 65.

The proposed Class Distribution Order confirms the Notice’s provisions for such redistribution of any residue of the Net Settlement Fund.

CONCLUSION

Based on the foregoing, Lead Counsel respectfully requests that the Court approve and enter the Proposed Class Distribution Order submitted herewith.

Dated: November 24, 2014

Respectfully submitted,

BERNSTEIN LIEBHARD LLP

/s/ Jeffrey M. Haber

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