

Keith A. Ketterling, OSB No. 913368
Email: kketterling@stollberne.com
Timothy S. DeJong, OSB No. 940662
Email: tdejong@stollberne.com
Jennifer S. Wagner, OSB No. 024470
Email: jwagner@stollberne.com
Lydia Anderson-Dana, OSB No. 166167
Email: landersondana@stollberne.com
STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. Oak Street, Fifth Floor
Portland, Oregon 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840

Steve W. Berman (*pro hac vice*)
Email: steve@hbsslaw.com
Karl P. Barth (*pro hac vice*)
Email: karlb@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Attorneys For Plaintiffs
[Additional Counsel of Record Listed on Signature Page]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

LAWRENCE P. CIUFFITELLI, for himself and
as Trustee of CIUFFITELLI REVOCABLE
TRUST; GREG and ANGELA JULIEN;
JAMES and SUSAN MACDONALD, as Co-
Trustees of the MACDONALD FAMILY
TRUST; R.F. MACDONALD CO.; ANDREW
NOWAK, for himself and as Trustee of the

Case No. 3:16-cv-00580-AC

**THE SETTLEMENT CLASS'
MOTION FOR AN ORDER FOR
DISTRIBUTION OF THE NET
SETTLEMENT FUND AND
ALLOWING PAYMENT OF
ADMINISTRATION COSTS; AND
MEMORANDUM OF LAW IN
SUPPORT THEREOF**

ANDREW NOWAK REVOCABLE LIVING TRUST U/A 2/20/2002; WILLIAM RAMSTEIN; and GREG WARRICK, for himself and, with SUSAN WARRICK, as Co-Trustees of the WARRICK FAMILY TRUST, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DELOITTE & TOUCHE LLP;
EISNERAMPER LLP; SIDLEY AUSTIN
LLP; TONKON TORP LLP; TD
AMERITRADE, INC.; INTEGRITY BANK &
TRUST; and DUFF & PHELPS, LLC,

Defendants.

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I. MOTION

The Settlement Class hereby moves this Court for entry of an Order Approving Distribution of the Net Settlement Fund and Approving Payment of Claims Administration Expenses (the “Distribution Order”), which will:

- 1) approve the payment of fees and reimbursement of expenses of Epiq Class Action & Claims Solutions, Inc. (“Epiq”) in the amount of \$160,145.08, as set forth in the accompanying Declaration of Jordan Broker Regarding Motion for Distribution (the “Broker Decl.”), ¶ 12; as well as the payment of any taxes or escrow fees owed by the Net Settlement Fund;
- 2) approve the procedures used and actions taken by Epiq and the Settlement Class’ Counsel for the administration of the Settlement and approve the list of eligible Class Member Accounts attached as Exhibit B to the Broker Decl.; and direct that the distribution of the balance of the Net Settlement Fund be made to the eligible Class Member Accounts listed in Exhibit B to the Broker Decl.;
- 3) direct that the portion of the Distribution for which ownership is disputed pursuant to the pending motion for determination of ownership pending before the Court [Dkt. # 625] remain in the Net Settlement Fund pending the Court’s ruling on that motion;
- 4) direct that the final cut-off date for objections to the Claims Administrator’s determinations was December 28, 2020, and that no objections received after this date will be included in the Distribution for any reason whatsoever;

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- 5) direct that the distribution checks to Class Member Accounts shall bear the notation “Non-negotiable After 90 Days,” and that no check shall be negotiated in the Net Settlement Fund more than 120 days after the date of the check;
- 6) direct that any balance remaining in the Net Settlement Fund after four months from the date of distribution of the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise), shall, if feasible, be reallocated among the Class Member Accounts who deposited the checks sent in the initial distribution based upon their *pro rata* share of the total Net Loss of all Class Member Accounts who deposited the checks sent in the initial distribution. If not economically feasible to make a subsequent distribution, any balance still remaining shall be donated to an appropriate non-profit entity chosen by Lead Class Counsel;
- 7) direct that all potential claims against all persons involved in the administration of the Settlements are barred; and
- 8) allow destruction of all paper forms and related correspondence in administering the settlement one year after the distribution of the Net Settlement Fund; and all electronic information related to the Settlement three years after the distribution of the Net Settlement Fund.

II. BACKGROUND

The total amount of the Gross Settlement Fund consisted of \$234.6 million, consisting of three separate settlement agreements, as follows:

- On May 31, 2018, Plaintiffs Lawrence P. Ciuffitelli (on behalf of himself and as Trustee of the Ciuffitelli Revocable Trust U/A 5/1/1996); Greg and Angela Julien (as Trustees of the Gregory and Angela Julien Revocable Trust U/A 7/2/2012); R.F. MacDonald Co.; James and Susan MacDonald (as co-Trustees of the MacDonald

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Family Trust U/A 12/05/2000); William Ramstein; Greg Warrick (on behalf of himself and as co-Trustee of the Warrick Family Trust); and Susan Warrick (as co-Trustee of the Warrick Family Trust) (collectively, the Class Representatives entered into the Stipulation of Settlement with Defendant Tonkon Torp LLP (“Tonkon”), which was amended on August 21, 2018 (“Amendment No. 1”) and again on October 18, 2018 (“Amendment No. 2”), for a total settlement of all claims against Tonkon for the amount of \$12.9 million. On July 15, 2019, the Court issued Findings & commendation preliminarily approving this Settlement [Dkt. # 579];

- On April 24, 2019, the Class Representatives and Defendant Integrity Bank & Trust (“Integrity”) entered into a Stipulation of Settlement of all claims against Integrity in the amount of \$1.7 million. On July 15, 2019, the Court issued Findings & Recommendation preliminarily approving this Settlement [Dkt. # 580]; and
- On July 8, 2019, the Class Representatives entered into an agreement to settle all claims against Defendants Deloitte & Touche LLP; EisnerAmper LLP; Sidley Austin LLP; TD Ameritrade, Inc.; and Duff & Phelps, LLC in exchange for a cash payment of \$220 million. On July 15, 2019, the Court issued Findings & Recommendation preliminarily approving of this Settlement [Dkt. # 581].

On August 7, 2019, the Court adopted each of the July 15, 2019 Findings and Recommendation [Dkt. # 579, 580, 581] and issued an Order granting Preliminary Approval of the Settlements and the Plan of Allocation, approving the form of Notice, appointing Epiq Class Action & Claim Solutions, Inc. (“Epiq”) as the Claims Administrator to supervise and administer the notice procedure as well as the processing of claims, and setting the Settlement Hearing for November 26, 2019 [Dkt. # 585-88].

On October 15, 2019, the Class Representatives filed their Motion for Final Approval of Class Action Settlements (the “Final Settlement Motion”) [Dkt. # 592] and Lead Class Counsel filed their Motion for Award of Attorney Fees and Costs (the “Fee Petition”) [Dkt. # 596].

On November 26, 2019, a hearing was held before this Court regarding the Final Settlement Motion and the Fee Petition. Notice of the Settlements, Fee Petition and the hearing

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thereon had previously been sent to Class Members. On November 26, 2019, this Court issued Findings and Recommendation recommending Final Approval of the Settlements [Dkt. #619].

By Order dated December 16, 2019 (the “Final Order”) [Dkt. # 621], this Court adopted the November 26, 2019 Findings and Recommendation, granted Final Approval of the Settlements and the Plan of Allocation, granted incentive awards to the Class Representatives, granted Class Counsels’ request for fees and expenses and directed the Parties and the Claims Administrator to consummate the Stipulations in accordance with their terms and provisions.¹

III. SETTLEMENT ADMINISTRATION

As described above, Epiq was appointed as Claims Administrator for the Settlements.

A. Identification of Potential Class Members and Determination of Their Net Losses

On August 23, 2019, the Receiver provided the Claims Administrator with the names, addresses, and certain transactional data for potential Class Members that had purchased Covered Aequitas Securities on or after June 9, 2010 (“Initial Class Data”). Broker Decl., ¶ 3. The Initial Class Data included 24,512 transactions for 1,849 accounts belonging to 1,440 individuals and entities. *Id.* Based upon this data, on September 4, 2019, the Claims Administrator sent, by First-Class Mail, Notices to the 1,849 potential Class-Member accounts (“Initial Notice Mailing”).

B. Net Loss Determination Letters

On January 24, 2020, the Receiver provided the Claims Administrator with updated data, including an additional 2,042 transactions made by the Potential Class Members. Broker Decl.,

¹ All capitalized terms that are not defined herein shall have the same meanings as set forth in the Stipulations.

¶ 4. From this data, the Claims Administrator performed time-intensive and difficult calculations of the Net Loss or Net Gain amount for each account, as required pursuant to the Plan of Distribution. Broker Decl., ¶ 5. This review identified approximately 168 of the 1,849 accounts in the Initial Notice Mailing as duplicative. After consolidating the duplicative accounts, Epiq preliminarily identified 1,681 Class-Member Accounts. *Id.*

On July 31, 2020, Epiq mailed 1,681 Net Loss and Net Gain Determination Letters (“Determination Letters”) by U.S. First-Class mail to Class-Member Accounts. Broker Decl., ¶ 7. Of this total, 1,543 Class Member Accounts were sent Net Loss Determination Letters (including 5 Class Member Accounts with a \$0.00 Net Loss) and 138 Class Member Accounts had a Net Gain. The accounts with \$0.00 Net Loss or a Net Gain were ineligible to recover from the Settlement. Broker Decl., ¶ 6. The Determination Letters set forth the Class-Member Account’s Net Loss or Gain amount based upon the amount of Covered Aequitas Securities purchased during the Class Period, minus any principal or interest payment received on those Covered Securities. The Determination Letters also informed Class Members that if they agreed with the Net Loss or Gain amount set forth in the Determination Letter, they would automatically receive payment from the Net Settlement Fund on a *pro-rata* basis. *Id.* A copy of a sample Determination Letter is attached hereto as Exhibit A to the accompanying Broker Decl.

C. Disputes of Net Loss / Net Gain Determinations

The Determination Letters also informed Class Members that they had 20 days from the date of the Determination Letter to request review of the Net Loss amount, and to provide copies of relevant documents confirming any disputed amounts. Broker Decl., ¶ 8. As of December 22,

2020, the Claims Administrator had received disputes of the Net Loss or Net Gain calculations contained in the Determination Letters from 50 Class Member-Accounts. The Claims Administrator reviewed each dispute and accompanying supporting documentation, determining (in consultation with Lead Counsel and the Receiver) that 32 of the disputes provided a sufficient basis to adjust the Net Loss or Net Gain amount from that set forth in the Determination Letters. Broker Decl., ¶ 9. Updated Determination Letters reflecting the adjusted Net Loss calculations were sent to each of these 32 Class Members for which adjustments were made. *Id.*

The remaining 18 disputes of the Net Loss calculations contained in the Determination Letters were sent a customized letter explaining why their disputes of the Net Loss calculations were rejected. Broker Decl., ¶ 10. The specific reasons for rejection of these 18 disputes included one or more of the following reasons: incorrect calculation of Net Loss amount by the disputing party; improper merging of multiple accounts in violation of the Plan of Allocation methodology; and/or insufficient documentation to support the dispute. *Id.* Class Counsel is unaware of any party filing any motion with this Court to contest any of these determinations.

D. Exclusions from the Class

After consultation with Plaintiffs' Counsel, 14 investors with 17 accounts from the Updated Class data were initially identified by the Claims Administrator as potentially excluded parties under the Class Definition, as being *either*: (1) a registered investment advisor or investment advisor representative that placed customers in Aequitas investments, and/or (2) an investor who received finder's fees or other consideration from Aequitas in connection with referring investors to Aequitas. Broker Decl., ¶ 11.

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Beginning on July 31, 2020, the Claims Administrator mailed 17 Exclusion Notices to these potentially excluded parties, providing them an opportunity to dispute this conclusion and request inclusion to the Class.² Broker Decl., ¶ 11. In response to the Exclusion Notices, the Claims Administrator received four requests for inclusion. After consultation with Lead Counsel, the Claims Administrator determined that all four requestors were properly included in the Class. Net Loss Notices were subsequently mailed to each of these Class Members. Two additional investors were identified as excluded parties after the July 31 mailing and were subsequently sent Exclusion Notices. *Id.*

E. Summary of Class Members and Associated Net Losses

12. Based upon the review and analysis described above, the Claims Administrator has determined that there are a total of 1,547 Class-Member Accounts which are eligible to receive Distribution Payments based on their purchases of covered Aequitas Securities. Broker Decl., ¶ 12.³ The aggregate Net Loss of these accounts is \$296,230,694.77, consisting of the total Net Loss for each eligible Class-Member Accounts identified in Exhibit B to the Broker Decl.

F. The Net Settlement Fund

The Net Settlement Fund consists of a current balance of \$176,481,996.05. Broker Decl., ¶ 13, Exhibit C.

² Two additional investors were identified as excluded parties after the July 31 mailing and were subsequently sent Exclusion Notices.

³ 1,547 eligible Class Member accounts = 1,543 initially sent Net Loss Determinations (Broker Decl., ¶ 6) – five with Net Loss Determinations of zero (Broker Decl., ¶ 6, n.2) + five changed from Net Gain to Net Loss (Broker Decl., ¶ 9) + four approved requests for inclusion (Broker Decl., ¶ 11).

IV. ORDER FOR DISTRIBUTION OF THE NET SETTLEMENT FUND

Lead Counsel respectfully requests that the Court enter an Order finding that the Effective Date has occurred and directing and authorizing distribution of the balance of the Net Settlement Fund, pursuant to the following terms.

A. Fees and Expenses of the Claims Administrator, Taxes and Escrow Fees

Epiq, under the direction of Class Counsel, was retained pursuant to Court Order to mail the Court approved Notice to all potential Class Members, to cause publication of summary notices, to calculate and process the eligibility of Class Members based upon transactional data provided by the Receiver and to distribute the Net Settlement Fund to eligible Class Members. The Settlement Class respectfully requests that the Court approve payment of Epiq's requested fees and expenses \$160,145.08 from the Net Settlement Fund for administering the Settlement (including estimated amounts through the initial distribution). Broker Decl., ¶ 12.

The Settlement Class further requests the Court approve payment of any taxes or estimated taxes owed by the Net Settlement Fund, the costs of preparing appropriate tax returns, and any escrow fees related to the Net Settlement Fund to also be paid from the Net Settlement Fund prior to distribution.

B. Request for Approval of Administration Procedures and for Distribution to Eligible Class Member Accounts

The Settlement Class respectfully requests that the Court approve the procedures used and actions taken by Epiq and Settlement Class Counsel in administration, which complied with the Settlements, the Plan of Allocation and the Court's Preliminary and Final Approval Orders, as described herein and in the Broker Decl.

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The Settlement Class further requests that the Court accept Epiq's determination of the 1,547 Class Member Accounts that are eligible to receive Distribution Payments based upon their purchases of Covered Aequitas Securities. *See* Broker Decl., ¶ 12, Exhibit B. Of the 15 accounts rejected by Epiq, the reasons for their rejection are listed in the Broker Decl. at ¶ 11. Class Counsel is unaware of any appeal of these determinations to the Court.

C. Disputed Ownership of Certain Settlement Proceeds

As the Court is aware, there remains pending one case of contested ownership of the distributions. *See, the Settlement Class' Motion for Determination of Appropriate Party to Receive a Pro-Rata Distribution from the Settlements* [Dkt. # 625]. Specifically, Northern Lights Fund Trust ("Northern Lights") purchased a significant amount of Covered Aequitas Securities during the Class Period, resulting in a significant Net Loss from these purchases. On April 14, 2016 (after the conclusion of the Class Period), OL Group, Ltd. ("OL Group") purchased these securities from Northern Lights. However, on May 4, 2016, Northern Lights entered into an agreement purporting to sell its "claims" (specifically including class action recoveries) to Lake Avenue Funding EC V, LLC ("Lake Avenue"). Pursuant to their respective transactions, OL Group and Lake Avenue each now contend that they are the proper assignee of Northern Lights' claims and therefore entitled to receive the *pro-rata* share of the Settlement distribution.

To the extent that this motion regarding the ownership dispute remains pending at the time the Court considers this motion to distribute, Lead Counsel submits that dispute will not impact the Net Loss calculation or the amount to be distributed to one of these parties, but only whether the distribution will be made to *either*: 1) OL Group; or 2) Lake Avenue. Accordingly,

Lead Counsel respectfully requests that the Court permit the distributions to all other parties to proceed upon the Court's Order allowing distribution, while the *pro rata* proportion of the distribution related to the motion pending before the Court will remain in the Settlement Account pending the Court's ruling on that dispute.

D. Final Cut-Off Date

Additionally, it is also respectfully requested that this Court enter an Order directing that no objection to the Claims Administrator's decisions that is received after December 28, 2020 will be included in the distribution for any reason whatsoever. There must be a final cut-off date after which no more claims may be accepted in order that there may be a proportional distribution of the Net Settlement Fund. Objections to Epiq's determinations that are submitted or filed during the finalization of the administration and preparation of checks would necessarily require a delay in the distribution. *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 329 (3d Cir. 2001) ("There is no question that in the distribution of a large class settlement fund, 'a cutoff date is essential and at some point the matter must be terminated.'") (citations omitted).

E. Time Limitations for Negotiation of Distribution Checks

Although the size of many of the recoveries may serve to minimize this issue, based on the substantial experience of Class Counsel in class action distributions, it can be expected that a certain number of the payments to be distributed to Class Members will not be cashed promptly. To encourage Class Members to promptly cash their distributions and to avoid or reduce future expenses relating to unpaid distributions, the Settlement Class proposes that all the distribution

checks bear a notation “DEPOSIT PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT NEGOTIATED WITHIN 90 DAYS OF DISTRIBUTION.”

Lead Counsel also proposes that Class Member Accounts that do not cash their distribution checks within the time allotted, or on the conditions described by the Claims Administrator will irrevocably forfeit all recovery from the Settlement.

F. Request for Redistribution of Remaining Net Settlement Funds, if Necessary

The Settlement Class also requests the Court to direct that any balance remaining in the Net Settlement Fund after four months from the date of distribution of the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise), and, after the Claims Administrator has made reasonable and diligent efforts to have Class Member Accounts cash their distribution checks, then, any remaining balance in the Net Settlement Fund shall, if feasible, be reallocated among the Class Member Accounts that deposited the checks sent in the initial distribution based upon their *pro rata* share of the total Net Loss of all Class Member Accounts that deposited the checks sent in the initial distribution. If not economically feasible to make a subsequent distribution, any balance still remaining shall be donated to an appropriate non-profit 501(c)(3) charitable organization chosen by Class Counsel.

G. Release and Bar of Future Claims

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 Net

Settlement Fund, be released and discharged from any and all claims arising out of such involvement, and all Class Members, whether or not they are to receive payment from the Net Settlement Fund, are barred from making any further claim against the Net Settlement Fund or the Released Parties beyond the amount allocated to them. Accordingly, the Settlement Class respectfully requests that the Court enter an Order allowing for these terms.

H. Retention of Records

Finally, Lead Counsel also respectfully requests that the Court authorize the Claims Administrator to discard paper or hard copies of the supporting documents not less than one year after the distribution of the Net Settlement Fund to the Class Member Accounts and electronic or magnetic media data not less than three years after the distribution of the Net Settlement Fund to the Class Member Accounts.

V. CONCLUSION

Class Counsel submits that the work performed, as explained above, was conducted fairly and in accordance with the terms and provisions of the Stipulation and Settlement Agreement. For the reasons described herein, the Settlement Class' Motion for an Order for Distribution of the Net Settlement Fund should be approved.

Dated: December 30, 2020.

HAGENS BERMAN SOBOL SHAPIRO LLP

By: *s/ Steve W. Berman*
Steve W. Berman (admitted *pro hac vice*)
Karl P. Barth (admitted *pro hac vice*)
1301 Second Avenue, Suite 2000

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Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
Email: steve@hbsslaw.com
karlb@hbsslaw.com

-And-

Keith A. Ketterling, OSB No. 913368
kketterling@stollberne.com
Timothy S. DeJong, OSB No. 940662
tdejong@stollberne.com
Jennifer S. Wagner, OSB No. 024470
Email: jwagner@stollberne.com
Lydia Anderson-Dana, OSB No. 166167
Email: landersondana@stollberne.com
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840

-And-

Robert S. Banks, Jr., OSB No. 821862
Email: bbanks@SamuelsLaw.com
Darlene D. Pasieczny, OSB No. 124172
Email: darlenep@SamuelsLaw.com
SAMUELS YOELIN KANTOR LLP
Attorneys at Law
111 SW 5th Avenue, Suite 3800
Portland, OR 97204-3642
Telephone: (503) 226-2966
Facsimile: (503) 222-2937

Attorneys For Plaintiffs

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