



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TILE SHOP HOLDINGS, INC.
LITIGATION

Consol. C.A. No. 2019-0892-SG

**PLAINTIFFS' BRIEF IN SUPPORT OF
UNOPPOSED MOTION FOR ADMINISTRATIVE ORDER**

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Plaintiffs, K-Bar Holdings LLC and Wynnefield Capital, Inc. (“Plaintiffs”), respectfully move for entry of the proposed Administrative Order approving the distribution plan for the proceeds of the Settlement in the above-captioned securities class action (the “Action”). The Distribution Plan is included in the accompanying Affidavit of Luiggy Segura in Support of Plaintiffs’ Unopposed Motion for Administrative Order (the “Segura Affidavit” or “Segura Aff.”),¹ submitted on behalf of the Court-approved Claims Administrator, JND Legal Administration (“JND”).

If entered by the Court, the Administrative Order would permit JND to make an Initial Distribution of Settlement proceeds to eligible Claimants. Among other things, the Administrative Order would: (i) approve JND’s administrative determinations accepting and rejecting Claims submitted in connection with the Settlement; (ii) direct the Initial Distribution of the Net Cash Settlement Fund to Claimants whose Claims are accepted by JND as valid and approved by the Court (“Authorized Claimants”), while maintaining a Reserve for any tax liability and claims administration-related contingencies that may arise; and (iii) approve JND’s

¹ Unless otherwise indicated in this memorandum, all terms with initial capitalization shall have the meanings ascribed to them in the Segura Affidavit or the Stipulation of Settlement dated as of August 7, 2020 (Trans. ID 65830861) (the “Stipulation”). The Settlement is contained in the Stipulation.

fees and expenses incurred and estimated to be incurred in the administration of the Settlement and the Initial Distribution.

Under the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Cash Settlement Fund. *See* Stipulation ¶¶ 17, 19. Lead Counsel has communicated with counsel for Defendants, who take no position on this motion. There are no disputed Claims by any Class Member requiring Court review. As such, the motion is ripe for determination.

I. BACKGROUND

The Court approved the Stipulation setting forth the terms of the Settlement, which represents a complete resolution of this Action in return for a payment of \$12 million in cash (the “Cash Settlement Amount”) and significant non-monetary benefits for the benefit of Settlement Class Members. *See* Notice ¶¶ 30-36.

In accordance with the Court’s August 12, 2020 Scheduling Order (Trans. ID 65843207) (the “Scheduling Order”), JND mailed the Notice of Proposed Settlement of Class and Derivative Action, Settlement Hearing, and Right to Appear (the “Notice”) and the Proof of Claim (the “Claim Form” or “Proof of Claim Form” and, collectively with the Notice, the “Notice Packet”) to potential Settlement Class Members, brokers, and other nominees. *Segura Aff.* ¶ 2. JND has disseminated

11,808 Notice Packets to potential Settlement Class Members, brokers, and nominees. *Id.* ¶ 4. The Notice informed Settlement Class Members that if they wished to be eligible to participate in the distribution of the Net Cash Settlement Fund, they were required to submit a properly executed Claim Form received or postmarked no later than January 8, 2021. *Id.* ¶ 7.

On October 12, 2020, the Court granted final approval of the Settlement and entered final judgment in its Order and Final Judgment (Trans. ID 66014623) (the “Judgment”). The Effective Date of the Settlement has occurred. *See* Stipulation ¶ 31. Accordingly, the Net Cash Settlement Fund may be distributed to Authorized Claimants, and Plaintiffs respectfully request that the Court enter the Administrative Order approving the Distribution Plan.

II. CLAIMS ADMINISTRATION

As set forth in the Segura Affidavit, through April 20, 2022, JND received and processed 1,985 Claims. Segura Aff. ¶ 7. All Claims received through April 20, 2022, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*see id.*), and JND has worked with Claimants to help them perfect their Claims. *See id.* ¶¶ 19-32. Many of the Claims were initially deficient or ineligible for one or more reasons, including for being incomplete, not signed, not properly documented, or otherwise deficient, which required substantial follow-up work by JND. *Id.* ¶¶ 19, 22.

If JND determined a Claim to be defective or ineligible, JND sent a Deficiency Letter (if the Claimant or filer filed a paper Claim) or a Deficiency Email with an attached Deficiency Spreadsheet (if the Claimant or E-Filer filed an Electronic Claim) to the Claimant or filer, as applicable, describing the defect(s) or condition(s) of ineligibility in the Claim and the steps necessary to cure any curable defect(s) in the Claim (“Deficiency Notices”). *Id.* ¶¶ 20, 22. The Deficiency Notices advised the Claimant or filer that the appropriate information or documentary evidence to complete the Claim had to be sent within 20 days from the date of the Deficiency Notice, or JND would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 20, 23. Examples of the Deficiency Notices are attached as Exhibits A, B, and C to the Segura Affidavit.

Of the 1,985 Claims that are the subject of this motion, JND has determined that 1,192 Claims are acceptable in whole or in part, and that 793 Claims should be rejected because they are ineligible for payment from the Net Cash Settlement Fund. *See id.* ¶¶ 39-42. Plaintiffs respectfully request that the Court approve JND’s administrative determinations accepting and rejecting Claims as stated in the Segura Affidavit.

A. No Disputed Claims

JND carefully reviewed Claimants’ and filers’ responses to the Deficiency Notices and worked with them to resolve deficiencies where possible. *Id.* ¶¶ 21, 26.

Consistent with paragraph 20(e) of the Stipulation, the Deficiency Notices specifically advised the Claimant or filer of the right, within 20 days after the mailing or emailing of the Deficiency Notice, to contest the rejection of the Claim and request Court review of JND's administrative determination of the Claim. *Id.* ¶¶ 20, 23, and Exhibits A and B.

With respect to the fully processed Claims, JND received no requests for Court review of its administrative determinations. *Id.* ¶ 32. Accordingly, there are no outstanding requests for Court review by any Claimants and the motion is ripe for determination. *Id.*

B. Late Claims and Final Cut-Off Date

The 1,985 Claims received through April 20, 2022, include 77 Claims that were postmarked or received after January 8, 2021, the Court-approved Claim submission deadline. *Id.* ¶¶ 33, 41. Those late Claims have been fully processed, and 32 of them are, but for their late submission, otherwise eligible to participate in the Settlement. *Id.* Although these 32 Claims were late, they were received while the processing of timely Claims was ongoing. *Id.* Due to the amount of time needed to process the timely Claims received, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the Net Cash Settlement Fund. *Id.* The Court has discretion to accept Claims received after the Claim submission deadline. *See* Stipulation ¶ 20(b); *see also* Scheduling Order

¶ 12. Plaintiffs respectfully submit that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the distribution of the Net Cash Settlement Fund solely because it was received after the Court-approved Claim submission deadline if it were submitted while timely Claims were still being processed.

To facilitate the efficient distribution of the Net Cash Settlement Fund, however, there must be a final cut-off date after which no other Claims may be accepted. Accordingly, Plaintiffs respectfully request that this Court order that any new Claims and any adjustments to previously filed Claims received after April 20, 2022, be barred.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with JND's agreement with Lead Counsel to act as the Claims Administrator for the Settlement, JND was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Cash Settlement Fund to Authorized Claimants. Segura Aff. ¶ 2. JND's fees and expenses for its work performed through January 31, 2022, are \$159,689.36, and its estimated fees and expenses for work to be performed on behalf of the Settlement Class in connection with the Initial Distribution are \$17,273.74, which together total \$176,963.10. Should the estimate

of fees and expenses to conduct the Initial Distribution of the Net Cash Settlement Fund exceed the actual cost, the excess will be returned to the Net Cash Settlement Fund and will be available for subsequent distribution to Authorized Claimants. *Id.*

¶ 44. To date, JND has received no payment for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$176,963.10 payable to JND, which amount includes the estimated fees and expenses to be incurred by JND in connection with the Initial Distribution. *Id.* Lead Counsel reviewed JND's invoices and respectfully requests on behalf of Plaintiffs that the Court approve all of JND's fees and expenses.

IV. DISTRIBUTION PLAN FOR THE NET CASH SETTLEMENT FUND

A. Distribution of the Net Cash Settlement Fund

Under the proposed Distribution Plan, JND will distribute 95% of the Net Cash Settlement Fund, after eliminating Authorized Claimants whose allocated payment from the Net Cash Settlement Fund calculates to less than \$5.00, while maintaining a 5% reserve to address any tax liability and claims administration-related contingencies that may arise (the "Initial Distribution"). *See Segura Aff.*

¶ 45(a). JND will calculate the Net Cash Settlement Fund, which will be the remaining balance of the Cash Settlement Fund after deducting (i) any Taxes; (ii) any Administration Costs; and (iii) any Cash Settlement Fund Award. *Id.* ¶ 45(a)(1). JND will calculate the total "Shares," which will be the total number of Eligible

Shares based on the valid Claims submitted by Authorized Claimants *Id.* ¶ 45(a)(2). JND will calculate the “Per-Share Payout,” which will be calculated by dividing the Net Cash Settlement Fund by the total number of Shares *Id.* ¶ 45(a)(3). Since the Per-Share Payout equals less than \$1.44 per share, the entire Net Cash Settlement Fund will be distributed to Authorized Claimants and there will be no remaining funds to allocate among Authorized Claimants. Each Authorized Claimant will receive a *pro rata* distribution from the Net Cash Settlement Fund equal to the product of (i) the Per-Share Payout; and (ii) the Claimant’s total number of Eligible Shares, subject to the \$5.00 minimum payment threshold for payments from the Net Cash Settlement Fund. *Id.* ¶ 45(a)(4).

To encourage Authorized Claimants to cash their checks promptly, Plaintiffs propose that all distribution checks bear the notation, “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 45(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 45(b) of the Segura Affidavit will irrevocably forfeit all recovery from the Settlement, and the funds allocated to these stale-dated checks will be available to be redistributed to other Authorized Claimants in a subsequent distribution, as described below. *Id.* ¶ 45(c).

B. Additional Distribution(s) of the Net Cash Settlement Fund

After JND has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, but not earlier than six (6) months after the Initial Distribution, JND will, after consulting with Lead Counsel, conduct the Second Distribution of the Net Cash Settlement Fund. *Id.* ¶ 45(d). In the Second Distribution, any amount remaining in the Net Cash Settlement Fund after deducting any unpaid fees and expenses incurred, will be distributed to all Authorized Claimants who cashed their Initial Distribution checks and would receive at least \$5.00 from the Second Distribution based on their *pro rata* share of the remaining funds. *Id.* After the Second Distribution, if any funds remain in the Net Cash Settlement Fund, and if cost-effective, subsequent distributions will take place at six (6)-month intervals until Lead Counsel, in consultation with JND, determines that further distribution is not cost-effective. *Id.* At such time as Lead Counsel, in consultation with JND, determines that further distribution of the funds remaining in the Net Cash Settlement Fund is not cost-effective, the remaining balance of the Net Cash Settlement Fund, after payment of any unpaid fees or expenses incurred in connection with administering the Net Cash Settlement Fund and after the payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow

fees, shall be deemed a recovery with respect to Plaintiffs' derivative claims and will be paid to the Company. *Id.* ¶ 45(e).

V. RELEASE OF CLAIMS

In order to allow the full and final distribution of the Net Cash Settlement Fund, it is necessary to (i) bar any further claims against the Net Cash Settlement Fund beyond the amounts allocated to Authorized Claimants, and (ii) provide that all persons involved in any aspect of Claims processing, or who are involved in the administration or taxation of the Settlement Fund or the Net Cash Settlement Fund, be released and discharged from all claims arising out of that involvement. *See* Stipulation ¶ 23. Accordingly, Plaintiffs respectfully request that the Court release and discharge all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Cash Settlement Fund from all claims arising out of that involvement, and bar all Settlement Class Members and other Claimants, whether or not they receive payment from the Net Cash Settlement Fund, from making any further claims against the Net Cash Settlement Fund, Plaintiffs, Lead Counsel, the Claims Administrator, the Escrow Agent or any other agent retained by Plaintiffs or Lead Counsel in connection with the administration or taxation of the Settlement

Fund or the Net Cash Settlement Fund, or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants.

Courts have repeatedly approved similar releases in connection with the distribution of settlement proceeds. *See, e.g., In re Kinder Morgan Energy Partners, L.P. Capex Litig.*, Consol. C.A. No. 9318-VCL (Del. Ch. Mar. 16, 2017) (ORDER) (“All persons involved in any aspect of the administration of the Settlement or taxation of the Settlement Fund, are hereby released and discharged from any and all claims arising out of such involvement, and all Class Members, whether or not they receive payment from the Net Settlement Fund, are hereby barred from making any further claims against the Net Settlement Fund, Lead Plaintiff, Co-Lead Counsel, the Claims Administrator, the Escrow Agent or any other agent retained by Lead Plaintiff or Co-Lead Counsel in connection with the administration of the Settlement or taxation of the Settlement Fund beyond the amount allocated to Award Recipients.”).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Plaintiffs’ Unopposed Motion for Administrative Order should be granted, and the [Proposed]

Administrative Order should be entered.

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