

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

DIKE BOONE NERREN,

Defendant.

No. 4:20-CV-965

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION
FOR AN ORDER APPROVING A DISTRIBUTION PLAN FOR THE DIKE BOONE
NERREN FAIR FUND AND MEMORANDUM IN SUPPORT THEREOF**

Plaintiff, United States Securities and Exchange Commission (the "SEC"), moves the Court for an order approving a plan to distribute \$37,500 to compensate injured Dike Boone Nerren ("Nerren" or "Defendant") investors for their losses (the "Distribution Plan"). A proposed order granting this Motion, and appending the Distribution Plan, is filed herewith. The SEC respectfully requests that this Court enter an order approving a Distribution Plan for the Nerren Fair Fund and such other relief that the court deems just and proper.

I. BACKGROUND

The SEC filed its Complaint on December 21, 2020, in which it alleged that the Defendant and others raised money from November 2015 through May 2017 to fund a real estate project in McKinney, Texas (the "McKinney Project") by selling membership units in Sapient Fund II, LLC and limited partnership units in Vintage Place Fund, LP using private placement memoranda ("PPMs"). The PPMs stated that investor funds would be used solely in connection with the acquisition and development of the McKinley Project, and through two securities offerings the Defendant and others raised \$1.4 million for the McKinney Project. The Complaint alleges that

between January 5, 2016 and May 9, 2016, the Defendant diverted a total of \$450,000 of investor funds to another unrelated project. It alleges that in February 2017, the developer for the McKinney Project confronted Nerren about the missing \$450,000, and that in March 2017, the Nerren began to return the diverted funds to the McKinney Project accounts, but that the repayment process took more than two years. Finally, the Complaint alleges that the McKinney Project experienced financial difficulties caused by the missing funds, and that in May 2020, the lender for the McKinney Project instituted foreclosure proceedings resulting in a total loss to the investors. The McKinney Project developer has stated that the McKinney Project would have been successfully completed but for Nerren's diversion of \$450,000 from the project in 2016. Final judgment was entered against Nerren on March 25, 2021, and he was ordered to pay a penalty of \$37,500.

On February 14, 2022, the Court granted the SEC's motion to establish a Fair Fund, to appoint Miller Kaplan Arase LLP as the Tax Administrator, and to appoint Allison Moon, an SEC employee, as the Distribution Agent of the Fair Fund (the "Distribution Agent"). Dkt No. 7. The Defendant has paid in full. The Fair Fund has been deposited in an SEC designated account at the United States Department of the Treasury's Bureau of Fiscal Service for investment.

II. ARGUMENT

A. The Applicable Standard

Nearly every plan to distribute funds obtained in an SEC 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 SEC significant discretion to design and set the parameters of a distribution plan.

E.g., SEC v. Great White Marine & Rec., Inc., 428 F.3d 553, 556 (5th Cir. 2005); *SEC v. Forex Asset Management LLC*, 242 F.3d 325, 331 (5th Cir. 2001); *SEC v. Fischbach Corp.*, 133 F.3d 170, 175

(2d Cir. 1997); *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 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) ("unless 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.

For the reasons articulated below, the SEC submits that the Distribution Plan for the Nerren Fair Fund constitutes a fair and reasonable allocation of the funds available for distribution and should be approved.

B. The SEC's Distribution Plan Provides A Fair and Reasonable Allocation of the Nerren Fair Fund

The Distribution Plan seeks to compensate investors who were harmed by the Defendant's conduct alleged in the Complaint in connection with the Defendant's misappropriation of investor funds, which were invested to acquire and develop a single family subdivision for the McKinney Project, and the ultimate foreclosure of the McKinney Project caused by the Defendant's misappropriation of the funds, resulting in a total loss for all investors. As calculated using the methodology detailed in the Plan of Allocation (attached as Exhibit A to the Distribution Plan), investors will be compensated for their losses in investor membership units in Sapient Fund II, LLC and limited partnership units in Vintage Place Fund, LP (the "Securities") that were purchased between November 2015 and May 2017 (the "Relevant Period"). Since the net available Fair Fund is less than the sum of the investors' losses, the distribution amounts will equal each eligible investor's *pro rata* share of the Fair Fund.

i. Calculation Of Harm

The Distribution Agent will calculate each investor's loss (the "Recognized Loss") as the sum of their purchase amounts in the Securities during the Relevant Period. If the Recognized Loss calculates to a gain, then the Recognized Loss will be \$0.00.

ii. Compensation from Other Sources

To avoid payment of a windfall, the Recognized Loss will be reduced by the amount of any compensation for the loss that resulted from the conduct alleged in the Complaint that was received from another source (e.g., class action settlement), to the extent known by the Distribution Agent. The SEC routinely includes provisions reducing the Recognized Loss or Distribution Payment by the amount of other sources of compensation received by the investor in distribution plans in both federal court cases and SEC administrative proceedings, in which there may be other sources of compensation. This provision ensures that the Fair Fund will not be used to compensate any injured investor beyond 100% of their harm.

iii. Disposition of Remaining Funds

Upon completion of all distributions and payment of all administrative costs, the Distribution Agent will prepare a final accounting on an SEC standardized form. The final accounting report will be accompanied by a recommendation as to the disposition of any residual funds. In accordance with the Distribution Plan, upon completion of the final accounting, the SEC staff will petition this Court seeking approval of the final accounting and recommending disposition of the Residual consistent with *Liu v. SEC*, 140 S. Ct. 1936 (2020) and Section 21(d)(7) of the Exchange Act, 15 U.S.C. § 78u(d)(7).¹ If distribution of

¹ Section 21(d)(7) was added to the Exchange Act by Section 6501(a) of the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, enacted January 1, 2021. The relevant provisions of the NDAA apply "to any action or proceeding that is pending on, or commenced on or after, the date of" the NDAA's enactment. NDAA, Section 6501(b).

the Residual to investors is infeasible, the SEC may recommend the transfer of the Residual to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.²

III. CONCLUSION

For all of the foregoing reasons, the SEC respectfully requests that the Court grant its *Motion for an Order Approving a Distribution Plan for the Dike Boone Nerren Fare Fund* and grant other relief as it deems necessary and proper.

Signed this 28th day of October, 2022.

Respectfully Submitted,



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² Section 21F(g)(3) of the Exchange Act, 15 U.S.C. §78u-6(g)(3), provides, in relevant part, that any monetary sanction of \$200 million or less collected by the SEC in any judicial action brought by the SEC under the securities laws that is not added to a disgorgement fund or Fair Fund or otherwise distributed to victims, plus investment income, shall be deposited or credited into the SEC Investor Protection Fund.