

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :	:	
Plaintiff, :	:	
	:	00 Civ 2685 (MGC)
v. :	:	
	:	HON. MIRIAM G. CEDARBAUM
ENTERPRISES SOLUTIONS, INC. :	:	
HERBERT S. CANNON :	:	
DR. JOHN A. SOLOMON, :	:	
	:	
Defendants, :	:	
And :	:	
	:	
ROWEN HOUSE, LTD, :	:	
MONTVILLE, LTD., :	:	
	:	
Relief Defendants. :	:	

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**MOTION AND MEMORANDUM FOR ORDER APPROVING PROPOSED ELIGIBLE
SUPPLEMENTAL CLAIMANT LIST AND AUTHORIZING SUPPLEMENTAL
DISTRIBUTION OF GIBRALTAR FUNDS**

Now comes the RECEIVER,¹ Phillip S. Stenger, by and through his attorneys, STENGER & STENGER, P.C., and through this *Motion and Memorandum for Order Approving Proposed Eligible Supplemental Claimant List and Authorizing Supplemental Distribution of Gibraltar Funds* (the “SUPPLEMENTAL DISTRIBUTION MOTION”) requests that this COURT enter an order providing, in pertinent part, as follows:

A. Approving the “PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST” attached as **Exhibit A** to this SUPPLEMENTAL DISTRIBUTION MOTION;²

¹ All terms defined in this COURT’s *Order Approving Plan of Supplemental Distribution and Providing for Implementation Thereof*, dated February 18, 2011 (Dkt. No. 98) (the “SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER”), and the “SUPPLEMENTAL DISTRIBUTION PLAN” (Dkt. No. 99), shall have the same meaning when used herein.

² As required by the SUPPLEMENTAL DISTRIBUTION PLAN approved by the COURT, the PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST includes a list of all ELIGIBLE SUPPLEMENTAL CLAIMANTS, the APPROVED SUPPLEMENTAL NET STOCK LOSS of each such ELIGIBLE SUPPLEMENTAL CLAIMANT, the percentage of the aggregate

- B. Authorizing the RECEIVER to distribute the sum of US\$575,000.00 from the GIBRALTAR FUNDS held at Huntington National Bank to the ELIGIBLE SUPPLEMENTAL CLAIMANTS in the ratio of their APPROVED SUPPLEMENTAL NET STOCK LOSSES, pursuant to the terms of the SUPPLEMENTAL DISTRIBUTION PLAN;
- C. Authorizing the RECEIVER to hold back the sum of US\$49,369.92 in GIBRALTAR FUNDS to provide for outstanding Receivership costs as of November 30, 2014, as detailed in the RECEIVER'S concurrently filed *Motion and Brief for Payment of Costs, Fees and Expenses of the Receiver No. 7* ("COMPENSATION REQUEST NO. 7"); and
- D. Authorizing the RECEIVER to transfer the residual balance of GIBRALTAR FUNDS (estimated at US\$56,470.19) from Huntington National Bank to the RECEIVERSHIP ACCOUNT at Fifth Third Bank to provide for the costs of completing the Receivership.

The RECEIVER states the following in support of this SUPPLEMENTAL DISTRIBUTION MOTION:

I.
BACKGROUND

1. The general background of this matter is set forth in this COURT'S *Opinion* dated June 6, 2001 (Dkt. No. 45) (the "OPINION"), the *Receiver's Motion and Memorandum Relating to Supplemental Distribution Plan for Gibraltar Funds* ("SUPPLEMENTAL DISTRIBUTION PLAN MOTION") (Dkt. No. 96), and the SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER (Dkt. No. 98) regarding the same.

APPROVED SUPPLEMENTAL NET STOCK LOSSES of all ELIGIBLE SUPPLEMENTAL CLAIMANTS represented by each ELIGIBLE SUPPLEMENTAL CLAIMANT'S APPROVED SUPPLEMENTAL NET STOCK LOSS, and the amount of the distribution to each ELIGIBLE SUPPLEMENTAL CLAIMANT. Ex. A, SUPPLEMENTAL DISTRIBUTION PLAN, p. 17-18, ¶II.(xiii).

2. The RECEIVER was appointed in this matter on July 21, 2003 (Dkt. No. 64). The estate initially consisted of US\$1.1 Million recovered as part of the underlying SEC matter as outlined in the Opinion (the “**INITIAL FUND**”). The RECEIVER conducted a claims and distribution procedure and after distribution to victims and payment of expenses of the Estate, the remaining balance of the INITIAL FUND in the RECEIVERSHIP ACCOUNT at Fifth Third Bank is currently US\$38,323.62. (See “**SOURCES AND USES OF FUNDS REPORT**,” a copy of which is attached as **Exhibit B** and incorporated herein by reference).

3. During the pendency of this matter, a parallel case was initiated in Gibraltar (In the Matter of Rowan House Limited, “the Company” and In the Matter of the Companies Ordinance, 2005 Comp. 97, in the Supreme Court of Gibraltar, Chancery Jurisdiction) (the “**GIBRALTAR COURT**”) and a Gibraltar accountant was appointed by the GIBRALTAR COURT as Liquidator in that matter. At the conclusion of the Gibraltar matter, pursuant to order of the GIBRALTAR COURT, the Gibraltar Liquidator transferred US\$747,179.29 (the “**GIBRALTAR FUNDS**”) to an account established by the RECEIVER at Huntington National Bank for distribution to investors, the ELIGIBLE SUPPLEMENTAL CLAIMANTS, who were generally identified as having purchased or sold AATM and/or CYGA stock during a specified time period. The GIBRALTAR FUNDS, after expenses, have a current balance of US\$680,849.77.

4. Pursuant to the SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER, the RECEIVER has conducted a supplemental claims procedure and now seeks the COURT’S authority to distribute the GIBRALTAR FUNDS less administrative expenses and holdbacks as set forth in this SUPPLEMENTAL DISTRIBUTION MOTION.

II.
THE SUPPLEMENTAL DISTRIBUTION PLAN

5. The SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER adopted the SUPPLEMENTAL DISTRIBUTION PLAN to govern the determination of those claimants entitled to participate in the distribution of the GIBRALTAR FUNDS and how that distribution was to be effected. No objections were filed to the SUPPLEMENTAL DISTRIBUTION PLAN, and the proposed SUPPLEMENTAL DISTRIBUTION PLAN was approved by this COURT without issue.

III.
DETERMINATION OF ELIGIBLE SUPPLEMENTAL CLAIMANTS

6. The RECEIVER has taken several steps to identify POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANTS.

7. Pursuant to the SUPPLEMENTAL DISTRIBUTION PLAN, promptly upon the entry of the SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER, the RECEIVER mailed by United States First Class Mail, to one hundred and fifty (150) POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANTS known to the RECEIVER, a SUPPLEMENTAL DISTRIBUTION PLAN NOTICE and a PROOF OF SUPPLEMENTAL CLAIM FORM. In addition, the RECEIVER posted a copy of the SUPPLEMENTAL DISTRIBUTION PLAN APPROVAL ORDER, with all Exhibits, on the RECEIVER'S ENTERPRISES website (www.enterprisessolutions.com). (See "AFFIDAVIT OF RECEIVER," a copy of which is attached as **Exhibit C** and incorporated herein by reference.)

8. In response to the mailing, the RECEIVER received thirteen (13) executed PROOFS OF SUPPLEMENTAL CLAIM FORMS.

9. However, pursuant to paragraph II(v) of the SUPPLEMENTAL DISTRIBUTION PLAN, "...if any POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANT ha(d) previously provided investment information to the RECEIVER by providing the RECEIVER a properly completed

INVESTOR RESPONSE FORM, and has received written confirmation from the RECEIVER of receipt of such INVESTOR RESPONSE FORM, then such POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANT shall not be required to complete and/or file with the RECEIVER an additional PROOF OF CLAIM FORM, but shall provide to the RECEIVER such additional information, if any as the RECEIVER may request.”

10. The RECEIVER therefore reviewed the claims for not only the thirteen (13) who returned PROOFS OF SUPPLEMENTAL CLAIM FORMS, but also for the one hundred and fifty (150) POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANTS who had previously submitted an INVESTOR RESPONSE FORM in order to determine if any investor had previously provided evidence of purchases or sales of AATM and/or CYGA stock during the relevant period, and if so, if they had a SUPPLEMENTAL NET STOCK LOSS.

11. The RECEIVER has completed the processing of all PROOFS OF SUPPLEMENTAL CLAIMS FORMS filed with him and the analysis of the files for those investors who had previously returned an INVESTOR RESPONSE FORM in this matter. On March 28, 2013, a total of forty seven (47) DETERMINATION NOTICES were issued by the RECEIVER pursuant to the SUPPLEMENTAL DISTRIBUTION PLAN. (See “**PROOF OF SERVICE OF DETERMINATION NOTICES**,” a copy of which is attached as **Exhibit D** and incorporated herein by reference.) Only one (1) claimant sought reconsideration of the RECEIVER’S determination which was subsequently approved in part and denied in part and a FINAL SUPPLEMENTAL CLAIMS DETERMINATION was provided to this claimant on January 7, 2014. No appeals were filed with this COURT.

12. Pursuant to paragraph II (x) of the SUPPLEMENTAL DISTRIBUTION PLAN, “A failure to properly and timely request reconsideration of a RECEIVER’S SUPPLEMENTAL CLAIMS DETERMINATION as reflected in the relevant SUPPLEMENTAL CLAIMS DETERMINATION NOTICE, or

to appeal the decision contained in a FINAL SUPPLEMENTAL CLAIMS DETERMINATION NOTICE, shall permanently waive the POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANT'S right to object to or contest the RECEIVER'S SUPPLEMENTAL CLAIMS DETERMINATION or the FINAL SUPPLEMENTAL CLAIMS DETERMINATION NOTICE."

13. The PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST (**Exhibit A**) reflects the results of this claims determination process.³ As shown on **Exhibit A**, there are forty seven (47) ELIGIBLE SUPPLEMENTAL CLAIMANTS, whose aggregate APPROVED SUPPLEMENTAL NET STOCK LOSSES equal US\$3,246,667.99.

**IV.
APPROVAL OF ELIGIBLE SUPPLEMENTAL CLAIMANT LIST AND
AUTHORIZATION FOR SUPPLEMENTAL DISTRIBUTION**

14. The SUPPLEMENTAL DISTRIBUTION PLAN also directs the RECEIVER to petition the COURT for approval of the PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST and further directs the RECEIVER to petition the COURT "for authority to distribute out of the Gibraltar Funds to each Eligible Supplemental Claimant (subject to availability of funds, including payment of estimated administrative costs as well as any federal, state or local taxes payable in connection with the Receivership) an amount equal to the percentage of such claimant's Approved Supplemental Net Stock Loss which is equal to the percentage of the Approved Net Stock Loss received by each ESI Eligible Claimant from the Initial Distribution (27.9%)." SUPPLEMENTAL DISTRIBUTION PLAN, ¶II (xiii), pp. 17-18.

³ **Exhibit A** is submitted in response to the requirement of ¶II (xiii) of the SUPPLEMENTAL DISTRIBUTION PLAN, p. 17, that "Promptly following completion of processing of all POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANT claims and DISTRIBUTION PLAN OBJECTIONS, including the resolution of any appeals arising therefrom, the RECEIVER shall prepare a list of all ELIGIBLE SUPPLEMENTAL CLAIMANTS, the APPROVED SUPPLEMENTAL NET STOCK LOSS of each such ELIGIBLE SUPPLEMENTAL CLAIMANT, and the percentage of the aggregate APPROVED SUPPLEMENTAL NET STOCK LOSSES of all ELIGIBLE SUPPLEMENTAL CLAIMANTS represented by each ELIGIBLE CLAIMANT'S APPROVED SUPPLEMENTAL NET STOCK LOSS..."

15. As of September 30, 2014, there was a balance of US\$680,849.77 in the GIBRALTAR FUNDS (**Exhibit B**). After allowing a reserve to take into account contingencies as well as fees and expenses incurred to date and not yet paid, and for anticipated fees and expenses involved in the closing of the Receivership, together with any federal, state or local taxes payable in connection with the Receivership, and all necessary regulatory filings, the RECEIVER recommends that the sum of US\$575,000 be distributed to ELIGIBLE SUPPLEMENTAL CLAIMANTS as provided in the SUPPLEMENTAL DISTRIBUTION PLAN. As previously mentioned, concurrent with filing this SUPPLEMENTAL DISTRIBUTION MOTION, the RECEIVER is filing COMPENSATION REQUEST NO. 7 seeking authority to pay outstanding costs, fees and expenses of the Receivership through November 30, 2014, totaling US\$49,369.92, out of the GIBRALTAR FUNDS.

16. Within ten (10) calendar days following the filing of this SUPPLEMENTAL DISTRIBUTION MOTION, the RECEIVER will give notice of this SUPPLEMENTAL DISTRIBUTION MOTION by posting a copy of the SUPPLEMENTAL DISTRIBUTION MOTION (without exhibits) on the ENTERPRISES website, www.enterprisessolutions.com, and by mailing a copy of the SUPPLEMENTAL DISTRIBUTION MOTION (including exhibits) by U.S. First Class Mail to each ELIGIBLE SUPPLEMENTAL CLAIMANT on **Exhibit A** to the last address as indicated on the RECEIVER'S records.

17. In order to efficiently distribute the GIBRALTAR FUNDS, which are currently held at Huntington National Bank in an account titled "Phillip S. Stenger, Receiver for ESI-Gibraltar Funds" (the "**GIBRALTAR FUNDS ACCOUNT**"), the RECEIVER requests that he be allowed to conduct the distribution of the GIBRALTAR FUNDS as set forth herein. It is not anticipated that there will be sufficient funds to conduct a further distribution.

18. The RECEIVER seeks this COURT's authority, following completion of the SUPPLEMENT DISTRIBUTION, to transfer the residue in the GIBRALTAR FUNDS ACCOUNT (including amounts credited on the ELIGIBLE SUPPLEMENTAL CLAIMANTS LIST as approved by the COURT to ELIGIBLE SUPPLEMENTAL CLAIMANTS who cannot be located by the RECEIVER, or whose distribution checks are returned or which have not been cashed within the period set forth below) to the RECEIVERSHIP ACCOUNT at Fifth Third Bank to provide for the costs of completing the Receivership, and authority to close the GIBRALTAR FUNDS ACCOUNT at Huntington National Bank following said transfer.

19. Following completion of the SUPPLEMENTAL DISTRIBUTION, the RECEIVER will be filing a closing motion seeking: (i) approval of the RECEIVER's final report, final accounting and final compensation request; (ii) authority to hold back a reserve fund comprised of the residue of Receivership Estate assets after payment of the final compensation request, to be held in trust pending IRS clearance of all open Receivership Estate tax returns; and (iii) authority to disgorge the reserve fund balance remaining after IRS clearance and any final expenses that may be incurred in obtaining said clearance or in response to other issues, if any arise, to the COMMISSION for turnover to the United States Treasury without necessity of further court orders.

20. A copy of this SUPPLEMENTAL DISTRIBUTION MOTION, with supporting exhibits, was provided to the Securities and Exchange Commission (the "COMMISSION") in advance of filing, and the COMMISSION advised the RECEIVER on January 7, 2015 that it has no objection to the SUPPLEMENTAL DISTRIBUTION MOTION.

(continued on the following page)

WHEREFORE, the RECEIVER respectfully requests that the COURT enter the SUPPLEMENTAL DISTRIBUTION APPROVAL ORDER:

- A) Approving the notice given by the RECEIVER concerning the filing of this SUPPLEMENTAL DISTRIBUTION MOTION and finding that all requirements of due process and of this COURT's orders have been complied with in connection with this proceeding and the proposed supplemental distribution of the GIBRALTAR FUNDS;
- B) Approving the claims administration process as conducted by the RECEIVER, finding that the RECEIVER has complied with all requirements of the SUPPLEMENTAL DISTRIBUTION PLAN, approving and adopting the PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST as the final "**ELIGIBLE SUPPLEMENTAL CLAIMANT LIST**" and as a final and binding determination of the ELIGIBLE SUPPLEMENTAL CLAIMANTS and their APPROVED SUPPLEMENTAL NET STOCK LOSSES, and finding that no POTENTIALLY ELIGIBLE SUPPLEMENTAL CLAIMANT who is not included on the ELIGIBLE SUPPLEMENTAL CLAIMANT LIST as approved by this COURT, or who fails to cash his distribution check as set forth below, shall have any claim against the GIBRALTAR FUNDS or against the RECEIVER, the RECEIVER's attorneys or accountants, or the officers, directors, employees, consultants or agents of any of them;
- C) Authorizing and directing the RECEIVER to distribute from the GIBRALTAR FUNDS the sum of US\$575,000 to the ELIGIBLE SUPPLEMENTAL CLAIMANTS in the amounts shown on the PROPOSED ELIGIBLE SUPPLEMENTAL CLAIMANT LIST (**Exhibit A**);

- D) Authorizing and directing the RECEIVER to hold back the sum of US\$49,369.92 from the GIBRALTAR FUNDS to pay outstanding costs, fees and expenses of the Receivership through November 30, 2014, as detailed in the RECEIVER's concurrently filed COMPENSATION REQUEST NO. 7;
- E) Providing that it shall be the obligation of each ELIGIBLE SUPPLEMENTAL CLAIMANT to advise the RECEIVER of any change of address of such ELIGIBLE SUPPLEMENTAL CLAIMANT and to ensure that such ELIGIBLE SUPPLEMENTAL CLAIMANT'S contact information is properly reflected on the RECEIVER'S records; and providing further that, in making such distributions, the RECEIVER shall be under no obligation to inquire or otherwise investigate to determine the proper contact information for any ELIGIBLE SUPPLEMENTAL CLAIMANT for whom the contact information contained in the RECEIVER'S records proves inaccurate or incomplete, or whose distribution check is returned to the RECEIVER or is not cashed within the period set forth below;
- F) Providing that if there are ELIGIBLE SUPPLEMENTAL CLAIMANTS whose distribution checks are returned or have not been cashed within one-hundred-twenty (120) calendar days from the date of mailing of such checks (and in no event later than _____), such checks shall be void and the right to receive such payments shall terminate and the amounts otherwise distributable to such ELIGIBLE SUPPLEMENTAL CLAIMANTS shall be disposed of as set forth below; and providing further that the RECEIVER shall warn ELIGIBLE SUPPLEMENTAL CLAIMANTS of this potential loss of rights and the need promptly to cash their checks by including copies of the letter attached as **Exhibit E** hereto, which is

incorporated herein by reference (which letter the RECEIVER requests be approved by the COURT), in the mailing of the distribution checks;

G) Authorizing and directing the RECEIVER, following completion of the SUPPLEMENTAL DISTRIBUTION, to transfer the residue in the GIBRALTAR FUNDS ACCOUNT (including amounts credited on the ELIGIBLE SUPPLEMENTAL CLAIMANTS LIST as approved by the COURT to ELIGIBLE SUPPLEMENTAL CLAIMANTS who cannot be located by the RECEIVER, or whose distribution checks are returned or which have not been cashed within the period set forth above) from Huntington National Bank to the RECEIVERSHIP ACCOUNT at Fifth Third Bank to provide for the costs of completing the Receivership, and authorizing closure of the GIBRALTAR FUNDS ACCOUNT at Huntington National Bank following said transfer;

H) Providing that the Receivership Estate shall indemnify and hold the RECEIVER and his Retained Personnel harmless from any and all third party claims, demands, liabilities, judgments, losses, damages, actions (pending or threatened and whether at law or in equity in any forum), costs and expenses, including, but not limited to, reasonable attorneys' and other professionals' fees, that the RECEIVER and his Retained Personnel may incur arising out of or by reason of their duties and responsibilities as RECEIVER or counsel or accountant for, or consultant to, the RECEIVER, arising from the conduct or omission of the RECEIVER or his agents, employees and consultants under the terms of the SUPPLEMENTAL DISTRIBUTION MOTION and subsequent Order, unless it can be demonstrated the RECEIVER or such other persons acted in bad faith; and

D) Exonerating the RECEIVER, his attorneys and accountants, and the officers, directors, employees, consultants or agents of any of them, from any liability in connection with the Receivership.

Respectfully submitted,

STENGER & STENGER, P.C.
Attorneys for the Receiver

DATED: January 12, 2015.

By: 

Phillip S. Stenger (PS9969)

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