

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
v.	:	Case No. 06 CV 2942 (RWS)
	:	
TYCO INTERNATIONAL, LTD.,	:	
	:	
Defendant.	:	
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**PLAINTIFF’S NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT,
FOR AN ORDER AUTHORIZING A SECOND DISTRIBUTION TO CERTAIN
ELIGIBLE CLAIMANTS**

NOTICE

PLEASE TAKE NOTICE, that based upon the accompanying Affidavit of Lorri Staal in Support of the Securities and Exchange Commission’s Motion for Second Distribution of Fair Fund executed on December 1, 2015, the Proposed Order submitted herewith, and all prior proceedings had herein, and pursuant to the Distribution Plan approved by this Court on November 24, 2010, Plaintiff Securities and Exchange Commission will move this Court, at a date and time to be determined by the Court, before the Honorable Robert W. Sweet, at the United States Courthouse for the Southern District of New York, 500 Pearl Street, New York, New York 10007, for an order authorizing the Fund Administrator to conduct a second distribution from the approximately \$2.39 million remaining in the Fair Fund to certain Eligible Claimants.

MOTION

The Securities and Exchange Commission (“Commission”) respectfully requests that the Court enter an Order authorizing the Fund Administrator to conduct a second distribution from the approximately \$2.39 million remaining in the Fair Fund to certain Eligible Claimants.

MEMORANDUM

Procedural Background

On April 17, 2006, the Commission filed its Complaint in this action. The Complaint alleged that from 1996 through 2002, Tyco International, Ltd. (“Tyco”) engaged in various improper accounting practices that violated the federal securities laws by, among other things, overstating its reported financial results, improperly using reserve accounts to enhance and smooth reported financial results, engaging in improper acquisition accounting practices, and concealing from investors substantial amounts of senior executive compensation and a large number of related party transactions.

On May 1, 2006, this Court entered Final Judgment as to Defendant Tyco International, LTD. Pursuant to the Final Judgment, on or about May 10, 2006, the Defendant paid \$50,000,001.00 representing its obligation to pay disgorgement, penalties and prejudgment interest to the Clerk of this Court (the “Distribution Fund”). The Distribution Fund was deposited in an interest bearing account in the CRIS system under the case name designation “SEC v. Tyco International, Ltd, 06 CV 2942” (“Tyco CRIS Account”).

The Commission subsequently filed a related case against three former Tyco officers and employees, alleging that they were involved in devising, implementing, or furthering certain of Tyco’s improper accounting practices. *See SEC v. Richard D. Power, Edward Federman, and*

Richard J. “Skip” Heger, No. 06-CV-15343 (RWS) (SDNY filed Dec. 21, 2006). Between 2006 and 2009, final judgments were entered against each of these defendants. Pursuant to the judgments, the defendants paid disgorgement and civil penalties totaling approximately \$3.6 million into the Tyco CRIS Account.

On August 5, 2009, the Commission moved the Court to create a Fair Fund under Section 308(a) of the Sarbanes-Oxley Act of 2002 for the purpose of distributing the money paid by Tyco and the three former Tyco officers. The Commission also requested that the Court appoint Garden City Group, LLC¹ (“GCG”) as the Fund Administrator. The Court granted the Commission’s motion to establish the Fair Fund and appoint GCG as its Fund Administrator on August 19, 2009.

On October 28, 2010, the Commission filed a motion requesting the Court approve a distribution plan for the Tyco Fair Fund. The Court granted the motion and approved the Tyco Distribution Plan on November 24, 2010.

On April 25, 2013, the Court issued an order to transfer the funds in the Tyco CRIS account to the Fund Administrator for distribution to Eligible Claimants² in accordance with the Distribution Plan. Pursuant to this order, beginning on June 18, 2013, over \$56 million was distributed to 161,651 Eligible Claimants, while \$150,000 was held in reserve for future tax obligations of the Fair fund, the future fees and expenses of the Tax Administrator, post-judgment interest reserve,³ and to accommodate any claim adjustments (“Initial Distribution”).

After the Initial Distribution, GCG monitored the status of all checks issued and attempted to follow-up with Eligible Claimants who did not negotiate their payments. *See the*

¹ Please note that Garden City Group, LLC was f/k/a The Garden City Group, Inc.

² Capitalized terms used by not defined herein shall have the meanings ascribed to such terms in the Distribution Plan approved by the Court.

³ Defendant Richard D. Power, paid \$3,132.88 is post-judgment interest. Pursuant to 31 U.S.C. 3302(b), this amount will be paid to the U.S. Treasury in addition to any final residual of the fund.

Affidavit of Lorri Staal in Support of the Securities and Exchange Commission's Motion for Second Distribution of Fair Fund, dated December 1, 2015 ("Affidavit"), filed separately. As a result of this effort, about \$54 million of the funds included in the Initial Distribution were negotiated by Eligible Claimants, including payments that were reissued. Despite GCG's follow-up efforts, approximately \$2.39 million still remains in the Fair Fund. This amount includes \$133,669.16 still held in reserve from the Initial Distribution, \$965,180 in returned funds, \$1,286,883 in uncashed and undeliverable checks, and a tax refund credit of \$4,597.20.

Second Distribution of Funds to Eligible Claimants

The Distribution Plan does not contemplate a second distribution. As provided in Paragraph 4.2 of the Distribution Plan, all remaining funds are to be remitted to the Commission for transfer to the United States Treasury. Since approximately \$2.39 million remains in the Fair Fund, the Fund Administrator has indicated in its Affidavit that it believes a second distribution is feasible after taking into account a reserve for taxes and fees and expenses of the Tax Administrator. Therefore the Commission requests, and the Fund Administrator recommends, that the Court authorize a distribution of the remaining funds to Eligible Claimants who negotiated their payments from the Initial Distribution. Based on estimated figures from the Fund Administrator, if this distribution occurs, Eligible Claimants who receive a second distribution will receive approximately 0.14% of their total recognized loss.

The proposed terms of the second distribution are as follows:

- The distributable amount will consist of the remaining funds in the Fair Fund, less a reserve of \$15,236.00 for taxes, and the fees and expenses of the Tax Administrator.⁴
- Only Eligible Claimants who received an Initial Distribution from the Fair Fund and who negotiated the payment will be eligible to receive a distribution. All

⁴ No fees are due to GCG, as Tyco has paid for the initial distribution work and a potential second distribution.

disbursements will be on a *pro rata* basis and must be equal to or greater than the Minimum Distribution Amount of \$10.00.

- All checks will bear the notation “CASH PROMPTLY, VOID IF NOT CASHED WITHIN 60 DAYS.” Checks that are not negotiated within this period will be voided and the issuing financial institution will be instructed to stop payment on those checks. Where an Eligible Claimant’s check has not been negotiated within the sixty (60) day period and has been voided, that Eligible Claimant’s claim will be extinguished upon the occurrence of the stale date and all such funds will remain in the Fair Fund.
- After the second distribution occurs, if cost effective, as determined by the Fund Administrator and Commission staff, the Fund Administrator will be authorized to conduct a further distribution of any remaining funds in the Fair Fund to Eligible Claimants who negotiated their second payment.
- All other terms and conditions of the Distribution Plan will remain in full effect to the extent applicable.

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

Dated: December 2, 2015

Respectfully submitted,

/s/ Nichola L. Timmons
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