UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re DHB INDUSTRIES, INC. CLASS ACTION LITIGATION	:	Civil Action No. 2:05-cv-04296-JS
	:	CLASS ACTION
This Document Relates To:	:	
ALL ACTIONS.	:	

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPROVAL OF SUPPLEMENTAL SETTLEMENT AGREEMENT

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Lead plaintiffs George Baciu and the NECA-IBEW Pension Fund (together, "Lead Plaintiffs")[1] respectfully submit this memorandum: (1) to bring before the Court a supplemental settlement agreement (the "Supplemental Settlement Agreement"), reached by certain parties to this securities class action (the "Class Action") and others, to resolve numerous differences among them, as well as litigation pending in other courts, and thereby facilitate the operation of the prior settlement of the Class Action (the "Prior Settlement"), approved by the Court in a Final Judgment and Order of Dismissal of Class Action with Prejudice dated July 8, 2008 (Dkt. No. 346) (the "Final Approval Order");[2] and (2) in support of their request that the Court approve the Supplemental Settlement Agreement and permit the disbursement of $20 million from the Escrowed Funds (defined below) to fund a loan to the Debtors (defined below), in accordance with the Supplemental Settlement Agreement.[3] To that end, Lead Plaintiffs respectfully request that the Court order the issuance of notice concerning the Supplemental Settlement Agreement, and schedule a hearing to consider its merits, as discussed below.

The Supplemental Settlement Agreement brings an end to multiple appeals and litigation before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court")

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[1] Because Robino Stortini Holdings, LLC has been canceled of record as a Delaware LLC, Plaintiffs' Counsel (defined below) has requested that it be formally withdrawn as a lead plaintiff in this action (Dkt. No. 413). Accordingly, it is not a Lead Plaintiff for purposes of this motion.

[2] The terms of the Prior Settlement are set out in a Stipulation and Agreement of Settlement dated as of November 30, 2006, submitted to the Court on March 12, 2007 (Dkt. No. 227) (the "2006 Stipulation"), as approved by the Final Approval Order. The Prior Settlement resolved not only the Class Action, but also a derivative action captioned *In re DHB Industries, Inc. Derivative Litigation*, Case No. 05-cv-04345 (E.D.N.Y.) (the "Derivative Action").

[3] The Supplemental Settlement Agreement, originally executed on February 5 and 6, 2015, was amended on May 4, 2015 (and therefore entitled "Amended Settlement Agreement") to take into account the Court's memorandum and order dated March 27, 2015 regarding restitution (the "Restitution Order") in a related criminal action. *See United States v. Schlegel, et al.*, Case No. 06-cr-00550 (JS) (E.D.N.Y.) (the "Criminal Action"), Dkt. No. 1869. The Supplemental Settlement Agreement, submitted herewith as Exhibit 1 to the Declaration of Samuel H. Rudman, dated May 4, 2015 (the "Rudman Decl."), formalizes a Term Sheet executed on or about November 24, 2014 (the "Term Sheet"). Unless otherwise indicated, all exhibits cited herein are attached to the Rudman Decl. and cited as "Exhibit __" or "Exh. __." Capitalized terms not defined herein have the meanings ascribed to them in the Supplemental Settlement Agreement.

and the United States District Court for the District of Delaware (the "Delaware District Court"), which previously blocked the operation of the Prior Settlement. In essence, and as discussed below, the two victim constituencies of David Brooks' fraud are intended to be parties to and beneficiaries of the Supplemental Settlement Agreement – the investor victims and the Debtors.

I. INTRODUCTION

The Class Action and the Prior Settlement have a long and difficult history, as the Court is well aware (and as described below). Although the Class Action and Derivative Action settled with the Court's blessing more than six years ago – after almost three years of litigation and negotiation – the Class (defined below) has not received one dime of the settlement fund, made up of $34,900,000 in cash plus accrued interest (the "Escrowed Funds")[4] and the value of 3,184,713 shares of Point Blank[5] common stock.[6] Instead, the Prior Settlement became mired in disagreement, appeals, and other proceedings – both here and in related bankruptcy proceedings – that threaten the possibility of the Class ever receiving the recovery they have deserved for years. Indeed, the Prior Settlement has essentially been on life support.

Now, however, there has been a development that frees the Prior Settlement from the current morass, and therefore offers those Class members who submitted an eligible claim not only the benefit of the Court's Restitution Order, but also a large portion of the benefit of their original bargain. This development, reflected in the allocation provisions set forth in the Supplemental Settlement Agreement, is separate from but complementary to the Prior Settlement, among parties

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[4] The Escrowed Funds also include $300,000 for attorneys' fees and expenses to plaintiffs' counsel in the Derivative Action, for a total of $35,200,000 in cash.

[5] Defendant DHB Industries, Inc. ("DHB") later became Point Blank Solutions, Inc. ("Point Blank"), and is known today as SS Body Armor I, Inc. ("SS Body Armor I"). In this memorandum, Lead Plaintiffs use the terms "DHB," "Point Blank," and "SS Body Armor I" interchangeably.

[6] DHB's common stock was delisted from the American Stock Exchange and trades over-the-counter at approximately $.20 to $.45 per share. *See* http://www.reuters.com/finance/stocks/chart?symbol=PBSOQ.PK.

who have not seen eye to eye since Point Blank filed for chapter 11 protection: (1) Lead Plaintiffs, on behalf of themselves and all members of the class certified by the Court (the "Class Plaintiffs" or the "Class") in the Final Approval Order; (2) counsel for Lead Plaintiffs and the Class ("Plaintiffs' Counsel");[7] (3) SS Body Armor I (Point Blank), on behalf of itself and its affiliated debtors and debtors in possession (SS Body Armor II, Inc., SS Body Armor III, Inc., and PBSS, LLC (collectively, the "Debtors")) in the chapter 11 proceeding pending in the Bankruptcy Court, captioned *In re SS Body Armor I, Inc., et al.*, Case No. 10-11255 (CSS) (the "Bankruptcy Proceeding"); and (4) plaintiffs' counsel in the Derivative Action ("Derivative Counsel").[8]

The Supplemental Settlement Agreement represents an enormous opportunity for the Class, as well as certain additional victims of the criminal conduct for which David Brooks stands convicted. As reflected therein, the Supplemental Settlement Agreement is intended "to resolve all pending litigation and claims that have been or may be asserted between and/or among the Parties, and to provide a means for the Parties to focus on a joint effort to maximize and accelerate a distribution to the Debtors and the Plaintiffs as victims of the fraud perpetrated by David Brooks."[9] Exh. 1 at 3.

Specifically, the Supplemental Settlement Agreement substantially aids in the resolution of the Debtors' and the Class Plaintiffs' competing claims to approximately $180 million of funds restrained or forfeited in connection with the Criminal Action against David H. Brooks ("David Brooks"). The Class Plaintiffs asserted a restitution claim of approximately $186 million, while the Debtors asserted a claim of more than $117 million. As between these competing claims, the

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[7] Plaintiffs' Counsel are Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Labaton Sucharow LLP ("Labaton").

[8] Derivative Counsel are the Law Offices of Thomas G. Amon and Robbins Arroyo LLP.

[9] As used herein, "Parties" refers to the Parties to the Supplemental Settlement Agreement.

Government originally asked this Court "to enter a restitution order equaling the full amount of [Point Blank's] losses (*i.e.*, $117.2 million)," *see* Criminal Action, Dkt. No. 1762 at 23, while recommending only a fraction of that amount for the investor victims. *See* Criminal Action, Dkt. Nos. 1661-1 at 37, 1866.[10] On March 27, 2015, the Court issued the Restitution Order, which granted restitution in the Criminal Action of $53,912,545.62 to the Debtors and $37,584,301.30 to the investor victims identified in the Restitution Order.[11]

The Supplemental Settlement Agreement would resolve all issues related to the Escrowed Funds by providing for an allocation of the Escrowed Funds so as to create a 50/50 allocation with the Debtors when taking into account the Restitution Order and a 50/50 allocation of any future recoveries from the Shared Recovery Matters to the Debtors and the Plaintiffs/Investor Claimants, including the Class Plaintiffs. Under the terms of the Supplemental Settlement Agreement, as more fully described below, the Investor Victims' Restitution Award will be augmented, the numerous disputes surrounding Class Plaintiffs' entitlement to the Escrowed Funds will be resolved, all parties in interest will be relieved of the intense litigation that surrounds the Escrowed Funds, and the risk that ***none*** of the Escrowed Funds will be available to Class Plaintiffs will be eliminated.

At the same time that it creates this 50/50 allocation, the Supplemental Settlement Agreement requires, subject to the conditions set forth therein, the Class Plaintiffs to provide the Debtors with an immediate source of cash to fund a chapter 11 plan, in the form of a $20 million, interest-free,

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[10] In a Memorandum and Order dated December 18, 2014 in the Criminal Action (Dkt. No. 1851), the Court reserved judgment on the amount of restitution due to any victim of David Brooks' criminal misconduct, and directed the Government to submit a supplemental calculation of shareholder losses consistent with the Court's Memorandum. The Government made its supplemental submission on January 18, 2015 (Dkt. No. 1856), presenting the Supplemental Report of its expert, Jordan G. Milev, including a revised inflation table, and requesting an extension of time, through February 27, 2015, to submit a supplemental calculation of shareholder losses. The Court granted the Government's request for additional time on January 20, 2015. On February 27, 2015, the Government filed its supplemental calculation, which further reduced the loss to investor victims to $37,584,301.31. *See* Criminal Action, Dkt. No. 1861. The Government then further clarified its calculation on March 18, 2015. *See* Criminal Action, Dkt. No. 1866.

[11] Notably, the administrator of the claims process in the Criminal Action estimates that $31,872,156 of the $37,584,301 in allowed claims in the Criminal Action is attributable to claims by Class Plaintiffs. *See* Rudman Decl. ¶7.

non-recourse loan from the Escrowed Funds. Although this loan by the Class Plaintiffs is characterized as "non-recourse," it is to be repaid from the Debtors' portion of the Shared Recovery Matters (defined below), including the $53.9 million restitution award and whatever forfeiture or other distributions from the Shared Recovery Matters the Debtor ultimately receives. By resolving the Parties' competing claims to the restrained and forfeited assets, and establishing an allocation framework, the Supplemental Settlement Agreement allows the Debtors and Class Plaintiffs to pursue the recovery of the restrained/forfeited assets in a cooperative, non-adversarial fashion that will maximize the recoveries, and minimize both costs and risks, for the Class Plaintiffs.[12] At the same time, it does not impair the rights of any of the criminal defendants in any criminal proceeding before this Court and provides those defendants with a dismissal with prejudice of the Class Action and the Derivative Action.

Indeed, the proposed Supplemental Settlement Agreement resolves a variety of complex litigation matters, pending in the Bankruptcy Court, the Delaware District Court, and this Court, that threaten the prospects of the Class Plaintiffs receiving ***any*** of the benefits of the Prior Settlement. The Escrowed Funds, as well as Point Blank's 2010 rejection of the Prior Settlement, are the subject of: (a) the Turnover Adversary Proceeding (defined below) in the Bankruptcy Court, in which Point Blank sought, *inter alia*, turnover of the Escrowed Funds from Robbins Geller (as Escrow Agent), Plaintiffs' Counsel, and Derivative Counsel, with two motions to dismiss filed by the Class Plaintiffs and David Brooks; (b) two appeals – by the Class Plaintiffs and David Brooks – to the Delaware District Court from the Rejection Order (defined below), entered by the Bankruptcy Court, approving Point Blank's rejection of the 2006 Stipulation and related agreements; and (c) three

[12] Given the amount of the restitution awards to both the Debtor and the Plaintiffs/Investor Claimants, which would allow for the full repayment of the loan, the only risk of non-payment of the loan under the above-described terms comes from David Brooks' appeal of the Court's Amended Judgment in a Criminal Case (Dkt. No. 1875), and it will be borne proportionally by the Class Plaintiffs and their counsel.

"rejection damages" claims, which focus primarily on the ownership of the Escrowed Funds in the event they are not distributed in accordance with the 2006 Stipulation, filed against Point Blank in the Bankruptcy Proceeding by David Brooks and Point Blank's former Chief Financial Officer, Dawn M. Schlegel. If these matters are ultimately decided in a manner that is contrary to the interests of the Class Plaintiffs, the Class Plaintiffs' ***only*** source of recovery would be their share of the Court's Investor Victims' Restitution Award, *i.e.* approximately $31.8 million.

In the face of these challenges to the Prior Settlement, the proposed Supplemental Settlement Agreement provides for the release of the Escrowed Funds to the Class Plaintiffs (in accordance with the Prior Settlement) subject to the 50/50 allocation. Once the conditions of the Supplemental Settlement Agreement are satisfied, the Turnover Adversary Proceeding will be dismissed, the Class Plaintiffs' appeal from the Rejection Order will be dismissed, and the Class and Derivative Actions will be dismissed. The only matter left to be resolved by this Court would be the competing claims to the cash and other assets currently under restraint in connection with the Civil Forfeiture Proceeding (discussed below). The Supplemental Settlement Agreement, however, establishes a framework under which the Debtors, the Class Plaintiffs, and the victims of David Brooks' criminal conduct (for which he stands convicted), can pool their efforts to maximize the recovery for their respective constituencies. Specifically, assuming the Supplemental Settlement is approved by the courts and becomes effective, each constituency (the Debtors and the Plaintiffs/Investor Claimants) would be entitled to approximately $64 million, inclusive of their respective restitution awards.

Finally, the Supplemental Settlement Agreement is eminently fair to the other parties to the Prior Settlement. In particular, the Supplemental Settlement Agreement will give David Brooks and the other defendants in the Class and Derivative Actions the "benefit of the bargain" they expected to receive under the Prior Settlement: as contemplated in the Prior Settlement, the Escrowed Funds

will be released to the Class Plaintiffs and, in exchange, the claims asserted against David Brooks and the other defendants asserted in the Class and Derivative Actions will be dismissed with prejudice. Moreover, because the Supplemental Settlement Agreement will facilitate the intended effect of the Prior Settlement (*i.e.*, use of the Escrowed Funds to resolve the Class and Derivative Actions), the Supplemental Settlement Agreement will either resolve or moot David Brooks' appeal from the Rejection Order and the "rejection damages" claims asserted by David Brooks and Dawn Schlegel.

In short, the Supplemental Settlement Agreement resolves disputes among certain parties to the Prior Settlement, facilitates the intended operation of the Prior Settlement, and affords the Class Plaintiffs a strong likelihood of receiving more in compensation than if there were no settlement and they faced the risks inherent in the Turnover Adversary Proceeding, the Bankruptcy Proceeding, and the related appeals pending in the Delaware District Court. Accordingly, the Class Plaintiffs respectfully request that the Court approve the Supplemental Settlement Agreement and permit them, according to its terms (and consistent with the 2006 Stipulation), to effectuate the Supplemental Settlement Agreement by, among other terms and conditions, lending the Debtors $20 million to fund a chapter 11 plan, which loan is to be repaid according to the terms of the Supplemental Settlement Agreement.

II. PROCEDURAL HISTORY

A. The Class and Derivative Actions and the 2006 Stipulation

On and after September 9, 2005, multiple class actions were filed in the United States District Court for the Eastern District of New York (the "E.D.N.Y.") against DHB and certain of its officers and directors, including David Brooks. The actions were filed on behalf of purchasers of Point Blank's publicly traded securities. The complaints alleged, among other things, that Point Blank's

public disclosures were false or misleading in violation of the Securities Exchange Act of 1934. The class actions were consolidated into the Class Action.

On and after September 14, 2005, multiple derivative actions were also filed in the E.D.N.Y. on behalf of Point Blank against certain of Point Blank's officers and directors, including David Brooks. The complaints alleged, among other things, causes of action for breach of fiduciary duty, abuse of control, gross mismanagement, waste of corporate assets, and unjust enrichment. The derivative actions were consolidated into the Derivative Action.

On November 30, 2006, the parties to the Class and Derivative Actions entered into the 2006 Stipulation. *See* Exh. 2.[13] Under the 2006 Stipulation, the parties agreed to the following resolution of the Class and Derivative Actions: (a) the Class Action would be settled for $34,900,000 in cash, plus 3,184,713 shares of Point Blank common stock; and (b) the Derivative Action would be settled for Point Blank's adoption of certain corporate governance policies and its payment of Derivative Counsel's attorneys' fees and expenses. *Id.* ¶¶2.1, 2.4, 2.12. The cash portion of the Prior Settlement (*i.e.*, the Escrowed Funds), in the total amount of $35,200,000, was deposited with Robbins Geller, as the Escrow Agent designated under a related Escrow Agreement. *Id.* ¶2.1.

The Effective Date of the 2006 Stipulation was conditioned upon final court approval of the Prior Settlement of both the Class and Derivative Actions, including the resolution of any appeals.[14] *Id.* ¶¶7.1, 7.2. The 2006 Stipulation was approved (as modified by the Court) pursuant to judgments

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[13] The parties to the 2006 Stipulation were: (a) Point Blank; (b) Lead Plaintiffs; (c) the derivative plaintiff in the Derivative Action; (d) Point Blank's former officers and directors – David Brooks, Sandra Hatfield, Dawn M. Schlegel, Cary Chasin, Jerome Krantz, Gary Nadelman, Barry Berkman, and Larry R. Ellis; and (e) Jeffrey Brooks (David Brooks' brother), Terry Brooks (David Brooks' ex-wife), David Brooks International, Inc., Andrew Brooks Industries Inc., Elizabeth Brooks Industries Inc., and Tactical Armor Products, Inc.

[14] While the Supplemental Settlement Agreement resolves a host of litigated matters, including the appeal of the Rejection Order (defined below), nothing set forth herein is intended to prejudice or compromise Lead Plaintiffs' position and arguments with respect to that appeal or any other litigated matter in the event the Supplemental Settlement Agreement does not become effective and the appeal and other litigation go forward.

entered in the Class and Derivative Actions on July 8, 2008. D. David Cohen, an alleged party in interest who had requested exclusion from the Class Action (*see* Dkt. No. 346 at Exhibit 1), timely filed an appeal with the Second Circuit solely from the judgment entered in the Derivative Action.[15] On September 30, 2010, the Second Circuit issued a decision (the "Second Circuit Opinion") vacating and remanding the judgment in the Derivative Action on the grounds that certain indemnification and release provisions of the 2006 Stipulation violated section 304 of the Sarbanes-Oxley Act of 2002, effectively putting the Prior Settlement in suspension. David Brooks and Dawn M. Schlegel have since waived their rights under those provisions.[16]

As discussed in further detail below, this Court has not taken any further action with respect to the 2006 Stipulation following the issuance of the Second Circuit Opinion because, among other reasons, Point Blank filed for bankruptcy protection and the Debtors rejected the 2006 Stipulation and certain related agreements in the Bankruptcy Proceeding. Accordingly, the Escrowed Funds remain in the possession of Robbins Geller as Escrow Agent, Plaintiffs' Counsel, and Derivative Counsel, as follows: (a) approximately $27,200,000 of the Escrowed Funds, plus accrued interest, is held in the escrow account maintained by Robbins Geller; and (b) approximately $9,925,000 of the Escrowed Funds was provisionally distributed from the escrow account as attorneys' fees and expenses to Plaintiffs' Counsel and Derivative Counsel pursuant to the 2006 Stipulation and the Order approving the fees and expenses. Exh. 2 ¶6.4; Dkt. No. 354. The approximate current value of the Escrowed Funds, including the amounts provisionally paid as attorneys' fees, is $37,000,000.

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[15] On August 1, 2008 and September 5, 2008, notices of appeal to the United States Court of Appeals for the Second Circuit were filed to challenge the Final Approval Order. The appeals were later withdrawn and dismissed by Orders dated April 28, 2009 and August 4, 2009. *See* Docket of Second Circuit Court of Appeals, No. 08-3814. The Class Action Judgment was not vacated by the Second Circuit.

[16] *See* Exh. 3 (status report filed by David Brooks in this Court setting forth his position regarding the indemnification and release provisions); Exh. 4 (letter filed by Dawn Schlegel in this Court setting forth her position regarding the indemnification and release provisions).

B. The Criminal Proceedings Against David Brooks, Sandra Hatfield, and Dawn Schlegel

1. David Brooks' Conviction and Guilty Pleas and the Related Restitution and Forfeiture Proceedings

In October 2007, David Brooks was indicted in this Court on multiple charges based on, among other things, the same misconduct alleged in the Class and Derivative Actions. On September 14, 2010, a jury convicted him of conspiracy to commit securities fraud (Count 1), securities fraud (Count 2), conspiracy to commit mail and wire fraud (Count 3), mail fraud (Count 4), wire fraud (Count 5), insider trading (Counts 6, 7, 8, 9, 10, and 11), conspiracy to obstruct justice (Count 15), obstruction of justice (Count 16), and material misstatements to auditors (Count 17). He also pled guilty to tax counts of conspiracy to defraud the United States (Count 18) and false filing of tax returns (Counts 19 and 20).

Upon the filing of the indictment against David Brooks, the Government restrained a significant amount of cash and non-cash assets – the proceeds of his criminal conduct – including accounts at several financial institutions. At the time of restraint, the value of those seized accounts was $158,815,308.50. *See* Criminal Action, Dkt. No. 1343. In addition to those amounts, David Brooks forfeited approximately $19 million in bail funds when he violated his bail conditions before trial.

In November 2010 and December 2011, this Court conducted extensive non-jury forfeiture proceedings in the Criminal Action to determine the amount of traceable assets that David Brooks obtained as a result of his criminal offenses. Ultimately, the Court issued a preliminary order granting forfeiture of the assets that David Brooks obtained through his unauthorized compensation scheme (valued at $5,564,681), and $59,602,931 as a result of David Brooks' insider trading. According to the Amended Preliminary Order of Forfeiture, dated August 15, 2013, in the Criminal Action (Dkt. No. 1709), the universe of restrained assets available for restitution is $185,723,663.

Amended Forfeiture Order at 3 n.2. The Court has continued to restrain all of the seized assets pending restitution to David Brooks' victims.

The Debtors and the Class Plaintiffs asserted competing claims to this amount. In a letter to this Court dated November 8, 2013 in the Criminal Action (Dkt. No. 1750), Plaintiffs' Counsel asserted a claim for losses of $186,362,631 on behalf of the investor-victims of David Brooks' fraud. In support of that request, Plaintiffs' Counsel submitted the expert affidavit of Frank Torchio, President of Forensic Economics, Inc., which challenged the damage calculation and plan of allocation of both the Department of Justice and David Brooks. Plaintiffs' Counsel later reiterated that request in a September 19, 2014 letter to the Court in the Criminal Action (Dkt. No. 1835). Consequently, Plaintiffs' Counsel requested that the entire amount available for restitution – $185,723,663 – be made available to compensate investor-victims. Similarly, just before David Brooks' sentencing, Point Blank submitted a letter to this Court updating and detailing its restitution claim, which at that time amounted to over $117 million, for the losses and costs purportedly expended by Point Blank as a result of David Brooks' criminal conduct.

In August 2013, this Court sentenced David Brooks to 17 years imprisonment for his criminal conduct. At sentencing, the Court found that Point Blank and certain purchasers of Point Blank's stock during the Class Period (and other periods identified by the government), including the Class Plaintiffs, were victims of David Brooks' criminal conduct and were entitled to restitution. However, the Court deferred a determination of the amount of restitution until a later date. The Government and David Brooks filed briefs addressing the amount of restitution on November 25 and December 30, 2013. *See* Dkt. Nos. 1762 & 1781. The Government supported Point Blank's restitution claim of $117 million. In a Memorandum and Order dated December 18, 2014 in the Criminal Action (Dkt. No. 1851), the Court reserved judgment on the amount of restitution due to

any victim of David Brooks' criminal misconduct, and directed the Government to submit a supplemental calculation of shareholder losses under the applicable federal statute (18 U.S.C. §3663A) consistent with the Court's Memorandum. The Government made its supplemental submission on January 18, 2015 (Dkt. No. 1856), presenting the Supplemental Report of its expert, Jordan G. Milev, including a revised inflation table, and requesting an extension of time, through February 27, 2015, to submit a supplemental calculation of shareholder losses. The Court granted the Government's request for additional time on January 20, 2015. On February 27, 2015, the Government filed its supplemental calculation, which purported to reduce the loss of investor victims to $37,584,301.31. This amount was later clarified by the Government on March 18, 2015.

On March 27, 2015, in a memorandum and order (Dkt. No. 1869), the Court ordered restitution in the Criminal Action of $53,912,545.62 to the Debtors and $37,584,301.20 to the Plaintiffs/Investor Claimants. These restitution awards were incorporated into an Amended Judgment against Brooks. On April 13, 2015, Brooks filed a notice of appeal to the Amended Judgment. *See* Criminal Action, Dkt. No. 1879.

2. Sandra Hatfield's Conviction and Dawn Schlegel's Guilty Pleas

Sandra Hatfield (Point Blank's former Chief Operating Officer) and Dawn Schlegel (Point Blank's former Chief Financial Officer) were also indicted in the E.D.N.Y. based on, among other things, the same misconduct alleged in the Class and Derivative Actions. Hatfield was convicted on September 14, 2010 of: conspiracy to commit securities fraud; securities fraud; conspiracy to commit mail and wire fraud; three counts of insider trading; conspiracy to obstruct justice; and obstruction of justice. On May 9, 2014, Hatfield was sentenced to seven years in federal prison.

On or about October 23, 2007, Schlegel pled guilty to securities fraud conspiracy and tax fraud conspiracy. On November 5, 2014, this Court sentenced Schlegel to three years of supervised release.

C. The Chapter 11 Cases

On April 14, 2010 (the "Petition Date"), the Debtors commenced the Bankruptcy Proceeding by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Since that time, the Debtors have continued to operate and manage their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Bankruptcy Proceeding.

On April 26, 2010, the Office of the U.S. Trustee appointed the Official Committee of Unsecured Creditors in the Debtors' chapter 11 cases. On July 27, 2010, the Office of the U.S. Trustee appointed an Official Committee of Equity Security Holders. On September 17, 2010 (*i.e.*, before the issuance of the Second Circuit Opinion), Point Blank moved to reject the 2006 Stipulation and related agreements. On December 22, 2010, the Bankruptcy Court entered an order approving Point Blank's rejection of the 2006 Stipulation and related agreements as of the Petition Date (the "Rejection Order"). Lead Plaintiffs and David Brooks filed notices of appeal from the Rejection Order. Both appeals are currently stayed.

On November 16, 2010, Point Blank commenced an action in the Bankruptcy Court under the caption *Point Blank Solutions Inc. v. Robbins Geller Rudman & Dowd LLP, et al.*, Adv. No. 10-55361 (PJW) (the "Turnover Adversary Proceeding"). In the Turnover Adversary Proceeding, Point Blank sought turnover of the Escrowed Funds from Robbins Geller (as Escrow Agent), Plaintiffs' Counsel, and Derivative Counsel, as well as other relief. Point Blank also sought a declaratory judgment that the Escrowed Funds were the property of the Debtors' bankruptcy estates, and that any adverse claims thereto were not interests in property but were, at most, unsecured claims for

rejection damages. Point Blank asserted its claim for declaratory relief against Plaintiffs' Counsel, Derivative Counsel, David Brooks, Sandra Hatfield, Dawn M. Schlegel, Cary Chasin, Jerome Krantz, Gary Nadelman, Barry Berkman, and Larry R. Ellis.

On February 10, 2011, Brooks filed a motion to dismiss the Turnover Adversary Proceeding. Between February 17, 2011 and March 11, 2011, Plaintiffs' Counsel and Derivative Counsel filed a motion to dismiss the Turnover Adversary Proceeding, a motion for a determination that the Turnover Adversary Proceeding was not a core proceeding (the "Core Motion"), a motion to stay the Turnover Adversary Proceeding (the "Stay Motion"), and a motion to withdraw the reference of the Turnover Adversary Proceeding. The Bankruptcy Court stayed the Turnover Adversary Proceeding through March 4, 2015 (but given the pendency of the motions related to the Supplemental Settlement Agreement and the Debtor's filing of a Disclosure Statement and Plan of Liquidation in the Bankruptcy Court, no further activity has taken place since), and the Delaware District Court has stayed the motion to withdraw the reference.

On May 20, 2011, the Bankruptcy Court entered an order in the Turnover Adversary Proceeding denying the Core Motion (the "Core Order"), and entered a letter ruling denying the Stay Motion. On June 3, 2011, Plaintiffs' Counsel and Derivative Counsel filed a notice of appeal from the Core Order, and also filed a motion requesting leave to appeal the Core Order. The appeal from the Core Order is currently stayed.

Lead Plaintiffs in the Class Action have filed claims in the Bankruptcy Proceeding, individually and on behalf of the Class, against Point Blank based on the same violations of federal securities laws alleged in the Class Action. *See* Claim Nos. 458, 460, 461, 482, 484, and 485. David Brooks has filed two "rejection damages" claims in the Bankruptcy Proceeding. *See* Claim Nos. 428 and 541. Claim No. 428 asserts a prepetition claim for $22,325,000, plus interest, as "moneys due

Brooks in the event civil settlement is not approved by court." Claim No. 541 asserts a prepetition claim for $19,325,000, plus interest, as "rejection damages" based upon the Rejection Order.

Finally, Point Blank's former Chief Financial Officer, Dawn M. Schlegel, filed a $13,725,000 (plus contingent damages) claim in the Bankruptcy Proceeding against the Debtors for "rejection damages" based upon the Rejection Order. *See* Claim No. 542. The addendum to Claim No. 542 contends that Schlegel is entitled to recover, among other things, a portion of the Escrowed Funds and an unspecified additional amount for Schlegel's "exposure to . . . claims . . . as a result of the rejection" of the 2006 Stipulation.

D. The Global Settlement Negotiations

In or around June 2011, the Parties entered into global settlement negotiations with David Brooks, Jeffrey Brooks (David Brooks' brother), and various other members of the Brooks family in an effort to resolve, among other things, the Turnover Adversary Proceeding, the appeals pending in the Delaware District Court, the Class and Derivative Actions, and the Parties' competing claims to the Restrained Assets and Bail Funds. On December 22, 2011, the Parties executed a global settlement term sheet with David Brooks, Jeffrey Brooks, and the other members of the Brooks family.

The Parties then commenced the process of seeking approval of the global settlement from the Government and this Court. After the Parties had invested years of time and effort, and substantial expense, into obtaining the necessary approvals of the global settlement, which included participation in mediation ordered by this Court, David Brooks abandoned the global settlement in late 2013.

E. The Supplemental Settlement Agreement

After David Brooks abandoned the global settlement, the Parties continued to engage in settlement negotiations amongst themselves. The Parties executed the Term Sheet on November 25,

2014, followed by the Settlement Agreement on February 5 and 6, 2015, and the Amended Settlement Agreement (designated herein as the Supplemental Settlement Agreement) on May 4, 2015. The Supplemental Settlement Agreement is consistent with the Term Sheet and has additional terms designed to effectuate that agreement in the context of the Bankruptcy Proceeding and before this Court, as described above.

The principal terms of the Supplemental Settlement Agreement are as follows:[17]

(a) $20,000,000 of the Escrowed Funds will be loaned to the Debtors' estates (the "Plaintiffs' Loan") to fund a chapter 11 Plan. The Plaintiffs' Loan will be interest-free and non-recourse as to the Debtors' estates, except that the loan will be secured by, and payable solely from, 50% of the Recoveries/Proceeds realized by the Debtors from the Shared Recovery Matters, including but not limited to the $54.9 million restitution award (*see* subparagraph (c) below). The Plaintiffs' Loan will be funded upon the Bankruptcy Court's approval of the Supplemental Settlement Agreement, this Court's approval of the Supplemental Settlement Agreement, and confirmation of the Debtors' chapter 11 Plan. Exh. 1 ¶¶1(a)-(c), 2(b)-(d).

(b) Except as set forth in the Supplemental Settlement Agreement in connection with the Plaintiffs' Loan, the Debtors will release their claims to the Escrowed Funds, which have an approximate current value of $37,000,000, subject to the 50/50 division discussed in paragraph (d) below. *Id.* ¶5(c)(ii). The portion of the Escrowed Funds available to the Class Plaintiffs will be distributed to the Class Plaintiffs in accordance with the 2006 Stipulation, the award of attorneys' fees and expenses in the Class Action, and the Plan of Allocation approved in the Class Action. *Id.* ¶2(a). The Class Plaintiffs will also be entitled to an additional distribution, if available, from Point Blank's bankruptcy estate equivalent to the value of the 3,184,713 shares of Point Blank common

[17] Although this description of the principal terms of the Supplemental Settlement Agreement is intended to be accurate, if there is any discrepancy between the two, the Supplemental Settlement Agreement controls.

stock that were to be delivered to the Class Plaintiffs pursuant to the 2006 Stipulation (*i.e.*, the "Plaintiffs' Stock Share"). *Id.* ¶4. With respect to any distributions available over and above the amount contemplated by the Restitution Order, the Escrowed Funds and Plaintiffs' Stock Share, such distributions will be made in accordance with the distribution and allocation procedure to be established by this Court.

(c) The Parties will take all appropriate actions, consistent with their respective fiduciary duties, to maximize their rights, claims and recoveries in connection with the following "Shared Recovery Matters":

(i) All claims of the Parties against David Brooks, his family members (including his brother, Jeffrey Brooks, and his ex-wife, Terry Brooks), and entities in which the Brooks family has direct or indirect interests (*id.* ¶3(d)(i));

(ii) All claims of the Parties to the Restrained Assets and the Bail Funds (*id.* ¶¶3(d)(ii)-(iv)); and

(iii) All other claims of the Parties in the Civil Forfeiture Proceeding and the Criminal Action (*id.* ¶3(d)(v)).

(d) The Parties will use their best efforts, consistent with their respective fiduciary duties, to effectuate a 50/50 division of all Recoveries/Proceeds realized by any of the Parties, such that 50% of the Recoveries/Proceeds is realized by the Debtors' bankruptcy estates and 50% of the Recoveries/Proceeds is realized by the Plaintiffs/Investor Claimants. *Id.* ¶3(a). The term "Recoveries/Proceeds" means the recoveries or proceeds realized by any of the Parties arising out of the Shared Recovery Matters, the Escrowed Funds, and the Plaintiffs' Stock Share. *Id.* ¶3(c).

(e) The equalization of the Recoveries/Proceeds will take into account the Restitution Order, the distribution of the Escrowed Funds, the Plaintiffs' Stock Share, the Restrained Assets, and

the Bail Funds, and the Class Plaintiffs will forgive the Plaintiffs' Loan to the extent necessary to equalize the Debtors' Share and the Plaintiffs' Share. *Id.* ¶¶3(b)(i)-(ii) and Exhibit 1 thereto.

(f) The Parties will enter into stipulations to dismiss with prejudice the Turnover Adversary Proceeding, the Class Plaintiffs' appeal from the Rejection Order, the Class Action, and the Derivative Action. *Id.* ¶6(a).

(g) The Parties will exchange mutual releases, and Lead Plaintiffs will withdraw with prejudice the proofs of claim filed in the Debtors' chapter 11 cases. *Id.* ¶¶5(a)(i), 5(b)(i), 5(c)(i), 6(c).

(h) The Parties will support, and use their best efforts to obtain confirmation of, a chapter 11 Plan, consistent in all material respects with the Supplemental Settlement Agreement, to be jointly proposed in the Debtors' bankruptcy cases by the Debtors and the Creditors' Committee, upon consultation with Plaintiffs' Counsel and the Equity Committee. *Id.* ¶7. Upon confirmation of the Debtors' chapter 11 Plan, the Class Plaintiffs' bankruptcy counsel and Plaintiffs' Counsel will have an allowed $1,500,000 administrative claim in the Debtors' chapter 11 cases. *Id.* ¶8.

(i) The Effective Date of the Supplemental Settlement Agreement is contingent upon this Court's approval of the Supplemental Settlement Agreement, the Bankruptcy Court's approval of the Supplemental Settlement Agreement, and confirmation of the Debtors' chapter 11 Plan. *Id.* ¶¶1(a)-(c). In the event of an appeal from the orders approving the Supplemental Settlement Agreement, or the order confirming the chapter 11 Plan, the Debtors will maintain an escrow account, funded by any source other than the Plaintiffs' Loan, to replenish the Escrowed Funds in the event that the approval orders or confirmation order are reversed on appeal. *Id.* ¶¶2(e)(i), (iii). The balance of this escrow account must meet or exceed the outstanding balance of the Plaintiffs' Loan. *Id.* ¶2(e)(ii). The funds deposited in the escrow account will be released to the Debtors upon the approval orders

and confirmation order becoming final and non-appealable, or the Plaintiffs' Loan being repaid in full, whichever is earlier. *Id.* ¶2(e)(iv).

On February 6, 2015, the Debtors filed a motion pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure for approval of the Supplemental Settlement Agreement in the Bankruptcy Court (the "9019 Motion"). The 9019 Motion is currently scheduled to be heard by the Bankruptcy Court on May 12, 2015.

III. ARGUMENT

As the Procedural History demonstrates, the viability of the Prior Settlement has been at risk for several years. By virtue of the Supplemental Settlement Agreement, that is no longer true. Not only does the Supplemental Settlement Agreement revive the Prior Settlement by eliminating many of the disagreements and disputes creating the impasse (and putting the Class Plaintiffs and Debtors in a cooperative posture), it also resolves the intense dispute over the Escrowed Funds. Absent approval of the Supplemental Settlement Agreement, Class Plaintiffs would have no alternatives other than litigation with respect to the Escrowed Funds. Given the harm that Class Plaintiffs have already suffered as a result of the fraud perpetrated by David Brooks, it would be devastating for Class Plaintiffs to be forced to continue to litigate over their entitlement to the Escrowed Funds, especially where the result is uncertain at best, with the possibility that none of the Escrowed Funds will ultimately be available to Class Plaintiffs. Furthermore, the Supplemental Settlement Agreement essentially guarantees that the Class Plaintiffs will be in a ***better*** position than they would be in if they continued to litigate the Turnover Adversary Proceeding and in the Bankruptcy Proceeding. It does so by establishing a 50/50 allocation taking into consideration the restitution/forfeiture awards made by this Court to the investor victims and the Debtors. Given the Restitution Order, Class Plaintiffs and investor claimants will be entitled to approximately $64 million in total, less the attorney's fees and expenses already approved by this Court. This is

significantly more than the amount of the Prior Settlement, which the Court previously held was fair, reasonable, and adequate.

In addition, it leaves the Defendants in the Class and Derivative Actions (David Brooks and others) in the position they bargained for as part of the Prior Settlement – no longer subject to the claims asserted against them in the Class and Derivative Actions, while preserving their rights in connection with the Criminal Proceeding before this Court and any appellate court. The Supplemental Settlement Agreement should, therefore, be approved.

A. The Supplemental Settlement Agreement Is Fair, Reasonable, and Adequate

Under Fed. R. Civ. P. 23(e), a class action settlement is not effective until the presiding court reviews and approves it, which it may do only if the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Sony Corp. SXRD*, 448 Fed. App'x 85, 87 (2d Cir. 2011). While the decision to grant or deny approval of the settlement lies within the broad discretion of the court, a general policy favoring settlement exists, especially with respect to class actions. *See Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"). As the Second Circuit has noted, while a court should not give a "rubber stamp of approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) ("*Grinnell*"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 221 (E.D.N.Y. 2013).[18]

[18] In *Grinnell*, the Second Circuit identified the following factors (the "*Grinnell* Factors") as being relevant to the approval of a proposed class action settlement: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a

The situation here is an unusual one. The Court has long since considered and approved the Prior Settlement. The only question now, therefore, is whether the Supplemental Settlement Agreement – the effect of which is to resuscitate the Prior Settlement (free of the SOX indemnification provisions that concerned the Second Circuit) and increase the pool of funds available to compensate the Class – is fair, reasonable, and adequate. The Court need hardly engage in a detailed examination of the various *Grinnell* factors (which it has previously considered in approving the Prior Settlement) to answer the question in the affirmative. ***Without*** the Supplemental Settlement Agreement, the Prior Settlement – with all its benefits to the Class (including the distribution of the Escrowed Funds) – remains on life support, with only years of continued litigation to look forward to. ***With*** the Supplemental Settlement Agreement, the Prior Settlement is not only revived; it is ***improved*** through the availability of an increased pool of funds with which to compensate the Class and other investor victims of the Brooks fraud, and the elimination of competition with the Debtors for a share of those funds.

Moreover, the 2006 Stipulation gives the Court the authority to permit the Plaintiffs' Loan required by the Supplemental Settlement Agreement. Paragraph 2.6 of the 2006 Stipulation states: "The Escrow Agent [Robbins Geller] shall not disburse the Settlement Fund ***except*** as provided in this Stipulation, ***by an order of the Court***, in the Escrow Agreement, ***or*** pursuant to a written agreement among counsel for DHB, counsel for David H. Brooks and Class Plaintiffs' Counsel." Exh. 2 ¶2.6 (emphasis added). Similarly, paragraph 2.8 states: "All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the

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possible recovery in light of all the attendant risks of litigation. *See Grinnell*, 495 F.2d at 463. To approve a settlement, however, a court need not conclude that all the *Grinnell* factors weigh in favor of the settlement. "Instead a court 'should consider the totality of these factors in light of the particular circumstances.'" *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 U.S. Dist. LEXIS 152275, at *15 (E.D.N.Y. Oct. 23, 2012) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)).

jurisdiction of the Court." *Id.* ¶2.8. With this clear authority, and for the reasons stated herein, the Court should not hesitate to approve the use of the Escrowed Funds to fund the Plaintiffs' Loan.

First, without the Supplemental Settlement Agreement (and the Plaintiffs' Loan necessary to effect it), the Class is at substantial risk of losing ***all*** the benefits of the Prior Settlement, including the Escrowed Funds (which are the source for the proposed loan). Thus, there is no credible argument that approval of the Plaintiffs' Loan would take settlement benefits out of the hands of the Class. To the contrary, it is only by approving the Plaintiffs' Loan and effecting the Supplemental Settlement Agreement that the Class will be able to enjoy the benefits of the Prior Settlement, including the Escrowed Funds, without years of litigation and the very real risk that the Escrowed Funds might never be available to the Class.

Second, there is now very little risk that the Plaintiffs' Loan will not be repaid. The Supplemental Settlement Agreement requires the Debtors to give 50% of the first $40 million they receive in Shared Recovery Matters in repayment of the loan. Thus, full repayment of the loan is certain given the Court's award of approximately $54 million to Point Blank in restitution, as long as the award is upheld on appeal. Moreover, any risk associated with the repayment of the Plaintiffs' Loan pales in comparison to the risk the Class has endured during the years of litigation and disputes threatening the viability of the Prior Settlement.

Finally, the Supplemental Settlement Agreement, including the Plaintiffs' Loan, opens the door to an even greater recovery for the Class than if it proceeded to litigate with the Debtor– a 50/50 allocation of any further sums recovered from the Shared Recovery Matters to the investor victims and the Debtors. Even taking into account the Plaintiffs' Loan, therefore, the Supplemental Settlement Agreement represents pure upside for the Class when measured against the risks the Class would otherwise face.

B. Lead Plaintiffs Propose Providing Notice of the Supplemental Settlement Agreement to Those Class Members and Other Victims Who Have Submitted Meritorious Claims Either in the Class Action or the Criminal Action

Because the Supplemental Settlement Agreement revives, facilitates, and improves upon the Prior Settlement, supplemental notice to the Class regarding the Revised Settlement is arguably unnecessary. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 n.10 (3d Cir. 2013) (class members need only be notified of "material alterations" to the settlement); *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (a change that "merely expanded the rights of class members" and that did not give "rise to a risk that unfavorable terms would be forced upon some class members" did not require supplemental notice); *City of Livonia Emps.' Ret. Sys. v. Wyeth*, No. 07 Civ. 10329 (RJS), 2013 U.S. Dist. LEXIS 113658, at *30 (S.D.N.Y. Aug. 7, 2013) (supplemental notice necessary upon material alteration of settlement); *Jones v. Gusman*, 296 F.R.D. 416, 467 (E.D. La. 2013) (minor modifications to settlement, which "did not impair class members' rights even indirectly" and "certainly did not constitute a material change with respect to the class members," did not require supplemental notice).

Lead Plaintiffs propose, nevertheless, to provide notice of the principal terms of the Supplemental Settlement Agreement to: (i) those members of the Class who submitted valid claims in the Class Action claims administration process; and (ii) any additional investor victims identified in the Criminal Action who submitted valid claims through the claims administration process in the Criminal Action. The proposed notice would contain a description of the nature and procedural history of the Action, as well as the material terms of the Supplemental Settlement Agreement and their impact on the Prior Settlement. In accordance with the provisions of Fed. R. Civ. P. 23(c)(2)(B), Lead Plaintiffs would cause the notice to be mailed individually to all eligible claimants.

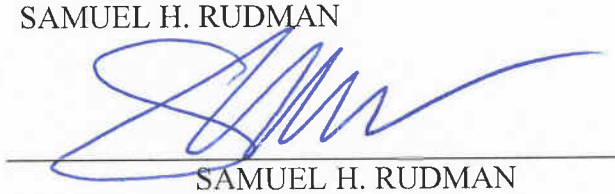
A copy of the proposed notice is attached to the Rudman Decl. as Exh. 5.

IV. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (1) order the mailing of notice in the form attached to the Rudman Decl. as Exhibit 5 to (a) those members of the Class who submitted valid claims in the Class Action claims administration process, and (b) any additional investor victims identified in the Criminal Action who submitted a valid claim through the claims administration process in the Criminal Action; (2) schedule a hearing, to be held not fewer than 30 days after the completion of mailing of the notice, for the consideration of approval of the Supplemental Settlement Agreement; and (3) after the hearing, approve the Supplemental Settlement Agreement, including its provision that $20 million from the Escrowed Funds be loaned to the Debtors to fund a chapter 11 plan, with repayment of the loan to be made in accordance with the provisions of the Supplemental Settlement Agreement. A proposed order concerning the issuance of notice and scheduling the proposed hearing is submitted herewith. A proposed order concerning the approval of the Supplemental Settlement Agreement will be submitted before the hearing on the approval of the Supplemental Settlement Agreement.

DATED: May 4, 2015

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN



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