

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	Case No. 1:09-cv-01906
	:	(JSG)
v.	:	
	:	
BRANTLEY CAPITAL MANAGEMENT, LLC et al.	:	
	:	
Defendants.	:	
	:	

**MOTION TO TRANSFER FUNDS TO THE DISTRIBUTION AGENT FOR
DISBURSEMENT TO ELIGIBLE CLAIMANTS AND AUTHORIZE THE
PAYMENT OF TAXES, FEES AND EXPENSES**

The Securities and Exchange Commission (“Commission”) respectfully requests that the Court enter an Order: 1) Directing the Clerk of the Court (“Clerk”) to issue a check to the Distribution Agent appointed herein, Epiq Systems Class Action & Claims Solutions (“Distribution Agent” or “Epiq”), for the payment of fees and expenses; 2) Directing the Clerk to transfer the remaining amount on deposit with the Court, minus Court registry fees, to the Distribution Agent for distribution to Eligible Claimants¹; 3) Directing the Distribution Agent to deposit these funds in the Bank pursuant to Paragraph 4.29 of the Distribution Plan; 4) Directing the Distribution Agent to distribute these funds, less a reserve of \$23,103.98, to Eligible Claimants pursuant to the Distribution Plan; and 5) Authorizing the Distribution Agent to pay remaining taxes, and fees and expenses of the Tax Administrator and/or Distribution Agent upon written request to and

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Distribution Plan approved by the Court.

written approval by Commission staff from the reserve without further order from the Court.

Background

The Commission filed its Complaint against Brantley Capital Management, LLC (“Brantley Capital”), Robert Pinkas (“Pinkas”), and Tab Keplinger (“Keplinger”) on August 13, 2009 (DE1). By order dated October 13, 2009, the Court entered Final Judgment as to Keplinger pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (DE 15). Pursuant to the Final Judgment, Keplinger paid \$50,000 to the Commission, who remitted the funds to the United States Treasury. By separate orders dated September 28, 2010, the Court entered Final Judgments as to Brantley Capital and Pinkas (DE 56 and DE 57). The judgment against Brantley Capital did not include a monetary liability. Pursuant to the judgment against him, Pinkas paid a total of \$957,729 in disgorgement, prejudgment interest, and civil penalty to the Clerk of this Court (the “Distribution Fund”). The Distribution Fund is currently held with the Court Registry Investment System in interest-bearing Government Account Series securities.

On December 17, 2010, the Commission filed a motion requesting the Court appoint Damasco & Associates LLP as Tax Administrator of the Distribution Fund (DE 58), which the Court approved by order dated January 6, 2011 (DE 59).

On May 15, 2013, the Commission moved the Court to create a Fair Fund under Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, for the purpose of distributing the money paid by Pinkas. The Commission also requested that the Court appoint Epiq as the Distribution Agent (DE 73). Subsequently, on July 8, 2013, the Commission filed a motion requesting the Court approve a plan to distribute the

Distribution Fund to Eligible Claimants (the “Distribution Plan”) (DE 77). By separate orders dated July 29, 2013, the Court granted the Commission’s motions by establishing a Fair Fund and appointing Epiq to serve as the Distribution Agent for the Distribution Fund (DE 80) and approving the Distribution Plan with a slight modification² (DE 81).

Payment of Distribution Agent Fees and Expenses

Pursuant to the order that appointed Epiq as the Distribution Agent, Epiq is to execute the distribution of the Distribution Fund to approved claimants in coordination with Commission staff pursuant to the Distribution Plan. In return, Epiq is to be paid reasonable fees and expenses for its services from the Distribution Fund.

The Distribution Agent has incurred fees and expenses of \$7,294.24 from July 1, 2014 through September 30, 2014 for services performed on behalf of the Distribution Fund. These fees and expenses are explained in detail in the invoices submitted by Epiq attached as Exhibit A.

The undersigned Counsel has reviewed the invoices and believes that the fees and expenses incurred by the Distribution Agent are reasonable and appropriate for the services performed. The Commission requests that the Court authorize the Clerk to pay these invoices from the Distribution Fund.

Disbursement of the Distribution Fund

Pursuant to Paragraph 4.27 of the Distribution Plan, the Distribution Agent is to prepare and submit to Commission staff a list of Eligible Claimants and the Net Recognized Loss of each Eligible Claimant (the “Final Payee List”).³ The paragraph

² The modification does not affect how the funds are to be distributed to Eligible Claimants. It relates to what may be done with any remaining funds once the distribution to Eligible Claimants is complete and all taxes, fees and expenses have been paid. (See paragraph 6.2 of the Distribution Plan (DE 81)).

³ The Final Payee List will be provided to the Court upon request under seal.

further states, that after reviewing the Final Payee List, Commission staff is to petition the Court to transfer all funds held by the Court to the Distribution Agent in accordance with the provisions of the Distribution Plan for distribution to Eligible Claimants.

The Distribution Agent has submitted the Final Payee List to Commission staff. The Distribution Agent has also submitted the Distribution Payment File Declaration in support of the Commission's Motion (attached as Exhibit B), which provides a summary of the actions performed by Epiq to develop the Final Payee List (the "Declaration"). There are approximately 583 Eligible Claimants with Net Recognized Losses totaling over \$6.6 million.

The current balance of the Distribution Fund is approximately \$865,000⁴ and is held with the Court Registry Investment System in interest-bearing Government Account Series securities. The Distribution Agent has determined that a reserve of \$23,103.98 is needed for anticipated future tax obligations of the Distribution fund, and the future fees and expenses of the Tax Administrator and the Distribution Agent. After taking into consideration the amounts held in reserve, approximately \$835,235 is available for distribution to Eligible Claimants. Each Eligible Claimant will receive a *pro rata* share of the approximately \$835,235 available for distribution, based upon their Net Recognized Loss. The distribution payments to Eligible Claimants will be approximately 12.6% of their losses.

⁴ This amount includes the Distribution Agent's current fees and expenses of \$7,294.24.

The Commission therefore respectfully requests that the Court issue an order to transfer the funds it currently holds, less court registry fees, to the Distribution Agent for distribution to Eligible Claimants in accordance with the Distribution Plan.⁵

Payment of All Remaining Fees and Expenses

The Distribution Agent anticipates that a reserve of \$23,103.98 will be needed for administrative fees and expenses, and taxes in order to complete the distribution to Eligible Claimants. To expedite the termination of the Distribution Fund, the Commission requests that the Distribution Agent be authorized to pay any remaining taxes, fees and expenses from the reserve upon submission of a written request to and written approval by Commission staff, without further order from the Court. All such payments will be reflected in the final accounting, which will be submitted to the Court for approval prior to the termination of the Distribution Fund.

WHEREFORE, for all the foregoing reasons, the Commission respectfully requests that this Court enter the attached proposed Order and grant such other relief as it deems just and proper.

Dated: October 29, 2014

Respectfully submitted,

/s/ Nancy Chase Burton
Nancy Chase Burton (CO Bar # 10615)
Attorney for Plaintiff
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5631
Telephone: (202) 551-4425
Facsimile: (703) 813-9730
Email: burtonn@sec.gov

⁵ The Distribution Agent has executed an escrow agreement with Huntington National Bank for the deposit of the Distribution Fund for distribution.

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, a copy of the foregoing Plaintiff Securities and Exchange Commission's Motion to Transfer Funds to the Distribution Agent for Disbursement to Eligible Claimants and Authorize the Payment of Taxes, Fees and Expenses and its accompanying proposed Order were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/ Nancy Chase Burton
Nancy Chase Burton