

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

HOWARD BRETT BERGER,

Defendant,

MICHELLE BERGER,

Relief Defendant.

12-CV-4728  
(LDW-ARL)

ECF CASE

**MOTION FOR ORDER APPROVING PROPOSED DISTRIBUTION PLAN**

Plaintiff United States Securities and Exchange Commission (“SEC” or “Commission”) in coordination with the appointed Distribution Agent, Simon Consulting, LLC (“Distribution Agent”), respectfully moves the Court for an order:

- (1) approving the Commission’s proposed plan to distribute approximately \$5.36 million to injured investors who invested in Professional Offshore Opportunity Fund Ltd. (“POOF”) and/or Professional Traders Fund, LLC (“PTF”) from July 2008 and continuing through approximately early March 2010, and
- (2) establishing notice procedures as proposed in the SEC’s proposed Distribution Plan.

**I. BACKGROUND**

On September 21, 2012, the Commission filed a complaint against Defendant Howard Brett Berger (“Berger”) and Relief Defendant Michelle Berger (collectively, the “Bergers” or

“Defendants”). The Complaint alleged that no later than July 2008 and continuing through approximately early March 2010, Berger engaged in a fraudulent trade allocation scheme commonly referred to as “cherry picking.” Berger utilized a direct-access trading platform to delay final allocation of the trades until the end of the trading day, frequently after the market closed, so he could determine whether the trades were profitable. Oftentimes, he would cherry pick profitable trades by allocating those trades to his wife’s brokerage account while allocating unprofitable trades to other accounts, including POOF and PTF, two hedge funds Berger managed.

On January 22, 2013, the Court entered a Final Judgment of Permanent Injunction and Other Relief against Berger and Final Judgment against Relief Defendant Michelle Berger (“Final Judgment”) pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (Dkt. 4). The Final Judgment held the Bergers jointly and severally liable for a total of \$5,399,456.16 in disgorgement. Berger was also held liable for an additional \$1,433,521.84 in disgorgement, \$22,776.00 in prejudgment interest, and a \$50,000.00 civil penalty. The Final Judgment found that the Commission may by motion propose a plan to distribute the money received from Defendants subject to the Court’s approval.

Pursuant to the Final Judgment, on or about February 26, 2013, \$5,399,456.16 in disgorgement was paid to the Clerk of the Court and deposited in the Court Registry Investment System (hereafter, “Distribution Fund”). No additional payments have been made and the Commission is not expecting any further payments to be made.

On April 9, 2014, the Court appointed Simon Consulting, LLC as Distribution Agent (“Distribution Agent”) to assist in overseeing the administration and distribution of the Distribution Fund in coordination with Commission staff, pursuant to the terms of the

Distribution Plan (“Distribution Plan”) (Dkt. 11). Consistent with the Distribution Agent’s duties, an escrow account will be established from which the funds will be distributed to eligible investors.

## **ARGUMENT**

### **A. The Applicable Standard**

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, Courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. *See, e.g., SEC v. Wang*, 944 F.2d 80, 83-84 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989).

The Court’s review of a proposed Distribution Plan focuses on whether the plan is fair and reasonable. *See “Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) “[u]nless the consent decree specifically provides otherwise[,] once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end”<sup>1</sup> citing *Wang*, 944 F.2d at 85.

For the reasons articulated below, the Commission submits that the proposed Distribution Plan constitutes a fair and reasonable allocation of the funds available for distribution and should be approved.

### **B. The Commission’s Proposed Distribution Plan Provides a Fair and Reasonable Allocation**

The Commission’s principal goal in fashioning the proposed Distribution Plan was to identify a methodology that would allocate the available funds fairly and reasonably, in a manner

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<sup>1</sup> Courts have historically deferred to the Commission’s decision regarding whether and how to distribute disgorgement and prejudgment interest. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

proportional to the injury that investors in POOF and PTF suffered as a result of Berger's actions.

The Commission's Complaint alleged that Berger orchestrated a fraudulent trade allocation scheme commonly referred to as "cherry picking" that began no later than July 2008 and lasted through approximately early March 2010. Accordingly, the proposed Distribution Plan would equitably distribute the Distribution Fund to investors who had funds invested in POOF and/or PTF between July 2008 and March 2010.

As described in the proposed Distribution Plan, the funds available for distribution will be allocated 85.4017% to POOF investors and 14.5983% to PTF investors pursuant to the allocation of losses by fund as calculated by the Commission's Division of Economic and Risk Analysis.

Payments to eligible POOF investors, to the extent funds are available, will be calculated on a *pro rata* basis pursuant to the number of shares held by each investor.

Payments to eligible PTF investors, to the extent funds are available, will be calculated on a *pro rata* basis based on each investor's adjusted net asset value ("NAV"), as described in the proposed Distribution Plan.

Investors who previously received distributions in excess of what they would receive under the proposed Distribution Plan will not be entitled to a distribution from the Distribution Fund.

The Commission believes that the proposed Distribution Plan for the Distribution Fund should be approved as fair and reasonable.

WHEREFORE, the Commission respectfully requests that the Court enter an order:

- (1) approving the Commission's proposed Distribution Plan to distribute approximately \$5.36 million to injured investors who invested in POOF and/or PTF from July 2008 and continuing through approximately early March 2010; and
- (2) establishing notice procedures as proposed in the SEC's proposed Distribution Plan.

Dated: August 19, 2015

Respectfully submitted,

/s/ Michael S. Lim

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