

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NICHOLAS SAVVA

Defendant.

Civil No. 16-cv-05432-AMD

Hon. Ann M. Donnelly

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF MOTION,
MOTION AND MEMORANDUM IN SUPPORT OF ORDER TO ESTABLISH FAIR
FUND, APPOINT PLAN ADMINISTRATOR, AND APPROVE DISTRIBUTION PLAN**

NOTICE

PLEASE TAKE NOTICE, that based upon the accompanying Motion, 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 Ann M. Donnelly, at the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, for an order to establish a fair fund, appoint a plan administrator, and approve a distribution plan.

Motion

Plaintiff, Securities and Exchange Commission ("SEC" or "Commission"), respectfully requests that the Court enter an Order: 1) Establishing a Fair Fund; 2) Appointing Michael S. Lim, Commission employee, as Plan Administrator; and 3) Approving the Distribution Plan.

Memorandum

Background

On September 29, 2016, the Commission filed a complaint against Nicholas Savva (“Defendant”). The complaint alleged that, from May 2015 through February 2016, Defendant, a former registered representative who was statutorily disqualified by FINRA from association with its member firms, made false and misleading statements while soliciting approximately \$1.4 million from 12 investors in Defendant's hedge fund, Five Star. While soliciting investments, Defendant lied to his investors about: (i) the management of Five Star; (ii) Defendant's true industry experience; and (iii) Five Star's historic investment performance. While operating Five Star, Defendant misappropriated \$38,719.98 from Five Star for purely personal expenses, including, among other things, lodging during an international vacation, home improvement expenditures, and cash withdrawals. During the period when Defendant was acting as a corrupt investment adviser and stealing money from Five Star, Defendant also collected \$19,600 in fees for managing Five Star's investments.

On October 5, 2016, the Court entered Final Judgment against Defendant and ordered him to pay a total of \$218,708.78 in disgorgement, prejudgment interest, and penalties for violating §17(a) of the Securities Act of 1933, §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and §§ 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder.

The Commission was ordered to hold all funds, together with interest and income earned thereon (collectively, the “Fund”), pending further order of the Court. Defendant has paid a total of \$218,708.78 into the Fund for distribution to harmed investors.

On June 13, 2017, the Court appointed Miller Kaplan Arase LLP as the Tax Administrator to fulfill the tax obligations of the Fund.

The Court Should Establish a Fair Fund

The Commission brought this action under the securities laws and Defendant agreed to pay disgorgement, prejudgment interest, and a penalty of \$218,708.78 under a compromise settlement offer with the Commission on September 29, 2016. The Defendant paid a total of \$218,708.78 into the Fund for distribution to harmed investors to the Commission. The Final Judgment against Defendant states that the Commission may propose a plan to distribute the funds collected from Defendant. The Commission now moves the Court to designate the funds Defendant paid as a Fair Fund.

THE COURT SHOULD APPOINT A PLAN ADMINISTRATOR

The Court should appoint Michael S. Lim, Commission employee, as Plan Administrator to implement the proposed Distribution Plan, as described below. As the harmed investors are few in number and are known, the appointment of a Commission employee will avoid the costs and expenses that would ordinarily be incurred by appointing a third party administrator.

THE COURT SHOULD APPROVE A DISTRIBUTION PLAN

The Commission seeks approval of its proposed plan to distribute the funds already collected from Defendant (the “Distribution Plan”). The Distribution Plan provides for a distribution to certain individuals (the “Eligible Recipients”) who Defendant harmed by making false and misleading statements while soliciting approximately \$1.4 million from 12 investors in Defendant's hedge fund, Five Star, misappropriated \$38,719.98 from Five Star for purely personal expenses, and collected \$19,600 in fees for managing Five Star's investments. The Distribution Plan contemplates that a total of approximately \$218,708.78, less any taxes and fees of the Tax Administrator, will be distributed to Eligible Recipients on a *pro rata* basis for the harm Defendant caused. Commission staff plans to distribute the \$218,708.78 already collected

from Defendant, less any taxes and fees of the Tax Administrator, on a *pro rata* basis to Eligible Recipients, subject to the Court's approval of this Plan.

THE PROPOSED PLAN OF DISTRIBUTION

The Commission proposes the following methodology to determine the distribution of the corpus of the Fund:

(Step 1) Determine each Eligible Recipient's loss ("Eligible Recipient's Loss") and calculate total losses suffered by all harmed Eligible Recipients by adding up each Eligible Recipient's loss ("Total Losses");

(Step 2) Divide each Eligible Recipient's Loss by the Total Losses. This fractional result represents the Eligible Recipient's proportion of losses to the pool of total losses ("Eligible Recipient's Proportional Loss"); and

(Step 3) Multiply each Eligible Recipient's Proportional Loss times the total amount of money in the Fund less any reserve for taxes and fees of the Tax Administrator and any other administrative expenses ("Net Fair Fund"). The resulting figure represents the amount of the Net Fair Fund to be distributed to that Eligible Recipient ("Eligible Recipient's *Pro Rata* Share").

(Step 4) Any undistributed money from investors who are unable to be located or who have failed to provide adequate documentation including but not limited to form W-9 or for W-8 will be redistributed to the remaining investors. No investors will obtain a windfall from the distribution.

ARGUMENT

Generally, courts have broad discretion to approve plans to distribute funds collected in SEC enforcement actions. *SEC v. Wang*, 944 F.2d 80, 84 (2d Cir. 1991). In evaluating a

proposed distribution plan, a court should “decide whether, in the aggregate, the plan is equitable and reasonable.” *Id.* “Unless the consent decree specifically provides otherwise, once the District Court satisfies itself that the distribution of proceeds in a proposed Securities and Exchange Commission disgorgement plan is fair and reasonable, its review is at an end.” *Id.* at 85.

As the amount of money lost by Eligible Recipients is significantly more than the amount of funds that were collected for disbursement, the payments to investors will be calculated on a *pro rata* basis as described in the proposed Distribution Plan. The Commission believes that the proposed Distribution Plan for the Fund should be approved as equitable and reasonable.

CONCLUSION

For the reasons stated above, the Commission hereby moves the Court to:

- (1) establish a Fair Fund;
- (2) appoint Commission Employee Michael S. Lim as Plan Administrator; and
- (3) approve the Commission’s plan to distribute funds collected from Defendant to harmed investors.

Dated: July 18, 2017

Respectfully Submitted,

/s/ Michael Shueyee Lim
Michael Shueyee Lim
Attorney for Plaintiff
Securities and Exchange Commission

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CERTIFICATE OF SERVICE

I hereby certify that on **July 18, 2017**, I caused the foregoing document to be electronically filed with the clerk of the court for the U.S. District Court, Eastern 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.

/s/ Michael S. Lim
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