

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CASE NO.: 7:13-CV-1416 (GLS/TWD)

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	:
GERALD ESPOSITO, on behalf of himself	:
and all others similarly situated,	:
	:
Plaintiff,	:
	:
vs.	:
	:
DEATRICK & SPIES, P.S.C., a Kentucky	:
Professional Services Corporation,	:
	:
Defendant.	:
_____	x

ORDER OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

WHEREAS, the Court has been advised that the parties to this action, Gerald Esposito (hereinafter referred to as “Plaintiff” or “Class Representative”), and Deatruck & Spies, P.S.C., a Kentucky Professional Services Corporation (hereinafter referred to as “Defendant”), through their respective counsel, have agreed, subject to Court approval following notice to the Class Members and a Hearing, to settle the above-captioned lawsuit (hereinafter referred to as the “Lawsuit”) upon the terms and conditions set forth in the Class Action Settlement Agreement (hereinafter referred to as the “Settlement Agreement”), which has been filed with the Court, and the Court deeming that the definitions set forth in the Settlement Agreement are hereby incorporated by reference herein (with capitalized terms as set forth in the Settlement Agreement);

NOW, THEREFORE, based upon the Settlement Agreement and all of the files, records, and proceedings herein, and it appearing to the Court that, upon preliminary examination, the

proposed settlement appears fair, reasonable, and adequate, and that a Hearing should and will be held on January 28, 2015, after Notice to the Class Members, to confirm that the proposed settlement is fair, reasonable, and adequate, and to determine whether a Final Order and Judgment should be entered in this Lawsuit:

IT IS HEREBY ORDERED:

1. The Court has jurisdiction over the subject matter of the Lawsuit and over all settling parties hereto.

2. In compliance with the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(D), 1453, and 1711-1715, Defendant will cause to be served written Notice of the proposed class settlement on the United States Attorney General and the Attorneys General of Kentucky, Louisiana, Rhode Island, Indiana and New York.

3. **CLASS MEMBERS** – Pursuant to Fed. R. Civ. P. 23(b)(3), the Lawsuit is hereby preliminarily certified, for settlement purposes only, as a class action on behalf of the following class of plaintiffs (hereinafter referred to as the “Class Members”) with respect to the claims asserted in the Lawsuit:

All persons throughout the United States who, between November 13, 2012 and November 12, 2013, signed an ACH Agreement with Deatrick & Spies, P.S.C. containing the following language: “I understand that said credit and/or debit entries will be initiated without prior notice to me” and/or “This authority is to remain in force and effect until COMPANY has received written notification from me (or either of us) of its termination in such time and in such manner as to afford the COMPANY and DEPOSITORY a reasonable opportunity to act on it.” (the “Class Members”).

4. The Parties believe that there are 26 Class Members.

5. **CLASS REPRESENTATIVE AND CLASS COUNSEL APPOINTMENT** –

Pursuant to Fed. R. Civ. P. 23, the Court preliminarily certifies Plaintiff Gerald Esposito as the

Class Representative and James L. Davidson of Greenwald Davidson PLLC as Class Counsel.

6. **PRELIMINARY CLASS CERTIFICATION** – The Court preliminarily finds that the Lawsuit satisfies the applicable prerequisites for class action treatment under Fed. R. Civ. P. 23, namely:

- A. The Class Members are so numerous that joinder of all of them in the Lawsuit is impracticable;
- B. There are questions of law and fact common to the Class Members, which predominate over any individual questions;
- C. The claims of the Plaintiff are typical of the claims of the Class Members;
- D. The Plaintiff and Class Counsel have fairly and adequately represented and protected the interests of all of the Class Members; and
- E. Class treatment of these claims will be efficient and manageable, thereby achieving an appreciable measure of judicial economy, and a class action is superior to other available methods for a fair and efficient adjudication of this controversy.

7. The Court preliminarily finds that the settlement of the Lawsuit, on the terms and conditions set forth in the Settlement Agreement is in all respects fundamentally fair, reasonable, adequate, and in the best interest of the Class Members, especially in light of the benefits to the Class Members; the strength of the Plaintiff's case; the complexity, expense, and probable duration of further litigation; and the risk and delay inherent in possible appeals.

8. **ADMINISTRATION** – A third party class administrator acceptable to the parties will administer the settlement and notification to Class Members. The class administrator will be

responsible for mailing the approved class action notice and settlement checks to the Class Members. All costs of administration shall be paid by Defendant. Upon the recommendation of the parties, the court hereby appoints the following class administrator: McGladrey LLP, 751 Arbor Way, Suite 200, Blue Bell, PA 19422.

9. **WRITTEN NOTICE** – The Court approves the form and substance of the Notice of Class Action Settlement, attached to the Settlement Agreement as Exhibit C. The proposed form and method for notifying the Class Members of the settlement and its terms and conditions meet the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled to the notice. The Court finds that the proposed notice is clearly designed to advise the Class Members of their rights. In accordance with the Settlement Agreement, the class administrator shall cause the completed notice to be mailed to the Class Members as expeditiously as possible, but in no event later than 25 days after the Court’s entry of this order, *i.e.*, no later than October 25, 2014. The class administrator shall confirm, and if necessary, update the addresses for the Class Members through standard methodology that the class administrator currently uses to update addresses.

10. **EXCLUSIONS** – Any Class Member who desires to be excluded from the class must send a written request for exclusion to Class Counsel with a postmark date no later than 60 days after the Court’s entry of this order, *i.e.*, no later than November 29, 2014. To be effective, the written request for exclusion must state the Class Member’s full name, address, telephone number, and email address (if available), along with a statement that the Class Member wishes to be excluded. Any Class Member who submits a valid and timely request for

exclusion shall not be bound by the terms of the Settlement Stipulation.

11. **OBJECTIONS** – Any Class Member who intends to object to the fairness of this settlement must file a written objection with the Court within 60 days after the Court’s entry of this order, *i.e.*, **no later than November 29, 2014**. Further, any such Class Member must, within the same time period, provide a copy of the written objection to Class Counsel, Attention: Gerald Esposito v. Deatrck & Spies, P.S.C. Settlement, Greenwald Davidson PLLC, 5550 Glades Road, Suite 500, Boca Raton, FL 33431; and Counsel for Defendant, Attention: Gerald Esposito v. Deatrck & Spies, P.S.C. Settlement, Smith Sovik Kendrick & Sugnet, P.C., 250 S. Clinton St., Suite 600, Syracuse, NY 13202.

12. To be effective, a notice of intent to object to the Proposed Settlement must:

- (a) Contain a heading which includes the name of the case and case number;
- (b) Provide the name, address, telephone number and signature of the Class Member filing the objection;
- (c) Be filed with the Clerk of the Court no later than 60 days after the Court preliminarily approves the settlement;
- (d) Be sent to Class Counsel and Defendant at the addresses designated in the Notice by first-class mail, postmarked no later than 60 days after the Court preliminarily approves the settlement;
- (e) Contain the name, address, bar number and telephone number of the objecting Class Member’s counsel, if represented by an attorney. If the Class Member is represented by an attorney, he/she or it must comply with all applicable laws and rules for filing pleadings and documents in the U.S. District Court for the Northern District of New York.
- (f) A detailed statement of the specific legal and factual basis for each and every objection; and
- (g) A list of any legal authority the objector will present at the Final Approval Hearing.

13. Any Class Member who has timely filed an objection shall appear at the Settlement Approval Hearing, in person or by counsel, and be heard to the extent allowed by the Court, applying applicable law, in opposition to the fairness, reasonableness and adequacy of the Proposed Settlement, and on the application for an award of attorneys' fees and costs. The right to object to the Proposed Settlement must be exercised individually by an individual Class Member, not as a member of a group or subclass and, except in the case of a deceased, minor, or incapacitated Class Member, not by the act of another person acting or purporting to act in a representative capacity.

14. **SETTLEMENT PAYMENTS** – The class administrator will mail a settlement check to each Class Member who does not exclude himself or herself from the class. The settlement checks to the class members shall be sent via U.S. mail no later than 10 days after Final Order Day.

15. **INCENTIVE AWARD TO PLAINTIFF GERALD ESPOSITO** – Plaintiff Gerald Esposito will petition the Court to receive the sum of \$1,000 as an incentive award for his work in pursuing this case on behalf of the Class. Any incentive award shall be separate and apart from the Settlement Fund.

16. **FINAL APPROVAL** – The Court shall conduct a hearing (hereinafter referred to as the “final approval hearing”) on January 28, 2015 at the United States District Court for the Northern District of New York, James T. Foley U.S. Courthouse, 445 Broadway, Room 441, Albany, NY 12207, to review and rule upon the following issues:

- A. Whether this action satisfies the applicable prerequisites for class action treatment for settlement purposes under Fed. R. Civ. P. 23;

- B. Whether the proposed settlement is fundamentally fair, reasonable, adequate, and in the best interest of the Class Members and should be approved by the Court;
- C. Whether the Final Order and Judgment, as provided under the Settlement Agreement, should be entered, dismissing the Lawsuit with prejudice and releasing the Released Claims against the Released Parties; and
- D. To discuss and review other issues as the Court deems appropriate.

In the event that no timely objections to the settlement are made, the Court may cancel the final approval hearing and determine whether to finally approve the settlement without a hearing.

17. Attendance at the Final Approval Hearing is not necessary. Class Members need not appear at the hearing or take any other action to indicate their approval of the proposed class action settlement. Class Members wishing to be heard are, however, required to appear at the Final Approval Hearing. The Final Approval Hearing may be postponed, adjourned, transferred, or continued without further notice to the Class Members.

18. Submissions by the Parties, including memoranda in support of the proposed settlement, responses to any objections, petitions for attorney's fees and reimbursement of costs and expenses by Class Counsel, shall be filed with the Court no later than 14 days prior to the Final Approval Hearing, *i.e.*, **no later than January 14, 2015**.

19. The Settlement Agreement and this Order shall be null and void if any of the following occur:

- A. The Settlement Agreement is terminated by any of the Parties for cause, or any specified material condition to the settlement set forth in the Settlement Agreement is not satisfied and the satisfaction of such condition is not waived in

writing by the Parties;

- B. The Court rejects, in any material respect, the Final Order and Judgment substantially in the form and content attached to the Settlement Agreement and/or the Parties fail to consent to the entry of another form of order in lieu thereof;
- C. The Court rejects any material component of the Settlement Agreement, including any amendment thereto approved by the Parties; or
- D. The Court approves the Settlement Agreement, including any amendment thereto approved by the Parties, but such approval is reversed on appeal and such reversal becomes final by lapse of time or otherwise.

20. If the Settlement Agreement and/or this order are voided per ¶ 19 of this order, then the Settlement Agreement shall be of no force and effect and the Parties' rights and defenses shall be restored, without prejudice, to their respective positions as if the Settlement Agreement had never been executed and this order never entered.

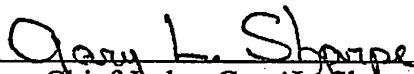
21. The Court retains continuing and exclusive jurisdiction over the action to consider all further matters arising out of or connected with the settlement, including the administration and enforcement of the Settlement Agreement.

22. The Court sets the following schedule:

<u>Date</u>	<u>Event</u>
September 30, 2014	Preliminary Approval Order Entered
October 25, 2014	Notice Sent
November 29, 2014	Deadline to Send Exclusion or File Objection
January 14, 2015	Motion for Final Approval and Attorney Fees Papers Filed
January 28, 2015 at 9:00 a.m.	Final Approval Hearing

IT IS SO ORDERED.

Dated: September 30, 2014
Albany, New York



Hon. Chief Judge Gary L. Sharpe
United States District Judge