

1 JOHN J. GRAUBARD  
Senior Attorney  
2 GEORGE S. CANELLOS,  
Regional Director  
3 Attorneys for Plaintiff  
Securities and Exchange Commission  
4 New York Regional Office  
3 World Financial Center  
5 New York, NY 10281-1022  
E-mail: graubardj@sec.gov  
6 Telephone: 212-336-0084 (Graubard)

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF ARIZONA

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10 SECURITIES AND EXCHANGE :  
COMMISSION, : Case No. CV06-2792-PHX-FJM  
11 :  
Plaintiff, :  
12 :  
- against - : MOTION TO APPROVE  
13 : PROPOSED AMENDED  
HOWARD R. BAER and : DISTRIBUTION PLAN  
14 KEVIN C. BAER, : AND TRANSFER FUNDS  
: TO COMMISSION  
15 Defendants. :  
\_\_\_\_\_ :

16  
17 The plaintiff Securities and Exchange Commission (the “Commission”)  
18 respectfully moves that the Court:

19 1. Enter an Order giving notice of this Motion to the Defendants and to the  
20 Potentially Eligible Claimants, providing a date for the hearing on this Motion, and  
21 providing an opportunity for the Defendants and the Potentially Eligible Claimants to  
22 comment upon or oppose the Motion before the hearing date;

1           2.     Enter an Order approving the Amended Distribution Plan, directing that the  
2 Commission supervise the distribution process;

3           3.     Enter an Order directing that the Clerk transfer the funds presently held in  
4 the Court Registry Investment System (“CRIS”) account for this action to the  
5 Commission; and

6           4.     Grant such other and further relief as may be necessary or appropriate to  
7 effectuate the foregoing.

8           In support of this Motion, the Commission relies upon previous submissions and  
9 submits the following:

10          1.     The Declaration of John J. Graubard and the Exhibits thereto in Support of  
11 this Motion;

12          2.     A proposed Order giving notice of the pendency of this Motion and setting  
13 a hearing date and providing a time for filing objections thereto;

14          3.     A proposed Order approving the Amended Distribution Plan; and  
15



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3 World Financial Center, Room 400  
5 New York, NY 10281-1022  
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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA

10 \_\_\_\_\_  
11 SECURITIES AND EXCHANGE  
COMMISSION,

12 Plaintiff,

13 - against -

14 HOWARD R. BAER and  
KEVIN C. BAER,

15  
16 Defendants.  
\_\_\_\_\_

Case No.  
CV06-2792-PHX-FJM

DECLARATION OF  
JOHN J. GRAUBARD  
MOTION FOR APPROVAL  
OF AMENDED DISTRIBUTION  
PLAN

17 JOHN J. GRAUBARD declares under penalty of perjury pursuant to 28 U.S.C. §

18 1746:

19 Introduction

20 1. I am a Senior Attorney in the Division of Enforcement, New York Regional  
21 Office, of the plaintiff Securities and Exchange Commission (the “Commission”). I am

1 over 18 years old, I am a member of the bar of this Court, and I believe in the obligations  
2 of an oath. I am personally familiar with the facts set forth in this Declaration.

3 2. I am making this Declaration in connection with the Commission's motion  
4 that the Court:

5 (1) Enter an Order approving the Amended Distribution Plan,  
6 directing that the Commission supervise the distribution process;

7 (2) Enter an Order directing that the Clerk transfer the funds  
8 presently held in the Court Registry Investment System ("CRIS") account  
9 for this action to the Commission; and

10 (3) Grant such other and further relief as may be necessary or  
11 appropriate to effectuate the foregoing.

12 Procedural History

13 3. On November 20, 2006, the Commission filed a Complaint (Dkt. No. 1)  
14 against the Defendants Howard R. Baer and Kevin C. Baer charging them with violations  
15 of the anti-fraud provisions of the federal securities laws with respect to Health  
16 Enhancement Products, Inc. ("HEPI") common stock.

17 4. Specifically, the Complaint alleged that the Defendant Howard R. Baer  
18 violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C.  
19 § 77q(a), and Sections 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"),  
20 15 U.S.C. §§ 78j(b), and Rules 10b-5 and 13a-14 thereunder, 17 C.F.R. §§ 240.10b-5 and  
21 240.13a-14. The Complaint further alleged that the Defendant Howard R. Baer engaged  
22 in acts that aided and abetted the violation of Section 13(a) of the Exchange Act, 15

1 U.S.C. § 78m(a), and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, 17 C.F.R.  
2 §§ 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13. The Complaint also alleged that  
3 the Defendant Kevin Baer engaged in acts that aided and abetted the violation of Section  
4 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.  
5 § 240.10b-5.

6 5. On November 29, 2006, the Court entered a Final Judgment as to the  
7 Defendant Howard R. Baer (Dkt. No. 8). This Final Judgment permanently enjoined the  
8 Defendant Howard R. Baer from future violations of Section 17(a) of the Securities Act,  
9 15 U.S.C. § 77q(a), Sections 10(b) and 13(a) of the Exchange Act, and Rules 10b-5, 12b-  
10 20, 13a-1, 13a-11, 13a-13, and 13a-14 thereunder, 17 C.F.R. §§ 240.10b-5, 240. 12b-20,  
11 240.13a-1, 240.13a-11, 240.13a-13, and 240.13a-14. In addition, the Defendant Howard  
12 R. Baer was prohibited from serving as an officer or director of any issuer that has a class  
13 of securities registered with the Commission pursuant to Section 12 of the Exchange Act,  
14 15 U.S.C. § 78l, or that is required to file reports with the Commission pursuant to  
15 Section 15(d) of the Exchange Act. 15 U.S.C. § 78o(d). The Final Judgment required the  
16 Defendant Howard R. Baer to disgorge his ill-gotten gains of \$1,349,592.81 and  
17 prejudgment interest of \$88,734.60, for a total of \$1,438,327.41, which amounts were to  
18 be paid to the Clerk of the Court. Finally, the Final Judgment against the Defendant  
19 Howard R. Baer required him to pay a civil penalty of \$120,000 to the Commission, to be  
20 remitted by the Commission to the United States Treasury.

21 6. On November 29, 2006, the Court also entered a Final Judgment as to the  
22 Defendant Kevin C. Baer (Dkt. No. 9). This Final Judgment permanently enjoined the

1 Defendant Kevin C. Baer from future violations of Section 10(b) of the Exchange Act, 15  
2 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The final judgment  
3 barred the Defendant Kevin C. Baer for a period of five years from serving as an officer  
4 or director of any issuer that has a class of securities registered with the Commission  
5 pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 78l, or that is required to file  
6 reports with the Commission pursuant to Section 15(d) of the Exchange Act. 15 U.S.C.  
7 § 78o(d). Finally the Final Judgment against the Defendant Kevin C. Baer required him  
8 to pay a civil penalty of \$25,000 to the Commission, to be remitted by the Commission to  
9 the United States Treasury.

10 7. With respect to the disgorgement and prejudgment interest paid by the  
11 Defendant Howard R. Baer, the Final Judgment provided that the amounts paid to the  
12 Clerk together with interest thereon would constitute a Fund, and that “The Commission  
13 may propose a plan to distribute the Fund pursuant to the Court’s approval.” The Fund is  
14 on deposit in the Court Registry Information System (“CRIS”) under the case name  
15 designation “*SEC v. Howard R. Baer, et al.*, D09AZ – 2:06-CV-2792-01 (the “HEPI  
16 Fund”). The HEPI Fund constitutes a Qualified Settlement Fund under Section 468B-a  
17 of the Internal Revenue Code, 26 U.S.C. § 468B-1, and related regulations, 26 C.F.R.  
18 §§ 1.468B-1 through 1.468B-5. The HEPI Fund is composed of the amounts currently in  
19 the CRIS account and any interest on such amounts.

20 8. On June 2, 2011, the Court entered an order directing that any future  
21 payments by the Defendant Howard R. Baer be paid to the Commission and remitted by

1 the Commission to the United States Treasury (Dkt. No. 39). The Court also ordered that  
2 the Commission propose a distribution plan for the HEPI Fund.

3 9. On June 2, 2011 the Court appointed Damasco & Associates LLP as Tax  
4 Administrator (Dkt. No. 40). Taxes imposed on the HEPI Fund as a Qualified Settlement  
5 Fund and the fees of the Tax Administrator will be paid from the HEPI Fund.

6 10. On September 12, 2011, the Court entered a Protective Order (Dkt No. 58)  
7 and an Order Appointing Distribution Agent (Dkt. No. 60). The Order Appointing  
8 Distribution Agent designated Rust Consulting, Inc. (“Rust”), of Minneapolis, Minnesota,  
9 as the Distribution Agent. The Court also entered an Order for Notice (Dkt. No. 59).

10 11. On November 9, 2011, the Court conducted a telephonic hearing, and  
11 directed that the Commission submit an Amended Distribution Plan (Dkt. No. 62). On  
12 November 21, 2011, the Commission submitted a Report to the Court concerning such  
13 Amended Distribution Plan.

14 12. The Commission has prepared an Amended Distribution Plan, a copy of  
15 which is attached as Exhibit A. The Amended Distribution Plan follows the substance of  
16 the original Distribution Plan, but places responsibility for its supervision on the  
17 Commission rather than on the Court. The Amended Distribution Plan also provides that  
18 both investors who purchased HEPI common stock on the open market and those who  
19 purchased HEPI common stock through private placements are eligible to participate in  
20 the Amended Distribution Plan.





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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

	:	Case No.: CV06-2792-PHX-EHC
SECURITIES AND EXCHANGE COMMISSION,	:	[PROPOSED] ORDER
Plaintiff,	:	ON MOTION TO TRANSFER
	:	FUNDS TO THE
-against-	:	SECURITIES AND
	:	EXCHANGE COMMISSION
HOWARD R. BAER and	:	
KEVIN C. BAER,	:	
	:	
Defendants.	:	
	:	

Upon the Motion of the of the plaintiff Securities and Exchange Commission (the “Commission”) for and Order directing the Clerk to disburse the funds presently being held for the above entitled action in the Court Registry Investment System (“CRIS”) to the Commission to be transferred to the Commission for distribution as provided in the Amended Distribution Plan approved by the Court, it is hereby:

ORDERED, that the Clerk of the Court shall transfer all funds now held in the CRIS account to the Commission, by sending the same to the Securities and Exchange

1 Commission, Office of Financial Management, Accounts Receivable, 100 F Street NE,

2 Mail Stop 6042, Washington, DC 20549.

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