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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

DAREN L. PALMER and TRIGON GROUP, INC., a Nevada Corporation,

DEFENDANTS.

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF PLAN OF PARTIAL DISTRIBUTION

Civil No. 09-75-S-EJL

Judge Edward J. Lodge

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The Securities and Exchange Commission (the "Commission") respectfully submits this Supplemental Memorandum in Support of the Motion for Approval of Partial Distribution. Based on the majority of case law and the undisputed facts of this case, the Commission's Plan of Distribution should be approved as proposed. In this case, a rising tide method of calculating the appropriate distribution to defrauded investors is fair and reasonable.

I. BACKGROUND

On February 26, 2009, the Commission filed a Complaint seeking to enjoin Daren L. Palmer ("Palmer") and Trigon Group, Inc. ("Trigon") (collectively, the "Defendants") from further violations of the federal securities laws, an *ex parte* Order to stay litigation, an *ex parte* Order freezing their assets, an *ex parte* Order to appoint a receiver, and a preliminary injunction. On February 26, 2009, this Court granted the *ex parte* Orders and appointed Wayne Klein as Receiver (the "Receiver") for Trigon (Docket #s 8 and 9). The Receiver was charged with marshalling Trigon's assets. The Commission seeks to make a partial distribution of funds in the Receivership Estate to defrauded investors. On June 9, 2010, the Commission proposed a Plan of Partial Distribution (the "Plan") that identifies the process by which the Receiver will distribute funds in the Receivership Estate. (Docket # 73 at Exhibit "B").

On August 4, 2010 the Commission received an objection to the Plan from Mark Rudd ("Rudd"), Breck Barton ("Barton"), David Taylor, Gerald Taylor (collectively the "Taylors"), James Cameron ("Cameron"), Dick Fitzek ("Fitzek") and Darryl Harris ("Harris") (Docket # 84). On August 5, 2010 the Commission received an additional objection to the Plan from Harris, Harris Publishing, Cameron and the Taylors (Docket # 88). On November 3, 2010, the Court held a hearing on the Commission's proposed Plan and, subsequently, entered a minute entry ordering the parties to submit supplemental briefing in support of their respective positions.

II. UNDISPUTED FACTS

A. THE DEFENDANTS

1. **Trigon Group, Inc.** ("Trigon") was a Nevada corporation headquartered in Idaho Falls, Idaho. Trigon claimed to be an investment business that specialized in helping clients generate high annual returns of approximately 20-25 percent. See Memorandum in Support of Motion for Summary Judgment (Docket # 35) at p. 3.

2. Trigon never registered any offering of its securities under the Securities Act of 1933 ("Securities Act") or any class of Securities under the Securities and Exchange Act of 1934 ("Exchange Act"). Id.

3. **Daren L. Palmer** ("Palmer"), age 41, is an Idaho resident living in Idaho Falls, Idaho. Palmer attended Ricks College for two years, received a degree in Finance from the University of Utah in 1995, and then worked as a financial representative at a finance company called American General. Palmer was the President and owner of Trigon. Id. at p. 4.

B. BACKGROUND

4. Beginning in 1996 and continuing through at least October 2008, Trigon and Palmer sold securities in the form of promissory notes and investment contracts to over 55 investors in unregistered, non-exempt transactions amounting to over $60 million. Id.

5. Palmer has never been registered with the Commission in any capacity and has never been licensed to sell securities. Id.

C. PALMER'S MISREPRESENTATIONS

6. Palmer marketed himself and Trigon by representing that he knew a complex trading strategy through which he invested in indexes, S&P 500 options or futures, currency futures, and stocks in a way that generated consistent annual returns of 20 percent or greater. Id. at p. 5.

7. Palmer touted his reputation in the Idaho Falls community as an honest family man with a long record of producing high returns for investors. Palmer told some investors that he had been generating annual returns of 20 percent or greater for more than 12 years. Id.

8. Palmer described his trading program as difficult to understand, but one that operated essentially like a hedge fund. He explained that the investor's principal would be combined with those of other investors and traded as a single fund. Id.

9. Palmer told investors that he was licensed to sell securities when in fact he was never registered or licensed to do so. Id.

10. Palmer guaranteed high returns using his strategy, regardless of market conditions, with no risk to investors' principal investments. Id.

11. Palmer failed to caution investors of the risk associated with futures trading. Id.

12. Palmer evidenced most of the investment monies he received with a Promissory Note ("Note") that he signed either as an individual or as the President of Trigon. Id. at p. 6.

13. Although not identical, the Notes generally stated that Palmer owed the investor his/her principal plus interest of 20 to 25 percent annually. However, in some instances,

Palmer's Note stated that the investor would be paid with interest "at the rate per performance from Trigon." Id. at p. 6.

14. All Notes Palmer issued stated: "No collateral will be provided." Id.

15. If Palmer did not issue a Note, he entered into a verbal investment contract which promised payment of 20 percent returns or greater per year. Id.

16. Palmer told investors that he would retain a portion of the generated profits, but actually paid himself a set amount of up to $25-35,000 per month. Id.

17. Of the money given to Palmer by investors, approximately $6.8 million was deposited into trading accounts, representing only 10.07% of the total amount Palmer received from investors. Id.

18. Only a small portion of the money invested was ever used to trade commodities. Palmer often placed money was in accounts and, then, withdrew it with no trading ever taking place. Id.

19. While some of the accounts did earn money, commissions and fees paid to those who assisted Palmer in trading coupled with the costs of trading services exceeded any profits actually earned from trading. Id.

20. Of the investor money deposited in Trigon's accounts, Palmer spent more than $6 million on his personal home expenses and construction costs. Id. at p. 7.

21. Palmer also spent millions paying himself a salary and paying for credit cards. Other personal expenses included over $245,000 on personal assets including art and jewelry, as well as over $118,000 on vehicle purchases including cars, trailers, and snowmobiles. Id.

22. Although Palmer led investors to believe that all money given to Palmer would be invested through Trigon, Palmer used over $360,000 of investor money to charter private planes and more than $270,000 for business expenses. Id. at p. 7.

23. Palmer also gave large amounts of investor money to close family members, including more than $387,000 to his father; approximately $50,000 to his brother; and over $2.7 million to his wife's relatives. Id.

24. Investor money was also distributed to various business entities controlled by Palmer or his family members, including over $1.4 million in property purchases, nearly $4 million in construction costs, and over $1.3 million to a construction company owned by Palmer's father. Id.

D. THE COLLAPSE OF PALMER'S SCHEME

25. In or around January 2009, Palmer admitted to investors that he had extinguished all funds and had been running a Ponzi scheme for many years. Id. at p. 8.

26. Although Palmer provided investors with statements showing trading profits, the payments made were actually from the principal investments of later investors. Id.

27. Later investors were not informed that Palmer would use their principals to pay returns to earlier investors. Id.

28. Palmer also admitted to using investor funds to pay his salary, personal credit cards, home construction costs and to purchase snowmobiles. Id.

29. Palmer gave the last $500,000 of investor funds to several individuals who purported to be lenders and/or investors from Dubai. The Dubai-based lenders and/or investors scammed Palmer in what appears to be an advance fee scam. Id.

30. Although Palmer collected at least $60 million in investor funds, he placed only a fraction of those funds into trading accounts, and used the rest to pay personal expenses and phony returns to earlier investors. Id. at p. 8.

31. Participants in the investment program invested over $68 million with Palmer, more than $46 million of which was used to pay phony returns. Id.

32. Pursuant to the claims process established by the Court, thirty-two investors submitted allowable claims to the Court-appointed Receiver. See Docket # 73-1. The allowable claimants made a total investment with Trigon of $31,380,987.00. Id. Those investors submitting allowable claims received returns from Trigon totaling $12,869,855.21. Id. Thus, as a group, the claimants received 41% of their invested funds in purported profits.

33. Those purported profits were not equally distributed among the claimants. Individually, investors with allowable claims received returns ranging between 0% of their investment to over 91% of their initial investment. Id.

34. A majority of investors (almost 60%) received absolutely no returns at all from Trigon or Palmer. Id.

35. Those individuals who will receive payment under the Commission's proposed Plan invested $10,621,217.90 with Trigon, representing 29.16% of the allowable claims. See Docket 73-1; Declaration of Wayne Klein ("Klein Decl."), attached hereto as Ex. "A." Those objecting to the Plan represent investments in Trigon of $23,980,000, or 65.83% of the allowable claims. Id.

36. Investors who will recover under the proposed Plan received 4.21% of their funds in purported returns from Trigon. In sharp contrast, the objecting investors received returns of 84.98%. Ex. "A."

37. If the Court adopts a net investment method, the non-objecting investors will receive returns of 9.32% while the objecting investors stand to collect over 81% of the funds they placed with Trigon. Id.: see also Proposed Equitable Distribution Based on Pro Rata Share of Out of Pocket Losses (submitted by counsel for the objecting investors during the November 3, 2010 hearing), attached hereto as Ex. "B."

38. In contrast, under the rising tide method proposed by the Commission, the recipients under the proposed plan will have received returns of 15.49% of the funds paid to investors and the objecting investors will have received 74.97% of the funds paid to investors. Id.

III. ARGUMENT

A. THE COURT SHOULD APPROVE THE PLAN AS PROPOSED

i. The Court has broad authority to approve the proposed plan

District courts have broad power and wide discretion to determine the appropriate relief in an equity receivership. SEC v. Lincoln Thrift Ass'n, 577 F.2d 600, 606 (9th Cir. 1978)("[I]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."); see also SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005); SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1143 (9th Cir. 1996); SEC v. Wenke, 783 F.2d 829, 837 n.3 (9th Cir. 1986) (collecting cases). The reason for the broad deference afforded district courts results from the fact that equity receiverships involve multiple parties and complex transactions. SEC v. Universal Fin., 803 F.2d 1034, 1038

(9th Cir. 1986). The Ninth Circuit has recognized that a primary purpose of equity receiverships "is to promote the orderly and efficient administration of the estate by the district court for the benefit of creditors." Id. (citations omitted). Under the broad discretion afforded district courts, a plan generally will be upheld if it serves to orderly and efficiently distribute funds to investors. CFTC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999). Thus, plans for distribution of funds will be reviewed for abuse of discretion. Id. at 1115-16; Universal Fin., 803 F.2d at 1038 ("We would be remiss were we to interfere with a district court's supervision of an equity receivership absent a clear abuse of discretion.").

"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." See SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). In formulating plans to compensate victims of securities fraud, the Commission may impose limits on claims to maximize the return to defrauded investors. Id., 944 F.2d at 81-82, 88; SEC v. Certain Unknown Purchasers of the Common Stock of & Call Options for the Common Stock of Santa Fe Int'l Corp., 817 F.2d 1018, 1020 (2d Cir. 1987). In Wang, the court approved the Commission's plan to limit distribution of funds only to investors who had suffered "out-of-pocket" losses, not just losses on paper. 944 F.2d at 81-82. "This kind of line-drawing – which inevitably leaves out some potential claimants – is . . . appropriately left to the experience and expertise of the SEC in the first instance." Id. at 88; see also SEC v. Byers, 637 F. Supp. 2d 166, 175 (S.D.N.Y. 2009)(noting the SEC's judgment is entitled to deference).

The Court should be mindful that what is fair and reasonable for one victim may be perceived as unfair and inequitable to another, depending on how each stands to benefit under the selected distribution scheme. "For a District Court sitting in equity . . . it is important to remember that each investor's recovery comes at the expense of the others." Byers, 637 F. Supp.

at 176. When funds are limited "hard choices must be made." Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 84 (2d Cir. 2006). As recognized by the Southern District of New York:

> where the assets of the receivership estate are insufficient to afford full recovery to all victims, any given plan is likely to be viewed more favorably by certain victims than others depending on how they fare under that plan . . . An equitable plan is not necessarily a plan that everyone will like.

SEC v. Credit Bancorp, Ltd., 99 Civ. 11395 (RWS), 2000 U.S. Dist. LEXIS 17171, at **94-95 (S.D.N.Y. Nov. 29, 2000).

This is exactly the case here. The plan is one that not all victims like, but that does not make the plan unfair. Not surprisingly, the objecting claimants are the individuals who received the highest percentage payouts of all investors and have already received payments from Trigon in excess of the benchmark. From March 2005 to January 2008 Rudd invested $150,000.00 and received distributions totaling $137,786.00, representing a net return of 91.86% if his investment. Declaration of R. Wayne Klein, Receiver, dated August 16, 2010 (" 08/16/2010 Klein Decl.") (Docket # 93 at Exhibit "A") at ¶ 8. From February 2003 to July 2007 Barton (with checks drawn on the bank account of Breck Barton & Associates Profit Sharing Plan) invested $705,000.00 with Trigon. Id. at ¶ 3. During this same time period Trigon made payments of $621,930.71 to Barton, which equals an 88.22% payout. Id.

David Taylor, Gerald Taylor and Taylor Chevrolet submitted a combined Proof of Claim Form (Claim No. 2015). The Taylors invested $8,400,000.00 from April 1999 to May 2008 and received distributions of $4,495,482.00 during that same time period. Id. at ¶ 7. This represents a 53.52% return of investment in distributions. Id.

James Cameron submitted two claims to the Receiver totaling $9,430,000.00. Id. at ¶ 4. The Receiver found that Cameron did not report all transactions with Trigon, including entities

that had received net profits on their investments with Trigon. Id. Excluding the unreported transactions, the Receiver determined that Cameron entities paid $9,430,000.00 directly to Trigon and received $5,205,156.00 in distributions for a 41.97% return. Id.

Dick Fitzek invested a total of $250,000 with Trigon through Duane Yost ("Yost") between September 2006 and June 2008. Id. at ¶ 5. Fitzek received payments of $65,000.00 for a 26% return. Finally, Darryl Harris submitted two Proof of Claim Forms for himself and Harris Publishing, for a total investment of $5,045,000.00, made between October 2003 and September 2008. Id. at ¶ 6. Distributions to Harris and his entities totaled $2,200,353.00 for a 43.61% return. Id.

Here, the Plan presented by the Commission provides a fair reasonable procedure for returning funds to defrauded investors. Although the initial distribution leaves out some potential claimants, that fact does not prevent the Court from approving the Plan. Those who will not recover in the initial distribution are those investors who collectively received over $12 million from Trigon, representing 84.98% of the funds Trigon paid to investors with allowable claims. Conversely, those investors who will receive a distribution under the proposed Plan received only 4.21% of the purported returns from Trigon. Any plan that simply ignores this disparity is unfair.

ii. The Rising Tide Method Provides a Fair and Reasonable Distribution

Generally, where funds available to compensate investors are limited, a pro rata distribution of funds from a receivership is an equitable remedy. Topworth, 205 F.3d at 1116; United States v. Real Prop. at 13328 & 13324 State Highway 75 N., 89 F.3d 551, 553 (9th Cir. 1996). Here, the Commission has proposed a pro rata distribution. The objecting investors do not object to this approach. Instead, the objecting investors complain regarding the treatment of

earlier distributions. As set forth in the Plan, the objecting investors will not receive a distribution until all other investors have received at least an equal percentage return.

Courts have considered five alternative distribution methods. See e.g. CFTC v. Barki, LLC, 3:09 CV 106-MU, 2009 U.S. Dist. LEXIS 112998, at *3 (W.D.N.C. Nov. 12, 2009).

> (1) the investors could return [withdrawn] 'profits' to the entire pool prior to the pro rata distribution; (2) the investors could both retain their [withdrawn] 'profits' and demand a full pro rata share of their initial investments; (3) [the rising tide method whereby] the investors could retain their distributed profits but would be forced to subtract that profit after determining the pro rata share of their investments; (4)[the net investment method whereby] the investors could retain their [withdrawn] 'profits' but would receive a pro rata share based on their initial investments *minus* the profit distribution . . . or (5) a modified net investment method whereby the investors could retain their withdrawn 'profits' but would receive a pro rata share based on the sum of their initial investments and the "illusory profits" that were never withdrawn from the account *minus* the profit distribution.

Id. at **3-4 (emphasis in original)(citations omitted).

Here, the Commission determined that option one was impractical. See CFTC v. Franklin, 652 F. Supp. 163, 169 (W.D. Va. 1986) (concluding that method one was "impracticable because it unrealistically would require some investors to return funds that they may no longer have on hand."). Options two and four do not require investors to account for withdrawn profits, which in this case exceed $12 million. As a result, option two is not fair or reasonable. Option five allows investors to retain withdrawn profits but gives those investors who did not withdraw funds the benefit of their illusory profits that were not withdrawn. This option is unworkable due to Trigon's poor record keeping and the disparate rates of return promised to investors. Palmer promised investors annual returns that ranged between 20% and 40%. Palmer promised other investors a portion of the trading profits. Allowing investors credit for illusory returns at such disparate rates would be inequitable. As a result, the Commission determined that the rising tide approach provided a fair and reasonable method of distribution to

defrauded investors. This approach is consistent with that taken in other cases analyzing the alternative distribution methods.

For example, in CFTC v. Equity Fin. Group, LLC, the Court adopted the rising tide method for distribution to defrauded investors in a Ponzi scheme that mirrors the fraud in this case. Civil No. 04-1512-RBK-AMD, 2005 U.S. Dist. LEXIS 20001, at **82-88 (D.N.J. Sept. 2, 2005) (analyzing alternative distribution methods in Ponzi scheme which raised $43 million in which over $12 was repaid to investors in Ponzi payments). In that case, the Court considered three other approaches: (1) ignoring withdrawals; (2) requiring withdrawals to be repaid to the receivership and redistributing the withdrawals to all investors; and (3) net investment method. Id. at **83-84.

The Court rejected the first approach because it would "permit an investor to receive the same percentage distribution for invested amounts with other investors who received little or no previous payments." Id. at *84. The Court similarly rejected the second method because it was not cost effective and raised issues of collectability. Id. at **84-85. The net investment theory was also rejected. The Court reasoned that "under the net investment method, investors who had previously received funds as withdrawals would benefit at the expense of other investors by retaining the benefit of the full amount of his withdrawal plus a distribution calculated on the basis of net funds invested, rather than the recommended distribution amount adjusted to take into account all amounts already received." Id. at **87-88. The Court demonstrated the inequity of the net investment methodology by comparing investor recovery under the rising tide theory and net investment method. Id. at **86-88 (illustrating the inequity of the net investment theory be examining examples comparing investors who had previously received recovery in the Ponzi scheme to those who had not).

Those same inequities are present in this case. Consider claimant number 2002 who invested $1,000,000 with Trigon and received absolutely no return on the investment from Trigon. Under the Commission's proposed Plan, Claimant 2002 will receive 24.89% of his investment, or $248,917.71. See Docket # 73-1. Under the net investment method, Claimant 2002 will receive 9.32% of his investment or $93,235.70. See Ex. B. Claimant 2002, who received nothing from Trigon, would receive $155,682.01 less under the net investment theory than under the rising tide approach. In sharp contrast, the Taylors (claimant 2015) who receive nothing under the rising tide method proposed by the Commission because they already received returns of 53.52% would receive an additional $364,040.48 under a net investment method. Adding the $364,040.48 the Taylors would receive under the net investment method to the $4,495,482.00 already received by the Taylors from Trigon brings the total percentage recovered by the Taylors to 57%. This stands in stark contrast to the 9.32% that Claimant 2002 would receive under the net investment method.

As another recent case noted, "[a] number of courts faced with circumstances similar to those in this case have determined that Rising Tide is a more appropriate method of distribution than Net Loss." SEC v. Parish, Civil Action No. 2:07-cv-00919-DCN, 2010 U.S. Dist. LEXIS 11757, at *19 (D.S.C. Feb. 10, 2010) (collecting cases selecting the rising tide method over a net investment or other proposed methods); see also CFTC v. Hoffberg, 93 C 3106, 1993 U.S. Dist. LEXIS 15173, at **4-9 (N.D. Ill. Oct. 28, 1993) (analyzing the net investment and rising tide methods and adopting the rising tide). "This is true because investors who received payments over the course of the Ponzi scheme that exceed their proportionate share are permitted under the Net Loss method to keep those payments ***and*** share in a distribution of the estate, thereby ultimately recovering more than other investors who did not receive any payments over the

course of the scheme." Parish, 2010 U.S. Dist. LEXIS at *19. (citations omitted). The Parish Court reasoned that since victims who received payments over the course of the Ponzi scheme were "actually being paid with money taken from other victims of the scheme," the rising tide method was the appropriate method of distribution. Id. at **23-28. The Court was "mindful that *hundreds* of victims have each lost a significant amount of money due to [defendant's] actions, and the majority of them . . . have never received a dime. It would be unfair to reduce the distributions to those victims so that other investors, who have already recovered a portion of their losses, may recover more than their proportionate share." Id. (emphasis in original).

As to be expected, as in this case, investors who would receive more under a net investment or other theory object to the adoption of the rising tide method. However, "[t]he propriety of using the "Net Investment" method . . . does not turn on whether mathematically, a group of investors will lose more under the "Rising Tide" method than other investors will gain. Instead . . . the court must determine which method is more equitable given the facts and circumstances." CFTC v. Lake Shore Asset Mgmt., Ltd., 07 C 3598, 2010 U.S. Dist. LEXIS 24061, at *30 (N. D. Ill. Mar. 15, 2010)(holding a straight pro rata distribution would be inequitable because it unfairly elevates investors who receive pre-receivership payments over those who did not).

> The fact that certain investors may not receive a distribution under the "Rising Tide" method is thus not germane. Investors who received pre-receivership payments may not recover more than their proportionate share of their respective initial investments than other investors. This is what would happen if the investors who received pre-receivership payments were allowed to retain those payments *and* also receive a pro rata distribution today. In this regard, the court notes that the "Net Investment" method adherents do not propose that they return their pre-receivership payments so that all of the investors can receive a true proportionate share of their initial investments. Thus, their championing of the "Net Investment" method as the fairest way to divide up the available funds is reminiscent of George Orwell's *Animal Farm*. George Orwell, *Animal Farm* (1945) ("All animals are equal. But some animals are more equal than others.").

Id. at **30-31.

The facts of the above-cited cases mirror those of Palmer's scheme. Those cases involve Ponzi-type schemes in which certain investors received funds from the perpetrator of the fraud during the operation of the scheme which were characterized as profits. The profits were illusory and simply came from funds deposited by later investors. The above Courts concluded, as this Court should, that under those facts a rising tide method of distribution is fair and reasonable.

The few cases that adopt a net investment theory over a rising tide method are easily distinguished from this case. First, in SEC v. Byers, where the Court adopted the net investment method, the net investment method was proposed by the court-appointed receiver and approved by the Commission. 637 F. Supp. 2d 166 (S.D.N.Y. 2009). The Court did not adopt the net investment method over objections by either the receiver or the Commission. Id. at 168 ("The Plan was formulated in cooperation with the SEC, which supports the Plan in its entirety."). In fact the Byers Court noted that "[t]he SEC's judgment is entitled to deference from this Court." Id. at 175 (noting the Commission supported the net investment method). Moreover, the proposed plan in Byers credited investors with distributions that investors chose to roll over into the funds rather than receive as cash distributions in the baseline amount for calculating the allowable claim amount for each investor. Id. at 172. Essentially, the plan treated a roll-over distribution as an out-of-pocket loss for investors. Id. In light of Trigon's poor record keeping, the Receiver does not have a complete record illustrating the purported profits earned by every investor in this case. In addition, the returns Palmer promised investors varied greatly and ranged from 20-40% per year. As a result, including these phony returns would only enhance disparate treatment of investors.

In Barki, the Court rejected the rising tide method in favor of a net investment theory, because the rising tide theory resulted in 55% of investors receiving no additional compensation. Barki, LLC, 2009 U.S. Dist. LEXIS at *5. In this case 63% of investors will receive additional recovery in the initial distribution in the Plan proposed by the Commission. Additional investors will recover in subsequent distributions as the amount distributed exceeds their baseline percentage recoveries. Moreover, the Barki Court noted the shortcomings of the net investment method, because it fostered a broader range of distribution relative to the rising tide method. Id. The Barki Court attempted to ameliorate this impact by adopting the modified net investment method used in the Byers case cited above. Id. at *6. However, the net investment method simply widened the disparity. Id. Here, the Commission's proposed Plan will decrease the disparity between investors in the proportionate returns each will have received. Under the Commission's Plan, every investor will receive at least 24.89% of his or her net investment. It will reduce the range of percentage returns from 0% to 91.86% as the range current stands or the range under the net investment of 10% to 91.86%.

Finally, in an early case, Franklin, the Court adopted a net investment approach. However, the Court in that case was under the erroneous assumption that an investor who received no returns during the scheme would receive the same distribution under either method. 652 F. Supp. at 170. This is clearly not the case. See Hoffberg, 1993 U.S. Dist. LEXIS at *8 (recognizing that the Franklin court operated under the incorrect assumption that investors who had not previously received money would receive the same return under either of the formulas); CFTC v. Skorupskas, Civil No. 83-CV-1885-DT, 1988 U.S. Dist. LEXIS 18649, at **5-7 (E.D. Mich. Aug. 22, 1988) (characterizing the Franklin analysis as opaque and undeveloped). In fact, "given the basic proposition that all investors should share proportionately in the estate, a

position not contested by any investor or party and generally supported in the law . . . the Franklin rule would permit those few investors who insisted on cashing out their 'profits' to receive more from the *res* held in constructive trust than a proportionate share based on their total investment." Skorupskas, 1988 U.S. Dist. LEXIS at **6-7 (rejecting the Franklin approach and adopting a rising tide methodology).

In short, a majority of cases considering the issue with facts similar to the case at bar conclude that the rising tide method is the more appropriate method. See Lake Shore Asset Management, Ltd., 2010 U.S. Dist. LEXIS 24061; Parish, 2010 U.S. Dist. LEXIS 11757; Equity Fin. Group, 2005 U.S. Dist. LEXIS 20001; United States v. Cabe, 311 F. Supp. 2d 501, 508-09 (D.S.C. 2003); Hoffberg, 1993 U.S. Dist. LEXIS 15173; Skorupskas, 1988 U.S. Dist. LEXIS 18649. The careful analysis set forth in those cases is equally applicable here. As a result, the Court should approve the Plan as proposed.

IV. **CONCLUSION**

Based on the forgoing, the Commission's Plan represents a fair and equitable distribution of Receivership assets. Therefore, the Commission respectfully requests this Court to approve the Motion for Approval of the Plan of Partial Distribution.

DATED this 24th day of November 2010.

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