

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Michael Tate, Joseph Shuster, Lyle
Evanson and John Ayers, individually
and on behalf of all other individuals
similarly situated,

Civil File No. 09-cv-02076 MJD/JJG

Plaintiffs,

vs.

**PLAINTIFFS' RESPONSE TO
GEMINI INVESTORS III, L.P.'S
OBJECTION TO CLASS
CERTIFICATION AND CLASS
ACTION SETTLEMENT**

Restaurant Technologies, Inc.,
Parthenon Capital LLC, Jeffrey R.
Kiesel, John C. Rutherford, Jonathan
O. Grad, Zachary F. Sadek, Philip A.
Clough and Robert E. Weil,

Defendants.

INTRODUCTION

Gemini Investors III, L.P.'s ("Gemini") objection, the only objection received, reflects a fundamental misunderstanding of the composition of the Class and the backdrop against which this settlement was negotiated and structured.¹ Despite invitations from Class Counsel to review the underlying documents and analyses regarding the Class and proposed Plan of Allocation, Gemini declined to conduct even minimal due diligence. Consequently, Gemini's objection depends on a manufactured "conflict" the basis for which was expressly rejected by Plaintiffs' First Amended

¹ Gemini filed an objection, but also filed a Proof of Claim and elected not to exclude themselves from the Class. While Gemini will receive several hundred thousand dollars under the settlement as proposed, their objection is made to try to obtain for themselves more of the settlement proceeds to the detriment of virtually every other Class member as set forth below.

Complaint filed last March — namely, that liquidation preferences (including accreted values) for holders of preferred shares should have been realized in the 2009 recapitalization of RTI.² As set forth below, RTI’s CEO, Chairman of the Board, and its lead transactional counsel testified that the 2009 recapitalization was not an event triggering the liquidation preferences that Gemini now bases its objection on.

RTI’s Articles of Incorporation make no distinction between common and preferred shares with respect to transactions like the 2009 recapitalization. Therefore, there is no “conflict” and no basis for subclassing. Moreover, it would be a cynical reversal for the Plaintiffs to now embrace the very theory they fought to defeat and proceed to use the theory as a framework for allocating settlement proceeds. Gemini’s analysis is nothing less than a repudiation of the equitable and legal principles pursued by the Plaintiffs which brought the case to this point. The effect of Gemini’s “plan” would simply divert the majority of the settlement proceeds to Gemini itself by employing Defendants’ theory of the case.

The Court should reject Gemini’s objection, certify the Class and approve the settlement — a settlement which has received overwhelming approval from other Class members. *See* Plaintiffs’ Memorandum in Support of Final Approval Orders dated November 19, 2010 (“Final Approval Mem.”).

BACKGROUND

Plaintiffs will not burden the Court with another recitation of the well-documented history of this litigation and settlement. Instead, Plaintiffs will describe Gemini’s

² *See* First Amended Complaint (Dkt. # 58) at ¶¶ 39, 41(l) 52(h), 68, 76 and 95.

involvement in the litigation as the case evolved factually and legally. Plaintiffs will also explain the fairness and reasonableness of the proposed Plan of Allocation and why the Class has been appropriately defined and adequately represented.

A. Gemini Works Against Plaintiffs' Interests During Discovery.

Plaintiffs commenced this litigation in July 2009 on behalf of common shareholders of Restaurant Technologies, Inc. ("RTI"). Plaintiffs' original Complaint focused in large part on the valuation of RTI and the allocation of equity in connection with a recapitalization which took place in June 2009.

On or about October 12, 2009, Plaintiffs served a subpoena on Gemini asking for the production of documents. (*See* Affidavit of Robert C. Moilanen dated Nov. 19, 2010 ("Moilanen Aff.") at ¶ 2.) Plaintiffs' counsel then entered into a series of communications with Molly Simmons, Gemini's Managing Director. *Id.* Despite counsel's effort to be accommodating, Gemini showed little willingness to cooperate with discovery. (*Id.* at Exs. A and B.) On January 28, 2010, Plaintiffs' counsel wrote to Ms. Simmons asking if she would make herself available for an interview. (*Id.* at Ex. B.) Ms. Simmons never responded to counsel's request. (*Id.*) Ms. Simmons was deposed, pursuant to a subpoena, on February 26, 2010. In preparation, Ms. Simmons met with Defendants' counsel. (*See id.* at Ex. C at 32-34.) When Ms. Simmons' deposition could not be completed due to her scheduling conflict, she was asked to check her calendar and advise as to when her deposition could be completed. (*Id.* at 164-165.) She never got back to Plaintiffs' counsel. Although Ms. Simmons was asked to complete the

production of Gemini's documents at her deposition (*id.* at 158-160, 164-165), Gemini never completed its production of documents required by the subpoena. (*Id.* at ¶ 4.)

B. The Plaintiffs Amend the Complaint to Add Certain Preferred Shareholders to the Class.

On March 23, 2010, after reviewing tens of thousands of pages of documents, conducting depositions and researching applicable law, Plaintiffs amended their Complaint to include additional claims and two additional defendants, while also expanding the putative class to include certain Series A preferred shareholders. (Dkt. #58.) The First Amended Complaint alleged that Defendants falsely portrayed RTI's recapitalization as a "liquidation event" so that they could improperly divert equity to Series B shareholders by cramming down Series A shareholders and wiping out RTI common shareholders. (*Id.* at ¶¶ 39, 41(1), 52(h), 68, 76 and 95.)

A prevailing premise of the First Amended Complaint was that "[t]he process described in the proxy, despite it not being an event triggering liquidation preferences, utilized accreted values of preferred stock holdings to divide up RTI's equity." (Dkt. #58, ¶ 39.) Plaintiffs asserted that, because the 2009 recapitalization did not trigger any legal or contractual right to liquidation preferences for holders of Series B-1 and B-2 preferred shares, RTI common and certain Series A preferred shareholders suffered damages based on the same wrongdoing. (*See, e.g.*, Dkt. #58, ¶¶ 33-34, 52(h)-53, 68-70, 95.) Plaintiffs requested an award of unspecified damages and sought a declaration that the recapitalization was unfair, void and should be rescinded. (*Id.* at ¶¶ 93-97.)

Plaintiffs also sought to pursue this case as a class action consisting of “non-insider persons and entities who purchased or otherwise acquired common or Series A preferred stock in RTI or ... options” (*Id.* at ¶ 15.) The putative class ultimately consisted of 156 holders of RTI common stock, 46 of whom also held preferred stock in RTI, and 230 option holders.³ (*See* Affidavit of Kelly Bethke dated Nov. 18, 2010 (“Bethke Aff.”) submitted with the Final Approval Mem.) Therefore, given the uniform applicability of the legal theory of liability — one which Gemini now argues against — and the fact that nearly one-third of the putative class held both common *and* preferred shares, Plaintiffs and their counsel determined that prosecution and resolution of the case would require a class comprised of both common and Series A preferred shareholders as their interests were actually aligned.

C. Gemini Declines to Contribute to the Litigation Effort.

After preferred shareholders (including Gemini) were formally added to the proposed class, on or about June 2, 2010, Mr. Tate, as he did with numerous other RTI shareholders, sent a letter to Ms. Simmons asking Gemini to make a contribution to help defray costs incurred in the litigation. (*See* Moilanen Aff. at Ex. D.) Mr. Tate subsequently made a personal call to Ms. Simmons to request a financial contribution to help defray the costs of the litigation and attempted to engage Mr. Goodman, also an officer of Gemini. (*See id.* at ¶ 6 and Ex. D.) No monetary contribution was ever made by Gemini.

³ Only two individual members of the putative Class held only RTI preferred stock making the concept of “subclassing” somewhat nonsensical.

D. The Parties Reach a Proposed Settlement and the Plan of Allocation is Developed.

Prior to the first mediation meeting with former Judge Richard Solum in June 2010, Plaintiffs looked at the impact of the upstreaming of equity to Series B-1 and B-2 holders in the recapitalization. (*See* Moilanen Aff. at ¶ 7 and Ex. E.) These calculations, while not polished, were predicated on absence of a liquidation event and were employed by the Class Representatives during the mediation. *Id.* Following weeks of negotiations, facilitated by former Judge Solum as a mediator, the parties reached a tentative settlement. On September 7, 2010, Class Counsel provided a proposed Plan of Allocation to the Class Representatives. (*Id.* at ¶ 7 and Ex. F.) The Class Representatives and Class Counsel held several conference calls and exchanged numerous emails regarding the proposed Plan of Allocation.⁴ (*Id.*)

The proposed Plan of Allocation is consistent with Plaintiffs' theory of legal liability, namely, that the 2009 recapitalization was not a liquidation event and therefore no contractual basis exists for dividing equity based on liquidation preferences. (*See* Moilanen Aff. at Exs. E and F.) In devising the Plan of Allocation, Class Counsel considered how a court might divide the equity that had been wrongfully shifted to Class B preferred shareholders. (*Id.*) In devising the Plan of Allocation, the "preference" rights of certain RTI preferred shareholders were taken into account as the price paid per share was higher on account of those rights.

⁴ Prior to making its objection, Class Counsel invited Gemini to visit Class Counsel's office and to review these communications and underlying documents; Gemini declined. (*See* Moilanen Aff. at ¶ 9 and Ex. G.)

The result was a proposed Plan of Allocation that employed both investment loss and estimated value-per-share analyses on both an individual and class-wide basis. (*Id.*) Ultimately, a blended approach was adopted by the Class Representatives giving preferred shareholders a greater per-share amount than common shareholders. (*See* Notice of Proposed Settlement of Class Action and Hearing Regarding Settlement attached to Bethke Aff., at Ex. A (“Notice”).)

E. Gemini Blindly Adopts Defendants’ Theory and Objects To The Settlement.

On October 21, 2010, Ms. Simmons contacted Class Counsel by telephone on behalf of Gemini to discuss the settlement. (*See* Moilanen Aff. at ¶ 9.) Class Counsel invited Ms. Simmons to visit Class Counsel’s offices to review documents and discuss any concerns she had.⁵ Class Counsel was later contacted by Gemini’s counsel, and the same invitation was extended to Gemini’s counsel. (*See id.* at Ex. G.) To date, no Gemini representative has visited Class Counsel’s office to review any of the underlying documents in the litigation or to understand the analysis supporting the Plan of Allocation. (*See id.* at ¶ 9.)

⁵ It should be noted that Ms. Simmons works in the Twin Cities area. Ironically, while Ms. Simmons continues to assist Gemini with respect to its investment in RTI, she currently works for another entity whose principals will receive fewer proceeds if Gemini’s proposal is adopted.

ARGUMENT

A. Gemini's Objection Is Contradicted By the Class's Liability Theory and the Factual Record on Which the Class's Theory Is Based.

Gemini's objection is based upon one theory — the theory employed by Defendants during the litigation. (*See* Objection of Gemini Investors III to Class Certification and Class Action Settlement (“Gemini Obj.”) at 2, 9–11, 13.) Not only does Gemini's objection appear oblivious to Plaintiffs' theory of the case, Gemini also incorrectly argues that Plaintiffs were compelled to create subclasses. (Gemini Obj. at 6.)

Plaintiffs had sound, fact-based reasons to reject Defendants' theory — now apparently espoused by Gemini — that liquidation preferences should have been considered because the facts unearthed during discovery showed the recapitalization was *not a liquidation event*.

As testified to by the lead attorney handling the recapitalization transaction:

Q. Okay. And in June of '09, was there a liquidation of RTI?

A. There was the concern that there would be a liquidation.

Q. Was there a liquidation of RTI?

A. No liquidation occurred.

Q. Was there a dissolution of RTI?

A. No dissolution occurred.

Q. Was there a winding up of RTI?

A. No, there was no winding up.

* * *

Q. I appreciate that. Now in June of 2009, was the majority of the stock held in RTI held by persons other than the persons who had held it before the recapitalization?

A. No.

Q. So in accordance with the Certificate of Incorporation, and what you understand of it, was there an entitlement to liquidation preferences in connection with the recapitalization?

A. **Well, the recapitalization was not a liquidation, dissolution or winding up.** But the articles, and I think you have to read Delaware law into the articles as part of what the articles are, in a merger transaction that was, such as the one that was effected in June of 2009, you could perform a recapitalization where the stock would be recapitalized into other shares of stock as happened, A going into common, et cetera. And you can use, if you got a shareholder approval, you can use different measures of the value of the stock for purposes of determining those conversion values.

* * *

Q. So what Delaware law were you relying on in connection with employing accreted values for the B-1 and B-2 stock at the time of the recapitalization?

A. The use of those values was not dictated by Delaware law, but it was the process that was used was provided for under Delaware law in the merger context. The values used were based on negotiations between the parties in interest.

Q. Wait a minute. **What governing document were you relying on? You weren't relying on the certificate, right?**

A. **No**, we were relying on, there was a negotiation among the parties in interest because of the impending bankruptcy or liquidation of the company, which was the alternative that could have happened here.

Q. I'm sorry, I don't mean to cut you off, but I want to know, you did not rely on the certificate with regard to determining whether or not liquidation preferences could be employed in connection with the recapitalization?

A. **The use of liquidation preferences was determined based on negotiation; it was not determined through the articles, the certificate.**

(See Moilanen Aff. at Ex. H at 42, 45-46 (emphasis added).) Similarly, the Chairman of the RTI Board testified as follows:

- Q. What was your understanding as to when liquidation preferences, what type of event would trigger liquidation preferences?
- A. Sale of the company.
- Q. This wasn't a sale, correct?
- A. Correct.
- Q. What else?
- A. I suppose any kind of liquifying event probably.
- Q. And this wasn't a dissolution, correct?
- A. Correct.
- Q. This wasn't a change of control, correct?
- A. Right.
- Q. This wasn't a sale, correct?
- A. Correct.

(See Moilanen Aff. at Ex. I at 155-56, and Ex. J (excerpts from RTI CEO Jeffrey Kiesel's deposition).) Contrary to Gemini's argument, there is no conflict between preferred and common shareholders because RTI's governing documents did not make any relevant distinctions between the classes in the context of a recapitalization.

On the strength of these and other arguments, the Class was able to obtain a settlement which will now provide significant recovery for all Class members, including Gemini. Gemini, having obtained this benefit, in no small part on the strength of Plaintiffs' theory, now seeks to disavow that same theory, deny the key factual allegations in the First Amended Complaint and wholeheartedly adopt an argument that would have left the class — including Gemini — with nothing.

Gemini's objection depends upon liquidation preferences that *could* have been triggered *if* certain events had taken place:

- a. “*In a liquidation ... all of the proceeds would have gone to the preferred shareholders ...[.]*” (Gemini Obj. at 13.)
- b. “... even a *sale* of RTI *would have* again *resulted* in the payment of the preferred shareholders in full.” (*Id.*)
- c. “... it *would have taken* \$234.4 million in order to satisfy those preferred shares in full.” (*Id.* at 10.)
- d. “Under at least one valuation, RTI’s pre-recapitalization value was only \$143 million, and after deducting RTI’s funded debt ... *that would have left* only \$31.1 million available to equity holders.” (*Id.*)
- e. “... the common shareholders could not have expected to receive any return *in the event of a sale or liquidation.*” (*Id.*)
- f. “By allocating 74% of the net settlement proceeds to common shareholders who *would have received* \$0.00 in a sale of RTI” (*Id.*)

Gemini attempts to fabricate a “conflict” out of speculation that has been rebutted by Plaintiffs and obliterated by the admissions of Defendants. The only “conflict” actually present is that between the events that in fact occurred and the events that Gemini imagines occurring.

B. There Is No Factual or Legal Basis for Subclassing.

Gemini also argues that there should be subclassing. However, Gemini’s reliance on *Amchem Products, Inc. v. Windsor* is misplaced because Gemini fails to appreciate the factual and contextual dissimilarities between the cases. 521 U.S. 591, 624 (1997) (“No settlement class called to our attention is as sprawling as this one.”). In *Amchem*, plaintiffs, exposed to the asbestos of one manufacturer, instituted a class action for a single class of all current and future asbestos-caused injuries *after a settlement had been reached* in principle. *Id.* at 597–98, 601–02. The parties moved jointly for conditional

class certification and approval of the settlement, and the district court granted the motion *without any litigation having taken place*. *Id.* at 605–06.

The Supreme Court held that, in those circumstances, there should be a higher level of scrutiny of whether Rule 23’s requirements are met, because a court asked to certify a settlement class in those circumstances “will lack the opportunity, *present when a case is litigated*, to adjust the class, *informed by the proceedings* as they unfold.” *Id.* at 620 (emphasis added).

Such concerns are absent here. This case had been vigorously litigated before and after Series A preferred shareholders were added to the Class. Unlike *Amchem*, this case involves a Class defined around the facts and legal theories developed in litigation, not a class based upon a desire to avoid litigation by resolving all potential claims in one fell swoop. Numerous courts have distinguished *Amchem* on similar grounds. *See, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) (“We also do not believe, as the objectors suggest, that the stark conflicts of interest that the Supreme Court discerned in *Amchem* and *Ortiz* are present here.”); *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000) (distinguishing *Amchem* while affirming district court’s approval of class settlement: “The trial judge’s views are accorded great weight ... because he is exposed to the litigants, and their strategies, positions and proofs” (quotes omitted)).

Further, courts have recognized that subclassing based on unduly magnified differences is neither necessary nor appropriate. *See In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005) (“If subclassing is required for each material legal or economic difference that distinguishes class members, the Balkinization of the class

action is threatened. Such a fragmented class might be unmanageable, certainly would reduce the economic incentives [of class litigation] and could be extremely difficult to settle.” (citation omitted)).

Even if Gemini was able to articulate some differing interests between common and preferred shareholders that are not already addressed in the Plan of Allocation, there would still be no basis for subclasses. The Class’s claims and damages all stem from wrongdoing that culminated in a single, identifiable event, namely, the 2009 recapitalization. *See In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 283 (S.D.N.Y. 2002) (no subclasses needed where the respective claims arose out of “a common core of facts and legal issues, deal[t] with overlapping or intertwined defendants, and attack[ed] various aspects of a uniform course of conduct”).

Gemini’s argument, if taken to its logical conclusion, illustrates the problem with relying on *potential* differences in value based on *contingent* rights in *hypothetical* scenarios. If Gemini’s analysis could be applied consistently to a subclassing decision, the result could be no less than six subclasses, which could readily expand based on other hypothetical scenarios. For example:

- (1) Holders of RTI preferred shares by series
 - a. Holders of Series A-4 shares (assuming sale and waterfall)
 - b. Holders of Series A-3 shares (assuming larger sale and waterfall)
 - c. Holders of Series A-2 shares (assuming still larger sale and waterfall)
 - d. Holders of Series A-1 shares (assuming even larger sale and waterfall)

- (2) Holders of only common shares
- (3) Holders of both preferred and common shares, but more common than preferred
- (4) Holders of both preferred and common shares, but more preferred than common
- (5) Holders of both preferred and common shares, in amounts giving rise to no net difference in settlement proceeds
- (6) Holders of only preferred shares

. . . and on and on and on.

As described above, Gemini’s arguments for subclassing rely upon a vivid imagination and a willingness to engage in unbridled speculation. Other courts have noted the problems created when distinctions among class members are magnified to an unreasonable degree: “Yet if every distinction drawn (or not drawn) by a settlement required a new subclass, class counsel would need to confine settlement terms to the simplest imaginable or risk fragmenting the class beyond repair.” *International Union v. General Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007).

Here, after extensive litigation, Class Counsel determined that there was a prevailing legal theory driving the claims of the entire Class whether members held common, Series A preferred shares, or a combination of both. (*See Moilanen Aff.* at ¶ 7 and Ex. E; *see also* First Amended Complaint (Dkt. # 58).) That one of those Class members, particularly one who declined multiple invitations to review the facts and

filings to understand the case, now disavows a crucial component of Plaintiffs' case does not mean that the Class contains conflicts or that subclassing is warranted.⁶

C. The Class Representatives Are Excellent Representatives of the Class.

Gemini allege that the “class representatives ... sided with the common shareholders” (Gemini Obj. at 8.), and cannot adequately represent the Class. (*Id.* at 11.) Gemini’s argument is woefully misinformed; the Class Representatives are excellent reflections of the Class.

Gemini focuses on Mr. Evanson, arguing that Mr. Evanson’s ownership of a greater number of common shares makes him inadequate to represent the preferred shareholders. (*Id.*) However, Gemini ignores (or is willfully ignorant of) two essential facts concerning its fellow Class members: (1) all but two Class members holding preferred shares also hold common shares, and (2) of those Class members holding both common and preferred shares, all but two actually hold *more* shares of common stock than preferred stock. (*See* Moilanen Aff. at ¶ 10.) Thus, applying Gemini’s numerical analysis properly, Class Representatives have “sided” with the 97% of Class members owning common shares, as well as the 96% of preferred-owning Class members who own *more* common than preferred shares.

⁶ Given the lack of any discernable, good faith basis for Gemini’s objection and the potential disruption to the distribution of settlement proceeds to the Class that would be caused by any attempt to appeal from a rejection of this baseless objection, Plaintiffs’ proposed Final Order contemplates the potential requirement of a significant bond to protect both the Class and RTI. *See* Brian T. Fitzpatrick, The End of Objector Blackmail?, 62 VANDERBILT L. REV. 1623, 1624–26 (2009) (discussing the practice of frivolous objections and appeals to induce payoffs from class counsel and district courts’ response by requiring posting of significant bonds under Rule App. P. 7).

Mr. Evanson, as a holder of both common and preferred stock, is more than similarly situated with the vast majority of Class members holding preferred shares. Moreover, Mr. Evanson's interests are not in conflict with, or antagonistic to, the interests of Class members simply because the settlement may impact individuals differently. In *Petrovic v. Amoco Oil Co.*, the Eighth Circuit rejected the argument that individual differences among settlement members invariably give rise to a conflict:

If the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable. It seems to us that almost every settlement will involve different awards for various class members. Indeed, even if every class member were to receive an identical monetary award in settlement, the true compensation would still vary from member to member since risk tolerance varies from person to person (*i.e.*, a more risk-averse class member would place a greater premium on the certainty of a settlement award than a less risk-averse class member would).

200 F.3d 1140, 1146 (8th Cir. 1999); *see also Petrovic*, 200 F.3d at 1148 (“The interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they share common objective and legal or factual positions.”); *Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1350 (7th Cir. 1990) (differences among class members should be distinguished from “a concrete conflict of interest between ‘representative’ and other members of the class”).

D. The Plan of Allocation Acknowledges Preferred Shareholder Preferential Rights and Accreted Values.

Gemini incorrectly claims that the Plan of Allocation “ignores the preference rights that Gemini and the other preferred shareholders bargained for when they bought

preferred shares.” (Gemini Obj. at 11.) Gemini is wrong. The Plan of Allocation recognizes the premium paid by Gemini and other Class members to purchase those preferences by making a greater per-share allocation of settlement proceeds to preferred shares, but the underlying analysis does not end there. The Plan of Allocation also accounts for the long-running efforts by RTI’s management to pursue an IPO, in which case the preferred shareholders would have been converted to common shares and all liquidation preferences would have been eliminated. (Moilanen Aff. at Ex. F.) Simply stated, the Class Representatives and Class Counsel designed and eventually adopted an allocation plan intended to balance the numerous relevant factors, including differences in investment losses. Because such a balancing occurred, the preferred shareholders do receive more per-share than the common shareholders. (*See Notice.*)

Given the lack of any other objection to the settlement, it would appear that the Plaintiffs and Class Counsel have succeeded in meeting their aim of a reasonable, fair Plan of Allocation. *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, MDL-1446, 2008 WL 4178151, at *6 (S.D. Tex. Sept. 8, 2008) (agreeing with Class Representatives that “[w]hile the Plan may not satisfy every potential claimant, that does not mean that it is unfair. To the contrary, the Plan is the product of serious informed choices, is fair, reasonable and adequate and should be finally approved.”). Gemini’s suggested alternatives reveals a design that would redirect most of the Class’s settlement proceeds into one pocket — Gemini’s. (*See Gemini Obj. at 12–14.*) Gemini’s disappointment with its slice of the pie does not mean that the Plan of Allocation is

flawed or unfair — particularly when the plan Gemini suggests is predicated on the same conjecture used in the wealth transfer Plaintiffs fought against.

E. The Plan of Allocation Is a Fair Allocation to the Entire Class.

Gemini makes the baseless accusation that the Class Representatives and Class Counsel are attempting to punish Gemini “simply because Gemini did not fund the litigation.” (Gemini Obj. at 15.) Certainly, Gemini’s fellow Class members would have appreciated a more cooperative approach from Gemini. (*See Moilanen Aff.* at ¶¶ 2–4.) Fortunately, the Class Representatives and Class Counsel’s dogged pursuit of this litigation did not depend on Gemini or its analysis. It is ludicrous to suggest that the Plan of Allocation, which will fairly allocate settlement proceeds to over 250 Class members, is an expression of vindictiveness directed at a single preferred shareholder (who also owned 12,000 shares of common stock).⁷

Courts have rejected similar objections calling for subclassing where settlement proceeds were allocated by different percentages. For example, in *Insurance Brokerage Antitrust Litig.*, Civ. No. 04-5184, 2009 WL 411877, at *14 (D. N.J. Feb. 17, 2009), the court rejected an objection to a plan of allocation that distributed different percentages of the settlement fund between two groups of claimants. In so holding, the court held that the fact that the relief sought may vary among named representatives and members of the class does not show conflicting or antagonistic interests. *Id.* (citing *Roe v. Operation Rescue*, 123 F.R.D. 500, 504 (E.D. Pa. 1988)). Also, other courts have approved plans of

⁷ If Gemini was somehow being “punished” by the Class Representatives in the Plan of Allocation, it certainly would not be receiving its proportional share of proceeds which, for Gemini, should amount to several hundred thousand dollars.

allocation where different classes of stock received different settlement amounts. *See, e.g., In re Enron Corp.*, 2008 WL 4178151, at *5 (plan of allocation approved where methodology used for plan took into consideration “interclass distinctions based on the relative strength and weaknesses of the different claims” and the settlements covered approximately 195 different Enron or Enron-related securities); *In re Delphi Corp. Sec., Deriv. & ERISA Litig.*, No. 05-md-1725, 2008 WL 5111908, at *1 (E.D. Mich. Dec. 4, 2008) (plan of allocation approved for all persons and entities who acquired shares of common and preferred stock).

Had Gemini accepted even one of Class Counsel’s invitations to come to their offices, reviewed the key documents produced in this lawsuit, fully considered and examined the basic legal theories upon which fifteen months of litigation (complete with numerous motions and months of ongoing settlement discussions) were based, it would understand why the entire premise upon which it has built its objection fails. Gemini’s argument — and the conclusion that the Class suffers from irreconcilable conflicts or that the Plan of Allocation is unfair — lacks any factual or legal basis whatsoever and its objection should not delay the settlement of this class action. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982) (affirming approval of settlement and plan of allocation and stating that “our judgment is informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement. As we have said elsewhere, a ‘just result is often no more than an arbitrary point between competing notions of reasonableness.’”).

CONCLUSION

For all the above reasons, Plaintiffs respectfully request that the Court reject Gemini's Objection to Class Certification and Class Action Settlement and proceed to issue a Final Judgment and Order in the form proposed by Plaintiffs.

Dated: November 19, 2010

**ANTHONY OSTLUND BAER
& LOUWAGIE, P.A.**

By: /s/ Nathan P. Brennan

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