

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____		)	
SECURITIES AND EXCHANGE		)	
COMMISSION,		)	
		)	Civil No. 1:14-cv-01740-
		)	PAC
	Plaintiff,	)	
v.		)	
		)	
JOHN BABIKIAN,		)	
		)	
	Defendant.	)	
_____		)	

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S NOTICE OF MOTION,  
MOTION, AND MEMORANDUM OF LAW IN SUPPORT OF AN ORDER  
APPROVING PROPOSED DISTRIBUTION PLAN FOR THE FAIR FUND**

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that upon the accompanying Motion, Memorandum, and Proposed Order, and all other papers and proceedings herein, Plaintiff United States Securities and Exchange Commission will move this Court, at a date and time to be determined by the Court, before the Honorable Paul A. Crotty, for an Order approving the proposed Distribution Plan.

**MOTION**

Plaintiff United States Securities and Exchange Commission (“SEC” or the “Commission”) respectfully moves the Court to approve the proposed Distribution Plan. The SEC has submitted a proposed Order to the Court contemporaneously with the filing of this Motion.

**MEMORANDUM OF LAW**

**I. BACKGROUND**

On March 13, 2014, the Commission filed a complaint against John Babikian (“Defendant”) for his role in a securities fraud known as “scalping.” Scalping is the practice of recommending the purchase of a stock and immediately selling the stock without adequately disclosing the intent to sell. Babikian used a platform of affiliated microcap stock promotion websites to fraudulently promote and illegally scalp Utah-based coal mining corporation America West Resources, Inc.

On July 8, 2014, the Court entered Final Judgment against the Defendant (Dkt. # 46). The Court ordered that Defendant was liable for disgorgement of \$1,915,670.00, together with prejudgment interest thereon in the amount of \$128,073.00, and a civil penalty in the amount of \$1,686,257.00, pursuant to the Exchange Act Section 21(d)(3) [15 U.S.C. 78u(d)(3)] and the Securities Act Section 20(d) [15 U.S.C. 77t(d)], for a total of \$3,730,000.00. Pursuant to the Final Judgment, the Defendant paid the full amount ordered to the Court Registry on July 2, 2014 and thereafter, the Clerk of the Court transferred the funds to an SEC designated account at the United States Treasury. On January 4, 2017, the Commission filed a motion to establish a Fair Fund and appoint a tax administrator and distribution agent (Dkt. # 47). On January 19, 2017, the Court issued an order that established a Fair Fund, and appointed Damasco & Associates, LLP<sup>1</sup> as the tax administrator and Epiq Systems, Inc. as the distribution agent (Dkt. # 48).

The Fair Fund is currently deposited with the United States Treasury’s Bureau of Fiscal Service for investment in an interest bearing account. The Commission now respectfully moves

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<sup>1</sup> As of October 1, 2016, Damasco & Associates, LLP, became a part of Miller Kaplan Arase, LLP. The firm’s engagement with the SEC and its ability to carry out its duties as appointed Tax Administrator for this case has not changed.

the Court for an Order approving the proposed Distribution Plan (“Exhibit A”).

## II. ARGUMENT

### A. The Applicable Standard

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

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

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

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

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

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<sup>2</sup> Courts have historically deferred to the Commission’s decisions regarding whether and how to distribute disgorgement and prejudgment interest. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). Courts have also held that the decision of whether and how to distribute penalty money is soundly within the Commission’s discretion. *Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 72, 84 (2d Cir. 2006).

economic harm that investor victims suffered as a result of the Defendant's actions. The Commission's complaint alleged that the Defendant, a promoter behind a platform of affiliated microcap stock promotion websites, used AwesomePennyStocks.com and its related site PennyStocksUniverse.com, to commit a brand of securities fraud known as "scalping." Scalping is the practice of recommending the purchase of a stock and immediately selling the stock without adequately disclosing the intent to sell. Accordingly, the proposed Distribution Plan would equitably distribute the Fair Fund to investor victims of the Defendant's securities violations. The Distribution Plan contemplates that a total of approximately \$3,730,000.00 will be distributed to Eligible Recipients on a *pro rata* basis for the harm created by Defendant's conduct. Commission staff plans to quickly distribute the approximately \$3,730,000.00 collected from Defendant, less any taxes and fees of the Tax Administrator and Distribution Agent, on a *pro rata* basis to Eligible Recipients, subject to the Court's approval of this Distribution Plan.

**WHEREFORE**, for all the foregoing reasons, the Commission respectfully requests that the Court enter the attached proposed Order and grants such other relief as the Court deems just and proper.

Dated: August 14, 2018

Respectfully submitted,

/s/ Keshia Ellis

Keshia Ellis  
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Michigan Bar # P65146  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2018, I caused the foregoing document to be electronically filed with the clerk of the court for the U.S. District Court, Southern District of New York, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

Respectfully submitted,

/s/ Keshia Ellis

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Attorney for Plaintiff

# EXHIBIT A: PROPOSED DISTRIBUTION PLAN

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____ )		
<b>SECURITIES AND EXCHANGE</b>	)	
<b>COMMISSION,</b>	)	
	)	<b>NO. 1:14-cv-01740-PAC</b>
	)	
	)	<b>Plaintiff,</b>
<b>v.</b>	)	
	)	
<b>JOHN BABIKIAN,</b>	)	
	)	
	)	<b>Defendant.</b>
_____ )		

**DISTRIBUTION PLAN FOR SEC V JOHN BABIKIAN FAIR FUND**

**INTRODUCTION**

On March 13, 2014, the Commission filed a complaint against John Babikian (“Defendant”) for his role in a securities fraud known as “scalping” or, recommending the purchase of a stock and immediately selling the stock without adequately disclosing the intent to sell. Babikian used a platform of affiliated microcap stock promotion websites to fraudulently promote and illegally scalp Utah-based coal mining corporation America West Resources, Inc. (“America West”).

On July 8, 2014, the Court entered Final Judgment against the Defendant (Dkt. # 46). The Court ordered that Babikian was liable for disgorgement of \$1,915,670.00, together with prejudgment interest thereon in the amount of \$128,073.00, and a civil penalty in the amount of \$1,686,257.00, pursuant to the Exchange Act Section 21(d)(3) [15 U.S.C. 78u(d)(3)] and the Securities Act Section 20(d) [15 U.S.C. 77t(d)], for a total of \$3,730,000.00 (“Distribution

Fund”). Pursuant to the Final Judgment, the Defendant paid the full amount ordered to the Court Registry on July 2, 2014 and thereafter, the Clerk of the Court transferred the funds to an SEC-designated account at the United States Treasury. The Distribution Fund is currently deposited in an interest bearing account with the United States Treasury’s Bureau of Fiscal Service for investment.

On January 19, 2017, a Fair Fund (“Fair Fund” or “Fund”) was established by the Court to compensate investor victims of the fraud and a Tax Administrator, Damasco & Associates LLP<sup>1</sup>, was appointed to handle the tax obligations of the Fund. Also on January 19, 2017, the Court entered an order appointing Epiq Class Action & Claims Solutions, Inc. (“Epiq”) as the Distribution Agent for the Fair Fund to assist in overseeing the administration of the distribution of the Fair Fund in consultation with Commission staff, pursuant to the terms of this Distribution Plan.

## ARTICLE I

### DEFINITIONS

This Distribution Plan sets forth the method and procedures for distributing the Fair Fund created in this matter. As used in this Distribution Plan, the following definitions shall apply:

1.1 **“Affiliate”** shall have the meaning set forth in Section 101(2) of Title 11 of the United States Code, 11 U.S.C. § 101(2).

1.2 **“Approved Claim”** shall mean the final amount of an Eligible Claimant’s asserted claim that is ultimately approved for payment pursuant to this Distribution Plan.

1.3 **“Claims Bar Date”** shall mean the date established in accordance with this Distribution

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<sup>1</sup> As of October 1, 2016, Damasco & Associates, LLP, became part of Miller Kaplan Arase, LLP. The firm’s engagement with the SEC and its ability to carry out its duties as appointed Tax Administrator for this case has not changed.



Plan by which a Claim Form must be postmarked by or, if not sent by U.S. mail, received by the Distribution Agent to receive consideration under this Distribution Plan. The Claims Bar Date shall be 90 days after the Distribution Agent's initial mailing of Claim Packets to Potentially Eligible Claimants as set forth in Section 2.11(c) below. Claims postmarked or, if not sent by U.S. mail, received after the Claims Bar Date will not be reviewed and evaluated.

1.4 **“Claim Deficiency Notice”** means the notice sent by the Distribution Agent to a Potentially Eligible Claimant whose claim is deficient in one or more ways (*e.g.*, failure to provide required information or documentation). The Claim Deficiency Notice shall advise the Potentially Eligible Claimant of the reason(s) for the deficiency and provide the opportunity to cure any such deficiencies. A Claim Deficiency Notice shall be provided no later than sixty (60) days after the Claims Bar Date.

1.5 **“Claims Determination Date”** shall mean the date on or before which the Distribution Agent is to reach its determination concerning the validity and amount of each Potentially Eligible Claimant's claim. Except as otherwise provided herein, the Claims Determination Date shall be no later than two hundred and ten (210) days following the Claims Bar Date.

1.6 **“Claims Packet”** shall mean the materials relevant to submitting a claim that will be provided to Potentially Eligible Claimants known to the Distribution Agent or to those people who request such materials. The Distribution Agent, in consultation with the Staff of the Commission, shall prepare the Claim Packet, which shall include, at a minimum, a copy of the Distribution Plan Notice (“Notice”) and a Proof of Claim Form (together with instructions for completing the Proof of Claim Form).

1.7 **“Close of Trading”** shall mean 4:00 p.m. E.S.T.

1.8 **“Days”** shall mean calendar days, unless otherwise specified herein.

1.9 **“Determination Notice”** shall mean the notice sent by the Distribution Agent to a Potentially Eligible Claimant who filed a claim and which states the Distribution Agent’s determination of the eligibility of the claim and the Eligible Loss Amount. In the event the claim is denied, the Determination Notice will state the reason for such denial and notify the Potentially Eligible Claimant of their opportunity to request reconsideration of their claim.

1.10 **“Distribution Agent”** shall mean Epiq (including its employees, agents, consultants or independent contractors), the Distribution Agent appointed by the Court to assist with the administration and distribution of the Fair Fund in accordance with the terms of this Distribution Plan and the Court’s orders.

1.11 **“Distribution Payment”** shall mean the payment to an Eligible Claimant in accordance with the terms of this Distribution Plan.

1.12 **“Distribution Plan”** shall mean this distribution plan as approved by the Court.

1.13 **“Distribution Plan Notice”** shall mean the notice given to Potentially Eligible Claimants which shall contain information about the Fair Fund and the obligation to file a Proof of Claim Form in order to participate. The Distribution Agent, in consultation with Commission staff, shall design the Distribution Plan Notice, consistent with the provisions of this Distribution Plan, and such notice shall include, at a minimum, a statement that the Fair Fund relates to purchases of Eligible Securities during the Recovery Period, the means of obtaining a copy of the Distribution Plan and Claims Packet (including Proof of Claim Forms), instruction for submitting Proof of Claim Forms, and the Claims Bar Date. The Distribution Plan Notice shall advise claimants that by participating in the distribution of the Fair Fund, they will not be releasing any rights or claims they may have against any party, including, but not limited to,

John Babikian.

1.14 **“Eligible Claimant”** means a Potentially Eligible Claimant who suffered a loss as a result of transactions in Eligible Securities and who is determined by the Distribution Agent to be eligible for a Distribution Payment from the Fair Fund. An Eligible Claimant shall not include:

(a) Any Affiliates, assigns, creditors, heirs, distributees, spouses, parents, children, or controlled entities;

(b) Any Defendant in any action brought by the Commission related to the conduct described in the Complaint or any related Commission action, unless and until such defendant is found not liable in all such civil suits prior to the Claims Bar Date, and proof of the finding(s) is included in such defendant’s timely filed Proof of Claim Form;

(c) Any Person who, as of the Claims Bar Date, has been the subject of criminal charges related to the violations alleged in the Complaint or any related Commission action, unless and until such Person is found not guilty prior to the Claims Bar Date, and proof of the finding(s) is included in such Person’s timely filed Proof of Claim Form;

(d) Any Purchaser or Assignee of another Person’s right to obtain a recovery from the Fair Fund, provided, however, that this provision shall not be construed to exclude those Persons who obtained such a right by gift, inheritance, devise or operation of law; and/or

(e) The Distribution Agent, its employees, and those persons assisting the Distribution Agent in its role as the Distribution Agent.

1.15 “**Eligible Loss Amount**” is the amount of loss an Eligible Claimant incurred through the investment in Eligible Securities during the Recovery Period calculated in accordance with the Plan of Allocation.

1.16 “**Eligible Securities**” means America West common stock during the Recovery Period.

1.17 “**Fair Fund**” shall refer to the Fair Fund established by the Court’s January 19, 2017 Order, together with any interest earned on those funds or any additions thereto as may be provided by future Court order or agreement in related cases or otherwise.

1.18 “**Minimum Distribution Amount**” shall mean the specified dollar amount that a Distribution Payment must equal or exceed in order for a distribution to be made to an Eligible Claimant. The Minimum Distribution Amount shall be \$10.00.

1.19 “**Person**” shall mean a natural individual as well as a legal entity, such as a corporation, partnership, limited liability company, or governmental entity. All nouns, pronouns, and any variations thereof in this Distribution Plan shall be deemed to refer to the masculine, feminine, neuter, singular, or plural as the context may require.

1.20 “**Plan of Allocation**”, shall be the methodology for the calculation of the Eligible Loss Amount for each Eligible Claimant set forth in Exhibit A and attached hereto.

1.21 “**Potentially Eligible Claimant**” shall mean a Person, or their lawful successors, identified by the Distribution Agent as having a possible claim to the Fair Fund under this Distribution Plan, or a Person asserting that he or she has a possible claim to the Fair Fund under this Distribution Plan.

1.22 “**Proof of Claim Form**” shall mean the form designed by the Distribution Agent in accordance with this Distribution Plan for the filing of proof of a Potentially Eligible

Claimant's claim. The form shall require, at a minimum, sufficient documentation reflecting trades in the Eligible Securities and the Tax Identification Number of the Potentially Eligible Claimant.

1.23 “**Pro Rata Share**” is a computation intended to measure Potentially Eligible Claimants' claims against one another. Should the sum of Eligible Loss Amounts of all Eligible Claimants exceed the Net Fair Fund, the Distribution Agent will distribute funds to the Eligible Claimants based upon a *pro rata* distribution formula. The Distribution Agent shall determine each Eligible Claimant's pro rata share of the Fair Fund based upon each Eligible Claimant's Eligible Loss Amount divided by the sum of Eligible Loss Amounts of all Eligible Claimants.

1.24 “**Recovery Period**” shall mean the period of time commencing on February 23, 2012 through the Close of Trading on February 24, 2012.

1.25 “**Summary Notice**” shall mean the Notice published in print or internet media pursuant to Section 2.11(h) below. Such notice (the text of which shall be approved by the staff of the Commission) shall include, at a minimum, a statement that the Fair Fund was established for the benefit of investors who traded in the Eligible Securities, the means of obtaining a Claim Packet, and the Claims Bar Date.

1.26 “**Tax Administrator**” shall mean Damasco & Associates, LLP, the firm appointed by the Court on January 19, 2017. As of October 1, 2016, Damasco & Associates, LLP, became part of Miller Kaplan Arase, LLP. The firm's engagement with the SEC and its ability to carry out its duties as appointed Tax Administrator for this case has not changed.

## **ARTICLE II**

### **ADMINISTRATION OF THE CLAIMS PROCEDURE**

**A. General Administrative Provisions**

2.1 The Distribution Agent shall oversee the administration of the claims, procedures, and distribution as provided in this Distribution Plan. The Distribution Agent shall review the claim of each Potentially Eligible Claimant and make a determination under the criteria established herein as to the eligibility of each Potentially Eligible Claimant to recover monies and the amount of money to be distributed from the Fair Fund to each Eligible Claimant in accordance with the provisions of this Distribution Plan.

2.2 All claims asserted by a Potentially Eligible Claimant must be verified on the basis of a sworn Proof of Claim Form, executed by the Potentially Eligible Claimant under penalty of perjury under the laws of the United States.

2.3 Any claim asserted by a Potentially Eligible Claimant shall provide adequate documentary evidence to substantiate the claim, including all documentary evidence which the Distribution Agent deems necessary or appropriate, including, but not limited to, available account statements and trade confirmations.

2.4 Claims with 100 or more transactions or on behalf of 20 or more different accounts must be submitted electronically and in the format specified by the Distribution Agent. The mandatory electronic filing requirements will be available on the website. Files that do not comply with the required electronic filing format may be rejected.

2.5 In determining the Eligible Loss Amount for an Eligible Claimant, the Distribution Agent will calculate an Eligible Loss Amount for each unique account held by an Eligible Claimant. Eligible Claimant's will not be able to aggregate their accounts, even if such accounts are controlled by the same Person or Entity, with the exception of the aggregation outlined in paragraph 2.5(a) below. This is to ensure that Eligible Loss Amounts can be correctly calculated

in accordance with the Plan of Allocation.

(a) If a Potentially Eligible Claimant purchased Eligible Securities and subsequently transferred such shares to a different account, such accounts may be aggregated for the purpose of correctly applying the calculations set forth in the Plan of Allocation regarding matching of purchases and sales.

(b) The Distribution Agent in its exclusive discretion may, for purposes of Section 2.5(a), aggregate accounts not designated for aggregation in a Proof of Claim Form, but the Distribution Agent shall not have any obligation to do so where such transfer information is not clearly provided by the Potentially Eligible Claimant.

2.6 The receipt of Eligible Securities by gift, inheritance, devise, or operation of law shall not be deemed to be a purchase of Eligible Securities during the Recovery Period, nor shall it be deemed an assignment of any claim relating to the purchase of such securities unless specifically provided in the instrument of gift or assignment. However, the recipient of Eligible Securities as a gift or as a distribution from an estate shall be eligible to file a Proof of Claim Form and participate in the distribution of the Fair Fund to the extent the particular donor or decedent as the actual purchaser of Eligible Securities would have been eligible based upon the circumstance of such purchase. Such a claim will be computed by using the date and price of the original purchase and not the date and price of transfer. However, the donee and the donor may not both make a claim with regard to the same share of an Eligible Security. If both the donor and the donee make such a claim, only the claim filed by the donee will be honored.

2.7 To the extent that an Eligible Claimant, his or her representative, heir, or assign requests a distribution check to be issued or reissued in a different name than the Eligible

Claimant (*e.g.*, as the result of a name change because of marriage or divorce, or as the result of death), the Distribution Agent shall honor such request upon receipt of documentation which the Distribution Agent in its sole discretion deems appropriate to substantiate the request.

2.8 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 are properly made by the custodian or fiduciary of the plan and not by the plan's participants. The Distribution Agent shall distribute any payments on such claims directly to the custodian or fiduciary of the retirement plan. The distribution shall be accompanied by a list of plan participants and the number of shares owned by each plan participant, if that information is known to the Distribution Agent or provided to the Distribution Agent. The custodian or fiduciary of the retirement plan shall distribute any payments received in a manner that is consistent with its fiduciary duties and the account or plan provisions. With respect to any retirement plan that has been closed prior to the Distribution Agent's identification of Potentially Eligible Claimants, the Distribution Agent shall endeavor to distribute funds directly to the beneficial account holders of such retirement plans if the information required for such a distribution is known to or provided to the Distribution Agent prior to the Claims Bar Date.

2.9 Custodians, trustees, or professionals investing on behalf of more than one Potentially Eligible Claimant in a pooled investment fund or entity 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.

**B. Identification of and Notice to Potentially Eligible Claimants**

2.10 The Distribution Agent shall, insofar as is practicable, use its best efforts to identify Potentially Eligible Claimants from a review of records obtained by the Commission staff, account information provided by the transfer agent for America West, registered broker-dealers, investment advisors, and any other commercially reasonable sources available to it.

2.11 Within (30) days following the entry by the Court of its order approving this Distribution Plan, the Distribution Agent shall:

- (a) Create a mailing and claims database based upon information in the trading records for Eligible Securities obtained by the Commission staff and records provided by the transfer agent and/or depository bank for America West, or otherwise obtained by the Distribution Agent;
- (b) Design and submit a Claim Packet, including a Distribution Plan Notice and a Claim Form, to the Commission staff for review and approval;
- (c) Mail by United States First Class Mail a Claim Packet to each Potentially Eligible Claimant known to the Distribution Agent;
- (d) Establish and maintain a Fair Fund website, located at [www.SECvJohnBabikianFairFund.com](http://www.SECvJohnBabikianFairFund.com) from which each Potentially Eligible Claimant may obtain a copy of the Distribution Plan Notice or the approved Distribution Plan, download a copy of the Claim Packet, request a Claim Packet by mail and obtain information regarding the claims process and eligibility requirements;
- (e) Request that the Commission staff establish a link to the website on the

Information for Harmed Investors page on the Commission's website, [www.sec.gov](http://www.sec.gov);

- (f) Establish a toll-free telephone number by which Potentially Eligible Claimants may call and speak to a live representative of the Distribution Agent from 6:00 a.m. to 6:00 p.m. Eastern Standard Time, or outside of such hours to hear pre-recorded information about the Fair Fund. The Distribution Agent will advise the Commission staff of the toll-free telephone number;
- (g) Establish and maintain a traditional mailing address and an email address, [info@SECVJohnBabikianFairFund.com](mailto:info@SECVJohnBabikianFairFund.com) to enable Potentially Eligible Claimants to correspond with the Distribution Agent; and
- (h) Publish a copy of a Summary Notice, approved by Commission staff, on a single occasion in the *Investor's Business Daily* and disseminate the Summary Notice via PRNewswire.

2.12 The Distribution Agent will mail notices 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 Eligible Securities in the Recovery Period. The Distribution Agent will request that these entities, to the extent that they were record holders for beneficial owners of the Eligible Securities:

- (a) Notify the respective beneficial owners within ten (10) days of receipt of the Distribution Agent's notice so that beneficial owners may timely file a claim. The burden will be on the nominee holders to ensure the Claim Packets and other relevant materials are properly disseminated to their customers; and/or
- (b) Provide the Distribution Agent with a list of last known names and

addresses for all beneficial owners for whom the record holders purchased Eligible Securities so that the Distribution Agent can communicate with them directly.

2.13 The Distribution Agent shall promptly provide a Claim Packet to any Potentially Eligible Claimant who so requests electronically, in writing, or by telephone, as set forth in the Distribution Plan Notice.

2.14 To avoid being barred from asserting a claim, on or before the Claims Bar Date, each Potentially Eligible Claimant must submit to the Distribution Agent a properly completed Proof of Claim Form reflecting such Potentially Eligible Claimant's claim, together with all required supporting documentation. The Distribution Agent shall have the authority, after consultation with the Commission staff, on a case-by-case basis, to extend the Claims Bar Date and waive technical claim deficiencies and approve claims. Where the Claims Bar Date is extended for one or more Potentially Eligible Claimants by the Distribution Agent, such extension shall constitute the Claims Bar Date for such Potentially Eligible Claimants. Unless otherwise determined by the Distribution Agent, in consultation with the Commission staff, and for good cause shown, any Potentially Eligible Claimant who does not file a properly completed and documented Proof of Claim Form, including the Potentially Eligible Claimant's Tax Identification Number, so that such completed form and documentation are postmarked by (or received by the Distribution Agent if not sent by U.S. Mail) on or before the Claims Bar Date (*see* Section 1.3 above), shall be barred from asserting a claim against the Fair Fund or the Distribution Agent. The burden shall be upon the Potentially Eligible Claimant to ensure that his or her Proof of Claim Form has been properly and timely received by the Distribution Agent.

**C. Notification of Claims Determination, Including Notice of Deficient Claims and Opportunity to Cure**

2.15 The Distribution Agent shall review each Proof of Claim Form received to determine the validity and amount of such Potentially Eligible Claimant's Eligible Loss Amount. Each Potentially Eligible Claimant shall have the burden of proof to establish the validity and amount of his or her claim, and that he or she qualifies as an Eligible Claimant; and the Distribution Agent shall have the right to request, and the Potentially Eligible Claimant shall have the burden of providing to the Distribution Agent, any additional information and/or documentation deemed relevant by the Distribution Agent. The Potentially Eligible Claimant also has the burden of notifying the Distribution Agent of his or her current address and other contact information, and confirming receipt of that information by the Distribution Agent.

2.16 The Distribution Agent shall provide to each Potentially Eligible Claimant whose claim is deficient, in whole or in part, a Claim Deficiency Notice setting forth the reason(s) why the claim is deficient, notify the Potentially Eligible Claimant of the opportunity to cure such deficiency, and provide instructions regarding what is required to cure such deficiency. The Claim Deficiency Notice shall be provided to such affected claimants within sixty (60) days after the Claims Bar Date.

2.17 Any Potentially Eligible Claimant who has received a Claim Deficiency Notice shall have twenty (20) days from the date of the Claim Deficiency Notice to cure any deficiencies identified in the Notice.

2.18 On or before the Claims Determination Date, the Distribution Agent shall send by United States First Class Mail or via email for electronic filings a Determination Notice to each Potentially Eligible Claimant who has filed a Proof of Claim Form with the Distribution Agent,

setting forth the Distribution Agent's conclusions concerning such claim. In the event the claim is denied, the Determination Notice will state the reason for such denial.

2.19 All determinations made by the Distribution Agent in accordance with this Distribution Plan shall be final and not subject to appeal.

**D. Payment of Approved Claims**

2.20 The Distribution Agent shall distribute the Fair Fund to Eligible Claimants only after all timely submitted Proofs of Claim have been processed and all Potentially Eligible Claimants whose claims have been rejected or disallowed, whether in whole or in part, have been notified and provided the opportunity to cure pursuant to the procedures set forth above and provided that the Distribution Payment to be made to an Eligible Claimant is equal to or exceeds the Minimum Distribution Amount.

**E. Final Payee List**

2.21 Within thirty (30) days following the Claims Determination Date, the Distribution Agent shall prepare a list of Eligible Claimants, the amount of the asserted claim of each Eligible Claimant, and the Eligible Loss Amount of each Eligible Claimant (*i.e.*, the Final Payee List). The Distribution Agent shall provide the Final Payee List to Commission staff with a reasonable assurances letter as to the completeness and accuracy of the Final Payee List and a Declaration describing in sufficient detail the procedures that the Distribution Agent used to develop the Final Payee List.

2.22 After receipt and acceptance of the Final Payee List, Commission staff will petition the Court to transfer the entire Fair Fund to the Distribution Agent for distribution to Eligible Claimants pursuant to this Distribution Plan. In recommending a distributable

amount to the Court, the Distribution Agent will retain a prudent reserve to pay any taxes, fees and expenses payable in connection with the Fair Fund, as well as a reasonable contingency for potential unforeseen issues. The Final Payee List shall, upon request, be made available to the Court under seal.

**F. Establishment of the Escrow Account**

2.23 Prior to disbursement of the Fair Fund, the Distribution Agent will establish accounts described as follows at a U.S. commercial bank (“Bank”), not unacceptable to Commission staff. The Distribution Agent will establish an escrow account (the “Escrow Account”) pursuant to an escrow agreement (the “Escrow Agreement”) to be provided by Commission staff. The Escrow Account will be established to receive the monies from the Commission and the Fair Fund will be held in the Escrow Account until the time of distribution. The Distribution Agent will also establish a separate deposit account (*e.g.*, controlled distribution account, managed distribution account, linked checking and investment account) (the “Distribution Account”) for the purpose of funding the Distribution Payments to be distributed to Eligible Claimants. The accounts shall be in the name of and bearing the Employer Identification Number of the Fair Fund as custodian for the distributees of this Distribution Plan. The name of each account will be in the following form: “John Babikian Fair Fund, as custodian for the benefit of investors allocated a distribution pursuant to the Distribution Plan in SEC v. John Babikian, Case NO. 1:14-cv-01740-PAC (S.D.N.Y.)”

2.24 During the term of the Escrow Agreement, if invested, the Escrow Account shall be invested and reinvested in short-term United States 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, tax obligations, and/or fees and expenses that may accrue, including investment or reinvestment in a bank account insured by the Federal Deposit Insurance Corporation (“FDIC”) up to the guaranteed FDIC limit, or 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.

2.25 In consultation with the staff of the Commission, the Distribution Agent will work with the Bank on an ongoing basis to determine an allocation of funds between the Escrow Account and Distribution Account that will preserve earnings, if possible, while providing maximum protection for the Fair Fund.

2.26 Upon receipt of the monies, the Distribution Agent shall provide sufficient evidence of receipt of the funds to Commission staff within ten (10) days of receipt of the monies.

2.27 Upon transfer from the Commission the assets of the Fair Fund will be held in the Escrow Account, separate from Bank assets, until the presentation of checks. All Fair Fund checks presented for payment or electronic transfers will be subject to “positive pay” controls before they are honored by the Bank. The “positive pay” system provides protection against fraud arising from counterfeit or altered checks. The “positive pay” system will require, at a minimum, confirmation by the Bank that all checks presented for payment match the identifiers and amounts on the payee list prior to honoring such checks. In each instance, funds will be transferred from the Escrow Account to the Distribution Account on the Bank’s confirmation that a presented check matches the relevant “positive pay” criteria.

2.28 The Distribution Agent shall provide copies of 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.

**G. Distribution**

2.29 The Fair Fund will be distributed to Eligible Claimants as provided under the terms of the Distribution Plan. An Eligible Claimant's Eligible Loss Amount, as determined in accordance with the Plan of Allocation contained in Exhibit A to this Distribution Plan, will be used to determine the amount of their Distribution Payment.

2.30 Should the total amount of the Eligible Loss Amount of all Eligible Claimants exceed the Net Fair Fund, the Distribution Agent will distribute funds to the Eligible Claimants based upon a *pro rata* distribution formula. This formula will be the fraction of the Eligible Loss Amount of each Eligible Claimant divided by the aggregate Eligible Loss Amounts of all Eligible Claimants. No Distribution Payment will be made to an otherwise Eligible Claimant unless the amount to be paid equals or exceeds \$10.00.

2.31 Following the Court's approval of the Commission's petition for the authority to distribute the Fair Fund to Eligible Claimants as provided for in this Distribution Plan, the Distribution Agent shall commence the distributions to all Eligible Claimants as promptly as possible following the transfer of funds from the Commission to the Escrow Account at the Bank.

2.32 All Fair Fund checks issued to Eligible Claimants by the Distribution Agent shall bear a stale date of ninety (90) days. Accordingly, checks that are not negotiated within this period shall be voided and the issuing financial institution shall be instructed to stop payment on those checks. Where an Eligible Claimant's check has not been negotiated within the ninety (90) day period and has been voided by the Distribution Agent, that Eligible Claimant's claim shall be extinguished upon the occurrence of the stale date. All such funds



will remain in the Fair Fund.

2.33 All Distribution Payments shall be preceded or accompanied by a communication, submitted to the staff of the Commission and the Tax Administrator for review and approval, that includes, as appropriate:

- (a) A statement characterizing the distribution;
- (b) A statement that the tax treatment of the distribution is the responsibility of each recipient and that the recipient should consult his or her tax advisor for advice regarding the tax treatment of the distribution;
- (c) A statement that checks will be void after ninety (90) days; and
- (d) The name of a person or entity to contact if the Eligible Claimant has any questions regarding the distribution.

2.34 The Fair Fund distribution checks, on their face, or the accompanying mailing shall clearly indicate that the money is being distributed from a Fair Fund established by the Commission to compensate investors for harm as a result of their trades in the Eligible Securities made contemporaneously with Defendant during the Recovery Period.

### **ARTICLE III**

#### **UNCASHED AND REISSUED CHECKS**

3.1 The Distribution Agent shall reissue checks to Eligible Claimants, upon the receipt of a valid, written request from the Eligible Claimant. Such reissued checks will be void at the later of ninety (90) days from the issuance of the original check or thirty (30) days from the reissuance, and in no event will a check be reissued after ninety (90) from the date of the original issuance.

3.2 The Distribution Agent shall use reasonable commercially available resources to

locate all Eligible Claimants whose checks are returned to the Distribution Agent as undeliverable by the U.S. Postal Service, and will reissue checks to Eligible Claimants who are located so long as the new address is received within ninety (90) days post-distribution. However, Eligible Claimants have the burden of providing the Distribution Agent with any changes to their mailing address.

3.3 In addition, the Distribution Agent will make reasonable efforts to contact Eligible Claimants to follow up on the status of uncashed Distribution Payments over \$100 (other than those returned as “undeliverable”) and take appropriate action to follow up on the status of uncashed checks at the request of Commission staff. The Distribution Agent may reissue such checks, subject to the time limits detailed herein.

#### **ARTICLE IV**

#### **TERMINATION OF FAIR FUND**

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

4.2 Upon final distribution of the funds, the Distribution Agent shall make arrangement for the final payment of taxes, and any remaining fees and expenses.

4.3 The Distribution Agent shall also provide to Commission staff for Court approval a final report and final account statement in a format to be provided by Commission staff, when the administration of the Fair Fund is completed. The final report shall include, among other things, a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Distribution Plan and shall be compiled in coordination with the Tax Administrator.

4.4 The Fair Fund shall be eligible for termination, and the Distribution Agent eligible for

discharge, after all of the following have occurred: (1) the final fund accounting has been submitted to and approved by the Court; (2) all taxes, fees and expenses have been paid; and (3) all remaining funds have been paid to the Commission for transfer to the United States Treasury.

4.5 The Distribution Agent will maintain all documents, including documents in any media, six (6) years after approval of the final fund accounting and thereafter will transfer the documents to the Commission, pursuant to Commission direction.

4.6 The Distribution Agent will shut down the toll-free number and website established specifically for the administration of the Fair Fund upon approval of the final fund accounting by the Court.

4.7 Following the distribution, all approved final fees and expenses shall be paid by the Fair Fund, all outstanding checks shall be voided, and any remaining funds shall be paid to the Commission for transfer to the United States Treasury upon receipt of written instructions by the Distribution Agent.

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

## **ARTICLE V**

### **RESPONSIBILITIES OF THE TAX ADMINISTRATOR**

5.1 The Fair Fund is a Qualified Settlement Fund within the meaning of the regulations issued under Section 468B(g) of the Internal Revenue Code of 1986, as amended. The Tax Administrator is the administrator of such Qualified Settlement Fund, for purposes of Treas. Reg. § 1.468B-2(k)(3)(I), and shall satisfy the tax related administrative requirements imposed by Treas. Reg. § 1.468B-2, including, but not limited to:

- (a) Obtaining a taxpayer identification number;

(b) Submitting requests for funds necessary for the timely payment of all applicable taxes, making timely payment of taxes for which the Tax Administrator has received funds, and filing of applicable returns; and

(c) Fulfilling any information, reporting, or withholding requirements required for distributions from the Fair Fund.

5.2 The Distribution Agent shall cooperate with the Tax Administrator in providing any information necessary to ensure income tax compliance.

5.3 All fees, costs and expenses of the Tax Administrator will be paid by the Fair Fund as part of the cost of the administration of the Fair Fund.

## **ARTICLE VI**

### **PAYMENT OF COSTS, FEES, AND TAXES, AND FILING OF REPORTS AND ACCOUNTINGS**

6.1 Pursuant to the Order to Establish a Fair Fund and Appoint a Tax Administrator and Distribution Agent, entered by the Court on January 19, 2017, the Distribution Agent's reasonable fees and expenses associated with distributing the Fair Fund shall be paid by the Fair Fund and all taxes and reasonable Tax Administrator fees shall be paid by the Fair Fund.

6.2 The Distribution Agent shall provide to Commission staff and file with the Court a progress report within forty-five (45) days of the Court approval of this Distribution Plan, and shall provide to Commission staff for Court approval and file additional reports within twenty (20) days after the end of every quarter thereafter.

6.3 Once the money has been transferred to the Escrow Account, a quarterly account

statement, in a format to be provided by the Commission staff, shall be submitted with the status report by the Distribution Agent.

6.4 The progress report and quarterly account statement will inform the Court and the Commission staff of the activities and status of the Fair Fund during the relevant reporting period, and once funds are transferred to the Distribution Agent. The progress report and quarterly account statement will specify, at a minimum:

- (a) The location of the account(s) comprising the Fair Fund; and
- (b) An interim accounting of all monies in the Fair Fund as of the most recent month-end, including the value of the account(s), all monies earned or received into the account(s), and funds distributed to Eligible Claimants under this Distribution Plan.

6.5 The Distribution Agent shall also provide to the Commission staff and file with the Court when its duties are completed a final report and final account statement on a form to be provided by the Commission staff for Court approval. The final report shall include, among other things, a final accounting of all monies received, earned, and distributed in connection with the administration of this Distribution Plan.

## **ARTICLE VII**

### **OTHER RIGHTS AND POWERS**

7.1 To carry out the purposes of this Distribution Plan, the Distribution Agent is authorized to make non-material changes to the Distribution Plan if agreed upon by the Distribution Agent and the staff of the Commission. Material changes to this Distribution Plan may only be implemented by the Distribution Agent after consultation with, and the

consent of, Commission staff and approval of the Court.

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

7.3 The Distribution Agent is entitled to rely on all outstanding rules of law and Court orders. The Distribution Agent shall not be liable to anyone, except the Commission on behalf of the Fair Fund, for a pecuniary loss to the Fair Fund, or any action taken or omitted by the Distribution Agent in connection with this Distribution Plan, and Potentially Eligible Claimants will have no claims against the Distribution Agent, its employees, agents, and attorneys in connection with this Distribution Plan and the administration of the Fair Fund, and will be deemed enjoined from prosecuting or asserting any such claims, except upon a finding by this Court of misfeasance, gross negligence, or reckless disregard of duty under this Distribution Plan.

7.4 The Distribution Agent is authorized to enter into agreements with financial institutions (“Institutions”) as may be appropriate or necessary in the administration of the Fair Fund, provided that such Institutions are not excluded pursuant to other provisions of this Distribution Plan. In connection with such agreements, the Institutions shall be deemed to be agents of the Distribution Agent under this Distribution Plan.

7.5 All proceedings with respect to the administration, processing, and determination of claims and the determination of all related controversies, shall be subject to the exclusive jurisdiction of this Court.

7.6 The Court reserves the right to amend this Distribution Plan from time to time, and retains jurisdiction over this matter for this purpose and for any and all other matters that may arise under or relate to this Distribution Plan.

7.7 Under no circumstances shall the Distribution Agent, its employees or its agents incur any liability to any Person for making a distribution in accordance with the Order of the Court approving the distribution and the schedules of Eligible Claimants, and their Eligible Loss Amounts as approved by the Court, and all Persons are enjoined from taking any action in contravention of this provision. Upon receipt and acceptance by an Eligible Claimant of a distribution from the Fair Fund, such Eligible Claimant shall be deemed to have released all claims that such Eligible Claimant may have against the Distribution Agent, its employees, agents, and attorneys in connection with this Distribution Plan and the administration of the Fair Fund, and shall be deemed enjoined from prosecuting or asserting any such claims.

7.8 The submission of the Proof of Claim Form and the receipt and acceptance of a distribution by an Eligible Claimant shall not affect an Eligible Claimant's rights and claims against any party (other than the Distribution Agent), including, but not limited to, Defendant and Defendant's past or present directors, officers, employees, advisers, and agents.

**EXHIBIT A**

**PLAN OF ALLOCATION**

1. To Receive a Distribution from the Fair Fund, a Potentially Eligible Claimant MUST:
  - a) Have purchased America West common stock during the Recovery Period;
  - b) Complete and sign a Proof of Claim Form and supply all required documentation; and
  - c) Submit the completed Proof of Claim Form and required documentation so that it is postmarked by (or received by the Distribution Agent if not sent by U.S. Mail) on or before the Claims Bar Date.
  
2. Each Proof of Claim Form Must Separately Set Forth:
  - a) The Potentially Eligible Claimant's position in America West common stock as of the close of trading on February 22, 2012, the day before the Recovery Period;
  - b) Each transaction in America West common stock, i.e., purchase or sale including price and number and shares, made during the Recovery Period; and
  - c) The Potentially Eligible Claimant's position in America West common stock as of the Close of Trading on February 24, 2012.

**CALCULATION OF ELIGIBLE LOSS AMOUNT PER SHARE**

3. Based on the formula set forth below, Eligible Loss Amount per share shall be calculated for each share of America West common stock purchased or acquired during the Recovery Period that is listed in the claim and for which adequate documentation is provided. In the calculations below, if an Eligible Loss Amount per share calculates to a negative number, that Eligible Loss Amount per share shall be \$0.00.
  
4. For shares of America West common stock not purchased in the Recovery Period, the Eligible Loss Amount per share is \$0.00.
  
5. For shares of America West common stock purchased during the Recovery Period and:
  - a) Sold before the Close of Trading on February 24, 2012, the Eligible Loss Amount per share is purchase price minus sale price.
  - b) Held as of the Close of Trading on February 24, 2012, the Eligible Loss Amount per share is purchase price minus \$0.28.

**GENERAL PROVISIONS**

6. Exercise of option contracts or the conversion of preferred stock into common stock will



be considered to be purchases or sales of common stock as of the date of the exercise or conversion.

7. To the extent a claimant had a gain from his, her, or its overall transactions in America West common stock during the Recovery Period, the Eligible Loss Amount will be zero. Shares held before the beginning of the Recovery Period and uncovered short sales are excluded from the calculation of overall gain or loss. For shares purchased during the Recovery Period and held through the end of the Recovery Period, a value of \$0.28 will be applied as the holding value for the purpose of calculating an overall loss or gain. If a claimant had a net market loss in his, her or its trading in American West common stock, the claimant's Eligible Loss Amount shall be limited to the claimant's net market loss.
8. Subject to the limitations set forth in the Distribution Plan, if a Potentially Eligible Claimant acquired America West common stock by way of gift, inheritance, devise or operation of law, such claim will be computed using the date and price of the original purchase and not the date and price of transfer, gift or inheritance. To the extent those shares were not originally purchased in the Recovery Period, the Eligible Loss Amount per share for that acquisition shall be \$0.00.
9. The Eligible Loss Amount per share on "short sales" is zero. In the event that a claimant has an opening short position in America West common stock, the earliest Recovery Period purchases shall be matched against such opening short position and not be entitled to a recovery and will not contribute to a market gain or loss until that short position is fully covered.

**USE OF "FIFO" METHODOLOGY FOR COMPUTATION OF RECOGNIZED LOSSES FOR ELIGIBLE CLAIMANTS WHO MADE MULTIPLE TRANSACTIONS IN ELIGIBLE SECURITIES DURING THE RECOVERY PERIOD**

10. For Eligible Claimants who held shares before the beginning of the Recovery Period and/or made multiple purchases, acquisitions or sales of the America West common stock during the Recovery Period, the sales of shares will be matched in chronological order first against the claimant's closing position the day before the beginning of the Recovery Period, until that day's closing position has been exhausted; then remaining sales after the beginning of the Recovery Period will be matched in chronological order against purchases or acquisitions made in the Recovery Period until all such shares have been exhausted. Purchases and sales of eligible securities shall be deemed to have occurred on the "contract" or "trade" date as opposed to the "settlement" or "payment" date.

**COMPUTATION OF THE ELIGIBLE LOSS AMOUNT FOR EACH ELIGIBLE CLAIMANT**

11. The Eligible Loss Amount per share will be calculated for each share of America West common stock that was purchased in the Recovery Period and listed in the Proof of Claim Form. The Eligible Loss Amount for each Eligible Claimant is calculated by summing the appropriate Eligible Loss Amount per share as calculated in paragraph 5 above across all shares purchased in the Recovery Period.

#### **DISTRIBUTION PAYMENT CALCULATIONS**

12. Should the sum of Eligible Loss Amounts of all Eligible Claimants exceed the Net Fair Fund, the Distribution Agent will distribute funds to the Eligible Claimants based upon a *pro rata* distribution formula. The Distribution Agent shall determine each Eligible Claimant's *pro rata* share of the Net Fair Fund based upon each Eligible Claimant's Eligible Loss Amount divided by the sum of Eligible Loss Amounts across all Eligible Claimants.
13. Each Eligible Claimant shall be allocated a Distribution Payment if eligible. In no event will an Eligible Claimant receive a Distribution Payment totaling more than his, her or its Eligible Loss Amount.
14. If an Eligible Claimant has a calculated Distribution Payment that is less than \$10.00 that Eligible Claimant will not be included in the calculation and the funds will be distributed to other Eligible Claimants whose Distribution Payments are greater than the Minimum Distribution Amount.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE		)	
COMMISSION,		)	
		)	Civil No. 1:14-cv-01740-
		)	PAC
	Plaintiff,	)	
	v.	)	
		)	
JOHN BABIKIAN,		)	
		)	
	Defendant.	)	
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**ORDER APPROVING A DISTRIBUTION PLAN FOR THE FAIR FUND**

The Court, having considered Plaintiff’s Motion for an Order Approving Proposed Distribution Plan for the Fair Fund (the “Motion”), the Memorandum of Law in Support, and the proposed Distribution Plan, and for good cause shown, the Court grants the Motion and approves in its entirety the Distribution Plan attached thereto. The Distribution Plan shall govern the administration and distribution of the Fair Fund previously established by Order entered January 19, 2017.

**SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
United States District Judge