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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 02-5143 PA (CTx)	Date	March 22, 2010
Title	Sec. and Exch. Comm'n v. Currency Trading Int'l, Inc., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE		
	Paul Songco	Not Reported	N/A
	Deputy Clerk	Court Reporter	Tape No.
	Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: IN CHAMBERS - ORDER

Before the Court is a motion for orders: (1) approving the Distribution Agent's second and final report and account on the claims administration against Defendants; (2) approving and denying claims and approving a proposed final distribution plan and payment to approved claimants; (3) authorizing payment of income taxes, penalties and interest due by settlement fund; (4) approving and authorizing payment of "post-Order" distribution fees and expenses; (5) terminating the claims administration estate and discharging and exonerating Distribution Agent and Special Tax Administrator subject to payment of expenses of administration; and (6) for further instructions to Distribution Agent and Special Tax Administrator (Docket No. 298) filed by Richard Weissman, the Court appointed Distribution Agent ("Distribution Agent") in this case. Also before the Court is the Distribution Agent's motion for order approving and awarding fees and expenses (Docket No. 299.) Plaintiff Securities and Exchange Commission ("SEC") filed a statement of non-opposition to both motions. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for March 22, 2010, is vacated, and the matter taken off calendar.

I. BACKGROUND

Defendants Currency Trading International, Inc. ("CTI"), Brian R. Moore, Craig A. Cunningham, Craig Wiginton, James R. Kelsall, Christian J. Weber, and Robert Shane Jones ("Defendants") were held liable for violation of securities laws after a bench trial. The Court entered a judgment for a permanent injunction, disgorgement of unjust profits, prejudgment interest, and civil penalties. (See Docket No. 239.) A previously filed civil anti-fraud injunction action in the United States District Court for the Northern District of Ohio against substantially the same Defendants resulted in the "CTI Restoration Fund" ("Fund"). The Fund was seized by the SEC in this action, to be distributed to investors that Defendants defrauded. In order to effectuate the distribution, the Court appointed a Distribution Agent in a May 10, 2007 Order ("Appointment Order"). (See Docket No. 264.) The Fund was formerly with the Court Registry Investment Services in the Northern District of Ohio. On September 17, 2008, the \$2,556,286.48 Fund was remitted to the Distribution Agent.

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The Appointment Order provided that the Distribution Agent was to invest and manage the Fund, process claims, create a distribution plan, and provide the Court with periodic updates. It also appointed Damasco & Associates as Special Tax Administrator. Pursuant to the Appointment Order, the Distribution Agent and the Special Tax Administrator may recover their fees and expenses from the Fund with Court approval.

The claim Bar Date of August 31, 2009, has expired. Now, the Distribution Agent is moving for orders: (1) approving the Distribution Agent’s second and final report and account on the claims administration against Defendants; (2) approving and denying claims and approving a proposed final distribution plan and payment to approved claimants; (3) authorizing payment of income taxes, penalties and interest due by settlement fund; (4) approving and authorizing payment of “post-Order” distribution fees and expenses; (5) terminating the claims administration estate and discharging and exonerating Distribution Agent and Special Tax Administrator subject to payment of expenses of administration; and (6) for further instructions to Distribution Agent and Special Tax Administrator filed by Richard Weissman, the Court-appointed Distribution Agent in this case. The Distribution Agent is also moving for an order approving and awarding fees and expenses for himself and the Special Tax Administrator.

II. ANALYSIS

A. Approval and denial of claims

The Distribution Agent initially prepared and mailed a “Notice of Last Day to File Claim” and other documents (“Claim Forms”) to 964 known victims whose addresses had been identified by the SEC. Claim Forms were not sent to the remaining 347 victims because addresses were not available for them. However, the Claim Forms were posted on the SEC website on November 15, 2008 to provide the potential qualified claimants with constructive notice of their right to file a claim. After notice was given via these two methods, less than 100 persons filed claims.

Pursuant to the Court’s previous order dated May 26, 2009, the Distribution Agent coordinated with another government agency to send the Claim Forms to investors’ last known addresses on file with that agency, using investors’ social security numbers. The Court also extended the claims period through August 31, 2009. Following the extension of the claims period and the provision of additional notice, 382 claims were filed for losses in the aggregate amount of \$14,811,153.26.

The following six classes of claimants were derived from the claims program:

- (1) Eligible claimants whose claims were given full or partial preliminary approval by the Distribution Agent. These individuals filed complete Proof of Claim forms which were supported by competent evidence. The sum of these claims is \$13,398,699.84.

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- (2) Claimants who received the Claim Forms by certified mail, but failed to file any claim. This class includes those individuals whose mail was returned as “unclaimed” for various reasons, including the failure of the addressees to timely pick up their certified letters from the post office, or the removal of the “yellow notice slip” left by the mail carrier, such that the addressees were unaware of the letters. Claim Forms were re-mailed to each of these individuals via regular mail. The Distribution Agent has the certified mail receipts for each of these claimants; all of the receipts bear the postal service marking “unclaimed” or “refused.” The sum of these unfiled claims is \$3,826,570.85. The Distribution Agent has given preliminary disapproval to these claims.
- (3) Claimants for whom the Distribution Agent had Social Security Numbers and who received the Claim Forms by certified mail, but failed to file any claim. This class includes those individuals whose mail was returned as “unclaimed” due to an incorrect or unforwardable address. The Distribution Agent has all of the returned envelopes. The sum of these unfiled claims is \$5,218,166.73.
- (4) Claimants for whom the Distribution Agent had Social Security Numbers and who did not receive the Claim Forms when they were first sent by certified mail. These claimants were sent the Claim Forms again through regular mail, but still did not file a claim. The sum of these unfiled claims is \$719,587.90.
- (5) Claimants for whom the Distribution Agent did not have Social Security Numbers, whose addresses were not available or inadequate, and for whom no mailing could be achieved. The sum of these unfiled claims is \$7,396,730.85.
- (6) Claimants whose claims exceeded the losses documented by CTI and SEC records, and who did not submit competent proof supporting the claimed excess losses. All these claims were only approved up to the amount of the documented loss. Each of these claimants was given notice of the deficiency and informed of the type of documentation required to prove the excess amount, but nevertheless failed to provide the necessary evidence. The Distribution Agent has approved these claims in the sum of \$1,925,562.42. This sum is reflected in the sum for the first class of approved claims. The Distribution Agent has denied the claims to extent that they claim excess losses in the amount of \$1,010,548.13.

The Distribution Agent recommends that the Court approve the eligible claims in the amount of \$13,398,699.84 and deny all of the unfiled claims and unsupported claims for excess damages.^{1/} The

^{1/} The amount of eligible claims is substantially in excess of the amount of the Fund, which is only \$2,556,286.00. After payment of the Distribution Agent’s and the Special Tax Administrator’s

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Court agrees with the Distribution Agent's recommendation that the eligible claims be approved and that the remainder of the claims be denied. Accordingly, the Court approves the eligible claims in the amount of \$13,398,699.84 and denies the unfiled claims and unsupported claims for excess damages.

B. Payment of income taxes, penalties and interest due

The Distribution Agent reports that the appointed Special Tax Administrator has determined that the Fund will not have any tax liability for the tax years 2009 and 2010. However, as noted in the Distribution Agent's prior report, federal income tax returns were not filed for any of the eleven (11) years during which the Fund was held by the Northern District of Ohio, from 1998 to 2008. Consequently, tax liabilities arising during that period were not paid. The Court granted the Distribution Agent's prior motion to pay \$187,228.00 in federal income taxes out of the Fund. However, the Distribution Agent now advises the Court that the IRS has assessed penalties and interest and additional taxes on the Fund in the amount of \$165,000.00. The Special Tax Administrator has appealed the assessment and applied for a refund of some of the taxes previously paid. However, the Special Tax Administrator and the Distribution Agent recommend that the penalties be paid as soon as possible, pending the appeal, because payment will stop the accrual of interest on the assessed penalties. If the appeal is ultimately successful, the Fund may be refunded interest and penalties approximating \$90,000.00.

The Court finds that payment of the penalties pending appeal is appropriate, and therefore grants the Distribution Agent's motion to pay the additional penalties, interest and taxes in the amount of \$165,000.00. Such payment shall be made from the Fund forthwith.

If the tax penalties are abated by the IRS before the Fund has been disbursed to the eligible claimants, the refunded amounts shall be added to the Fund available for distribution. However, if the tax penalties are not abated until after the Fund has already been disbursed, a second distribution shall be made to the eligible claimants whose claims have already been given full or partial preliminary approval by the Distribution Agent. There shall be no minimum amount of distribution. However, if the cost of making such disbursement to any claimant exceeds the amount of the disbursement itself, then such amount shall be retained and disbursed to the United States Treasury.

C. "Post-Order" distribution fees and expenses

In addition to the fees and expenses that have been incurred thus far by the Distribution Agent and Special Tax Administrator, the Distribution Agent seeks this Court's approval of the estimated fees

fees and expenses, the amount of the Fund available for final distribution will be approximately \$1,995,001.00. Pro rata distribution of these funds will amount to a recovery rate of approximately 14.03% of the claimants' original investment.

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and expenses that are expected to be incurred after the issuance of this Order. In particular, the Distribution Agent estimates that:

- (1) The Distribution Agent's staff will spend approximately 78 hours to prepare the distribution checks. At a rate of \$40.00 per hour, these staff fees are expected to total \$3,120.00.
- (2) The Distribution Agent's accountant will spend approximately 10 hours overseeing the preparation of the distribution checks. At a rate of \$95.00 per hour, these staff fees are expected to total \$950.00.
- (3) The direct postage and mailing costs of the checks will be approximately \$172.00.
- (4) The check fraud prevention program to prevent the cashing of checks that have been altered by amount and/or payee will cost approximately \$800.00.
- (5) The Distribution Agent's accountant will spend approximately 30 hours reconciling the Fund bank account, preparing six monthly reports and a final reconciliation and financial report for the SEC, and issuing a final distribution check to the U.S. Treasury for the balance of the funds remaining on deposit, if any. These services are expected to take approximately 30 hours, at a rate of \$95.00 per hour, for a total fee of \$2,850.00.
- (6) The Special Tax Administrator and his staff will spend approximately 18 hours preparing data for income tax returns. At a blended rate for all staff of \$80.00 per hour, these fees are expected to total \$1,440.00.
- (7) The Special Tax Administrator will prepare income tax returns for the Fund for the years 2009 and 2010. Pursuant to its contract with the SEC, the Special Tax Administrator is entitled to \$1,675.00 per tax return paid and filed. Thus, the fees for these tax returns is expected to total \$3,350.00.
- (8) The paralegal fees for 30 hours of anticipated "post-Order" administration, at a rate of \$65.00 per hour, will cost \$1,950.00.
- (9) The Distribution Agent estimates that he will spend up to ten hours on "post-Order" services, excluding any "post-Order" litigation. At his approved hourly rate of \$295.00, the Distribution Agent expects the sum of these fees will not exceed \$2,950.00. The Distribution Agent also recommends a miscellaneous expense reserve of \$1,000.00.

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These anticipated "post-Order" fees and expenses total \$18,582.00. The Court finds these fees and expenses reasonable, and grants the motion to pay up to \$18,582.00 out of the Fund for the above services and fees.

If the actual amount of "post-Order" fees and expenses is less than currently estimated, and the tax penalties are abated by the IRS, but a second distribution has not yet been made, then the balance of those funds allotted for "post-Order" fees and expenses shall be added to the fund for distribution to the claimants. If the tax penalties are not abated, or a second distribution has already been made, then the balance of such funds shall be distributed to the United States Treasury, as provided in the Court's Order dated May 10, 2007.

D. Termination of the claims administration estate and discharge and exoneration of the Distribution Agent and Special Tax Administrator

The Distribution Agent requests that the claims administration estate be terminated, and that he and his employees be discharged and exonerated from liability for the claims administration, upon his performance and completion of the distribution plan and disbursement of the Fund. The Distribution Agent also requests that the Special Tax Administrator be discharged and exonerated from liability for the claims administration upon the completion of the distribution plan and Fund disbursement. The Court grants the Distribution Agent's motion as to these requests.

E. Award of fees and expenses for the Special Tax Administrator and the Distribution Agent

The Court previously awarded the Special Tax Administrator \$18,487.44 for interim fees and expenses incurred in the preparation of the Fund's income tax returns for the years 1998-2008. Since then, the Special Tax Administrator has performed additional services for the Fund in seeking the abatement of assessments for penalties and interest due to the late payment of taxes for that 11-year period. Accordingly, the Special Tax Administrator is now requesting expenses and fees in the total amount of \$10,450.00 for services rendered in 2009. The Appointment Order provides that such fees and expenses may be recovered from the Fund. (Appointment Order 7.) Accordingly, the Court grants the motion to pay the Special Tax Administrator \$10,450.00 for fees and expenses incurred to date.

In the Court's previous Order dated May 26, 2009, the Court awarded the Distribution Agent \$50,652.16 for interim fees and expenses. The Distribution Agent now requests an award of supplemental fees in the amount of \$83,042.78 for administrative expenses and services rendered by him, his accounting staff and paralegal staff between February 1, 2009 and January 31, 2010.

The Distribution Agent states that he has expended 61.1 hours on the performance of administrative services for the Fund from February 1, 2009 through January 31, 2010. In addition, the Distribution Agent states that he has expended 137.4 hours in the performance of legal services for the

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Fund, including the preparation of reports and motions to the Court, papers in support thereof, communications with counsel and legal research. The Appointment Order provides that the Distribution Agent is entitled to seek compensation at the rate of \$200.00 per hour for administrative services, and \$295.00 per hour for legal services. (Appointment Order 2-3.) Accordingly, the Distribution Agent requests a fee award of \$12,220.00 for the administrative services performed, and \$40,533.00 for legal services rendered.

The Distribution Agent also requests an award of paralegal fees in the amount of \$25,577.00 and accounting staff fees in the amount of \$3,517.73. The Distribution Agent's paralegal staff was responsible for the initial review of all claims filed, communicating any claim deficiencies to claimants, soliciting evidence to support claims for excess damages, soliciting claimants to file their claims, and assisting in the preparation of the final claims report. The Distribution Agent states that his paralegal staff expended over 390 hours on this claims administration between February 1, 2009 and January 31, 2010. The Distribution Agent also states that his accounting staff expended over 37 hours in preparing and reconciling the Fund's bank accounts, which involved preparing disbursement checks, reports, and monthly income and expense statement data for detailed accountings. The Appointment Order provides that the Distribution Agent's administrative employees are entitled to seek compensation at the rate of \$65.00 per hour for their services. (Appointment Order 3.) In addition, the Appointment Order authorizes the Distribution Agent to "retain attorneys, accountants and other persons to assist in carrying out this Order." (Appointment Order 2.) The Court previously found that \$95.00 per hour for the accountant is a reasonable rate.

In addition to fees for services rendered, the Distribution Agent requests \$1,194.80 for administrative costs incurred, including costs and fees incurred for copying, facsimile transmissions, messenger deliveries, certified copies, and special postage. Thus, the total amount of fees and expenses requested by the Distribution Agent is \$83,042.78. Because payments on account were made in the sum of \$43,716.18, the net balance of the requested fees and expenses is \$39,326.60.

Upon review of the statements, invoices, and summaries submitted by the Distribution Agent in support of the motion for fees and expenses, the Court finds that the requested fees and expenses are reasonable. Accordingly, the Court grants the motion to the extent that the Distribution Agent is permitted to withdraw a total of \$39,326.60 in fees and expenses from the Fund.

Conclusion

For the forgoing reasons, the Distribution Agent's Motions are granted. It is hereby ordered that:

- (1) The Distribution Agent's final report on the claims administration program is approved.
- (2) The Court approves the eligible claims in the amount of \$13,398,699.84 and denies the unfiled claims and unsupported claims for excess damages.

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- (3) The Distribution Agent's motion to pay the additional penalties, interest and taxes assessed by the IRS in the amount of \$165,000.00 is granted. The Distribution Agent is authorized to pay \$165,000 to the IRS out of the fund forthwith. If the tax penalties are abated by the IRS before the Fund has been disbursed, the refunded amounts shall be added to the Fund available for distribution. If the tax penalties are not abated until after the Fund has already been disbursed, a second distribution shall be made to the eligible claimants whose claims have already been given full or partial preliminary approval by the Distribution Agent. There shall be no minimum amount of distribution. However, if the cost of making such disbursement to any claimant exceeds the amount of the disbursement itself, then such amount shall be retained and disbursed to the United States Treasury.
- (4) The Distribution Agent's motion for "post-Order" fees and expenses of up to \$18,582.00 is granted. The Distribution Agent is authorized to withdraw up to \$11,820.00 from the Fund in payment for the services rendered by him and his staff. The Distribution Agent is also authorized to disburse up to \$1,440.00 to the Special Tax Administrator for services rendered by him and his staff, and up to \$800.00 in payment for the check fraud prevention program. Upon preparation of the Fund's income tax returns for 2009 and 2010, the Distribution Agent is authorized to disburse up to an additional \$3,350.00 to the Special Tax Administrator. The Distribution Agent may also withdraw up to \$172.00 in payment for postage and mailing costs and is authorized to set up a miscellaneous expense reserve of \$1,000.00. If the actual amount of "post-Order" fees and expenses is less than currently estimated, and the tax penalties are abated by the IRS, but a second distribution has not yet been made, then the balance of those funds allotted for "post-Order" fees and expenses shall be added to the fund for distribution to the claimants. If the tax penalties are not abated, or a second distribution has already been made, then the balance of such funds shall be distributed to the United States Treasury.
- (5) After performance and completion of the distribution plan and disbursement of the Fund, the claims administration estate shall be terminated. At that time, the Distribution Agent, the Special Tax Administrator, and their respective employees shall be discharged and exonerated from any and all liability for the claims administration.
- (6) The Special Tax Administrator's petition for expenses and fees, submitted through the Distribution Agent, is granted. The Distribution Agent is authorized to disburse \$10,450.00 from the Fund to the Special Tax Administrator for services rendered.
- (7) The Distribution Agent's petition for expenses and fees in the amount of \$83,042.78 is granted. Given that payments on account have already been made in the sum of

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\$43,716.18, the Distribution Agent is permitted to withdraw a total of \$39,326.60 in fees and expenses from the Fund.

IT IS SO ORDERED.