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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 SECURITIES AND EXCHANGE COMMISSION,
15 Plaintiff,
16 v.
17 JAMES MICHAEL MURRAY,
18 Defendant,
19 and
20 EVENT TRADING GP, LLC,
21 Relief Defendant.

Case No. CV-12-1288-EMC

SECURITIES AND EXCHANGE
COMMISSION'S MOTION FOR ORDER
APPROVING DISTRIBUTION PLAN AND
DISBURSEMENT OF FUNDS AND
APPOINTING DISTRIBUTION AGENT

Date: August 16, 2018
Time: 1:30 p.m.
Honorable Edward M. Chen
Courtroom 5, 17th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 16, 2018 at 1:30 p.m. or as soon thereafter as the matter may be heard, Plaintiff United States Securities and Exchange Commission (“SEC” or the “Commission”) will, and hereby does, move this Court, the Honorable Edward M. Chen presiding, for an Order approving the Distribution Plan and disbursement of funds and appointing a Distribution Agent.

By this motion, the Commission respectfully requests that the Court enter an Order:

(i) approving the Distribution Plan; (ii) approving the disbursement of monies held in the Distribution Fund; and (iii) appointing Keshia W. Ellis, a Commission attorney, as the Distribution Agent. This motion is supported by the accompanying Memorandum of Law, the Declaration of Keshia W. Ellis and the exhibits thereto, the Proposed Order, all other papers and proceedings herein, and upon such oral or other written evidence as may be presented at or before the hearing on this motion.

MEMORANDUM OF LAW**I. BACKGROUND**

On March 15, 2012, the Commission initiated this action by filing a complaint against defendant James Michael Murray (“Murray” or “Defendant”) for making misrepresentations to investors in his Market Neutral Trading funds in violation of Section 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) and Rule 206(4)-8 thereunder. (Dkt. No. 1.) Previously, in February 2012, federal criminal charges for wire fraud were filed against Murray; these charges were later supplemented in a Fourth Superseding Indictment related to aspects of the scheme. (Crim Dkt. Nos. 1, 203.) In October 2016, Murray was convicted on all counts. (Crim Dkt. No. 348.) In November 2016, this Court granted in part the SEC’s motion for summary judgment against Defendant arising out of Defendant’s criminal conviction for investment fraud, among other crimes, for which he was sentenced to 15 years in prison. (Dkt. 141.) The criminal case established that Defendant fraudulently raised over \$2.5 million from various investors in the fund

1 between 2009 and 2012.¹ The Commission has reviewed investor records regarding the amount
2 invested by each eligible investor in MNT during the relevant period, which is slightly shorter
3 than the time period in the criminal case, and the losses incurred by each investor. Based on these
4 records, it has calculated that total losses to the MNT investors during the relevant period
5 amounted to \$2,457,964 (Dkt. No. 042).

6 While awaiting trial on the criminal charges, Defendant also perpetrated another fraud by
7 using his investors' pledged assets to generate additional profits through a successful short sale trade
8 of Netflix securities at Oppenheimer & Co. ("Oppenheimer"). The Defendant then diverted the
9 proceeds of the Oppenheimer trade away from the fund, laundering a portion of the proceeds through
10 his attorney and transferring another portion of the proceeds to an account in the name of Event
11 Trading GP, LLC, another entity Murray controlled, at a brokerage firm called Interactive Brokers.

12 On June 22, 2017, the SEC filed a Motion for Disgorgement Against Relief Defendant Event
13 Trading GP, LLC seeking an order against Relief Defendant to disgorge ill-gotten gains that it
14 received through Defendant's fraudulent transfer and for which Relief Defendant had no legitimate
15 claim (Dkt. No. 166). Those ill-gotten gains had been previously frozen by the Court in January 2013
16 at the Commission's request, in an account at Interactive Brokers LLC ("Interactive Brokers") in the
17 name of Event Trading GP ("Event Trading Account").

18 On July 27, 2017, the Court granted the SEC's Motion for Disgorgement Against Relief
19 Defendant Event Trading GP, LLC (Dkt. No. 181). The Court found that assets in the amount of
20 \$363,000 in the Event Trading Account were "an ill gotten product of a long chain of Defendant's
21 fraudulent conduct." The Court also found that Relief Defendant did not have a legitimate claim to
22 the \$363,000 because the Event Trading Account was merely a vehicle to enable Murray to continue
23 his fraud.

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26 ¹ See Anderson Decl. filed in Support of the Commission's Rule 52 motion at Ex. 62 (Villanueva) at
27 1261, 1273-76 & *id.* Ex. 30 (Crim Ex. 392) (reflecting amounts obtained from various MNT investors
28 in amount of \$2,358,000); *id.* Ex. 61 (Seibt) at 183-84, 192-93, 240-41 & *id.* Ex. 19, *id.* Ex. 20 at 5
(reflecting amounts obtained from Seibt in amount of \$161,114.47); *compare id.* Ex. 17 (ordering
restitution for same victims in MNT fund). (Dkt. No. 167.)

1 In a separate order, dated July 28, 2017, the Court ordered that the Relief Defendant pay all
2 monies held in the Event Trading Account to the Clerk of the Court, together with a cover letter
3 identifying Relief Defendant in this action, setting forth the title and civil action number of this action
4 and name of this Court; and specifying that payment is made pursuant to the order. The Court also
5 ordered that the Clerk of the Court accept from Interactive Brokers a check made payable to “Clerk,
6 United States District Court,” in the amount of the total current balance of the Event Trading Account
7 and directed that the funds be deposited into an interest bearing account with the Court Registry
8 Investment System (“CRIS”) or any other type of interest bearing account utilized by the Court.
9 Additionally, the Court ordered Interactive Brokers to release all funds currently frozen in the Event
10 Trading Account to allow Relief Defendant to comply with the order.

11 On September 18, 2017, Interactive Brokers paid \$353,826.18 to the Clerk of the Court, as
12 ordered. The funds constitute the Distribution Fund and are currently held in a Treasury Registry
13 account used by the Court under Case/Party: D-CAN-3-12-CV-001288-001. On December 5, 2017,
14 Interactive Brokers transferred an additional \$7,476.47 to the Clerk of the Court (Dkt. 200). The
15 funds were added to the Distribution Fund, which increased the total amount of the fund to
16 \$361,302.65. Finally, on June 19, 2018, Interactive Brokers transferred an additional \$37.11 to
17 Interactive Brokers, representing additional funds owed on the Event Trading account. This payment
18 increased the total amount of the fund to \$361,339.76.

19 On November 9, 2017, the Court issued an Order approving the Commission’s
20 Administrative Motion to appoint a tax administrator to handle the tax reporting obligations of the
21 Distribution Fund and authorized a payment amount up to a limit of \$7,000.

22 **II. ARGUMENT**

23 **A. The Standard for Approval of Distribution Plans**

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

1 1165, 1182 (2d Cir. 1989). The court’s review of a proposed distribution plan focuses on whether the
2 plan is fair and reasonable. *See Official Committee of Unsecured Creditors of WorldCom, Inc. v.*
3 *SEC*, 467 F.3d 73, 82 (2d Cir. 2006), citing *Wang*, 944 F.2d at 85, “[u]nless the consent decree
4 specifically provides otherwise[,] once the district court satisfies itself that the distribution of
5 proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end.”

6 For the reasons articulated below, the Commission submits that the Distribution Plan,
7 attached to the Declaration of Keshia W. Ellis as Exhibit A, constitutes a fair and reasonable
8 allocation of the funds available for distribution and should be approved.

9 **B. The Court Should Approve the Commission’s Distribution Plan Because It**
10 **Provides a Fair and Reasonable Allocation of the Distribution Fund**

11 The Commission seeks approval of its Distribution Plan (Exhibit A to the Ellis Declaration) to
12 distribute the Distribution Fund. The Distribution Plan provides for a distribution to investors (the
13 “Eligible Recipients”) who were harmed by the Defendant’s false and misleading statements in
14 connection with the sale of MNT shares.

15 The Commission’s principal goal in fashioning a distribution plan for the Distribution Fund
16 was to identify a methodology that would allocate the available funds fairly and reasonably, in a
17 manner proportional to the injury that investors in Market Neutral Trading suffered as a result of the
18 Defendants’ actions. Here, the total losses suffered by the investors identified by the SEC during its
19 investigation exceed \$2.45 million and the amount of money recovered from the Event Trading
20 account is only \$361,302.65. The amount of money lost by the harmed investors is significantly
21 more than the amount of funds that are available for distribution.

22 In this case, the SEC proposes distributing the available funds to the harmed investors as
23 fairly and as cost-effectively as possible. The Commission’s counsel has identified Eligible
24 Recipients who are eligible to receive a distribution payment. These Eligible Recipients had
25 investment losses ranging from \$99,000 to \$1,050,000. Given the amount of available funds, a *pro*
26 *rata* distribution to the Eligible Recipients would yield payments from approximately \$14,484.28 to
27 \$108,671.19. The Plan proposes to compensate Eligible Recipients for their investment in Market
28 Neutral Trading less any funds received from other sources, which will limit an Eligible Recipient’s

1 recovery to his/her/its net losses. Consistent with Commission policy, no Eligible Recipient will
 2 receive a windfall, i.e. more than 100% of his/her/its net losses. The Commission's Distribution Plan
 3 thereby allocates the available funds fairly and reasonably, in a manner proportional to the economic
 4 harm sustained.

5 Accordingly, and subject to the Court's approval, the Distribution Plan contemplates that the
 6 Distribution Fund, less court fees and a \$5,900.00 reserve for taxes and fees and expenses of the Tax
 7 Administrator will be distributed to Eligible Recipients on a *pro rata* basis for the harm created by
 8 the Defendants' conduct.

9 C. The Court Should Appoint a Distribution Agent

10 The Commission requests an Order appointing Keshia W. Ellis, a Commission attorney in the
 11 Division of Enforcement's Office of Distributions, as Distribution Agent to administer and implement
 12 the Distribution Plan, as described in Exhibit A to the Ellis Declaration. As a Commission employee,
 13 the Distribution Agent shall receive no compensation, other than her regular salary as a Commission
 14 employee, for her services in administering the Distribution Fund. As the harmed investors are limited
 15 in number and known, the appointment of a Commission employee will expedite the distribution
 16 process and avoid the costs and expenses that would ordinarily be incurred by appointing a third-party
 17 administrator; thus maximizing the return to certain investors.

18 III. CONCLUSION

19 For the reasons stated above and as set forth in the referenced exhibits to the Declaration of
 20 Keshia W. Ellis and Proposed Order,, the Commission respectfully requests that the Court: (a)
 21 approve the Commission's Distribution Plan and the disbursement of funds thereunder; and (b)
 22 appoint Commission attorney, Keshia W. Ellis, as Distribution Agent.

23
 24 DATED: June 27, 2018

Respectfully submitted,

25
 26 /s/ Keshia W. Ellis
 KESHIA W. ELLIS
 Attorney for Plaintiff
 SECURITIES AND EXCHANGE
 COMMISSION

CERTIFICATE OF SERVICE

I, Janet L. Johnston, am a citizen of the United States, over 18 years of age and not a party to this action. On June 27, 2018, I served the following:

- 1) SECURITIES AND EXCHANGE COMMISSION’S MOTION FOR ORDER APPROVING DISTRIBUTION PLAN AND DISBURSEMENT OF FUNDS AND APPOINTING DISTRIBUTION AGENT;
- 2) [PROPOSED] ORDER GRANTING MOTION BY PLAINTIFF SECURITIES AND EXCHANGE COMMISSION, APPROVING DISTRIBUTION PLAN AND DISBURSEMENT OF FUNDS AND APPOINTING DISTRIBUTION AGENT; and
- 3) DECLARATION OF KESHIA W. ELLIS IN SUPPORT OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MOTION FOR ORDER APPROVING DISTRIBUTION PLAN AND DISBURSEMENT OF FUNDS AND APPOINTING DISTRIBUTION AGENT, with exhibits.

via U.S. Mail to the following:

James Michael Murray 17020-111
MCC San Diego
Metropolitan Correctional Center
808 Union Street
San Diego, CA 92101

I declare under penalty of perjury that the statements made above are true and correct.

Executed in San Francisco, California on June 27, 2018.

Janet L. Johnston
Janet L. Johnston