

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**GARRETT O’ROURKE and  
MICHAEL J. BLACK,**

**Defendants**

**Case No.: 19-CV-4137 (KAM)**

**[Proposed] Plan of Distribution**

**Introduction**

1. The Securities and Exchange Commission (the “SEC”) instituted this action by Complaint filed on July 17, 2019, alleging that, from approximately May 2016 through July 2018, Garrett O’Rourke (“O’Rourke”) and Michael J. Black (“Black”) (collectively, the “Defendants”) schemed to sell the stock of five publicly traded companies to investors through false and misleading statements and high pressure stock promotional campaigns. (ECF No. 1). The SEC further alleged that the defendants disguised their control over some or all of the companies and their stock, thereby circumventing their obligations to register the stock with the SEC pursuant to Section 5 of the Securities Act of 1933 and conduct sales in accordance with the governing registration regulations. *Id.* The SEC charged the Defendants, variously, with violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 [15 U.S.C. §§ 77e(a), e(c), q(a)] and Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]. *Id.*
2. The matter has since been resolved against O’Rourke. By amended final order entered by consent on December 7, 2020, the Court ordered O’Rourke, among other things, to pay disgorgement and prejudgment interest aggregating to \$5,763,719 (the “O’Rourke

Order”). ECF No. 79. The SEC has since collected this monetary relief in full and holds over \$5.7 million in an interest-bearing account at the U.S. Treasury’s Bureau of Fiscal Service (the “Distribution Fund”). Accrued interest will be added to the Distribution Fund.<sup>1</sup> The O’Rourke Order provides that the SEC may propose a plan to distribute the collected funds.

3. By Order dated March 4, 2021, this Court appointed Miller Kaplan Arase LLP as Tax Administrator (the “Tax Administrator”), appointed JND Legal Administration as Distribution Agent (the “Distribution Agent”), and authorized the SEC to pay all tax obligations and administrative fees and expenses without further Court Order (the “Appointment Order”). ECF No. 89.

4. The SEC developed this distribution plan (the “Plan”) jointly with the Distribution Agent and the Tax Administrator, in accordance with practices and procedures customary in Distribution Fund administrations. The Plan governs the administration and distribution of the Distribution Fund, and sets forth the method and procedures for distributing the assets of the Distribution Fund to investors harmed by the conduct alleged in the Complaint.

### **Definitions**

5. In addition to words otherwise defined herein, the following definitions apply to the Plan:

a. “Administrative Costs” means any administrative costs and expenses, including without limitation the fees and expenses of the Tax Administrator and the

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<sup>1</sup> The matter is still pending with respect to Black and the SEC likely will seek to add any additional collections in this matter to the Distribution Fund if the Distribution Fund has not yet been distributed. Moreover, the SEC anticipates that collections in related SEC or other actions, if timely, may be directed to the Distribution Fund for distribution.

Distribution Agent, tax obligations, and investment costs. All Administrative Costs will be paid by the Distribution Fund.

b. The “Bank” shall refer to a United States commercial bank that is not unacceptable to the SEC staff.

c. “Claim Form” shall mean the form designed by the Distribution Agent and reviewed by SEC staff, for the filing of claims in accordance with the Plan. The Claim Form will require, at a minimum, sufficient documentation of transactions in the Securities during the Relevant Period such that eligibility under the Plan can be determined; tax identification and related information from the Potential Claimant as determined necessary by the Distribution Agent in coordination with the Tax Administrator; information on Prior Recoveries, if any; and a certification that the Potential Claimant is not an Excluded Party.

d. “Claims Bar Date” shall mean the date established in accordance with the Plan by which Claim Forms must be postmarked or submitted electronically by in order to receive consideration under the Plan. Subject to certain extensions provided for in this Plan, the Claims Bar Date will be one hundred twenty (120) days from the initial mailing date of the Claims Packet.

e. “Claims Packet” shall mean the materials relevant to submitting a claim and provided to Potential Claimants, including Potential Claimants who request such materials through a website or otherwise prior to the Claims Bar Date. The Claims Packet will include, at minimum, a copy of the Plan Notice and a Claim Form (together with instructions for completion of the Claim Form).

f. “Days” shall mean calendar days, unless otherwise specified herein. Should a deadline fall on a weekend or holiday, that deadline should be pushed to the next business day.

g. “Determination Notice” shall mean the notice sent by the Distribution Agent within ninety (90) days of the Claims Bar Date to all Potential Claimants that submitted a Claim Form. The Determination Notice will set forth the Distribution Agent’s determination of the eligibility of the claim (eligible, partially or wholly deficient, or ineligible) and the Eligible Loss Amount. The Determination Notice will provide to each Potential Claimant whose claim is deficient, in whole or in part, the reason(s) for the deficiency; notify the Potential Claimant of the opportunity to cure such deficiency; and provide instructions regarding further necessary actions. In the event the claim is denied, the Determination Notice will state the reason(s) for such denial and notify the Potential Claimant of their opportunity to request reconsideration of their claim.

h. “Distribution Payment” means the payment to an Eligible Claimant in accordance with the Plan.

i. “Eligible Claimant” means a Potential Claimant who is not an Excluded Party and who is determined by the Distribution Agent to be eligible under the Plan for a Distribution Payment.

j. “Eligible Loss Amount” means, for each Eligible Claimant, the aggregate of the Recognized Loss on each Security as defined and calculated in accordance with ¶¶ 13-20.

k. “Escrow Account” means the account established to hold the Escrow Property.

1. “Escrow Property” means the funds transferred to the Bank in accordance with ¶57.
- m. “Excluded Parties” shall mean the following entities of individuals:
- i) The Defendants in the captioned action and the legal representatives, nominees, assigns, creditors, heirs, distributees, spouses, parents, children, successors-in-interest, or controlled entities of the foregoing;
  - ii) Any respondent or defendant in an SEC enforcement action or criminal proceeding that is instituted prior to the determination of Eligible Claimants under the Plan and that seeks relief for the activities underlying the conduct underlying this action, including, without limitation, the defendants in *SEC v. Knox, et al.*, No. 18-cv-12058-RGS (D. Mass.) and *SEC v. Bajic, et al.*, No. 20-cv-7-LGS (S.D.N.Y.), and the legal representatives, nominees, assigns, creditors, heirs, distributees, spouses, parents, children, successors-in-interest, or controlled entities of the foregoing;
  - iii) The Distribution Agent, its employees, and those persons assisting the Distribution Agent in its role as the Distribution Agent; and
  - iv) Any purchaser or assignee of another Person’s purported right to obtain a recovery from the Distribution Fund for value; provided, however, that this provision shall not be construed to exclude Third-Party Filers or those Persons who obtained such a right by gift, inheritance, devise or operation of law.

n. “Final Determination Notice” means the Distribution Agent’s written reply to each Potential Claimant who timely responded to the Determination Notice in an effort to cure a deficiency or seek reconsideration of a denied claim. The Final Determination Notice will constitute the Distribution Agent’s final ruling regarding the status of the claim.

o. “Net Available Distribution Fund” means the Distribution Fund, plus accrued interest or earnings, less Administrative Costs.

p. “Person” means natural individuals as well as legal entities including, but not limited to, corporations, partnerships, limited liability companies, and governmental entities.

q. “Plan Notice” means the written notice from Distribution Agent to Potential Claimants informing them of the Distribution Fund, the Plan and its eligibility requirements, and explaining how to submit a claim and how to obtain a copy of the approved Plan and Claim Form by request or from the Distribution Fund’s website.

r. “Plan of Allocation” refers to the allocation method used in the Plan to determine eligibility and determine Distribution Payments as set forth in ¶¶13-20.

s. “Post-Period Price” means the volume-weighted average share price for each Security for the 90 calendar days directly following the Relevant Period. The Post-Period Price for each Security was calculated by Commission’s Division of Economic and Risk Analysis and is included in Exhibit A.

t. “Potential Claimant(s)” means individuals and entities, or their lawful successors, who purchased one or more of the Securities during the Relevant Period.

u. “Prior Recovery” means the amount of compensation received by an Eligible Claimant from any source for the loss that resulted from the conduct underlying this action.

To the extent an Eligible Claimant's Prior Recovery is known to the Distribution Agent, the Distribution Agent will reduce an Eligible Claimant's Distribution Payment by the amount of their Prior Recovery. Aside from the application of ¶19 (Reasonable Interest), in no instance will an Eligible Claimant receive a Distribution Payment that when combined with his, her, or its Prior Recovery exceeds his, her, or its Eligible Loss Amount.

v. "Recognized Loss" shall mean the amount of loss on each Security depending on when the share was acquired, sold, or if it was retained, as calculated pursuant to the Plan of Allocation.

w. The "Relevant Period" is different for each of the Securities, and is set forth on Exhibit A.

x. "Securities" are listed with their trading symbol on Exhibit A.

y. "Summary Plan Notice" means the notice published in print or internet media that shall include, at a minimum, a statement of the purpose of the Distribution Fund and the Plan, the means of obtaining a Claims Packet, and the Claims Bar Date.

z. "Third-Party Filer" means a third-party, including without limitation a nominee, custodian, or an intermediary holding in street name, who is authorized to, and submits, a claim(s) on behalf of one or more Potential Claimants. Third-Party Filer does not include assignees or purchasers of claims, which are excluded from receiving distribution payments. See ¶ 5.m.(iv).

### **The Distribution Agent**

6. The Distribution Agent will be responsible for administering the Distribution Fund in accordance with the Plan and the Appointment Order.

7. To carry out the purposes of this Plan, the Distribution Agent is authorized to make and implement immaterial changes to the Plan upon agreement of the SEC staff. If a change is deemed to be material by SEC staff, Court approval is required prior to implementation by amending the Plan.

8. The Distribution Agent may extend any procedural deadline contained in the Plan for good cause shown, if agreed upon by the SEC staff.

9. The Distribution Agent is authorized to enter into agreements with institutions (“Institutions”) as may be appropriate or necessary in the administration of the Distribution Fund, provided such Institutions are not excluded pursuant to other provisions of this Plan. In connection with such agreements, the Institutions shall be deemed to be agents of the Distribution Agent under this Plan. As set forth in the Appointment Order, the Distribution Agent will be entitled to payment from the Distribution Fund of reasonable fees and expenses incurred in the performance of its duties (including any such fees and expenses incurred by agents, consultants or third parties retained by the Distribution Agent in furtherance of its duties).

10. The Distribution Agent will retain all claims materials in paper and electronic form, and all other distribution records in either (or both) form for a period of six (6) years from the date of Court approval of a final fund accounting, and will thereafter transfer the documents to the SEC if and as directed by the SEC staff. In addition, the Distribution Agent will shut down the website, P.O. Box and customer service telephone line(s) established specifically for the administration of the Distribution Fund six (6) months after the closing of the Escrow and Deposit Accounts (*see* ¶¶ 5.k., 48, and 49), or at such earlier time as the Distribution Agent determines with concurrence of the SEC staff.

### **Tax Compliance**

11. The Distribution Fund is a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code, 26 U.S.C. § 468B(g), as amended. The Tax Administrator is the administrator of such QSF for purposes of Treas. Reg. § 1.468B-2(k)(3)(I), and shall satisfy the tax related administrative requirements imposed by Treas. Regs. § 1.468B-1 to § 1.468B-5, as set forth in the Appointment Order.

12. Payment of tax obligations and tax related costs and expenses will be requested and made from the Distribution Fund in accordance with the Appointment Order.

### **Plan of Allocation**

13. This Plan of Allocation is designed to compensate Eligible Claimants for losses in the Securities purchased and sold during each Security’s respective Relevant Period that were caused by the misconduct of the Defendants. The Recognized Loss will be calculated separately for each Security, and then summed for each Potential Claimant. Investors who did not transact in shares of a Security during its Relevant Period are ineligible to recover for that Security under the Plan.

a. The Recognized Loss on a Security will be calculated as the total purchase amount for shares of the Security purchased during the Relevant Period, less the sales proceeds on shares sold during the Relevant Period, less the holding value of excess shares.

b. The holding value of excess shares will be calculated as the difference between the number of shares purchased during the Relevant Period and the number of shares sold during the Relevant Period (which can be positive or negative), multiplied by the Post-Period Price set forth on the table included as Exhibit A.

c. If the Recognized Loss on a Security is less than zero, reflecting a gain, the Recognized Loss on that Security will equal \$0.00.

d. The Eligible Loss Amount for a Potential Claimant will be the sum of his, her, or its Recognized Losses on all of the Securities, some of which may be zero.

e. An example calculation is attached as Exhibit B.

14. All prices mentioned in the calculations exclude all taxes, fees, and commissions. Purchases and sales shall be deemed to have occurred on the “contract” or “trade” date as opposed to the “settlement” or “payment” date.

15. The date of covering a short sale is deemed to be the date of purchase of the Security and the date of a short sale is deemed to be the date of sale of the Security.

16. The receipt or grant of a Security to the Potential Claimant by gift, devise, inheritance, or operation of law during the Relevant Period is not considered an eligible purchase if the original purchase did not occur during the Relevant Period. Such shares will be excluded from the calculation of the Potential Claimant’s Eligible Loss Amount.

17. The Securities are the only securities eligible for recovery under the Plan (*see* ¶ 5.x. “Securities”). Option contracts to purchase or sell a Security are not eligible for recovery under the Plan. With respect to a Security purchased or sold through the exercise of an option, the purchase/sale date is the exercise date of the call and the assignment date of the put, and the purchase/sale price is the strike price of the call at the time of exercise and the strike price of the put at the time of assignment. Transactions in a Security that are pursuant to, or in connection with, a swap or another derivative will not be eligible for a recovery.

18. Aside from the application of ¶19, regarding Reasonable Interest, in no instance will an Eligible Claimant receive a Distribution Payment that when combined with his, her, or its Prior Recovery, exceeds his, her, or its Eligible Loss Amount.

19. If the Net Available Distribution Fund is less than the sum of the Eligible Loss Amounts of all Eligible Claimants, each Eligible Claimant will receive a Distribution Payment equal to the Net Available Distribution Fund multiplied by the ratio of the Eligible Claimant's Eligible Loss Amounts to the Eligible Loss Amounts of all Eligible Claimants. If the Net Available Distribution Fund equals or exceeds the sum of the Eligible Loss Amounts of all Eligible Claimants, each Eligible Claimant will receive a Distribution Payment equal to the amount of his, her, or its Eligible Loss Amount. If the Net Available Distribution Fund has funds in excess of that necessary to pay each Eligible Claimant a Distribution Payment equal to the amount of their Eligible Loss Amount, the Distribution Agent, in consultation with the SEC staff, may include in the Distribution Payments an additional amount to compensate each Eligible Claimant for the time value of their respective Eligible Loss Amount ("Reasonable Interest").<sup>2</sup>

20. If a Potential Claimant's Distribution Payment is less than \$10.00 (the "*De Minimis* Amount"), that Potential Claimant will not receive a Distribution Payment and the funds will be distributed to Eligible Claimants whose Distribution Payments are equal to or greater than \$10.00.

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<sup>2</sup> "Reasonable Interest" will be calculated by the Division of Economic and Risk Analysis ("DERA"), at a rate determined to be appropriate under the facts and circumstances of this case, compounded quarterly from the approximate date of the loss through the approximate date of the disbursement of the Distribution Fund.

### **Identification of and Notice to Potential Claimants**

21. The Distribution Agent shall, as practicable, use its best efforts to identify Potential Claimants from a review of records obtained by the SEC, account information provided by the transfer agent(s) for the Securities, registered broker-dealers, investment advisors, and any other commercially reasonable sources available to it.

22. Within forty-five (45) days of Court approval of the Plan, the Distribution Agent shall:

- a. create a mailing and claim database of all Potential Claimants based upon information identified by the Distribution Agent;
- b. design and submit a Claims Packet to the SEC staff for review and approval;
- c. mail a Claims Packet to each Potential Claimant identified by the Distribution Agent and to the Distribution Agent's list of banks, brokers, and other nominees in accordance with ¶26, below;
- d. establish and maintain a website dedicated to the Distribution Fund. The Distribution Fund's website, located at [www.OrourkeDistributionFund.com](http://www.OrourkeDistributionFund.com), will make available in downloadable form the approved Plan, components of the Claims Packet, and related materials, and such other information that the Distribution Agent believes will be beneficial to Potential Claimants;
- e. establish and maintain a traditional mailing address and an email mailing address which will be listed on all correspondence from the Distribution Agent to Potential Claimants as well as on the Distribution Fund's website; and

- f. establish and maintain a toll-free telephone number for Potential Claimants to call and speak to a live representative of the Distribution Agent during its regular business hours or, outside of such hours, to hear pre-recorded information about the Distribution Fund.
23. The Summary Plan Notice will be published in print or internet media acceptable to the SEC staff once a week for three consecutive weeks starting within five (5) days of the initial mailing of Claims Packets to Potential Claimants.
24. The SEC staff retains the right to review and approve any material posted on the Distribution Fund's website, any material mailed, and any scripts used in connection with communication with Potential Claimants.
25. The Distribution Agent will promptly provide a Claims Packet to any Potential Claimant upon request made via mail, phone, or email prior to the Claims Bar Date.
26. The Distribution Agent will mail a Claims Packet to the Distribution Agent's list of banks, brokers, and other nominees, as well as any other institutions identified during the outreach process that may have records of purchasers of the Securities during the Relevant Period. The Distribution Agent will request that these entities, to the extent that they were record holders for beneficial owners of the Securities during the Relevant Period:
- a. notify the respective beneficial owners within fourteen (14) days of receipt of the Claims Packet so that beneficial owners may timely file a claim. The burden will be on the record holders to ensure the Claim Packets and other relevant materials are properly disseminated to their customers; and/or
  - b. provide to the Distribution Agent within fourteen (14) days of receipt a list of last known names and addresses for all beneficial owners for whom the

record holders purchased the Securities during the Relevant Period so that the Distribution Agent can communicate with them directly.

27. Before commencing any mailing, the Distribution Agent shall run a National Change of Address search to retrieve updated U.S. addresses for all Potential Claimants recorded in the database.

28. The Distribution Agent shall attempt to locate anyone whose Claims Packet has been returned by the United States Postal Service (“USPS”) as undeliverable. The Distribution Agent shall immediately re-mail any returned undelivered mail for which the USPS has provided a forwarding address.

29. The Distribution Agent, with SEC staff approval, may engage a third-party search firm to conduct more rigorous searches for persons whose Claims Packet is returned as undeliverable. The Distribution Agent will utilize all means reasonably available to obtain updated addresses in response to undeliverable notices, and forward any returned mail for which an updated address is provided or obtained. The Distribution Agent will make available, upon request by the SEC staff, a list of all Potential Claimants whose Claims Packets have been returned as “undeliverable” due to incorrect addresses and for which the Distribution Agent has been unable to locate current addresses.

### **Claims Process**

30. In all materials that refer to the Claims Bar Date, the filing deadline will be clearly identified with the date, which is one hundred twenty (120) days from the initial mailing date of the Claims Packet.

31. To avoid being barred from asserting a claim, on or before the Claims Bar Date, each Potential Claimant must submit to the Distribution Agent a properly completed Claim Form

reflecting such Potential Claimant's claim, and it must be accompanied by such documentary evidence as the Distribution Agent deems necessary or appropriate to substantiate the claim. Without limitation, this information may include third-party documentary evidence of purchases and dispositions of the Securities, as well as holdings of the Securities, at relevant dates.

32. The burden to prove timely receipt of a claim by the Distribution Agent will be upon the Potential Claimant; therefore Potential Claimants will be instructed to submit their Claim Forms in a manner that will enable them to prove timely receipt of the Claim Form by the Distribution Agent. A Claim Form that is postmarked or otherwise received by the Distribution Agent after the Claims Bar Date will not be accepted unless the deadline is extended by the Distribution Agent for good cause shown, after consultation with the SEC staff.

33. The Distribution Agent shall review each claim and determine the eligibility of each Potential Claimant to participate in the Distribution Fund by reviewing claim data and supporting documentation (or lack thereof), verifying the claim, and calculating each Potential Claimant's Recognized Loss pursuant to the Plan.

34. Each Potential Claimant will have the burden of proof to establish the validity and amount of his or her claim, and that they qualify as an Eligible Claimant, including the burden to certify that they are not an Excluded Party. The Distribution Agent will have the right to request, and the Potential Claimant will have the burden to promptly provide to the Distribution Agent, any additional information and/or documentation deemed relevant by the Distribution Agent.

35. All claims and supporting documentation necessary to determine a Potential Claimant's eligibility to receive a distribution from the Distribution Fund under the terms of the Plan must be verified by a declaration executed by the Potential Claimant under penalty of perjury under the laws of the United States. The declaration must be executed by the Potential Claimant, unless the Distribution Agent accepts such declaration from someone authorized to act on the Potential Claimant's behalf, whose authority is supported by such documentary evidence as the Distribution Agent deems necessary.

36. Electronic claims submission is encouraged; the Claims Packet will include directions on how Potential Claimants can submit their claims electronically via the Distribution Fund's website. If using the web-based claim filing option, a Potential Claimant must submit their claim to the Distribution Agent by 11:59 p.m. PST on the Claims Bar Date. The Claims Packet will also include directions for submission of claims if the Potential Claimant is unable to submit their claim electronically.

37. When submitting claims to the Distribution Fund on behalf of its clients, all Third-Party Filers must use the electronic filing template provided by the Distribution Agent in this matter. Files that do not comply with the template and format provided by the Distribution Agent will be rejected. Third-Party Filers must also submit a signed master proof of claim and release, as well as proof of authority to file on behalf of the claimant(s) at the time the electronic file of transactions is submitted. Failure to do so may result in rejection of the claim(s).

38. Each Third-Party Filer must establish the validity and amount of each claim in its submission. Like all other Potential Claimants, Third-Party Filers must submit such supporting documentary evidence of purchases, dispositions, and holdings of Eligible Securities as the Distribution Agent deems necessary or appropriate to substantiate each individual

claim. Without limitation, this includes the complete name of the Potential Claimant (beneficial account owner) and its TIN (for individuals) or EIN (for companies), sufficient contact information to confirm the identity of the beneficial owner, and documentation from the original bank, broker or other institution of purchases and dispositions of Eligible Securities (account statements, confirmations and other documentation of purchases and dispositions ), as well as holdings of the Securities on pertinent dates. Documentation generated by the Third-Party Filer as well as affidavits in lieu of supporting documentation, will not be accepted unless, for good cause, the Distribution Agent determines it acceptable. The Distribution Agent will have the right to request, and the Third-Party Filer will have the burden of providing to the Distribution Agent, any additional information and/or documentation deemed necessary by the Distribution Agent to substantiate the claim(s) contained in the submission. Documentation from a Third-Party Filer that is not acceptable to the Distribution Agent will result in rejection of the affected claim(s). The determination of the Distribution Agent to reject a claim for insufficient documentation, as reflected on the Final Determination Notice, is final and within the discretion of the Distribution Agent.

39. Distribution Payments must be made by check or electronic payment payable to the Eligible Claimant (beneficial account owner). The Third-Party Filer shall not be the payee of any Distribution Payment check or electronic Distribution Payment. Subject to ¶68 below (ERISA Plans), any other payment arrangement must be discussed with the Distribution Agent in consultation with the SEC staff and must be authorized by the Eligible Claimant. Compensation to the Third-Party Filer for its services may not be paid or deducted from the Distribution Payment.

40. If, after discussion with the Distribution Agent in consultation with the SEC, and authorization by the Eligible Claimant(s), a Distribution Payment is to be made to a Third-Party Filer to distribute to the Eligible Claimant(s), the Third-Party Filer will be required to complete a certification, which will require them, at a minimum, to attest that any distribution to the custodian, trustee, or investment professional representing multiple potentially eligible beneficial owners, will be allocated for the benefit of current or former pooled investors and not for the benefit of management. The certification form will be available upon request from the Distribution Agent. All such Third-Party Filers must have an auditable mechanism available to the Distribution Agent and the SEC staff to confirm that each Potential Claimant, if determined an Eligible Claimant, received the Distribution Payment directed to them.

41. The receipt of the Securities by gift, inheritance, devise, or by operation of law will not be deemed to be a purchase of the Securities, nor will it be deemed an assignment of any claim relating to the purchase of the Securities unless specifically so provided in the instrument of inheritance. However, the recipient of the Securities as a gift, inheritance, devise or by operation of law will be eligible to file a Claim Form and participate in the distribution of the Distribution Fund to the extent the original purchaser would have been eligible under the terms of the Plan. Only one claim may be submitted with regard to the same transactions in the Securities, and in cases where multiple claims are filed by the donor and donee, the donee claim will be honored, assuming it is supported by proper documentation.

42. The Distribution Agent will provide a Determination Notice within ninety (90) days of the Claims Bar Date to each Potential Claimant who has filed a Claim Form with the Distribution Agent, setting forth the Distribution Agent's determination of the eligibility of

the claim (eligible, partially or wholly deficient, or ineligible) and the Eligible Loss Amount. The Determination Notice will provide to each Potential Claimant whose claim is deficient, in whole or in part, the reason(s) for the deficiency (*e.g.*, failure to provide required information or documentation). The Determination Notice will also notify the Potential Claimant of the opportunity to cure such deficiency, and provide instructions regarding what is required to do so.

43. Any Potential Claimant with a deficient claim will have thirty (30) days from the date of the Determination Notice to cure any deficiencies identified in the Determination Notice.

44. In the event the claim is denied, in whole or in part, the Determination Notice will state the reason for such denial. Any Potential Claimant seeking reconsideration of a denied claim must advise the Distribution Agent in writing within thirty (30) days of the date of the Determination Notice. All requests for reconsideration must include the necessary documentation to substantiate the basis upon which the Potential Claimant is requesting reconsideration of their claim.

45. The Distribution Agent will send, as appropriate, a Final Determination Notice to all Potential Claimants who responded to the Determination Notice in an effort to cure a deficiency or to seek reconsideration of a rejected claim. The Distribution Agent will send such Final Determination Notices no later than sixty (60) days following receipt of documentation or information in response to the Determination Notice, or such longer time as the Distribution Agent determines is necessary for a proper determination concerning the claim.

46. The Distribution Agent may consider disputes of any nature presented by Potential Claimants, and will consult the SEC staff as appropriate. The Distribution Agent will have the authority to waive technical claim deficiencies and approve claims on a case-by-case basis, or in groups of claims. All determinations made by the Distribution Agent in accordance with the Plan in any dispute, request for reconsideration, or request to cure a deficient claim will be final and not subject to appeal.

47. Any Eligible Claimant who relocates or otherwise changes contact information after receipt of the Claims Packet must promptly communicate any change in address or contact information to the Distribution Agent.

**Procedures for Distribution of the Net Available Distribution Fund**

48. Prior to the disbursement of the Net Available Distribution Fund, the Distribution Agent will establish an escrow agreement with the Bank in a form substantially similar to an agreement provided by SEC staff (the “Escrow Agreement”).

49. The Distribution Agent, pursuant to the Escrow Agreement, shall establish with the Bank a deposit account (the “Deposit Account”) (e.g. controlled distribution account, managed distribution account, linked checking and investment account), insured by the FDIC up to the guaranteed FDIC pass through limit. The Deposit Account shall be linked with the Escrow Account. Both Accounts shall have the same name, with the first line being identical to the full name of the qualified settlement fund established by the Tax Administrator with the IRS. The second line of the account name shall include “a Qualified Settlement Fund.” The “deposit account records” for the Escrow and Deposit Accounts, as defined in FDIC regulations, 12 CFR § 330.1(e) (“Deposit Account Records”), shall expressly identify the two Accounts as holding the assets of a QSF established pursuant to

section 468B of the Internal Revenue Code of 1986, 26 USC 468B, and shall disclose the respective Account's fiduciary relationship as custodian of funds for the benefit of investors allocated a distribution pursuant to the approved Plan of Distribution in *SEC v. O'Rourke, et al.*, Case No. 19-CV-4137 (KAM) (E.D.N.Y.).

50. During the term of the Escrow Agreement, the Escrow Property shall be fully invested and reinvested by the Bank in short-term U.S. Treasury securities backed by the full faith and credit of the United States Government or an agency thereof, of a type and term necessary to meet the cash liquidity requirements for payments to Eligible Claimants and tax obligations, including money market mutual funds registered under the Investment Company Act of 1940 that invest 100% of their assets in direct obligations of the United States Government.

51. All interest, dividends, and/or income earned will accrue for the benefit of the Distribution Fund. All costs associated with the Escrow and Deposit Accounts will be paid by the Distribution Fund; however no fees or compensation may be paid to the Bank, its agents, and/or its affiliates from the Escrow Property.

52. The Distribution Agent shall distribute the Net Available Distribution Fund to all Eligible Claimants only after all timely submitted Proof of Claim Forms have been processed and all Potential Claimants whose claims have been denied or disallowed, in whole or in part, have been notified and provided the opportunity to cure pursuant to the procedures set forth above.

53. The Distribution Agent, in consultation with the Tax Administrator and the SEC staff, shall determine the Net Available Distribution Fund by retaining a prudent reserve to

pay Administrative Costs. After all distributions and payment of all tax obligations, any remaining amounts in the reserve will become part of the residual described in ¶78.

54. Within seventy-five (75) days following the date of the Final Determination Notices described above, ¶45, the Distribution Agent shall compile and send to the SEC staff the payee information, including the names, addresses, and Distribution Payments of all Eligible Claimants (“Payee List”). The Payment File shall be accompanied by a Declaration from the Distribution Agent in a form acceptable to the SEC staff, representing, among other things, that a prudent reserve has been retained and that the Payee List: (a) was compiled in accordance with the Plan; (b) is accurate as to Eligible Claimants’ names, addresses, and Eligible Loss Amount; and (c) provides all information necessary to make a payment equal to the amount of the applicable Distribution Payment for each Eligible Claimant (the “Declaration”).

55. After the Escrow and Deposit Accounts have been established but prior to the transfer of Escrow Property to the Bank, the Distribution Agent shall provide the Payee List to the Bank. The Payee List shall be maintained by the Bank in the Deposit Account Records of the Deposit and Escrow Accounts. The Distribution Agent will also obtain from the SEC staff and communicate to the Bank the anticipated timing for the transfer of Escrow Property.

56. Upon receipt of the Payee List and the estimated timing for the transfer of the Escrow Property, the Bank will take all necessary steps to prepare for the Escrow Funds Pledge described in ¶58. Upon completion of all preparation, the Bank will so inform the Distribution Agent in writing (the “Pledge Notice”). The Distribution Agent will transmit the Pledge Notice to the SEC staff.

57. Upon the SEC staff's receipt, review, and acceptance of the Payee List, the Declaration, and the Pledge Notice, the SEC staff will petition the Court for authority to disburse the Escrow Property, comprised of the aggregate amount of the Distribution Payments, including any withholding amounts, from the SEC to the Distribution Agent for distribution to Eligible Claimants pursuant to the Plan. The Payee List shall, upon request, be made available to the Court under seal.

58. Immediately upon receipt of the Escrow Property, the Bank shall pledge collateral in the form of U.S. Government Securities in an amount equal to or exceeding the value of the Escrow Property to fully protect the Escrow Property from the time of its receipt by the Bank through its transfer to the Escrow Account and full investment in short-term U.S. Treasury securities backed by the full faith and credit of the United States Government (the "Escrow Funds Pledge").

59. Following the Court's approval of the SEC's petition for an order to disburse, the Distribution Agent shall use its best efforts to commence mailing Distribution Payment checks or effect electronic payments within fifteen (15) business days of the transfer of the funds into the Escrow Account. All efforts will be coordinated to limit the time between the Escrow Account's receipt of the funds and the issuance of Distribution Payments.

60. The Distribution Agent shall provide duplicate original bank and/or investment statements on any accounts established by the Distribution Agent to the Tax Administrator on a monthly basis and shall assist the Tax Administrator in obtaining mid-cycle statements, as necessary.

61. In consultation with SEC staff, the Distribution Agent shall work with the Bank on an ongoing basis to deposit or invest funds in the Escrow and Deposit Accounts so as to

result in the maximum return, taking into account the safety and the tax implications of such deposits or investments; and to determine an allocation of funds between the Escrow and the Deposit Accounts.

62. All funds shall remain in the Escrow Account, separate from bank assets, pursuant to the Escrow Agreement until needed to satisfy a presented check. All Distribution Fund checks presented for payment will be subject to “positive pay with payee verification” controls before being honored by the Bank, at which time funds will be transferred from the Escrow Account to the Deposit Account to pay the approved checks.

63. All checks issued to Eligible Claimants by the Distribution Agent shall bear a stale date of one hundred twenty (120) days. Checks that are not negotiated before the stale date shall be voided and the issuing financial institution shall be instructed to stop payment on those checks. Such Eligible Claimant’s claim is extinguished as of the stale date and the funds will remain in the Net Available Distribution Fund. If a check reissue has been requested before the stale date, such request is governed by the following section.

64. Electronic payments, in accordance with the Bank’s procedures, may be utilized at the discretion of the Distribution Agent to pay approved Distribution Payments if the payment information has been provided by the Eligible Claimant and/or if the Distribution Agent, in consultation with the SEC staff, has otherwise determined the payment information to be accurate. Notwithstanding, unless determined unnecessary by the Distribution Agent in consultation with the SEC staff, the Distribution Agent shall confirm electronic payment information in advance of issuing payments. Acceptable methods of confirmation include (without limitation):

- a. Confirmation of the payment information with the recipient financial institution; or
- b. Sending a test payment to the account and, as appropriate, requesting confirmation of receipt.

65. For any electronic payment, the exact amount necessary to make a payment shall be transferred from the Escrow Account to the payee bank account in accordance with written instruction provided to the Bank by the Distribution Agent. All electronic payments will be initiated by the Distribution Agent using a two-party check and balance system, whereby completion of an electronic payment will require authorization by two members of the Distribution Agent's senior staff.

66. For every electronic payment that is returned after the day of issuance, the Bank shall pledge collateral in the form of U.S. Government Securities to fully protect the payment until the returned payment has been fully invested in short-term U.S. Treasury securities backed by the full faith and credit of the United States Government or an agency thereof, or invested as otherwise directed in the Plan and/or Escrow Agreement.

67. Subject to ¶¶40 and 68, Distribution Payments will be made directly to Eligible Claimants and not to counsel or someone other than the Eligible Claimant unless, at the discretion of the Distribution Agent, sufficient documentation has been provided by or with respect to the Eligible Claimant to demonstrate that the full payment will be applied to the benefit of the Eligible Claimant, and not to pay attorney fees or otherwise to benefit someone other than the Eligible Claimant.

68. Claims on behalf of a retirement plan covered by Section 3(3) of ERISA, 29 U.S.C. § 1002(3), which do not include individual retirement accounts, and such plan's participants,

are properly made by the administrator, custodian or fiduciary of the plan and not by the plan's participants. The Distribution Agent will issue any payments on such claims directly to the administrator, custodian or fiduciary of the retirement plan. The custodian or fiduciary of the retirement plan will distribute any payments received in a manner consistent with its fiduciary duties and the governing account or plan provisions. With respect to any retirement plan that has been closed prior to the Distribution Agent's identification of Potential Claimants, the Distribution Agent will endeavor to distribute funds directly to the beneficial account owner of such retirement plans if the information required for such a distribution is known to or provided to the Distribution Agent.

69. All Distribution Payments shall be preceded or accompanied by a communication that will include, as appropriate: (a) a statement characterizing the distribution; (b) a statement from the Tax Administrator regarding the tax consequences of Distribution Payments and informing Eligible Claimants that the tax treatment of the distribution is the responsibility of each recipient and that the recipient should consult their tax advisor for advice regarding the tax treatment of the distribution; (c) a statement that checks will be void after one hundred twenty (120) days; and (d) providing contact information for the Distribution Agent, to be used in the event of any questions regarding the distribution. All such communications shall be submitted to the SEC staff and the Tax Administrator for review and approval. Distribution Payments on their face or the accompanying mailbag, shall clearly indicate that the money is being distributed from a Distribution Fund established by the Court for the benefit of investors for harm as a result of securities law violations.

### **Uncashed Checks and Reissues**

70. The Distribution Agent will work with the Bank and maintain information about uncashed checks, returned payments, any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Distribution Agent is responsible for researching and reconciling errors and reissuing payments when possible and for maintaining a record of such efforts. The Distribution Agent is also responsible for accounting for all payments. The amount of all uncashed or un-received payments will continue to be held in the Distribution Fund.

71. The Distribution Agent shall use its best efforts to make use of reasonable commercially available resources and other reasonably appropriate means to locate all Eligible Claimants whose checks are returned to the Distribution Agent as undeliverable by the USPS or whose electronic or otherwise issued payment was returned.

72. When new address information becomes available, the Distribution Agent shall repack the distribution check and send it to the new address. Where new address information is not available after a diligent search (and in no event later than one hundred twenty (120) days after the initial mailing of the original check) or if the distribution check is returned again, the check shall be voided and the Distribution Agent shall instruct the issuing financial institution to stop payment on such check. If the Distribution Agent, despite best practicable efforts, is unable to find an Eligible Claimant's correct address, the Distribution Agent, in its discretion, may remove such Eligible Claimant from the distribution and the allocated Distribution Payment will remain in the Net Available Distribution Fund for distribution, if practicable, to the remaining Eligible Claimants.

73. When the Distribution Agent receives sufficient new or corrected payment information in connection with returned electronic or other non-check payments, the Distribution shall re-issue the payment based on the new information. If the Distribution

Agent, despite best practicable efforts, is unable to find an Eligible Claimant's correct payment information, the Distribution Agent, in its discretion, may remove such Eligible Claimant from the distribution and the allocated Distribution Payment will remain in the Net Available Distribution Fund for distribution, if practicable, to the remaining Eligible Claimants.

74. At the discretion of the Distribution Agent, costs of reissue that were not factored into the Reserve, such as bank fees offset upon the return of a payment, may reduce the Eligible Claimant's Distribution Payment. In such situations, the Distribution Agent will immediately notify the Tax Administrator of the reduction in Distribution Payment.

75. The Distribution Agent will re-issue new checks to Eligible Claimants upon the receipt of a valid, written request from the Eligible Claimants prior to the initial stale date. Such reissued checks will be void if not negotiated by sixty (60) days after issuance.

76. In cases where an Eligible Claimant is unable to endorse a Distribution Payment (*e.g.*, as the result of a name change because of marriage or divorce, or as the result of death), any request by an Eligible Claimant or a lawful representative for reissuance of a Distribution Payment in a different name must be documented to the satisfaction of the Distribution Agent. If, in the sole discretion of the Distribution Agent, such change is properly documented, the Distribution Agent will issue an appropriately redrawn Distribution Payment, subject to the time limits detailed herein.

77. The Distribution Agent will make and document reasonable efforts to contact Eligible Claimants to follow-up on the status of uncashed Distribution Payments (other than those returned as "undeliverable") and take appropriate action to follow up on the status of

uncashed checks at the request of SEC staff. The Distribution Agent may reissue such checks, subject to the time limits detailed herein.

### **Disposition of Remaining Funds after Distribution**

78. A residual within the Distribution Fund (the “Residual”) will be established for any amounts remaining after all assets have been disbursed. The residual may include, among other things, collections after the initial distribution, funds reserved for future Administrative Costs, amounts from Distribution Payment checks that have not been cashed, amounts from Distribution Payments that were not delivered or accepted upon delivery, and tax refunds. After all Administrative Costs have been paid, all funds remaining in the Residual that are infeasible to distribute to investors will be returned to the SEC, pending a final accounting. Upon completion of the final accounting the SEC staff will file a motion with this Court to approve the final accounting, which will include a recommendation as to the final disposition of the Residual, consistent with *Liu v. SEC*, 140 S. Ct. 1936 (2020) and 15 U.S.C. 78u(d)(7). If distribution of the Residual to investors is infeasible, the SEC staff may recommend the transfer of the Residual to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.<sup>3</sup>

79. The Distribution Agent, in consultation with SEC staff, may distribute any residual funds to (a) Eligible Claimants, if any, who filed claims with the Distribution Agent after the Claims Bar Date or who were late in curing a denied claim in accordance with the Plan and, if feasible, (b) on a *pro rata* basis to all Eligible Claimants that negotiated the checks issued in the immediately preceding distribution or that received electronic payments, up to their

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<sup>3</sup> Section 21F(g)(3) of the Exchange Act, 15 U.S.C. § 78u-6(g)(3), provides, in relevant part, that any monetary sanction of \$200 million or less collected by the SEC in any judicial action brought by the SEC under the securities laws that is not added to a disgorgement fund or Distribution Fund or otherwise distributed to victims, plus investment income, shall be deposited or credited into the SEC Investor Protection Fund.

Eligible Loss Amount plus Reasonable Interest (if applicable), and subject to the *De Minimis Amount*.

### **Distribution Fund Reporting and Accounting**

80. The Distribution Agent will provide reports in accordance with the Appointment Order, including, in consultation with the Tax Administrator, a final accounting and final report.

### **Termination of the Distribution Fund**

81. Once all Distribution Payments have been negotiated or voided, any funds remaining in the Escrow and Deposit Accounts will be transferred to the SEC.

82. Upon completion of the final report and accounting, the SEC staff will seek an Order from the Court, as appropriate, approving the final accounting; discharging the Distribution Agent; transferring the remaining Residual, and any amounts returned to the Distribution Fund in the future, to the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act; and terminating the Distribution Fund

83. The Distribution Fund will be eligible for termination and the Distribution Agent will be eligible for discharge after all of the following have occurred:

- a. A final report and accounting has been submitted to and approved by the Court;
- b. All Administrative Costs have been paid; and
- c. The remaining Residual has been transferred to the SEC for disposition in accordance with Court Order.

84. Once the Distribution Fund has been terminated, no further claims will be allowed and no additional payments will be made whatsoever.

**Miscellaneous**

85. The Court reserves the right to amend this Plan from time to time, and retains exclusive jurisdiction over all claims arising in connection with this Plan, including, but not limited to, claims against the Distribution Agent or Tax Administrator asserting liability for violation of any duty imposed by this Plan or other Court order.

86. The Distribution Agent and the Tax Administrator are entitled to rely on all outstanding rules of law and Court orders.

87. The submission of the Claim Form and the receipt and acceptance of a distribution by an Eligible Claimant will not affect an Eligible Claimant's rights and claims as against any defendant to this action or their past or present directors, officers, employees, affiliates, nominees, creditors, advisors and agents.

Att: Exhibit A (Symbols, Relevant Periods, and Post-Period Prices for Securities)  
Exhibit B (Example of Calculation)

**Exhibit A**

**Trading Symbols, Relevant Period (Inclusive), and Post-Period Prices for Securities**

| <b>Company Name</b>                    | <b>Trading Symbol</b> | <b>Relevant Period Start Date</b> | <b>Relevant Period End Date</b> | <b>Post-Period Price</b> |
|--|-----------------------|-----------------------------------|---------------------------------|--------------------------|
| AV1 Group, Inc.                        | AVOP                  | 5/4/2016                          | 10/19/2016                      | \$0.192                  |
| EnviroTechnologies International, Inc. | ETII                  | 2/1/2017                          | 6/30/2017                       | \$0.210                  |
| EnviroTechnologies International, Inc. | ETII                  | 1/30/2018                         | 5/10/2018                       | \$0.191                  |
| Cyberfort Software, Inc.               | CYBF                  | 6/29/2018                         | 8/15/2018                       | \$0.461                  |
| Link Reservations, Inc.                | LRSV                  | 10/7/2016                         | 2/9/2017                        | \$0.152                  |
| BioHemp International, Inc.            | BKIT                  | 5/10/2019                         | 7/16/2019                       | \$0.288                  |

## Exhibit B

### Hypothetical Example of Recognized Loss Calculation

Assume a hypothetical investor reported the following transactions in the Securities during the Relevant Period:

- a. Purchased 60 shares of LRSV at \$1.00.
  - b. Sold 60 shares of LRSV at \$0.20.
  - c. Purchased 100 shares of AVOP at \$1.00.
  - d. Purchased 50 shares of AVOP at \$1.10.
  - e. Sold 50 shares of AVOP at \$0.25.
  - f. Purchased 25 shares of CYBF at \$1.60.
  - g. Sold 75 shares of CYBF at \$1.80.
84. As explained above, the Recognized Loss on a Security is (1) the total purchase amount for shares of the Security purchased during the Relevant Period, less (2) the sales proceeds on shares sold during the Relevant Period, and less (3) the holding value of excess shares.
- a. *Recognized Loss on LRSV:* The total purchase amount for shares of LRSV purchased during the Relevant Period by the hypothetical investor is  $(60 * \$1.00)$ , or \$60.00. The sales proceeds on shares sold during the Relevant Period by the hypothetical investor is  $(60 * \$0.20)$ , or \$12.00. The holding value of excess shares is  $[(60 - 60) * \$0.152]$ , or \$0.00, where the \$0.152 value per share is read from Exhibit A. The Recognized Loss on LRSV for the hypothetical investor would be  $(\$60.00 - \$12.00 - \$0.00)$ , or \$48.00.
  - b. *Recognized Loss on AVOP:* The total purchase amount for shares of AVOP purchased during the Relevant Period by the hypothetical investor is  $[(100 * \$1.00) + (50 * \$1.10)]$ , or \$155.00. The sales proceeds on shares sold during the Relevant Period by the hypothetical investor is  $(50 * \$0.25)$ , or \$12.50. The holding value of excess shares is  $[(100 + 50 - 50) * \$0.192]$ , or \$19.20, where the \$0.192 value per share is read from Exhibit A. The Recognized Loss on AVOP for the hypothetical investor would be  $(\$155.00 - \$12.50 - \$19.20)$ , or \$123.30.
  - c. *Recognized Loss on CYBF:* The total purchase amount for shares of CYBF purchased during the Relevant Period by the hypothetical investor is  $(25 *$

\$1.60), or \$40.00. The sales proceeds on shares sold during the Relevant Period by the hypothetical investor is  $(75 * \$1.80)$ , or \$135.00. The holding value of excess shares is  $[(25 - 75) * \$0.461]$ , or -\$23.05, where the \$0.461 value per share is read from Exhibit A. The Recognized Loss on CYBF for the hypothetical investor would be  $(\$40.00 - \$135.00 + \$23.05)$ , or -\$71.95. Because the Recognized Loss on CYBF for the hypothetical investor is less than zero, the Recognized Loss would be set equal to \$0.00.

- d. *Eligible Loss Amount for the Hypothetical Investor:* The hypothetical investor's Eligible Loss Amount is the sum of the Recognized Losses for each Security. Thus, the hypothetical investor's Eligible Loss Amount would be \$171.30. See Table A.

**Table A: Eligible Loss Amount for the Hypothetical Investor**

|             |   |             |   |             |   |             |   |             |   |             |   |                 |
|-------------|---|-------------|---|-------------|---|-------------|---|-------------|---|-------------|---|-----------------|
| <u>AVOP</u> |   | <u>ETII</u> |   | <u>ETII</u> |   | <u>CYBF</u> |   | <u>LRSV</u> |   | <u>BKIT</u> |   | <u>Total</u>    |
| \$123.30    | + | (2017)      | + | (2018)      | + | \$0.00      | + | \$48.00     | + | \$0.00      | = | <b>\$171.30</b> |
|             |   | \$0.00      |   | \$0.00      |   |             |   |             |   |             |   |                 |