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United States District Court, S.D. New York.
 Thomas DENNEY, R. Thomas Weeks, Norman R. Kirisits, Kathryn M. Kirisits, TD Cody Investments, L.L.C., RTW Investments, L.L.C., NRK Syracuse Investments, L.L.C., DKW Partners, DKW Lockport Investors, Inc., Donald A. Destefano, Patricia J. Destefano, DD Tiffany Circle Investments L.L.C., Tiffany Circle Partners, Diamond Roofing Company, Inc., Jeff Blumin, JB Hilltop Investments L.L.C., Kyle Blumin, KB Hoag Lane Investments, L.L.C., L. Michael Blumin, MB St. Andrews Investments, L.L.C., Fayetteville Partners, and Laurel Hollow Investors, Inc., on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

JENKENS & GILCHRIST, a Texas Professional Corporation, Jenkens & Gilchrist, an Illinois Professional Corporation, BDO Seidman, L.L.P., Pasquale & Bowers, L.L.P., Cantley & Sedacca, L.L.P., Dermody, Burke, and Brown, Certified Public Accountants, PLLC, Paul M. Daugerdas, Paul Shanbrom, Edward Sedacca, Deutsche Bank AG, and Deutsche Bank Securities, Inc., d/b/a Deutsche Bank Alex Brown, A Division of Deutsche Bank Securities, Inc., Defendants.

No. 03CIV5460SAS.

March 2, 2005.

[David R. Deary](#), [W. Ralph Canada](#), Shore & Deary, L.L.P., Dallas, Texas, [Jeffrey Daichman](#), Nahum Kainovsky, Kane Kessler, P.C., New York, New York, [Joe R. Whatley, Jr.](#), Othni Lathram, Whatley Drake, L.L.C., Birmingham, Alabama, [Ernest Cory](#), Cory Watson Crowder & Degaris, P.C., Birmingham, Alabama, [Stephen F. Malouf](#), Dallas, Texas, for Plaintiffs.

[Larry Black](#), Austin, Texas, for Defendants Paul Daugerdas, Erwin Mayer, and Donna Guerin.

[Rod Phelan](#), Baker Botts, L.L.P., Dallas, Texas, for Defendant Jenkens & Gilchrist, P.C.

[H. Lamar Mixson](#), Alison Berkowitz Prout, Bondurant, Mixson & Elmore, L.L.P., Atlanta, Georgia, [Steven Spielvogel](#), Gallion & Spielvogel, Garden City, New York, for Plaintiffs Eric Harslem, Lorraine Clasquin, Douglas MacGregor, Jeffrye Clarke and Loretta Clarke.

[Philip E. Bryant](#), Boyer & Ketchand, Houston, Texas, for Plaintiffs Denis Hoasjoe and Robert Moore.

[Robert J. Clary](#), Owens, Clary & Aiken, L.L.P., Dallas, Texas, for Plaintiffs James Mattei and J. Scott Mattei.

[Lawrence M. Hill](#), [Seth C. Farber](#), Dewey Ballantine, L.L.P., New York, New York, for Defendants Deutsche Bank AG and Deutsche Bank Securities.

[Michael R. Young](#), [Michelle Nadel](#), [Brian A. Turetsky](#), Willkie Farr & Gallagher, New York, New York, for Defendants BDO Seidman and Paul Shanbrom.

[Shirah Neiman](#), Justin S. Weddle, Assistant United States Attorneys, Southern District of New York, New York, New York, for the Government.

MEMORANDUM OPINION & ORDER

[SCHEINDLIN](#), J.

*1 On February 18, 2005, the Court entered a Judgment certifying a settlement class and approving the settlement with Jenkens & Gilchrist, P.C. (“Jenkins”). Class members (and objectors) James E. Mattei and J. Scott Mattei (“the Matteis”) now move, pursuant to [Federal Rule of Civil Procedure 59\(e\)](#), for an order altering or amending that Judgment. For the following reasons, the Matteis' motion is denied.

The Matteis seek to amend portions of the Judgment relating to the distribution of the settlement fund. They express concern that, as presently drafted, the Judgment permits distribution of portions of the settlement fund for payment of fees, expenses and incentive awards, prior to the exhaustion of all appeals relating to the fairness of the settlement or the propriety of certification. The Matteis' concern is based on a tortured misreading of the Judgment. The problem they seek to correct does not exist.^{FN1}

^{FN1} Even if the Matteis' motion had substantive merit, a [Rule 59\(e\)](#) motion may not be used to “raise arguments or present evidence that could have been raised prior to the entry of judgment.” [Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose](#), 282 F.Supp.2d 126, 131 (S.D.N.Y.2003). The relevant provisions of the Judgment have not changed since the first draft of the judgment

was submitted to the Court in April 2004. The Matteis had ample opportunity to object to those provisions prior to the entry of judgment. Their motion must be denied on this ground alone.

Paragraph 6 of the Judgment provides that the settling defendants will make payments to the settlement fund within 30 days of the date the Judgment becomes final. Paragraph 1(g)(1) and (2) provide that the Judgment will become final “in the event of an appeal of this Judgment, at the expiration of the time for seeking further review, following an affirmance [or] in the absence of an appeal of this Judgment, at the expiration of the time for perfecting any appeal.” In short, there is no settlement fund until the exhaustion of all appeals.^{FN2} Moreover, Paragraph 17 provides that fees, expenses and incentive awards will not be paid from the settlement fund until the later of three business days after the award of fees “becomes final and non-appealable,” or three business days after the settlement fund is funded. Thus, fees, expenses and incentive awards may not be paid prior to the Judgment becoming final.

^{FN2}. Additionally, defendants and the insurers have represented to the Matteis and to the Court that they will not finance the settlement fund unless and until the Judgment becomes final. See March 1, 2005 Letter from Class Counsel to the Court, Exhibits 1-3.

The Matteis' concern is based on two provisions. Paragraph 1(g)(3) provides that any appeal “pertaining solely” to fees, expenses, incentive awards or the plan of allocation will not prevent the Judgment from becoming final. The second portion of Paragraph 17 provides that “[i]f all or any part of the Fee and Expense Awards or the Incentive Awards is appealed, the Special Master shall segregate from the Settlement Fund an amount equal to those items that are the subject of the appeal, and hold such amount in escrow [] pending a final disposition of the appeal.”

The Matteis argue that these provisions “allow[] the Special Master the discretion to determine whether Fee and Expense Awards or Incentive Awards are the subject of an appeal. If he concludes that they are not, he can make an immediate distribution of any portion that he concludes is not impacted by the ap-

peal.”^{FN3} The Matteis plan to appeal certification of the class and the fairness of the settlement. They argue that the language of the Judgment will permit the Special Master to distribute fees, expenses and incentive awards from the settlement fund while their appeal is pending, if he decides that their appeal does not directly challenge those awards.

^{FN3}. The Matteis' Memorandum of Law in Support of Motion to Amend Judgment at 3.

*2 The Matteis have misread the Judgment. These clauses provide only that, if the only outstanding appeal is directed solely at, *e.g.*, expenses, the Judgment will become final, the settlement fund will be funded, and the Special Master may distribute amounts other than expenses. The Judgment certainly does *not* permit the Special Master to distribute fee awards while an appeal directed at the propriety of certification or the fairness of the settlement is pending; indeed, it could not, as there will be no settlement fund until the Judgment becomes final, which cannot happen while such an appeal is pending.^{FN4}

^{FN4}. Moreover, the Judgment provides that the Court retain jurisdiction over the distribution of the settlement fund. See Judgment ¶ 18. The Court has sufficient equitable powers to prevent any improper distributions from the settlement fund.

For the foregoing reasons, the Matteis' motion is denied. The Clerk of the Court is directed to close this motion [# 211].

SO ORDERED:

S.D.N.Y., 2005.
Denney v. Jenkins & Gilchrist
Not Reported in F.Supp.2d, 2005 WL 497841
(S.D.N.Y.)

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