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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE ENERGY RECOVERY INC.
SECURITIES LITIGATION.

Case No. [15-cv-00265-EMC](#)

**ORDER RE LEAD PLAINTIFF’S
MOTION FOR DISBURSEMENT OF
SETTLEMENT FUNDS**

Docket No. 154

United States District Court
Northern District of California

The Court previously conditionally granted Lead Plaintiff’s motion for disbursement of settlement funds. Having now received additional information from the claims administrator Garden City Group LLC (“GCG”), the Court hereby rules as follows.

The Court adopts the proposed order submitted by Lead Plaintiff at Docket No. 154-1, but with two modifications. First, as the Court previously indicated, a claimant shall have 180 days (not 90 days) to cash a check. *See* Prop. Order ¶ E. Second, the Court awards the claims administrator \$165,000 (instead of the requested \$196,405.36). *See* Prop. Order ¶ L.¹

With regard to the claims administrator fees and expenses, the Court notes as follows.

1. On February 22, 2017 – as a part of preliminary approval proceedings – the Court ordered the parties to provide the actual dollar value of, *inter alia*, claim administration costs that would be deducted from the gross settlement fund. The Court acknowledged that “some deductions will need to be estimated but the parties shall use their best efforts to provide a reasonably accurate estimate.” Docket No. 129 (Order ¶ B).

¹ The proposed order actually refers to a sum of \$216,279.46, but, at the hearing held on March 2, 2018, Lead Counsel admitted that this was an error. *See also* Ferrante Decl. ¶ 48 (declaration submitted on behalf of GCG) (stating that “GCG has billed a total of \$196,405.36”).

1 2. On March 1, 2017, Lead Plaintiff responded as follows: GCG “estimates that it will
2 be able to administer the class action for between \$120,000 and \$135,000, including fees and
3 expenses. This estimate is based upon the following key assumptions: 40,000 class members
4 (notice recipients); a notice and proof of claim package totaling 16 pages; an IVR telephone line
5 for 6,000 minutes of operation (assuming 5% of class members at 3 minutes/call); claims
6 processing at 20% response rate (8,000 claims); and a 12-month claims administration process.”
7 Docket No. 133 (Supp. Br. at 4). Lead Plaintiff added that a reminder notice “to approximately
8 40,000 class members would increase claim administration costs by approximately \$15,000 to
9 \$17,000.” Docket No. 133 (Supp. Br. at 11). Thus, the maximum estimate was \$152,000 (*i.e.*,
10 \$135,000 + \$17,000).

11 3. At the time of the supplemental brief, Lead Plaintiff reiterated that notice would
12 include not only mail notice but also publication notice in *Investor’s Business Daily*. See Docket
13 No. 133 (Supp. Br. at 10) (stating that, “[w]ith regard to the publication in *Investor’s Business*
14 *Daily*, the notice will be published once at the outset of the notice period”); see also Docket No.
15 127 (Mot. at 15) (noting that settlement “provides for publication of a summary notice . . . in the
16 national edition of *Investor’s Business Daily*”).

17 4. On April 11, 2017, the Court granted preliminary approval. See Docket No. 140
18 (order).

19 5. In conjunction with final approval proceedings, GCG submitted a declaration on
20 August 10, 2017, stating, *inter alia*, that: GCG disseminated 17,994 notice packets and 11,468
21 reminder postcards, see Docket No. 149-1 (Ferrante Decl. ¶¶ 2-3); GCG received 309 calls (with
22 respect to the toll-free phone line that was maintained), see Docket No. 149-1 (Ferrante Decl. ¶ 4);
23 and GCG received 4,797 proofs of claim. See Docket No. 149-1 (Ferrante Decl. ¶ 6).
24 Subsequently, on January 17, 2018 (in conjunction with the pending motion), GCG revised the
25 number of proofs of claim received to 5,760. See Docket No. 155 (Ferrante Decl. ¶ 30).

26 6. On January 17, 2018, GCG also provided information about the claims
27 administration costs. GCG represented that its total fees and expenses were \$196,405.36. See
28 Docket No. 155 (Ferrante Decl. ¶ 48). GCG acknowledged that it was seeking more than had

1 previously been represented to the Court as a part of preliminary approval but asserted that “there
2 were several modifications to the scope of the administration that were not contemplated in our
3 proposal and were beyond the scope of GCG’s initial proposal.” Docket No. 155 (Ferrante Decl. ¶
4 46). According to GCG, these modifications were as follows:

- 5 • “The size of the Proof of Claim Form was increased from four pages to ten pages.”
6 Docket No. 155 (Ferrante Decl. ¶ 46(a)). This claim is incorrect. The claim form that
7 Lead Counsel submitted during preliminary approval proceedings was eleven pages in
8 length. *See* Docket No. 126-3 (proof of claim). The claim form that was sent out by
9 GCG was actually shorter – nine pages. *See* Docket No. 145-1 (proof of claim).
10 Moreover, as noted above in ¶ 2, GCG contemplated that the notice packet – *i.e.*, the
11 long-form notice *plus* proof of claim – would total sixteen pages. It appears that the
12 notice packet that GCG sent out was only one page longer (*i.e.*, seventeen pages). *See*
13 Docket No. 145-1 (notice packet).
- 14 • GCG sent out a reminder postcard. While a reminder postcard may not have been
15 within the original estimate that GCG gave Lead Counsel, the Court specifically asked
16 the parties about the cost of a reminder postcard during preliminary approval
17 proceedings. Lead Plaintiff responded that a reminder notice “to approximately 40,000
18 class members would increase claim administration costs by approximately \$15,000 to
19 \$17,000.” Docket No. 133 (Supp. Br. at 11). *Including* the cost of reminder notice, the
20 maximum estimate for claims administration was \$152,000. *See* ¶ 2, *supra*. (Notably,
21 the cost of the reminder notice was estimated to be \$15,000 to \$17,000 if notice were
22 sent out to 40,000 class members. As it turns out, only 11,468 reminder postcards were
23 sent out. *See* ¶ 5, *infra*. Thus, if anything, the cost of the reminder notice should have
24 been markedly less than \$15,000 to \$17,000.)
- 25 • The publication of the summary notice in *Investor’s Business Daily*. Publication notice
26 was, admittedly, not explicitly identified as one of the “key assumptions” made by
27 GCG above. *See* ¶ 2, *supra*. However, there is no doubt that publication notice was
28 always contemplated by Lead Plaintiff as of the time of preliminary approval. *See* ¶ 3,

1 *supra*. No indication was ever given to the Court that the cost of claims administration
2 did not include the touted publication notice.

3 7. In light of the above, the Court stated at the hearing on the pending motion that it
4 was *not* inclined to award \$196,405.36 in claims administration costs and that instead it would
5 award \$155,000 unless GCG provided a better explanation in support of the requested amount.

6 8. On March 16, 2018, GCG provided a new declaration in which it defended the
7 \$196,405.36 figure because of:

- 8 • “Significantly more broker outreach than anticipated”;
- 9 • “Bigger Proof of Claim Form including increased cost of printing and postage”;
- 10 • “Reminder postcard, including printing and postage”;
- 11 • “Publication”; and
- 12 • “Significantly more class member communications.” Cirami Decl. ¶ 4.

13 9. The only new matters identified in the new declaration are “[s]ignificantly more
14 broker outreach than anticipated” and “[s]ignificantly more class member communications.”
15 Cirami Decl. ¶ 4. The assertions are too conclusory to support the \$196,405.36 figure. For
16 example, GCG has failed to explain how broker outreach was significantly more than anticipated
17 given that its original estimate was that 40,000 notice packets would be distributed. Similarly,
18 GCG has failed to explain how class member communications were significantly more than
19 anticipated given its original estimate of “an IVR telephone line for 6,000 minutes of operation
20 (assuming 5% of class members at 3 minutes/call); claims processing at 20% response rate (8,000
21 claims); and a 12-month claims administration process.” Docket No. 133 (Supp. Br. at 4).

22 10. For the foregoing reasons, the Court could well stand by its original ruling that
23 claims administration costs of no more than \$155,000 would be awarded. However, it shall
24 increase that figure slightly – to \$165,000 – to account for possible underestimation of costs. The
25 Court reiterates that, at the time of preliminary approval, the maximum cost was \$152,000, and
26 that was based on assumptions that were inflated (*e.g.*, a reminder postcard to 40,000 recipients).

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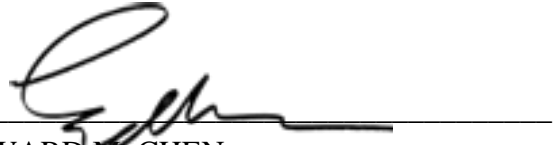
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1 For the foregoing reasons, the Court now gives final approval to Lead Plaintiff's motion
2 but modifies its proposed order at Docket No. 154-1. A modified order reflecting the Court's
3 rulings herein shall be filed shortly hereafter.

4 This order disposes of Docket No. 154.

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6 **IT IS SO ORDERED.**

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8 Dated: March 19, 2018



EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California

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