

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

HOWARD BRETT BERGER,

Defendant,

MICHELLE BERGER,

Relief Defendant.

12-CV-4728
(LDW-ARL)

ECF CASE

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S SECOND NOTICE OF
MOTION, MOTION AND MEMORANDUM IN SUPPORT OF ORDER FOR
DISTRIBUTION OF FAIR FUND**

NOTICE

PLEASE TAKE NOTICE, that based upon the accompanying Affidavit of Peter S. Davis ("Affidavit") in Support of the Securities and Exchange Commission's ("Commission") Second Motion for Distribution of Fair Fund executed on November 3, 2016, the Proposed Order submitted herewith, and all prior proceedings had herein, and pursuant to the Plan of Distribution approved by this Court on August 27, 2015 ("Distribution Plan"), Plaintiff Securities and Exchange Commission will move this Court, at a date and time to be determined by the Court, before the Honorable Judge Leonard D. Wexler, at the United States Courthouse for the Eastern District of New York, 100 Federal Plaza, Central Islip, New York 11722, for an order:

1. Directing the Commission to issue a check to the Distribution Agent, Simon Consulting, LLP, from the Commission's account under the case name designation "*SEC v. Howard Brett Berger, et al.*" for all of the funds in the Commission's accounts representing the SEC v Berger Distribution Fund ("Fair Fund" or "Fund"), totaling approximately \$687,357.86; and
2. Directing the Distribution Agent to:
 - a. Deposit these funds pursuant to Paragraph 32 of the Distribution Plan; and
 - b. Distribute these funds to Eligible Recipients in accordance with the terms of the Distribution Plan.

MOTION

In accordance with the Distribution Plan approved by this Court on August 27, 2015, the Commission respectfully requests that the Court enter an Order:

1. Directing the Commission to issue a check to the Distribution Agent, Simon Consulting, LLP, from the Commission's account under the case name designation "*SEC v. Howard Brett Berger, et al.*" for all of the funds in the Commission's accounts representing the SEC v Berger Distribution Fund ("Fair Fund" or "Fund"), totaling approximately \$687,357.86; and
2. Directing the Distribution Agent to:
 - a. Deposit these funds pursuant to Paragraph 32 of the Distribution Plan; and
 - b. Distribute these funds to Eligible Investors pursuant to the final payee list in accordance with the terms of the Distribution Plan.

MEMORANDUM

Procedural Background

On September 21, 2012, the Commission filed a complaint against Defendant Howard Brett Berger (“Berger”) and Relief Defendant Michelle Berger (collectively, the “Bergers” or “Defendants”). The Complaint alleged that no later than July 2008 and continuing through approximately early March 2010, Berger engaged in a fraudulent trade allocation scheme commonly referred to as “cherry picking.” Berger utilized a direct-access trading platform to delay final allocation of the trades until the end of the trading day, frequently after the market closed, so he could determine whether the trades were profitable. Oftentimes, he would cherry pick profitable trades by allocating those trades to his wife’s brokerage account while allocating unprofitable trades to other accounts, including Professional Offshore Opportunity Fund Ltd. (“POOF”) and/or Professional Traders Fund, LLC (“PTF”), two hedge funds Berger managed.

On January 22, 2013, the Court entered a Final Judgment of Permanent Injunction and Other Relief against Berger and Final Judgment against Relief Defendant Michelle Berger (“Final Judgment”) pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Final Judgment held the Bergers jointly and severally liable for a total of \$5,399,456.16 in disgorgement. Berger was also held liable for an additional \$1,433,521.84 in disgorgement, \$22,776.00 in prejudgment interest, and a \$50,000.00 civil penalty. The Final Judgment found that the Commission may be motion propose a plan to distribute the money received from Defendants subject to the Court’s approval. Pursuant to the Final Judgment, on or about February 26, 2013, \$5,399,456.16 in disgorgement was paid to the Clerk of the Court and deposited in the CRIS account.

On April 9, 2014, the Court appointed Simon Consulting, LLC as Distribution Agent (“Distribution Agent”) to assist in overseeing the administration and distribution of the

Distribution Fund in coordination with Commission staff, pursuant to the terms of the Distribution Plan.

To identify potential injured investors, the Distribution Agent obtained and analyzed records provided by various parties, including (a) the Commission; (b) Folio Administrators Ltd. (“Folio”), the fund administrator for POOF; (c) Greg Goldberg (“Goldberg”) via Andrew Solomon, counsel for Professional Trades Management, LLC and Professional Offshore Traders Management LLC, both of which are managed by Greg Goldberg; and (d) Ken Marshall (“Marshall”) of Development Group, LLC who represents various POOF investor interests. The Distribution Agent identified thirty-six (36) injured POOF investors from an investor holdings report provided by Folio that are eligible to receive a distribution. The Distribution Agent reconciled Folio’s investor holdings report to the detailed investor records provided by Goldberg and Marshall and verified that the number of injured POOF investors, the names of the investors, and the number of shares held by each investor are correct. The Distribution Agent identified twenty (20) PTF investors that could potentially qualify for a distribution. The Distribution Agent has determined that out of the 20 PTF investors that could potentially qualify for a distribution, ten (10) PTF investors have received Excess Distributions and are therefore ineligible for distributions from the Distribution Fund. PTF investors who are not considered injured and are therefore ineligible to participate in a distribution either: (a) withdrew their funds prior to June 30, 2008; (b) received a liquidating distribution on June 2, 2008; or (c) received a liquidating distribution later in 2008.

The Distribution Agent and Commission staff believes that all injured investors in POOF and PTF have been identified and the amount each will receive will be accurately calculated without additional information from investors.

On August 19, 2015, the SEC filed a motion to approve a proposed distribution plan, together with a proposed plan of distribution (“Distribution Plan”). On August 27, 2015, the Court approved the Distribution Plan. A total of \$5,362,661.59 was successfully distributed to injured investors.

On September 19, 2016, the SEC filed a motion to disburse funds to pay the remaining fees and expenses of the Distribution Agent and Tax Administrator, and approve the final accounting, discharge the Distribution Agent, and terminate the Distribution Fund. A ruling on that motion to disburse is pending.

Pursuant to the judgment entered on January 15, 2013, defendant Howard Berger was held liable to pay an additional \$1,433,521.84 in disgorgement, \$22,776 in prejudgment interest, and a \$50,000 civil money penalty. According to terms proposed in a settlement letter dated September 27, 2016, which the SEC accepted, defendant Howard Berger and relief defendant Michelle Berger entered into a settlement with the SEC wherein the balance of the judgment was to be satisfied. The SEC recently received \$700,000.00 under the stipulation agreement and wants to distribute that money. After deducting the estimated Distribution Agent and Tax Administrator fees and expenses, the estimated funds available for distribution is \$687,357.86. The \$687,357.86 is currently with the SEC.

Disbursement of Fair Fund

Pursuant to the Distribution Plan, the Distribution Agent has prepared and submitted to the Commission staff a list of Eligible Recipients, the amount of the asserted claim of each Eligible Recipients, and the Approved Claim for each Eligible Recipients (the “Final Payee List”).¹ Each Eligible Recipient will receive a *pro rata* share of the SEC v Berger Distribution

¹ The Final Payee List shall, upon request, be made available to the Court under seal.

Fund available for distribution. The Final Payee List and the Affidavit has been reviewed by the undersigned Commission Counsel who has no objections.

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

Dated: November 3, 2016

Respectfully Submitted,

/s/ Michael Shueyee Lim
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