UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RESERVE MANAGEMENT COMPANY, INC., RESRV PARTNERS, INC., BRUCE BENT SR. and BRUCE BENT II, Defendants, and THE RESERVE PRIMARY FUND, Relief Defendant.	:	No. 09 Civ. 4346 (PGG) ECF CASE

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF LAW IN RESPONSE TO OBJECTIONS TO ITS APPLICATION FOR INJUNCTIVE AND OTHER RELIEF AND APPROVAL OF THE COMMISSION'S PROPOSED PLAN OF DISTRIBUTION

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Plaintiff Securities and Exchange Commission ("Commission") respectfully submits this Memorandum of Law in Response to Objections to its Application for Injunctive and Other Relief and Approval of the Commission's Proposed Plan of Distribution.

INTRODUCTION

On May 5, 2009, the Commission filed an action against (i) Reserve Management Company, Inc. ("RMCI"), Resrv Partners, Inc. ("Resrv Partners"), Bruce Bent Sr. and Bruce Bent II (collectively "Defendants") for violations of various federal securities laws; and (ii) Relief Defendant The Reserve Primary Fund ("Primary Fund" or "Fund") seeking (a) to enjoin its plan of distribution that would withhold for an indeterminate time at least $3.5 billion in Primary Fund assets from Fund investors; and (b) to approve a more fair and equitable plan of distribution – namely a prompt *pro rata* distribution – to those investors. With its Complaint, the Commission also filed an Order to Show Cause and Application for Injunctive and Other Relief and Approval of the Commission's Proposed Plan of Distribution (the "Application") which sought a scheduling order to set a hearing on the Commission's Application on notice to all claimants to Fund assets.

In response to the Commission's Application, on June 8, 2009 this Court ordered all "claimants against the assets of the Primary Fund, the Defendants [or related individuals to] file any objections to the entry of the relief sought by the Commission" by July 27, 2009. The Court further ordered the Commission and the Primary Fund to notify claimants of their right to object to the Commission's proposed plan of distribution ("Plan"), and ordered the Commission and the Primary Fund to submit any responses to objections by August 21, 2009 in advance of a hearing scheduled for September 23, 2009. Accordingly, the Commission submits this Memorandum to address the objections and other submissions offered by Primary Fund investors, and to reiterate

the compelling equitable grounds supporting a prompt *pro rata* distribution.[1]

In its submission in support of its Application, the Commission showed that the process by which the Fund's Board of Trustees set the Fund's NAV on September 15 and 16, 2008 was so hopelessly and irreparably compromised by inaccurate and incomplete information that it would be impossible and unfair to rely on it to draw distinctions between shareholders.[2] As such, the fact that many investors happen to hold confirmations that they believe entitle them to $1 per share is not controlling here because the NAV set forth in those confirmations is not reliable and was not reliable at the time the confirmations were issued. In light of the unprecedented corruption of the process by which the Fund set its NAV during critical periods of time – including for much of September 15, when the Trustees were unaware of key facts relating to valuations of Lehman in the market, the unprecedented levels of redemptions that the Fund was receiving and the true nature of RMCI's and the Bents' commitment to support the Fund – the Commission believes that a "determination" of the Fund's true NAV cannot now be achieved and that the only fair and equitable manner in which to distribute the Fund's remaining assets is on a *pro rata* basis.

The overwhelming majority of shareholders who have not received $1 per share for their Primary Fund shares ("Unpaid Shareholders") opted not to object to the key features of the

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[1] Submitted herewith is the Declaration of Michael D. Birnbaum, executed August 21, 2009 ("Birnbaum Decl."), to which is attached those Objections and Responses received by the Commission that were not electronically filed by the party submitting them. Reference to an Objection or Response filed electronically is made by the Docket Entry ("DE") number assigned to each.

[2] On September 15, the Trustees decided that they could no longer use the amortized cost method for calculating the Fund's NAV and were, therefore, required by Rule 2a-4, 17 C.F.R. § 270.2a-4, to calculate the Fund's NAV at market value, or, if there was no market, to make a "good faith" determination of "fair value." (See Henry Ford Health Systems (DE 131) at 4-5; TD Ameritrade (DE 70) at 10.)

Commission's Plan.[3] Investors across the spectrum support, or at least accept, the Commission's Plan, ranging from the earliest of redeemers to the latest, and the largest of investors to the smallest. Many of these shareholders have colorable claims to redemptions at $1 per share but recognize that the events of September 15 and 16, and the absence of a reliable NAV for the Fund, render moot the notion of a valid $1 redemption.

As one would expect in this challenging economic climate, most shareholders seek a fair and fast distribution and recognize that the Commission's Plan will best achieve that result. There is no question that, as this Court recently noted "[t]here is a finite amount of money here. And multiple litigations . . . can only drain away assets from the Fund to the detriment of all shareholders." (Tr. of Aug. 5, 2009 10 a.m. Conf. at 3.)

Critically, even those few objectors who challenge the Commission's proposed *pro rata* distribution ("Objectors") do not support as fair or equitable the plan of distribution announced by the Primary Fund – a plan that would effectively halt all further distributions to any investors in order to fund an enormous "Special Reserve" to benefit the Fund's Trustees and individuals other than investors.[4] Moreover, as set forth below, courts in and out of this Circuit routinely have approved the kind of distribution plan the Commission proposes here in contexts ranging from receiverships, to "fair funds," to class action settlements where there exist, as here, limited

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[3] Several investors submitted memoranda supporting the Commission's proposed *pro rata* distribution of Fund assets while either seeking clarification of certain details of the Commission's Plan or proposing amendments to the Plan. The Commission addresses those questions and comments below, and seeks to accommodate many of the suggestions without unfairly prejudicing the rights of any shareholders. As an Appendix to this Memorandum, the Commission submits its Amended Plan that includes additional provisions that are consistent with the Plan as originally proposed.

[4] Furthermore, no investor appears to challenge the Commission's authority to pursue, or this Court's authority to grant, an injunction preventing the Fund from proceeding with its plan; the most strident objection merely points to the Commission's infrequent invocation of its authority. (E*TRADE Obj. (DE 76) at 8.)

assets to satisfy many competing claims.

Thus, the critical inquiry, as highlighted by several Objectors, is whether the Commission's proposed Plan itself is fair and equitable. Those Objectors who argue that it is not almost uniformly base their objections on the purported strength of their "contract" claim: as holders of $1 confirmations from the Fund, they claim an inviolate contractual right to a $1 per share redemption, even though their claims are based on the illusory and erroneous proposition that the Fund's NAV accurately was determined at $1 when the confirms were issued. The contract claimants also overlook that every shareholder – including those that chose to redeem later in the process, or not at all – had the right to have the NAV accurately calculated at all times. The payout to some investors of a finite pool of assets at an artificial $1 price would inevitably deprive other investors of funds to which they may be entitled.

Declining to exercise this Court's jurisdiction over the Primary Fund and to determine all claimants' rights to the *Res* at this juncture will likely lead to a particularly unfair and inequitable *de facto* distribution plan under which each investor's recovery will be determined by the speed at which any particular claimant can perfect judgment against the *Res* in whatever court or courts ultimately decide the merits of the approximately 37 actions currently pending against the Fund. Such a result would itself constitute a *de facto* plan of distribution that would be unfair and inequitable under Section 25(c) of the Investment Company Act.

Accordingly, the Objectors' challenges to the Plan should be rejected, and the Fund should be compelled to distribute assets remaining in the *Res* to investors on a *pro rata* basis pursuant to the terms of the attached Appendix.

ARGUMENT

I. THIS COURT HAS CLEAR STATUTORY AUTHORITY TO ENJOIN THE PRIMARY FUND'S PROPOSED PLAN OF DISTRIBUTION.

Section 25(c) of the Investment Company Act expressly confers upon this Court the authority to "enjoin the consummation of any plan of reorganization of [a] registered investment company upon proceedings instituted by the Commission ... [where] such a plan is not fair and equitable to all security holders."[5] Here, the Primary Fund announced on February 26, 2009, a "Plan of Liquidation" that would withhold $3.5 billion from distribution to investors who have not yet been fully paid for redeemed shares in the Primary Fund. (Declaration of Michael J. Osnato, Jr., executed May 4, 2009 ("Osnato Decl."), Ex. 1.) In accord with the plain language of Section 25(c), the instant action seeks, among other relief, an order enjoining the consummation of the Fund's proposed plan because it is neither fair nor equitable to investors.

II. THE COMMISSION MAY SEEK, AND THE COURT SHOULD APPROVE, A PLAN OF DISTRIBUTION THAT GIVES EACH SHAREHOLDER A *PRO RATA* SHARE OF THE *RES*.

The Commission may seek, and the Court should approve, the Plan of distribution sought by the Commission under Section 21(d)(5) of the Securities Exchange Act of 1934, which provides that "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. §

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[5] Under Section 2(a)(33)(E) of the Investment Company Act, the Fund's announced plan of distribution qualifies as a "plan of reorganization," which is defined as "a voluntary dissolution or liquidation of a company." 15 U.S.C. § 80a-2(a)(33)(E).

78u(d)(5). Courts in and out of this Circuit routinely exercise their equitable authority to compel specific distribution plans in similar contexts.[6]

Well before the enactment of Section 21(d)(5) as part of the Sarbanes-Oxley Act of 2002, the district courts' general equitable power to fashion appropriate relief in securities law cases was firmly established. See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (holding that even when the federal securities laws do not specifically authorize a certain form of relief, "it is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded."). Both prior to and after the enactment of Section 21(d)(5), district courts routinely have exercised their equity jurisdiction to fashion relief in securities cases, particularly with respect to protecting assets for distribution to investors. See, e.g., Eberhard v. Marcu, 530 F.3d 122, 131 (2d Cir. 2008) ("Although neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 explicitly vests district courts with the power to appoint trustees or receivers, courts have consistently held that such power exists.") (quoting SEC v. American Bd. of Trade, Inc., 830 F.2d 431, 436 (2d Cir. 1987)); Liberte Capital Group, LLC v. Capwill, 462 F.3d 543, 552 (6th Cir. 2006) (district court has authority to enjoin non-parties from instituting suits against assets subject to a receivership); SEC v. Wencke, 622 F.2d 1363, 1365 (9th Cir. 1980) (district court can issue stay prohibiting commencement of any suit against receivership entities except by leave of the court); SEC v. Byers, 592 F. Supp. 2d 532,

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[6] Banc of America Securities does not dispute the Court's equitable powers under Section 21(d)(5); rather, it asserts that Section 25(c) does not give the Commission the right to force an inequitable reorganization plan or substitute its judgment for the Court's. (Banc of America Obj. (Birnbaum Decl. Ex. 3) at 2.) But it is the Court, and not the Commission, that will reach a decision on the distribution after considering all objections and responses. Moreover, even if Section 25(c) does not contemplate the proposal of a plan by the Commission, in practical terms, the statute produces this result; the Commission will invoke Section 25(c) to seek an injunction against any plan other than one that distributes the Fund's assets *pro rata* on the grounds that any alternative plan – as we explain below – would be unfair and inequitable.

536 (S.D.N.Y. 2008) (district court has authority to enjoin non-parties from filing involuntary bankruptcy petitions against receivership entities).

Moreover, where, as here, there are limited assets to satisfy multiple competing claimants, courts routinely defer to the Commission's "experience and expertise" in determining how to distribute funds, and, pursuant to their general equitable powers, routinely review the Commission's distribution plans to ensure that they are "fair and reasonable." See, e.g., Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82-83 (2d Cir. 2006); SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991).[7]

In WorldCom, the Commission filed a civil enforcement action alleging accounting fraud and seeking injunctive relief and civil monetary penalties against WorldCom, which subsequently filed for Chapter 11 bankruptcy protection. WorldCom, 467 F.3d at 75-76. Under the plan of distribution proposed by the Commission in its civil action against WorldCom, funds from the bankruptcy estate were to be used to pay investors. Id. at 76. Applying a standard of "fair and reasonable" to the Commission's proposed settlement and plan, the district court approved the plan even though it provided for compensation to investors who otherwise would have recovered nothing in the related bankruptcy proceeding. Id. (approving usage of the Fair Funds for Investors provisions of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246(a)). In an appeal taken by WorldCom's unsecured creditors, the Second Circuit upheld the district court's

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[7] The Commission's authority to propose a plan of distribution and the Court's authority to approve the Commission's plan do not turn on the Commission's success on its underlying claims against wrongdoers, or the Commission's control over the assets in the Fund. No one challenges the propriety of distributing the Fund's available assets to shareholders, or that shareholders' rights to those assets are superior to any that Defendants or the Fund might claim (except for limited contractual rights).

"fair and reasonable" standard of review and held that it did not abuse its discretion in approving the plan. Id. at 81.

Additional sources of authority for the *pro rata* distribution of Fund assets abound. In the myriad cases where the Commission has filed a civil enforcement action and a receiver has been appointed to, among other things, marshal and distribute receivership assets to investors, courts have exercised their broad equitable discretion to approve *pro rata* distribution plans. See, e.g., SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 85 (2d Cir. 2002) (upholding plan where receiver would liquidate all assets, including shares of stock transferred by one defrauded victim, and distribute the resulting cash on a *pro rata* basis to all victims, based on the amounts of their initial investments); SEC v. Infinity Group Co., 226 F. App'x 217, 219 (3d Cir. 2007) (upholding use of *pro rata* distribution in "ponzi" scheme involving many innocent investors, even when it was possible to trace assets to a particular investor; district court did not err in concluding that there was no equitable basis to distinguish between investors); SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 331 (5th Cir. 2001) (no abuse of discretion in pooling all assets for *pro rata* distribution, even if some investors could trace their investments); United States v. Durham, 86 F.3d 70, 72-73 (5th Cir. 1996) (affirming use of *pro rata* distribution plan, even when certain claimants could trace their investments, when all claimants "stand equal in terms of being victimized"). General equitable principles further hold that claimants usually share ratably in fund assets. See 3 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers § 667.4 at 1213 (3d ed. 1992) ("The maxim, equality is equity, is frequently applied by courts of equity in the distribution of assets and funds in their hands" and courts "pay over funds in their hands equitably and ratably among claimants without regard to the character of their claims ... .").

In short, there is clear and settled statutory and case authority for the relief sought by the Commission.

III. ANY PLAN THAT WOULD DRAW DISTINCTIONS AMONG INVESTORS BASED UPON ALLEGED CONTRACTUAL RIGHTS ARISING OUT OF CONFIRMATIONS OF REDEMPTION WOULD BE UNFAIR AND INEQUITABLE.

The vast majority of Objectors do not question the Court's jurisdiction and authority to act upon the Commission's proposed relief, and choose instead to propose their own plan – one that recognizes what those Objectors believe are their "contractual rights." (See, e.g., CSAFE Obj. (DE 48) at 3; Deutsche Bank Obj. (DE 68) at 7-8; VeriSign Obj. (Birnbaum Decl. Ex. 1) at 8-9.) As several Objectors note, on September 15, and for part of September 16, many shareholders received "confirmations" that their redemption requests had been received and would be paid out at $1 per share, the next per-share NAV announced by the Fund at that time. But, because the prospectus, not the confirmations, set shareholders' contractual rights, all unpaid shareholders stand in the same shoes vis-à-vis their contract rights. While the confirmations ordinarily offer good evidence of what investors are entitled to, here, the confirmations do not govern because they reflect an unreliable NAV. The confirmations should not, therefore, give certain shareholders special rights to a greater share of the Fund's assets than other shareholders.

A. The Contractual Relationship Between the Fund and Shareholders Springs from the Contract, Not Confirmations, Which Were Based Upon an Inaccurate and Misinformed NAV.

All of the Objectors who base their claims on confirmations start from the premise that the confirmations they received entitle them to the NAVs recorded there. But the Prospectus, which undeniably governs the investors' contractual relationship, provides that shares "will be

redeemed at the next NAV determined after a proper redemption request." (Osnato Decl. Ex. 2.). While confirmations ordinarily document what the next determined NAV for the Fund was at any given time, because the NAVs set throughout the day on September 15 and through 3 p.m. on September 16 were the product of a process infected by misinformation, those NAVs are not meaningful here. (See Memorandum in Support of the Commission's Application ("Application Memorandum," or "Appl. Mem.") at 9-11.)

Under these circumstances, the approach embraced by the court in SEC v. Alpine Mut. Fund Trust, 824 F. Supp. 987 (D. Colo. 1993), in the face of similar contract claims based on confirmations, is instructive. There, the Court rejected the claims of redeemers at the NAVs appearing on their confirmations, agreeing with the court-appointed receiver that the stated NAVs were grossly inaccurate and did not reflect the fair market value of the Funds' assets. Id. at 991. Notwithstanding what appeared on the confirmations, the Court approved a restatement of the NAVs, even though it would "*equitably* reduce amounts that were incorrectly reported . . . as [the] proper redemption" figures. Id. at 993 (emphasis in original).[8]

As described in the Application Memorandum, restating the Fund's NAV would not be possible in this case. (Appl. Mem. at 7-16.)[9] At the same time, the stated NAV should not be

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[8] In that case, the receiver agreed with the pre-receivership redeemers that they should be treated as "creditors." Id. at 992. Accordingly, the Alpine court did not determine the issue and any language about their status is therefore *dicta.* As the Commission argues below, *all* Unpaid Shareholders here are creditors.

[9] The Commission maintains that it would be impossible to recalculate the Fund's NAV because the Trustees had numerous options available to them had they been apprised of all of the facts through the day on the 15th, including what the market was bidding for Lehman, the unprecedented levels of redemptions and State Street's refusal to extend the Fund's overdraft privileges, and the true facts concerning RMCI's commitment to protect the Fund's NAV. While the Trustees may have valued Lehman at zero, striking a different NAV, they might also have sought to suspend striking an hourly NAV or redemptions altogether, among other actions they could have considered and moved to implement. (Appl. Mem. at 15-16; accord Henry Ford

recognized, where, as in Alpine, and the exceptional circumstances presented in this case, it was not appropriately "determined." Indeed, because the Fund is only the second money market fund to break the buck, there can be no fear that the Commission's Plan will wreak havoc on investor confidence, as Objector E*TRADE grimly predicts. (E*TRADE Obj. (DE 76) at 11-12.) A *pro rata* distribution here would be recognized as a fair and pragmatic response to a highly unusual situation, not a fundamental reshaping of the financial order. Although a board's business judgment is entitled to deference, in this case, the Trustees effectively were disabled from exercising reasonable business judgment. In exceptional circumstances such as these, when the process by which the NAV was struck was so impaired by misinformation and lack of information that even the Trustees would not defend their decisions as reasonably informed business judgments, this Court may properly exercise its equitable authority to reach a fair and equitable result, contract claims notwithstanding.

Indeed, many Objectors implicitly agree that the confirmations' printed value was not necessarily accurate and is therefore entitled to no weight. As the Fund admitted in its November 26, 2008 press release (Osnato Decl. Ex. 13), it issued $1 confirmations to scores of investors on September 16 *after* the Fund broke the buck. In noting that they submitted their redemptions prior to 11 a.m. (the time the Fund has now set as the time when its NAV dipped below $1), several Objectors argue that their confirmations are superior to those $1 confirmations issued after that time. (See, e.g., Wal-Mart Obj. (DE 57) at 1-2; Cellco Obj. (DE

Health Systems Memorandum in Support (DE 131) at 18 -19; Northern Trust Obj. (DE 85) at 9-10.) Any one of those actions, moreover, would have greatly and almost immediately triggered an even more substantial run on the Fund and put the Fund into liquidation mode.

79) at 4-5, 12, J.M. Huber Obj. (DE 81) at 8-9.)[10] These Objectors seem to agree that an error in computing the Fund's NAV would not create a "contractual right" to $1 per share any more than a typographical error confirming a $2.00 per-share NAV would entitle redeeming shareholders to $2.00 per share.

In short, because the Fund's investors' contract rights are set by the Prospectus, which gave all investors the right to a "determined" NAV, investors should not be permitted to rely upon a confirmation that essentially reflects an error committed by the entity or individual calculating the NAV, especially when that error resulted from a fundamental breakdown in the process of determining the Fund's NAV.

B. Investors' Status as "Creditors" Does Not Create Any Special Right to Fund Assets.

Certain early redeemers also maintain that their rights are superior to later redeemers and non-redeemers because, once they received their confirmations, they became "unsecured creditor[s], as opposed to shareholders." (See, e.g., E*TRADE Obj. (DE 76) at 11; Russell Invest. Obj. (DE 24) at 11-12.) This argument ignores, however, that all Fund investors are creditors of the Fund, whether they redeemed or not.

Investors in an investment company have contractual rights to redemption *not* enjoyed by shareholders in an ordinary stock corporation. In re Bayou Group, LLC, 372 B.R. 661, 665 (Bankr. S.D.N.Y. 2007) (given the contractual right of redemption, shareholder in bankrupt

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[10] Several Objectors draw a line at 11:00 a.m. on September 16 because that is the time of the NAV strike identified in RMCI's November 26, 2008 press release announcing the "administrative error" in valuing the Fund. (See, e.g., FPL Group Obj. (Birnbaum Decl. Ex. 7), at 2.) 11:00 a.m. was the "next NAV determined" for all redemptions properly requested after 10:00 a.m., the time at which the Primary Fund was last scheduled to strike an NAV before 11:00. Thus, to the extent that RMCI's administrative error identifies any line of demarcation distinguishing among redemption requests, that line appears to be 10:00 a.m, not 11:00 a.m., leaving Objectors like FPL Group with a dollar confirm that could be honored at, at most, $0.99.

hedge fund is a creditor like any other contract claimant). Therefore all shareholders in an investment company are both equity holders and creditors.

Furthermore, even if the early redeemers could argue for return of their investment because they received confirmations with a greater NAV value, the equitable principle that all claims should be considered in parity, with no claimant being preferred over another, should not be displaced by any other theory of recovery. See WorldCom, 467 F.3d at 85; Clark, supra, § 667 at 1199 ("[A] court of equity is not bound by insolvency or bankruptcy statutes of distribution and preference.").

IV. THERE IS NO PRINCIPLED WAY TO DISTINGUISH THE REDEMPTION CLAIMS OF EQUALLY BLAMELESS UNPAID SHAREHOLDERS.

The Commission's position that a *pro rata* distribution will best promote equity recognizes that there is no principled way fairly to distinguish the redemption claims of equally blameless shareholders, each having competing claims. While Objectors all contend that their particular shares should be redeemed at $1, those few Objectors that offer an alternative to the Commission's *pro rata* Plan cannot agree on which investors should bear the burden of a non-*pro rata* plan and receive less than $1 per share. (Compare, e.g., Safeco Obj. (DE 41) at 2-3 (advocating $1/share to all September 15 redeemers) with Toyota Obj. (Birnbaum Decl. Ex. 8 at 2-3 (advocating $1/share to all who redeemed prior to 11:00 a.m. on September 16.)) Even if they could agree, however, the Objectors' plans are all self-defeating because each would involve separate complicated factual inquiries that would simply consume the *Res* to virtually no one's benefit, and would serve to shift burdens among equally blameless shareholders.

A. The Veritable Morass of Conflicting Evidence Makes Classifications Unworkable and Unjust and Supports a *Pro Rata* Distribution.

Even assuming that there was a principled way to assign shareholders to classes that were deserving of differing NAVs (and there is not), the determination of which shareholders fall into which class would be rife with factual conflicts. For example, gaping differences between shareholder and Fund redemption records highlight that the priority of shareholder redemption requests is far from settled. Thus, any attempt to classify shareholders based on redemption priority would require a hearing for each redemption request. Moreover, assuming that priority could be established with any certainty, each determination of priority would alter the number of redeemed shares at any given time and trigger additional adjustments to the Fund's NAV.

A closer look at Cellco (Verizon) illustrates this point. According to the Fund's redemption records, Cellco redeemed 554,840,068 of its 620,040,068 shares at approximately 1:12 p.m. on September 16, *after* the Fund broke the buck. (See Osnato Decl. Ex. 6.) However, Cellco has submitted an email that reflects its redemption request of 554,840,068 Primary Fund shares by 9:10 a.m. on the morning of September 16, a critical four-hour time difference from the Fund's records. (Cellco Obj. (DE 79) at 4.) On the strength of this evidence, Cellco seeks to move up in the redemption queue, ahead of all post-9:10 a.m. redeemers on September 16.[11]

If the Court were to conclude that it should unravel the factual tangle regarding redemption priority as to Cellco and numerous other investors, the Court necessarily would also be undertaking to recalculate each strike of the NAV, as the number of redeemed shares at any

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[11] Cellco is only one of several Objectors who claim an earlier redemption time than that reflected on Fund records. (See ERCOT Obj. (Birnbaum Decl. Ex. 6 at 2 (describing September 16 redemption)) as compared to Osnato Decl. Ex. 6 (reflecting ERCOT's redemption as of September 25)); Northern Trust Obj. (DE 85) at 6 n. 2; Complaint of BNPP (DE 1 in 09-CV-05997) ¶¶ 22, 23, 27 (detailing BNPP's telephonic redemption requests at times earlier than those reflected on the Fund's redemption list.)

time directly impacts the Fund's contemporaneous NAV. If a significant volume of shares were assigned an earlier redemption time, the hour at which the Fund broke the buck would move back as well. Such an approach would be unworkable, given the number of factual disputes, and would unfairly disadvantage shareholders who do not have independent evidence of their redemption requests and must instead rely on the Fund's records.

Priority of redemption issues aside, the facts and circumstances surrounding the redemptions of certain shareholders are fraught with other complications. For example, certain investors assert that they would have redeemed their shares or that they would have declined to purchase additional shares on September 15 and early on September 16 but for Defendants' false assurances that the Fund would not break the buck. (See, e.g., First Data Obj. (Birnbaum Decl. Ex. 16) at 1.) If the Court were to decide to draw lines of classification based on which shareholders received and relied upon false assurances, the time and expense in added litigation would further dissipate the already limited Fund.

The importance of avoiding an endless spiral of costly and time consuming litigation cannot be overstated. This effort is not simply a matter of the Commission's desire to achieve simplicity for simplicity's sake. (See E*TRADE Obj. (DE 76) at 12.) To the contrary, the Commission recognizes the factual impossibility here of reconstructing an accurate NAV, and therefore seeks to place a *pro rata* share of assets in investors' hands in the most expeditious manner possible. As the Second Circuit observed in WorldCom, 467 F.3d at 84, "when funds are limited, hard choices must be made." In this case, the Court's "hard choice" arises from the profusion of claims, many of them credible, to a limited pool of assets. In the analogous context of "limited fund" class action litigation, the Supreme Court has noted that the very goal should be to ensure that a limited pool of assets is fairly allocated amongst many deserving claimants,

including by ensuring that scarce funds are not consumed by litigating individual claims. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999) (articulating concept of "limited fund" class action lawsuits, where courts must preserve sufficient funds to ensure equitable treatment of claimants).

B. The Commission's Plan Equally Distributes the Benefits and Burdens to All Unpaid Shareholders.

Several Objectors claim that a *pro rata* distribution would unfairly place the "entire burden of the Primary Fund's shortfall on the early redeemers ... without requiring any reductions to later redeemers' recovery." (See, e.g., Deutsche Bank Obj. (DE 68) at 9-10.) This argument improperly assumes as a premise its conclusion – that early redeemers are entitled to $1, and late redeemers are not. In fact, all unpaid shareholders should bear Lehman-related losses equally, and a *pro rata* distribution ensures that they do.

If the Board had set the value of the Fund's Lehman Holdings on the morning of September 15 at zero – the course it chose on September 16 when the Trustees finally became aware of all the salient facts – then the Fund's per-share NAV would have been approximately $0.987, or approximately the same amount that investors stand to recover under the Commission's proposed Plan. Each shareholder would have then received approximately 98.7 cents per share, plus a *pro rata* payment of any value the Fund may recoup for its Lehman Holdings.

An examination of how a non *pro-rata* plan impacts "later redeemers" crystallizes the unfairness of a distribution that pays some Unpaid Shareholders more than others. Simple math dictates that every dollar paid to a shareholder leaves fewer dollars available to pay other unpaid shareholders. Thus, if all shareholders who hold $1 confirmations are paid a full $1 per share out

of the assets remaining in the Fund – a group that appears to comprise more than half of the remaining unpaid shareholders (see Osnato Decl. Ex. 6) – the unpaid shareholders not holding $1 confirmations will receive, at most, approximately $0.97 for their shares. If, further, claimants who received $1 confirmations after 3:00 p.m. on September 16 in error were paid a full $1 per share, then the balance of unredeemed shareholders would receive even less per share.[12] Consequently, even though the Fund's Lehman Holdings, valued at par, amounted to little more than 1 percent of the Fund's total assets at the start of September 15, a plan that would offer some shareholders $1 while leaving a smaller pot of money for remaining shareholders to share will necessarily leave some investors to shoulder an extremely (and inequitably) disproportionate share of any Lehman-imposed burden.

A plan that rigidly credited the Board's uninformed NAV calculations would have the additional flaw of setting an arbitrary distinction between those investors that would benefit from a rounding of the Primary Fund's NAV and those who would not enjoy such a benefit. For example, early investors who redeemed when the Fund was worth $0.9951 per share (just above the minimum value that could permissibly be rounded to $1) would nonetheless receive $1 per share. In order to pay early redeemers the rounded-up value per share, money would essentially have been taken from later redeemers. While early redeemers would not have done anything improper, a fair and equitable plan of distribution should not force later redeemers to fund the rounded-up redemptions of earlier redeemers.

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[12] Just how little some Unpaid Shareholders might ultimately receive for their shares would depend on how many claimants are awarded $1 per share, or at least more than a *pro rata* share of the Fund. Satisfaction of claims already asserted – with more sure to follow absent an injunction – may very well leave some investors with significantly less than $0.97 per share.

Objectors' assertions that a *pro rata* distribution would reward late redeemers over "conscientious and careful investors" who redeemed hours or even minutes earlier than other shareholders are not compelling. (See, e.g., E*TRADE Obj. (DE 76) at 11; Banc of America Obj. (Birnbaum Decl. Ex. 3) at 2.)[13] Nobody has claimed that the value of the Primary Fund's portfolio securities fluctuated in a way that justifies rewarding those investors who got their redemption requests in earliest. Whatever the Lehman Holdings were worth on September 15, a fair and equitable plan would compel all shareholders to share any Lehman-based loss in value to the Fund. The Fund's prospectus – the "contract" on which certain Objectors rely in shifting the Lehman-related losses to other shareholders – is a contract between the Fund and *all* investors, and there is no indication in the text of that contract that under circumstances such as those existing on September 15 and 16, some shareholders should be favored over others.

V. ENTRY OF RELIEF UNDER THE ALL-WRITS ACT IS NECESSARY AND APPROPRIATE IN AID OF THIS COURT'S JURISDICTION OVER THE *RES*.

Key to the Commission's Plan is the curtailment of indemnifiable claims against the Fund and its Trustees. By distributing the *Res*, the Court effectively would decide shareholders' and others' claims on the Fund, so to let other actions against the Fund continue would be to permit suits against a Fund with no assets, or, alternatively, would lead to the hold-back of a special reserve that could otherwise be distributed. The creation of such a reserve would defeat the primary purpose of the Commission's Plan – to fairly and equitably return Fund assets to investors as soon as reasonably practicable. Such a result could be avoided through an All-Writs

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[13] The Sixth Circuit recently noted that the focus in considering claims of priority in a ponzi scheme distribution should be on the "nature of the interest [held by the claimant], not on the degree of diligence spent to acquire it." Quilling v. Trade Partners, Inc., 572 F.3d 293, 300 (6th Cir. 2009).

Act injunction. Investors would not "lose out" from such an injunction; rather, an injunction ensures them a prompt *pro rata* distribution.

Certain Objectors question whether this Court may appropriately invoke its authority under the All-Writs Act, while others express concern about how such relief would impact non-indemnifiable claims against Defendants or other related entities and individuals. (See, e.g., E*TRADE Obj. (DE 76) at 6-7; Frankel Obj. (DE 62) at 3-7.) But as explained in the Commission's Application Memorandum, the Second Circuit has clearly ruled that All-Writs relief is particularly appropriate in cases such as this, where there are competing claims to a finite *res*. (Appl. Mem. at 23.)

Wal-Mart asserts: "To the extent that the SEC's proposed order in its *in personam* action against the Fund would enjoin earlier-filed actions in state court, it violates the [Anti-Injunction] Act." (Wal-Mart Obj. (DE 57) at 2.) This objection not only mischaracterizes the nature of this action – which is not *in personam*[14] – but is also incorrect as a legal matter. "If a court's 'injunction [is] in fact necessary in aid of its jurisdiction, then the injunction [is] authorized by the All Writs Act, and [is] not barred by the Anti-Injunction Act.'" SR Int'l Bus. Ins. Co., 445 F. Supp. 2d at 360 n.5 (quoting Retirement Sys. of Ala. v. J.P. Morgan Chase & Co., 386 F.3d 419, 425 (2d Cir. 2004)).

E*TRADE's attempt to distinguish the salient facts in this action from In re Baldwin United Corp., 770 F.2d 328 also is unavailing. (E*TRADE Obj. (DE 76) at 6-7). If this Court

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[14] See Judge Mukasey's discussion distinguishing *in rem* and *quasi-in rem* cases for which All-Writs relief is appropriate from true *in personam* actions ill-suited for such relief. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 445 F. Supp. 2d 356, 360 (S.D.N.Y. 2006); see also In re Baldwin United Corp., 770 F.2d 328, 337 (2d Cir. 1985) ("[T]he jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts.'" (citation omitted)).

grants the Commission's application to enjoin the Fund's plan of distribution, the Court will have unambiguously exercised its jurisdiction over the *Res* here at issue. "[B]ecause the 'exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached,' the federal court is empowered to enjoin any state court proceeding affecting that res." Id. at 336 (quoting Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922)).

The Commission is not simply seeking an All-Writs Act injunction to avoid duplicative litigation, although that is one valid purpose such an injunction would serve. Rather, as in Baldwin, an All-Writs Act injunction is necessary here to effectuate the underlying relief the Commission seeks through a *pro rata* distribution plan. To enjoin the Fund's proposed plan of distribution while allowing cases against the Fund to proceed in various state and federal courts would defeat the purpose of the Commission's action, as the Trustees would presumably create a new "Special Reserve" while claimants race to perfect judgment against the Fund and others pursue claims against those whom the Fund must indemnify. Allowing claims against individuals or entities that are not entitled to indemnification from the Fund (either because of the nature of the claims asserted or the absence of any indemnification agreement covering certain defendants) does not pose the same threat to the fair and equitable distribution of Fund assets. Accordingly, the Commission does not seek to enjoin any claims that will not give rise to a claim for indemnification from the Fund for liability.[15]

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[15] Several Objectors understandably question why late redeemers should be permitted to pursue fraud claims that may bring them a greater total recovery than early redeemers. (See, e.g., J.M. Huber Obj. (DE 81) at 11.) The Commission did not intend to create an ability to recover for late redeemers to the possible detriment of other investors. Accordingly, and as set forth in the Appendix, the Commission hereby clarifies its Plan to require a *pro rata* distribution of any funds awarded to any investor in satisfaction of any claim for relief relating to the facts

VI. THE COMMISSION'S PLAN SEEKS TO ACCOMODATE PROPOSALS MADE BY SHAREHOLDERS THAT ARE CONSISTENT WITH THE PLAN'S OBJECTIVE OF FAIRNESS, EQUITY AND FINALITY.

Many investors' submissions do not object to a *pro rata* distribution of funds, but seek clarification of certain aspects of the Plan or propose additional features to be added to the Plan. Where those suggestions are not inconsistent with the initial *pro rata* Plan set forth by the Commission and do not unfairly compromise any individual's or entity's rights, the Commission seeks to include those proposals in the Amended Term Sheet attached hereto as an Appendix. A brief overview of the most pertinent modifications or clarifications is set out below.

A. Purchasers at Less than $0.97

The Commission did not intend for its Plan to create a windfall for investors who purchased shares of the Primary Fund for less than the amount they would receive in a *pro rata* distribution. Accordingly, all investors redeeming shares purchased for an amount less than that which this Court may determine shall be distributed to investors *pro rata* should be receive no more than the purchase price for those shares.

B. Possible Recovery of "Overpayments" to Paid Redeemers

Several investors object to the absence in the Plan of any mechanism to claw back payouts made on September 15 to certain "early" redeemers who received a full $1 per share (the "Fully Paid Redeemers"). Essentially, these objections all offer some variant of the argument that if the Court chooses not to credit the Trustees' misinformed NAV calculations on September 15 in determining how to allocate funds among Unpaid Shareholders, then the same NAV should

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underlying the instant action. This clarification should not compromise the rights of any fraud claimant because, should the Plan be approved, fraud claimants will get no less than any other claimant. (See also Henry Ford Health Systems (DE 131) at 23 (sharing recovery on non-indemnifiable claims is appropriate because all investors are victims of fraud).)

not be credited to support actual $1 per share payments to the earliest of redeeming shareholders. (See, e.g., Unpaid Timely Redeemer Group Obj. (DE 64) at 12-15; TD Ameritrade Obj, (DE 70) at 18.)[16] These Objectors' appeal for what amounts to a *pro rata* distribution to *all* investors who held shares on September 15 is bolstered by Fund records that indicate that certain shareholders on September 15 were paid out of order – that some redemptions were apparently funded in an order other than that in which redemptions were received. (Osnato Decl. Ex. 6 (shaded entries indicating paid out investors).)

The Commission understands Objectors' desire to investigate the circumstances under which certain redeemers were fully paid on September 15. Therefore, the Commission would not object if the Court were to charge the proposed Monitor with investigating such claims and imbue the Monitor with the sole discretion to pursue any such claims he deems appropriate, as a receiver, with counsel retained on a contingent fee basis.

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[16] A group of investors calling themselves the "Unpaid Timely Redeemer Group," which together redeemed more than 8 billion shares in the Primary Fund, further requests that the Court require that certain investors who received $1 for some, but not all, of their redeemed shares – a group the Unpaid Timely Redeemer Group calls "Straddlers" – be compelled to forego part of any *pro rata* payment sufficient to "offset the excess portion of $1 NAV distributions on September 15" that those Straddlers received. (Unpaid Timely Redeemer Group Obj. (DE 64) at 14-16.) The Commission understands this suggestion to be substantively the same as the Unpaid Timely Redeemer Group's request, also articulated by certain other Objectors, that all funds paid to fully redeemed shareholders be "clawed back" so that investors who held shares at the start of September 15 share any losses equally.

C. Future Expenses

If approved, the Plan will necessarily impose some unavoidable costs on the Fund in connection with its liquidation and its existing contractual obligations to pay litigation expenses of indemnified parties incurred in the successful defense of non-indemnifiable claims. To ensure that the Fund assets are distributed as efficiently as possible, the Commission recognizes the need to both quantify and limit those expenses and has proposed a mechanism and schedule to address those concerns. The categories of expenses are: (1) management fees and expenses claimed by the Fund's adviser, Defendant RMCI, and the Fund's distributor, Defendant Resrv Partners, as owing under their respective contracts with the Fund; (2) indemnification expenses for litigation costs associated with the successful defense of claims asserting non-indemnifiable conduct against the Fund and its indemnitees, and State Street Bank and Trust, the Fund's custodian and agent; and (3) the costs and expenses of the Monitor. The Plan proposes that an Expense Fund be set at $75 million, now, so that the remaining assets in the Fund can be distributed as soon as possible.

To ensure that all indemnitees have a chance to be heard, and that the Fund's remaining assets can be distributed quickly, the Plan also proposes a mechanism for a final adjudication of an appropriate amount to be withheld as the Expense Fund from distribution. For the litigation expenses payable pursuant to the Fund's various indemnification agreements, the proposed Plan provides that the Court set a bar date for the assertion of all non-indemnifiable claims, and provides that 15 days after such bar date, the indemnitees will submit good faith estimates of their respective reasonable litigation expenses as a result of their defense of such claims. The Monitor will then recommend to the Court which claims should be honored and the Court will

determine whether to accept the Monitor's recommendation and direct him or her to set aside such amounts sufficient to satisfy those obligations.

As to the Defendants RMCI and Resrv Partners' claim for management fees and expenses under their contracts with the Fund, the Plan proposes that RMCI and Resrv Partners be directed to submit their claims within 45 days after the Plan is approved. The Monitor thereafter would recommend what portion of their claims are due and payable, leaving the determination of the final payment to the Court's determination. Any claim by the Commission in its action against the Defendants for disgorgement of fees paid to RMCI or Resrv Partners would be preserved, and the Commission would distribute any disgorged amounts *pro rata* to Unpaid Shareholders as permitted by the securities laws.

D. Distribution of Any Recoveries in the Commission's Action Against Defendants

The Plan contemplates that any recoveries obtained by the Commission in its action against Defendants RMCI, Resrv Partners and the Bents, such as disgorgement and penalties, will be distributed *pro rata* to Unpaid Shareholders to the extent allowable under the securities laws.

CONCLUSION

For the reasons stated herein, the Commission respectfully requests that this Court enjoin the Primary Fund's unfair and inequitable plan of distribution and approve the Commission's proposed Plan, subject to the terms and conditions set forth in the Appendix.

Dated: New York, New York
August 21, 2009

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

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Appendix

Appendix

The Commission's Amended Term Sheet

The Commission submits this Amended Term Sheet in order to clarify those terms presented in the Commission's Term Sheet circulated to Claimants and record holders of the Primary Fund and appended as an Appendix to the Court's June 8, 2009 Order.

As more fully explained in the Commission's Memorandum of Law in Response to Objections, submitted herewith, the Commission now has included certain provisions because they were requested by certain Claimants and because the Commission believes that those provisions are consistent with the previously proposed terms. Therefore, the Commission does not object to their inclusion in any final order issued by the Court.

Monitor's Duties

1. Appointment of a Monitor, proposed by the Commission and approved by the Court, with responsibility for:

a. liquidation and distribution of the assets of The Reserve Primary Fund ("Primary Fund");

b. investigation of grounds to claw back payouts by the Primary Fund at any time after 8:00 a.m. on September 15, 2008 in excess of amounts to be paid under this Plan to Primary Fund Shareholders who have not received $1.00 per share owned on or after September 15, 2008 ("Unpaid Shareholders");

c. ensuring that Unpaid Shareholders who bought Primary Fund shares after 3 p.m. on September 16, 2009 receive no more than the amount paid by such Unpaid Shareholder for each such share purchased;

d. investigation of the circumstances surrounding the transfers after 8:00 a.m. on September 15, 2008 by Primary Fund shareholders to other Funds advised by RMCI; and

e. review of any claims by the Primary Fund's adviser or distributor for management fees and expenses associated with the Primary Fund, and review of any claims for indemnification, as set forth herein.

2. In connection with the duties of investigation set forth in Paragraphs 1(b) and (d) above, and within 90 days of his appointment, the Monitor, in his or her sole discretion, shall determine those claims that should be pursued in the best interests of all Unpaid Shareholders, and shall recommend to the Court that he or she be appointed as receiver for the limited purpose of pursuing such claims (the "Claw Back Claims") on a contingency basis. Any net recovery obtained by settlement or judgment on such Claw Back Claims shall be distributed *pro rata* to Unpaid Shareholders, except that Unpaid Shareholders shall not receive a greater per-share total recovery than any shareholder from whom money is clawed back. The Commission reserves the right to object to any Claw Back Claim asserted if it believes such claim would be inconsistent with the equitable treatment of all current and former shareholders of the Primary Fund.

3. The Monitor shall promptly effect a distribution of the assets of the Fund, less the Expense Fund and Monitor Fund, as defined below, to the Unpaid Shareholders on a *pro rata* basis per share, and shall make all reasonable efforts to begin distribution within 30 days of the Monitor's appointment by the Court.

Initial Holdback for Certain Expenses

4. Excluded initially from the distribution of Primary Fund assets described herein shall be a fund of $75 million ("Expense Fund"), set aside to pay for:

a. the "Indemnification Expenses," which shall include:

(i) reasonable litigation expenses that may be incurred by State Street Bank and Trust Company ("State Street"), and indemnifiable by the Primary Fund pursuant to Section 15 of the Master Custodian Agreement, dated March 7, 2008, between, *inter alia*, the Primary Fund and State Street (the "State Street Indemnifiable Expenses"); and

(ii) reasonable litigation expenses that may be incurred by any "Indemnitee" as defined in the SEVENTH Declaration, Paragraph 11, of the Amendment Number Two to, and Restatement of, The Declaration of Trust, made December 10, 1986 of The Reserve Fund (the "Declaration of Trust"), and to the extent payable pursuant to the terms of the SEVENTH Declaration, Paragraph 11 (the "Declaration of Trust Indemnifiable Expenses"); and

b. any claims by the Primary Fund's adviser or distributor for management fees and expenses associated with the Primary Fund that are determined to be due and payable.

5. The Primary Fund shall make available proceeds from any applicable insurance policies to reimburse Indemnification Expenses. Such insurance proceeds shall be exhausted before any monies are advanced from the Expense Fund.

6. Also excluded initially from the distribution of Primary Fund assets described herein shall be a fund of $2 million ("Monitor Fund"), set aside to pay for the reasonable costs, fees and expenses of the Monitor (the "Monitor Fees"). All Monitor Fee applications shall be made by application to the Court setting forth in reasonable detail the nature of such costs, fees and expenses.

Claims against the Expense Fund[1]

7. Any and all claims by the Primary Fund's adviser or distributor for management fees and expenses associated with the Primary Fund must be brought within 45 days of the entry of the order of the Court approving a plan of distribution ("Claims Deadline"), or they will be forever barred. These claims shall be reviewed by the Monitor, who will make a recommendation to the Court concerning whether the claims are due and payable. The Court will then finally determine the amounts due and payable on such claims, if any, and direct the Monitor to make payment from the Expense Fund. Nothing herein shall limit the Commission's right to seek to recover any amounts paid to the Primary Fund's adviser or distributor in connection with its pending action against those entities.

8. On or before 15 days following the Claims Deadline, any claimant for indemnity, including State Street and all Indemnitees, must provide the Monitor with good faith estimates of their respective reasonable litigation expenses. The Monitor will review whether those expenses are indemnifiable and, upon consideration of all claims for indemnification, shall make a recommendation to the Court as to which claims should be honored. The Court will finally determine which claims should be honored and direct the Monitor to set aside in the Expense Fund amounts sufficient to satisfy those obligations.

9. At the appropriate time, the Monitor shall distribute to Unpaid Shareholders all amounts in the Expense Fund in excess of the amounts determined by

[1] For the purposes of this Term Sheet, any reference to "claims" or "claimants" shall not include state securities regulators.

the Court to satisfy claims for indemnification, and all amounts in the Monitor Fund in excess of the Monitor's costs, fees and expenses.

Enjoined Claims

10. All claims, whether actual or contingent, matured or unmatured, asserted or unasserted, directly or indirectly, against the Primary Fund or any person or entity entitled to be indemnified by the Primary Fund, but only to the extent of the Primary Fund's obligation to indemnify, shall be enjoined by Order of this Court, including, without limitation, all shareholder claims against any of the Defendants or the Relief Defendant, and their respective officers, directors, trustees, representatives, agents or employees, that are subject to indemnification by the Primary Fund.

Bar Date for Other Claims

11. Any and all claims against individuals and entities, including Defendants, or any of their respective officers, directors, trustees, representatives, agents or employees, for conduct relating to the Primary Fund that results from any such individual's or entity's willful misfeasance, bad faith, or gross negligence, in the performance of their duties, or by reason of his reckless disregard of their obligations and duties ("Non-Indemnifiable Conduct") must be brought by the Claims Deadline, or they will be forever barred.

Miscellaneous

12. If the Commission is successful in recovering any amounts in an award of disgorgement (including fees paid to the Defendants by the Primary Fund since September 15, 2008) or penalties from Defendants in this action, it will turn over such recovery to the Monitor for distribution, to the extent it is permitted to do so under the Fair Fund provisions of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246.

13. Any Unpaid Shareholder who pursues claims against Defendants, or any of their respective officers, directors, trustees, representatives, agents or employees, for Non-Indemnifiable Conduct, and who recovers an amount in excess of his *pro rata* share distributed pursuant to this Plan, shall turn over such excess recoveries to the Monitor for distribution to all Unpaid Shareholders on a *pro rata* basis.