



County of Fresno

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Legislation Text

File #: 16-1367, **Version:** 1

DATE: October 18, 2016
TO: Board of Supervisors
SUBMITTED BY: Daniel C. Cederborg, County Counsel
SUBJECT: Settlement with UBS for Municipal Derivatives Litigation

RECOMMENDED ACTION(S):

Board of Supervisors Sitting as the Board of Directors of the Fresno County Financing Authority (FCFA)

Approve and authorize Chairperson to execute Settlement Agreement with Defendants, UBS AG, UBS Financial Services, Inc., and UBS Securities, LLC (collectively, UBS), in connection with In re Municipal Derivatives Antitrust Litigation, MDL Docket No. 1950, Master Docket No. 08-2516 (VM) (GWG) (the MDL), including Fresno County Financing Authority (FCFA) v. AIG Financial Products Corp. et al., 09 Civ. 119 (VM), United States District Court, Southern District of New York, subject to execution of the Settlement Agreement by UBS AG and UBS Financial Services, Inc., and approval thereof as to form by FCFA's special co-counsel (\$15,000 gross amount).

ALTERNATIVE ACTION(S):

The County and FCFA each "opted out" of (*i.e.*, exclude itself from) the class action MDL settlement with UBS. Therefore, the Board (as the FCFA Board) may elect not to enter into the recommended Settlement Agreement, and direct outside counsel to continue pursuing separate litigation against the UBS entities that are defendants in the FCFA's lawsuit, discussed below.

FISCAL IMPACT:

Under the recommended Settlement Agreement, the FCFA would recoup \$15,000 of gross settlement proceeds (*i.e.*, \$12,000 net of special counsel's contingency fees and costs).

DISCUSSION:

When the Fresno County Financing Authority (FCFA) issues bonds for the County, the FCFA may temporarily invest the net bond proceeds in bond investment agreements until they are spent. Those bond investment agreements are known in the bond industry as "guaranteed investment contracts" or "municipal derivative transactions." The FCFA invested about \$38.6 million (par amount) in bond investment agreements.

Nationwide, there are several lawsuits by governmental agencies against providers and brokers of bond investment agreements for tax-exempt bonds. The majority of them were consolidated into a class action in a New York Southern District federal court, known as the Municipal Derivatives Antitrust Litigation or "MDL." In 2008, the FCFA joined the MDL. Generally, the FCFA, along with those agencies, allege that they suffered monetary losses sustained from their purchases of bond investment agreements in connection with the defendants' wrongful conduct, including rigging bids for the sale of their investment products, and other anti-

competitive behavior, that reduced those agencies' returns on their investments. UBS AG and UBS Financial Services, Inc., are defendant investment providers in the FCFA's lawsuit. UBS Securities, LLC, is a defendant investment provider only in the larger MDL (*i.e.*, not a defendant in the FCFA's lawsuit). This item refers to these defendants collectively as "the Defendant" or "UBS."

The FCFA is not aware of having invested in UBS bond investment agreements. Even so, the FCFA's lawsuit includes UBS because the alleged anticompetitive activities by defendants in the litigation include, among other things, claims based on purported conspiracy involving UBS arising out of or related to the allegations in the litigation.

Also, the County confirmed that it purchased a 2002 bond investment agreement from UBS AG in the approximate amount of at least \$116 million related to the County's 2002 taxable pension obligation refunding bonds. But the County does not receive any credit for that investment in the recommended Settlement Agreement; the reason is that the MDL class action only seeks recovery of losses related to tax-exempt bonds. Even so, the County would be covered by the proposed settlement.

The recommended Settlement Agreement is the result of the efforts of the FCFA's special co-counsel, Loeff, Cabraser, Heimann & Bernstein, LLP, and Scott+Scott, to obtain a monetary settlement from the "Defendant" referenced below.

The recommended Settlement Agreement is the result of a separate negotiation with UBS, outside of the MDL. Therefore, the settlement amount and terms of this recommended Settlement Agreement are different than the settlement amount and terms of other settlement agreements that the FCFA obtained in this litigation.

The "Releasing Parties" (also called the "Releasers") are generally defined in the recommended Settlement Agreement as the FCFA, including its affiliates.

The "Defendant" is generally defined in the recommended Settlement Agreement as released defendant investment providers UBS AG, UBS Financial Services, Inc., and UBS Securities, LLC, including the Defendant's direct and indirect parents, subsidiaries and affiliates, and others (*e.g.*, their successors).

The recommended Settlement Agreement, if approved by the Board, provides that the Defendant shall send the \$15,000 gross settlement amount to the FCFA within 10 business days of the parties' execution of the Settlement Agreement (which execution date also is its effective date); then, within 3 business days of receipt of the payment, the FCFA shall file with the court a stipulation of dismissal, with prejudice, from the litigation as against the released Defendant.

Upon the effective date of the recommended Settlement Agreement, the Releasing Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged all "Released Claims" (defined below) against the Defendant, and shall have covenanted not to sue the Defendant with respect to all such "Released Claims," and shall be permanently barred and enjoined from instituting, commencing, or prosecuting any such "Released Claims" against the Defendant.

Generally, "Released Claims" is defined as any and all claims, known or unknown, relating in any way to any conduct prior to the date of the parties' execution of the recommended Settlement Agreement and arising out of or related in any way to:

(i) the purchase or delivery of municipal derivative transactions (as defined in the Settlement Agreement) in the United States or its Territories; or

(ii) any conduct alleged in the litigation or that could have been alleged by the FCFA in the litigation against the Defendant.

The definition of “Released Claims” contains some but not all of the limiting language on the scope of the release that was negotiated into other FCFA settlement agreements in the litigation.

Only UBS AG and UBS Financial Services would execute the recommended Settlement Agreement on behalf of “Defendant, UBS,” but the Settlement Agreement also covers of UBS Securities, LLC.

FCFA special counsel forwarded to our Office PDF copies of the Settlement Agreement signature pages executed by UBS AG and UBS Financial Services, Inc.; FCFA special counsel is awaiting receipt of UBS legal counsels’ signatures for those pages, approving the recommended Settlement Agreement as to form for UBS. FCFA special counsel provided our Office PDF copies of their signatures for those pages, approving the recommended Settlement Agreement as to form for the FCFA. FCFA special counsel will coordinate the receipt and delivery of original signature pages to our Office.

The County and FCFA each “opted out” of (*i.e.*, exclude itself from) the MDL settlement with UBS. Therefore, outside counsel recommends that your Board approve the recommended Settlement Agreement.

ATTACHMENTS INCLUDED AND/OR ON FILE:

On file with Clerk - Settlement Agreement with UBS

CAO ANALYST:

Deborah Paolinelli