

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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| SECURITIES AND EXCHANGE | |) |
| COMMISSION | |) |
| | |) |
| Plaintiff, | |) |
| | |) |
| v. | |) |
| | Case No. 3:17-cv-2064-JAM |) |
| | |) |
| WESTPORT CAPITAL MARKETS, | |) |
| LLC AND CHRISTOPHER E. | |) |
| MCCLURE, | |) |
| | |) |
| Defendants. | |) |
| <hr/> | |) |

MOTION FOR AN ORDER TO SHOW CAUSE

Plaintiff, the Securities and Exchange Commission (the “SEC”), respectfully submits this Motion for an Order to Show Cause why the Court should not approve the proposed distribution plan attached as Exhibit 1, which provides for the distribution of collections in this matter to compensate clients of defendants Christopher E. McClure and Westport Capital Markets, LLC harmed by the conduct set forth in the Complaint (the “Plan”). A proposed order to show cause is attached as Exhibit 2.

Upon the completion of the steps set forth in the Order to Show Cause, the SEC will file a notice so informing the Court and responding to any objections, and provide a proposed Order approving the Plan or an amended plan, as appropriate.

WHEREFORE, the SEC respectfully requests that the Court enter an Order to Show Cause substantially in the form attached as Exhibit 2 to this Motion.

Respectfully submitted,

/s/ Catherine E. Pappas
Catherine E. Pappas (D. Conn. PHV206717)
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
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Dated: December 8, 2022

Attachments: Exhibit 1: Proposed Plan
Exhibit 2: Proposed Order to Show Cause

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and accordingly, the document will be sent electronically to all participants registered to receive electronic notice in this case.

/s/ Catherine E. Pappas
Catherine E. Pappas

Exhibit 1

(Proposed Plan)

II. BACKGROUND

4. On December 11, 2017, the SEC filed a Complaint against Westport and McClure. The SEC alleged that Westport and McClure were investment advisers who had a fiduciary duty to their investment advisory clients and were obligated to manage their clients' investments in the clients' best interests. (ECF No. 1) The SEC alleged that, instead, McClure, through his firm Westport, defrauded his clients over multiple years by regularly misusing client accounts to enrich himself. (ECF Nos. 1, 47-1)

5. In particular, the SEC alleged that, beginning in 2011 and lasting into mid-2015, Westport, acting through McClure, repeatedly bought newly issued securities from underwriters at discounted prices and then sold these securities to Westport's clients at higher prices, pocketing the difference. (ECF No. 47-1) The SEC further alleged that Westport and McClure received ongoing 12b-1 Fees from client mutual fund holdings, which reduced client mutual fund holdings and were paid to Westport because of its role as broker-dealer.

6. The SEC further alleged that, by their failure to disclose their financial interest in securities they recommended and the receipt of 12b-1 Fees to Westport's clients, the Defendants violated Sections 206(1) and (2) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. §§ 80b-6(1) and (2); their failure to obtain consent from their clients for Westport to act as principal in connection with certain transactions directly and indirectly violated Section 206(3) of the Advisers Act, 15 U.S.C. § 80b-6(3); and their false claim that Westport did not engage in principal transactions and failure to disclose conflicts relating to 12b-1 Fees violated Section 207 of the Advisers Act, 15 U.S.C. § 80b-7. (ECF Nos. 1, 47-1)

7. On July 6, 2021, the Court entered final judgments against the Defendants (the "Final Judgments," finding them jointly and severally liable for disgorgement and prejudgment interest of \$820,761.00, and ordering Westport and McClure to pay civil penalties of \$500,000 and \$200,000, respectively. (ECF Nos. 186-1, 186-2) The Final Judgments provide that the SEC may propose a plan to distribute collected funds subject to the Court's approval. *Id.*

8. The SEC currently holds approximately \$190,000, comprised of collections from McClure pursuant to the Final Judgments plus accrued interest and earnings (the "Distribution Fund"). Both past and future collections shall be attributed first to disgorgement until paid in full, after which it will be applied to civil penalty, prejudgment interest, and then post-judgment interest, in that order. The Distribution Fund has been deposited at the United States Department of the Treasury (the "Treasury") and any interest accrued will be added to, and become a part of, the Distribution Fund.

III. DEFINITIONS

As used in this Plan, the following definitions will apply:

9. **"12-b-1 Relevant Period"** is January 1, 2012 through September 14, 2017, inclusive.
10. **"Administrative Costs"** shall mean any administrative costs and expenses,

including without limitation tax obligations, the fees and expenses of the Tax Administrator, the fees and expenses of the Third-Party, and investment and banking costs.

11. **“Distribution Fund”** means the fund created for the benefit of investors harmed by the Defendants’ violations alleged in the Complaint. Any additional funds collected from the Defendants pursuant to the Final Judgments, received from other sources pursuant to Court order, SEC order, or otherwise, will be added to the Distribution Fund.

12. **“Distribution Payment”** means a payment from the Distribution Fund to a Payee in accordance with the terms of this Plan.

13. **“Eligible Claimant”** means a Preliminary Claimant, who is determined to have suffered a Recognized Loss pursuant to the Plan of Allocation and who is not an Excluded Party or an Unresponsive Preliminary Claimant.

14. **“Excluded Party”** shall mean: (a) the Defendants, and Defendants’ advisers, agents, nominees, assigns, creditors, heirs, distributees, spouses, parents, children, or controlled entities; (b) the Third-Party (see paragraph 29), its employees, and those Persons assisting the Third-Party in its role as Third-Party; and (c) any purchaser or assignee of another Person’s right to obtain a recovery from the Distribution Fund for value; provided, however, that this provision shall not be construed to exclude those Persons who obtained such a right by gift, inheritance or devise.

15. **“Final Determination Notice”** means the written notice sent by the Distribution Agent to (a) any Preliminary Claimant who timely submitted a written dispute of his, her, or its calculated Recognized Loss notifying the Preliminary Claimant of her resolution of the dispute; and (b) those Preliminary Claimants who have not responded to the Plan Notice as described in paragraph 21, except for those whose Plan Notice were returned as “undeliverable,” notifying the Preliminary Claimant that he, she, or it has been deemed an Unresponsive Preliminary Claimant. The Final Determination Notice will constitute the Distribution Agent’s final ruling regarding the status of the claim.

16. **“Markup Fees”** means the undisclosed selling dealer offering markup fees paid by Westport’s clients during the Markup Relevant Period.

17. **“Markup Relevant Period”** is January 1, 2012 through June 30, 2015, inclusive.

18. **“Net Available Distribution Fund”** means the Distribution Fund less Administrative Costs.

19. **“Payee”** means an Eligible Claimant whose distribution amount is equal to or greater than \$10.00 as calculated in accordance with the Plan of Allocation, and who will receive a Distribution Payment.

20. **“Person”** means natural individuals as well as legal entities such as corporations, partnerships, or limited liability companies.

21. **“Plan Notice”** means a written notice from the Distribution Agent to each Preliminary Claimant regarding the Court’s approval of the Plan, including, as appropriate: a statement characterizing the distribution; a link to the approved Plan posted on the SEC’s website and instructions for requesting a copy of the Plan; specification of any information needed from the Preliminary Claimant to prevent him, her, or it from being deemed an Unresponsive Preliminary Claimant, including any information needed for tax administration; his, her, or its preliminary Recognized Loss; a description of the tax information reporting and other related tax matters; the procedure for the distribution as set forth in the Plan; and the name and contact information for the Distribution Agent and/or the Third-Party as a resource for additional information or to contact with questions regarding the distribution.

22. **“Plan of Allocation”** means the methodology used by the Distribution Agent to calculate if a Preliminary Claimant has suffered a Recognized Loss and to determine the Distribution Payment, if any. The Plan of Allocation is attached as Exhibit A.

23. **“Preliminary Claimant”** means a Person, or their lawful successors, identified by the SEC staff based on its review and analysis of applicable records obtained by the SEC during its investigation and litigation, who may have suffered a loss from Markup Fees paid during the Markup Relevant Period and/or a loss from 12b-1 Fees paid during the 12b-1 Relevant Period.

24. **“Recognized Loss”** means the amount of loss calculated in accordance with the Plan of Allocation.

25. **“Unresponsive Preliminary Claimant”** means a Preliminary Claimant whose address the Distribution Agent and/or Third-Party have not been able to verify and/or who does not timely respond to the Distribution Agent’s or Third-Party’s attempts to obtain information, including any information sought in the Plan Notice. Unresponsive Preliminary Claimants will not be eligible for a distribution under the Plan.

IV. TAX COMPLIANCE

26. The Tax Administrator shall handle the tax obligations of the Distribution Fund. The Tax Administrator will be compensated for reasonable fees and expenses from the Distribution Fund in accordance with the Court’s Order of appointment. (ECF Nos. 189-1, 190)

27. The Distribution Fund constitutes a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 468B(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5. The Tax Administrator is the administrator of such QSF 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) Requesting funds necessary for the timely payment of all applicable taxes, the payment of taxes for which the Tax Administrator has received funds, and the filing of applicable returns; and
- (c) Fulfilling any information reporting or withholding requirements imposed on distributions from the Distribution Fund.

V. DISTRIBUTION AGENT

28. Catherine E. Pappas is the distribution agent for the Distribution Fund (“Distribution Agent”). As an SEC employee, the Distribution Agent shall receive no compensation, other than her regular salary as an SEC employee, for her services in administering the Distribution Fund.

29. The Distribution Agent will be responsible for administering the Distribution Fund in accordance with the Plan. This will include, among other things, taking reasonable steps to obtain accurate mailing information for Preliminary Claimants; disseminating the Plan Notice; preparing accountings; cooperating with the Tax Administrator appointed by the Court to satisfy any tax liabilities and to ensure compliance with income tax reporting requirements, including but not limited to Foreign Account Tax Compliance Act (FATCA); causing the disbursement of the Distribution Fund in accordance with this Plan, as ordered by the Court; and researching and reconcile errors and reissue payments, when possible. The Distribution Agent will engage a third-party, Analytics, LLC (the “Third-Party”), to perform some of the administrative tasks (listed or otherwise) associated with administering the Plan. The Third-Party’s fees and expenses will be paid from the Distribution Fund as an Administrative Cost pursuant to a cost proposal submitted to and approved by the SEC staff.

30. To carry out the purposes of this Plan, the Distribution Agent is authorized to make and implement immaterial changes to the Plan upon agreement of the SEC staff. If a change is deemed to be material by the SEC staff, Court approval is required prior to implementation by amending the Plan.

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

VI. PLAN PROCEDURES

Specification of Preliminary Claimants

32. Using information obtained during its investigation and litigation, the SEC has identified the Preliminary Claimants. Preliminary Claimants are limited to those Persons who may have suffered a loss from Markups Fees paid during the Markup Relevant Period and/or a loss from 12b-1 Fees paid during the 12b-1 Relevant Period.

Procedures for Locating and Notifying Preliminary Claimants

33. Within thirty (30) days of Court approval of the Plan, the Third-Party will:
- a. create a database of all Preliminary Claimants based upon information provided by the Distribution Agent;
 - b. run a National Change of Address search to retrieve updated addresses for all records in the database, thereby ensuring the mailing information for Preliminary Claimants is up-to-date; and
 - c. send the Plan Notice to each Preliminary Claimant's mailing address.

Undeliverable Mail

34. If any mailing is returned as undeliverable, the Third-Party will make the best practicable efforts to ascertain a Preliminary Claimant's correct address. If another address is obtained, the Third-Party will then resend it to the Preliminary Claimant's new address within thirty (30) days of receipt of the returned mail. If the mailing is returned again, and the Third-Party, despite best practicable efforts, is unable to find a Preliminary Claimant's correct address, the Distribution Agent, in her discretion, may deem such Preliminary Claimant an Unresponsive Preliminary Claimant.

35. Any Preliminary Claimant who relocates or otherwise changes contact information after receipt of the Plan Notice must promptly communicate any change in address or contact information to the Distribution Agent.

Procedures to Request Plan Notice

36. Any Person who does not receive a Plan Notice described in paragraph 21 but who is aware of this Plan (e.g., through other Preliminary Claimants or on www.sec.gov) and believes they should be included as a Preliminary Claimant should contact the Distribution Agent or the Third Party within thirty (30) days from the date of approval of the Plan to establish that they should be considered a Preliminary Claimant. Such Person should include with their communication, documentation sufficient to support their claim that they should be considered a Preliminary Claimant, as well as contact information (physical address, telephone number, and email address, if available). The Third-Party will send a Plan Notice to the Person within thirty (30) days of receiving the Person's documentation, if the Distribution Agent determines that the Person should have received a Plan Notice.

Failure to Respond to Plan Notice

37. If a Preliminary Claimant is requested to respond and fails to respond within thirty (30) days from the initial mailing of the Plan Notice, the Distribution Agent will make no fewer than two (2) attempts to contact the Preliminary Claimant using alternative contact information (an updated address, telephone number, or email address) if available. The second

attempt will in no event take place more than ninety (90) days from the initial mailing of the Plan Notice. If a Preliminary Claimant fails to respond to the Distribution Agent's contact attempts as described in this paragraph, the Distribution Agent, in its discretion, may deem such Preliminary Claimant an Unresponsive Preliminary Claimant.

Distribution Methodology

38. The Distribution Agent will work with the SEC staff, using the methodology in the Plan of Allocation, to determine whether a Preliminary Claimant has suffered a Recognized Loss and to calculate their Distribution Payment, if any. All Preliminary Claimants who are determined to have a Recognized Loss, and who are not deemed an Excluded Party or an Unresponsive Preliminary Claimant will be deemed an Eligible Claimant. All Eligible Claimants whose distribution amount is equal to or greater than \$10.00, as calculated in accordance with the Plan of Allocation, will be deemed a Payee.

39. There may be one or more distributions under the Plan in accordance with paragraph 56 and the Plan of Allocation.

Recognized Loss Disputes

40. The Distribution Agent may consider disputes of a Preliminary Claimant's Recognized Loss calculation, if notice of the dispute is presented in writing, along with any supporting documentation, to the Distribution Agent within sixty (60) days of the last mailing of the Plan Notice. The Distribution Agent will investigate the dispute, and such investigation will include a review of the written dispute as well as any supporting documentation.

Final Determination Notices

41. Within one hundred fifty (150) days of the initial mailing of the Plan Notices, the Distribution Agent will send a Final Determination Notice to (a) any Preliminary Claimant who timely submitted a written dispute as described in paragraph 40, notifying the Preliminary Claimant of her resolution of the dispute; and (b) those Preliminary Claimants who have not responded to the Plan Notice, as described in paragraph 37, except for those whose Plan Notice were returned as undeliverable, notifying the Preliminary Claimant that he, she, or it has been deemed an Unresponsive Preliminary Claimant.

Establishment of a Reserve

42. Before determining the amount of funds available for distribution and calculating each Payee's Distribution Payment, the Distribution Agent, in conjunction with the Tax Administrator, will establish a reserve to pay Administrative Costs and to accommodate any unexpected expenditures (the "Reserve").

43. After all Distribution Payments are made and Administrative Costs paid, any remaining amounts in the Reserve will become part of the Residual described in paragraph 57.

Preparation of the Payment File

44. Within two hundred twenty (220) days of Court approval of the Plan, the Distribution Agent will compile the Payee information, including the name, address, calculated Recognized Loss, the amount of the Distribution Payment, and any amount to be withheld for all Payees (the “Payee List”).

The Escrow Account

45. Prior to the disbursement of funds from the Net Available Distribution Fund, the Third-Party will establish an escrow account at a commercial bank not unacceptable to the SEC (the “Bank”), pursuant to an escrow agreement (the “Escrow Agreement”) provided by the SEC staff.

Distribution of the Distribution Fund

46. After preparation of the Payee List, the SEC will petition the Court for authority to disburse funds from the Net Available Distribution Fund to the Bank in accordance with the Payee List for distribution by the Third-Party in accordance with the Plan. Pursuant to the order, the funds will be transferred to the Bank, and the Third-Party will be responsible for issuing Distribution Payments to Payees in accordance with the Payee List. For any electronic payment, the exact amount necessary to make a payment shall be transferred directly to the Payee’s bank account in accordance with written instructions provided to the Bank by the Third-Party.

47. All checks will bear a stale date of one hundred twenty (120) days from the date of issuance. Checks that are not negotiated by the stale date will be voided, and the Bank will be instructed to stop payment on those checks. A Payee’s claim will be extinguished if he, she, or it fails to negotiate his, her or its check by the stale date, and the funds will remain in the Distribution Fund, except as provided in paragraph 51.

48. All Distribution Payments will be preceded or accompanied by a communication 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 Payee and that the Payee should consult his, her or its tax advisor for advice regarding the tax treatment of the distribution; (c) a statement that checks will be void and cannot be reissued after one hundred twenty (120) days from the date the original check was issued; and (d) contact information for the Distribution Agent and, as appropriate, the Third-Party for questions regarding the Distribution Payment. The letter or other mailings to Payees characterizing a Distribution Payment will be submitted to the Tax Administrator and SEC staff for review and approval.

49. All Distribution Payments, either on their face or in the accompanying mailing, will clearly indicate that the money is being distributed from the Distribution Fund established by the Court to compensate investors for harm as a result of securities law violations.

Post Distribution; Handling of Returned or Uncashed Checks; and Reissues

50. The Third-Party shall use its best efforts to make use of commercially available resources and other reasonably appropriate means to locate all Payees whose checks are returned to the Third-Party as “undeliverable,” or whose electronic payment has been returned or rejected. If new address or payment information becomes available, the Third-Party will repackage the distribution check and send it to the new address, or reissue the electronic payment. If new address or payment information is not available after a diligent search and outreach attempts (and in no event no later than one hundred twenty (120) days after the initial mailing of the original check), or if the distribution payment is returned again, the check shall be voided and the Third-Party shall instruct the issuing financial institution to stop payment on such check or electronic payment. If the Third-Party is unable to find a Payee’s correct address or payment information, the Distribution Agent, in her discretion, may remove such Payee from the distribution and the allocated Distribution Payment will remain in the Distribution Fund for distribution, if feasible, to the remaining Payees.

51. The Third-Party will reissue checks or electronic payments to Payees upon the receipt of a valid, written request from the Payee if prior to the initial stale date. In cases where a Payee is unable to endorse a Distribution Payment check as written (e.g., name changes, IRA custodian changes, or recipient is deceased) and the Payee or a lawful representative requests the reissuance of a Distribution Payment check in a different name, the Third-Party will request, and must receive, documentation to support the requested change. The Third-Party, in consultation with the Distribution Agent, will review the documentation to determine the authenticity and propriety of the change request. If, in the discretion of the Distribution Agent, such change request is properly documented, the Third-Party will issue an appropriately redrawn Distribution Payment to the requesting party. Reissued checks will be void at the later of one hundred twenty (120) days from issuance of the original check or sixty (60) days from the reissuance, and in no event will a check be reissued after one hundred twenty (120) days from the date of the original issuance without the approval of SEC staff.

52. The Third-Party will work with issuing financial institution and maintain information about uncashed checks and any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Third-Party is responsible for researching and reconciling errors and reissuing payments when possible. The Third-Party is also responsible for accounting for all payments. The amount of all uncashed and undelivered payments will continue to be held in the escrow account until returned to the SEC after the completion of all distributions under this Plan.

53. The Third-Party will make and document its best efforts to contact Payees to follow-up on the status of uncashed distribution checks (other than those returned as “undeliverable”) and take appropriate action to follow-up on the status of uncashed checks at the request of the Distribution Agent. The Third-Party may reissue such checks, subject to the time limits detailed herein.

54. At the discretion of the Distribution Agent, certain costs that were not factored into the Reserve, such as bank fees for the return of a payment or electronic payment reissuance

costs due to incorrect information provided by the Eligible Claimant, may reduce the Payee's Distribution Payment. In such situations, the Distribution Agent will immediately notify the Tax Administrator of the reduction in the Distribution Payment.

Receipt of Additional Funds

55. Should any additional funds be received pursuant to SEC or Court order, agreement, or otherwise, prior to the Court's termination of the Distribution Fund, such funds will be added to the Distribution Fund and distributed, if feasible, in accordance with the Plan.

Disposition of Undistributed Funds

56. If funds remain following the initial distribution and payment of all Administrative Costs, the Distribution Agent, in consultation with the SEC staff, may seek subsequent distribution(s) of any available remaining funds. All subsequent distributions shall be made pursuant to a Court Order in a manner that is consistent with this Plan.

57. A residual within the Distribution Fund will be established for any amounts remaining after the final disbursement to Payees from the Distribution Fund and the payment of all Administrative Costs (the "Residual"). The Residual may include funds from, among other things, amounts remaining in the Reserve, distribution checks that have not been cashed, checks or electronic payments that were not delivered or were returned to the SEC, and tax refunds for overpayment of taxes or for waiver of IRS penalties.

58. All funds remaining in the Residual that are infeasible to distribute to investors will be returned to the SEC and held pending a final accounting. 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 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

Administrative Costs

59. All Administrative Costs will be paid from the Distribution Fund in accordance with this Court's Orders.

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).

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.

Filing of Reports and Accountings

60. Upon completion of all distributions to Payees and payment of all Administrative Costs, pursuant to the procedures described above, the Tax Administrator, working with the Third-Party and the SEC, will submit to the Distribution Agent a final accounting, on a standardized form provided by the SEC staff. The Third-Party will also submit a report to the SEC staff containing the final distribution statistics regarding distributions to individuals and entities, and such other information requested by the SEC staff.

Termination of the Distribution Fund

61. The Distribution Fund will be eligible for termination and the Distribution Agent will be eligible for discharge after all of the following have occurred (a) a final accounting, in a standard accounting format provided by the SEC staff, has been submitted by the Distribution Agent and approved by the Court; (b) all Administrative Costs have been paid; and (c) the Court has approved the SEC's recommendation as to the final 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).

62. Once the SEC staff has reviewed and accepted the final accounting, the SEC will petition the Court for an order, as appropriate, approving the final accounting, discharging the Distribution Agent, disposing of the Residual, and terminating the Distribution Fund.

63. Once the Distribution Fund has been terminated, no additional payments will be made whatsoever.

Exhibit A

PLAN OF ALLOCATION

This Plan of Allocation is designed to compensate clients of Westport Capital Markets, LLC and Christopher E. McClure for undisclosed selling dealer offering markup fees (“Markup Fees”) paid from January 1, 2012 through June 30, 2015, inclusive (“Markup Relevant Period”), and/or mutual fund distribution fees (“12b-1 Fees”) paid from January 1, 2012 through September 14, 2017, inclusive (the “12b-1 Relevant Period”). Based upon records obtained by the SEC during its investigation and litigation, the SEC staff has identified those clients, or their lawful successors, who may have suffered a loss from Markup Fees paid during the Markup Relevant Period and/or 12b-1 Fees paid during the 12b-1 Relevant Period (the “Preliminary Claimants”). Clients who did not suffer a loss due to Markup Fees paid during the Markup Relevant Period or 12b-1 Fees paid during the 12b-1 Relevant Period are ineligible to recover under this Plan. SEC staff economists will perform the calculations described below using account-level holdings and transactions data obtained by the SEC in the course of its investigation and litigation.

The Distribution Agent, working with the SEC staff, will calculate each Preliminary Claimant’s loss from Markup Fees (“Recognized Loss from Markup Fees”) and from 12b-1 Fees (“Recognized Loss from 12b-1 Fees”) separately, as follows:

- A. Recognized Loss from Markup Fees will be calculated for each account that received an allocation of selling dealer offerings, in any calendar quarter of the Markup Relevant Period, as follows:
 1. For each selling dealer offering allocation, record the Markup Fees paid by the account.
 2. Sum these amounts for each account by quarter.
 3. The sum of these amounts across all quarters of the Markup Relevant Period for all accounts of the Preliminary Claimant will be his, her or its Recognized Loss from Markup Fees.

- B. Recognized Loss from 12b-1 Fees will be calculated for each account that paid 12b-1 Fees during the 12b-1 Relevant Period, as follows:
 1. Record the amount of actual 12b-1 Fees paid by the account during each quarter of the 12b-1 Relevant Period.
 2. The sum of these amounts across all quarters of the 12b-1 Relevant Period for all accounts of the Preliminary Claimant will be his, her or its Recognized Loss from 12b-1 Fees.

The Preliminary Claimant's Recognized Loss will be the sum of his, her or its Recognized Loss from Markup Fees plus Recognized Loss from 12b-1 Fees.

Any Preliminary Claimant who suffered a Recognized Loss pursuant to this Plan of Allocation, and who is not an Excluded Party or deemed an Unresponsive Preliminary Claimant as defined in the Plan, will be deemed an Eligible Claimant.

Additional Provisions

Subsequent Distributions: In the event of subsequent distributions, (1) the aggregate amount of any Distribution Payment paid to a Payee in prior distribution(s) will be subtracted from their Recognized Loss; and (2) Eligible Claimants not deemed Payees in the prior distribution(s) because their distribution amount was less than the Minimum Distribution Amount will be reevaluated after summing their prior (unpaid) distribution amount(s) with the distribution amount calculated in the subsequent distribution. If the sum is equal to or greater than the Minimum Distribution Amount, their Distribution Payment will be sum of the past unpaid amount and the distribution amount calculated in the subsequent distribution.

Allocation of Funds: If the Net Available Distribution Fund is equal to or exceeds the sum of Recognized Losses of all Eligible Claimants, each Eligible Claimant's distribution amount will equal his, her or its Recognized Loss, plus "Reasonable Interest" if applicable. If the Net Available Distribution Fund is less than the sum of the Recognized Losses of all Eligible Claimants, each Eligible Claimant's distribution amount will equal his, her or its "*Pro Rata Percent*" of the Net Available Distribution Fund (and no Reasonable Interest). In either case, the distribution amount will be subject to the "Minimum Distribution Amount."

Reasonable Interest: If, in connection with a Subsequent Distribution, after considering the aggregate Distribution Payments to Payees, the distribution of the Net Available Distribution Fund will cause Eligible Claimants to receive more than their Recognized Losses in full, the Distribution Agent, in consultation with the SEC staff, may include interest in the distribution amount to compensate for the time value of money on Recognized Losses. Reasonable Interest will be calculated for payments of Markup Fees and/or 12b-1 Fees in each calendar quarter as calculated in paragraphs A.2 and B.1 using the Short-term Applicable Federal Rate plus three percent (3%), compounded quarterly from the end of the calendar quarter through the approximate date of the disbursement of the funds. If there are insufficient funds to pay Reasonable Interest in full to all Eligible Claimants, Reasonable Interest will be awarded from the excess funds in proportion to each Eligible Claimant's full amount of Reasonable Interest.

Pro Rata Percent: A *Pro Rata Percent* computation is intended to measure Eligible Claimants' Recognized Losses against one another. The Distribution Agent shall determine each Eligible Claimant's *Pro Rata Percent* as the ratio of his, her, or its Recognized Loss to the sum of Recognized Losses of all Eligible Claimants.

Minimum Distribution Amount: The Minimum Distribution Amount will be \$10.00. If an Eligible Claimant's distribution amount is less than the Minimum Distribution Amount, he, she, or it will be deemed ineligible to receive a Distribution Payment and his, her, or its

distribution amount will be reallocated on a *pro-rata* basis to Eligible Claimants whose distribution amounts that are greater than or equal to the Minimum Distribution Amount.

Payee: An Eligible Claimant whose distribution amount equals or exceeds the Minimum Distribution Amount will be deemed a Payee and receive a Distribution Payment for his, her, or its distribution amount.

Distribution Payment Limitation: In no event will the sum of the Distribution Payments through the initial and subsequent distributions for any Payee exceed his, her or its Recognized Loss calculated in the initial distribution, plus Reasonable Interest, if any.

Exhibit 2

(Proposed Order to Show Cause)

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

**SECURITIES AND EXCHANGE
COMMISSION**

Plaintiff,

v.

**WESTPORT CAPITAL MARKETS,
LLC AND CHRISTOPHER E.
MCCLURE,**

Defendants.

Case No. 3:17-cv-2064-JAM

(Proposed) Order to Show Cause

Plaintiff Securities and Exchange Commission (the “SEC”) having filed a Motion for an Order to Show Cause (the “Motion”) why the Court should not approve the SEC’s proposed plan of distribution (the “Proposed Plan”) for collections in this matter (the “Distribution Fund”), and for good cause shown,

IT IS HEREBY ORDERED that the Motion is **GRANTED**.

I.

IT IS FURTHER ORDERED THAT, within two business days of the issuance of this Order:

- a) Within 10 business days of this Order, the SEC shall cause a copy of this Order, along with a copy of the Proposed Plan, to be sent to the last known address of all clients of the defendants identified as having been affected by the conduct underlying the Complaint (“Identified Investors”);
- b) The SEC shall publish this Order on the public webpage established for this case

(<https://www.sec.gov/divisions/enforce/claims/westport.htm>) (the “SEC Westport Webpage”) along with a copy of the Proposed Plan; and

- c) Any costs associated with a), above, shall be paid by the Distribution Fund.

The foregoing publication and dissemination, along with the publication of this Order through the Court’s ECF system, shall constitute and suffice as notice of the Proposed Plan and the opportunity to object to interested parties.

II.

IT IS FURTHER ORDERED THAT individuals and entities who were clients of Westport and paid undisclosed markups during the period January 1, 2012 through June 30, 2015, inclusive, and/or 12b-1 fees during the period January 1, 2012 through September 14, 2017, inclusive (“Preliminary Claimant”), or other interested parties, within forty (40) days from the entry of this Order (the “Objection Due Date”), shall show cause, if there is any, why this Court should not enter an Order approving the Proposed Plan.

Objections shall be made by correspondence received by the Distribution Agent no later than 11:59 p.m. EST on the Objection Due Date, at the following electronic mail address:

ENF-SECvWestport@sec.gov

The correspondence must clearly state that the submitting entity is a Potentially Eligible Investor as defined above, or otherwise state fully and clearly the entity’s interest in this matter, and the entity’s objection(s) to the Proposed Plan. The submitting entity must include all documentation necessary to support the objection. Any and all factual assertions must be concluded with the following declaration, if true, followed by the submitting person’s signature and the date of signature:

I declare pursuant to 28 U.S.C. §1746, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

All correspondence must include current contact information for the submitting person, including, if available, an email address and mobile telephone number. Unresolved objections will be publicly filed by the SEC with the Court, as further set forth below in Section IV.

To the extent a submitting entity seeks to include in their submission sensitive information such as a social security number, financial account number, or home address, they should encrypt the submission prior to sending, sending the password in a separate email, or submit it pursuant to the next paragraph.

If a submitting entity is unable to securely submit their objection by email, they may send it addressed as set forth below. The Distribution Agent must receive the submission no later than the Objection Due Date.

SEC Office of Distributions
Attn: Catherine E. Pappas/ Brian Beirne
SEC v. Westport Capital, LLC et al.
100 F Street NE
Mail Stop 5012
Washington, DC 20549

Failure to timely submit an objection in accordance with this section will result in the objection being waived. Proof of timely receipt by the Distribution Agent will be the burden of the submitting entity.

III.

IT IS FURTHER ORDERED that, if no objections to the Proposed Plan are timely submitted, the SEC shall:

- a) File a notice so advising the Court (the “Notice”), accompanied by a copy of the Proposed Plan, as well as a proposed Order approving the Proposed Plan; and

- b) Post a copy of the Notice, Proposed Plan, and proposed Order on the SEC Webpage.

Upon receipt of such Notice from the SEC, the Court may enter an Order approving the Proposed Plan without further notice or passage of time.

IV.

IT IS FURTHER ORDERED THAT, if objections are timely received pursuant to this Order and cannot be resolved, the SEC shall file them, with sensitive information redacted, together with its response, within sixty (60) days of the entry of this Order, with copies of its response served by electronic, First Class, or Overnight Mail upon any objecting party. The SEC may propose an amended plan if and as appropriate. If the SEC proposes an amended plan, the amended plan, and any accompanying filings, will be made available to all Potentially Eligible Investors and interested parties through the SEC Webpage, with notice of the same sent to all Identified Investors. All costs of such dissemination shall be paid by the Distribution Fund. Such publication and dissemination, along with the publication through the Court's ECF system, shall constitute and suffice as notice of the amended plan. No further objection period will be provided unless expressly ordered by the Court.

If the Court deems it necessary or appropriate, the Court may conduct a hearing before approving the Proposed (or amended) Plan. Notice of a hearing shall be provided through the Court Docket and the SEC Webpage, and if and as otherwise ordered by the Court.

SO ORDERED, this ___ date of _____, 2022,

The Honorable Jeffrey A. Meyer
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---------------------------|---|-------------------------------|
| _____ |) | |
| SECURITIES AND EXCHANGE |) | |
| COMMISSION |) | |
| |) | Case No. 3:17-cv-2064-JAM |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | Memorandum in Support of |
| WESTPORT CAPITAL MARKETS, |) | Proposed Plan of Distribution |
| LLC AND CHRISTOPHER E. |) | |
| MCCLURE, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

Introduction

Plaintiff, the Securities and Exchange Commission (the “SEC”), respectfully submits this memorandum in support of its proposed plan of distribution (the “Plan”) to distribute collections in this matter to compensate clients of Westport Capital Markets, LLC (“Westport”) and Christopher E. McClure (“McClure”) (collectively, the “Defendants”) injured by the misconduct alleged in the Complaint.¹ Because collections in this matter are ongoing, the Plan contemplates multiple distributions.

The SEC is simultaneously seeking, by the accompanying motion, the entry of an Order to Show Cause so that interested parties have the opportunity to object to the Plan (the “Motion”). If the Court grants the Motion and enters the proposed Order to Show Cause, upon the completion of the steps set forth in the Order to Show Cause the SEC will file a notice (the “Notice”) and/or a response, so notifying the Court and responding to any objections, and provide a proposed Order approving the Plan or an amended plan, as appropriate. By this

¹ The Plan is attached as Exhibit 1 to the accompanying Motion for an Order to Show Cause.

memorandum, and subject to the Notice, the SEC provides to the Court the factual and legal basis for approving the Plan.

I. Background

On December 11, 2017, the SEC filed its Complaint in this matter, alleging that Westport and McClure were investment advisers who had a fiduciary duty to their investment advisory clients and were obligated to manage their clients' investments in the clients' best interests.

(ECF No. 1) The SEC alleged that, instead, McClure, through his firm Westport, defrauded his clients over multiple years by regularly misusing client accounts to enrich himself. (ECF Nos. 1, 47-1). In particular, the SEC alleged that, beginning in 2011 and lasting into mid-2015,

Westport, acting through McClure, repeatedly bought newly issued securities from underwriters at the discounted price paid by securities dealers, and then turned around and sold them from his firm's account to clients at a higher price, pocketing the difference. (ECF No. 47-1). The SEC further alleged that Westport and McClure received ongoing 12b-1 fees from client mutual fund holdings, which reduced client mutual fund holdings and were paid to Westport because of its role as broker-dealer.

The SEC alleged that the Defendants' failure to disclose to clients their financial interest in recommending securities and managing client accounts violated Sections 206(1) and (2) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. §§ 80b-6(1) and (2); their failure to obtain consent from their clients for Westport to act as principal in connection with certain transactions directly and indirectly violated Section 206(3) of the Advisers Act, 15 U.S.C. § 80b-6(3); and their false claim that Westport did not engage in principal transactions and failure to disclose conflicts relating to 12b-1 fees violated Section 207 of the Advisers Act, 15 U.S.C. § 80b-7. (ECF Nos. 1, 47-1).

On July 6, 2021, the Court entered final judgments against the Defendants (the “Final Judgments”) finding them jointly and severally liable for disgorgement and prejudgment interest of \$820,761.00, and ordering Westport and McClure to pay civil penalties of \$500,000 and \$200,000, respectively. (ECF Nos. 186-1, 186-2) The Final Judgments provide that the SEC may propose a plan to distribute collected funds subject to the Court’s approval. *Id.*

The SEC currently holds approximately \$190,000 collected from the Defendants pursuant to the Final Judgments, plus accrued interest and earnings (the “Distribution Fund”). The money is in an SEC-designated account with the United States Treasury. Additional collections, accrued interest, and any amounts directed to the Distribution Fund by administrative or Court order or otherwise, will be added to, and become a part of, the Distribution Fund.

By Order dated August 9, 2022, the Court appointed Heffler, Radetich & Saitta LLP as tax administrator (the “Tax Administrator”), to execute all income tax reporting requirements for the Distribution Fund. ECF Nos. 189, 190.

II. The Plan is Fair and Reasonable and Should be Approved.

By the Plan, the SEC seeks to compensate clients of Westport and McClure for undisclosed markups (“Markup Fees”) paid from January 1, 2012 through June 30, 2015, inclusive (“Markup Relevant Period”) and/or 12b-1 fees (“12b-1 Fees”) paid from January 1, 2012 through September 14, 2017, inclusive (the “12b-1 Relevant Period”). The Court should approve the Plan because it fairly and reasonably allocates the Distribution Fund among the injured clients.

A district court has broad discretion in approving a plan of distribution, and that determination is reviewed for abuse of discretion. *Official Comm. Of Unsecured Creditors of*

WorldCom, Inc. v. SEC, 467 F.3d 73, 84 (2d Cir. 2006). *See also CFTC v. Walsh*, 712 F.3d 735, 749 (2d Cir. 2013) (in the context of approval of receiver’s plan supported by the SEC and the CFTC); *SEC v. Loewenson*, 290 F.3d 80, 84 (2d Cir. 2002) (in the context of approval of a plan presented by a receiver). District courts review distribution plans proposed by the SEC to determine whether the plan fairly and reasonably distributes limited funds among the potential claimants. *See WorldCom*, 467 F.3d at 81-82, 84; *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *SEC v. CR Intrinsic Investors, LLC*, 164 F. Supp. 3d 433, 435-36 (S.D.N.Y. 2016). *See also SEC v. Amerindo Inv. Advisors*, 639 F. App’x 752, 755 (2d Cir. 2016) (quoting *Wang*, finding adequate the district court’s finding that the receiver’s proposed distribution was fair and reasonable).

Under the Plan, the undersigned, an SEC employee, will act as the distribution agent for the Distribution Fund (the “Distribution Agent”). As an SEC employee, the Distribution Agent will receive no compensation other than her regular salary as an SEC employee, for her services in administering the Distribution Fund. Plan ¶ 28. To assist in the administration of the Distribution Fund, the Distribution Agent will engage a third party Analytics, LLC (“Analytics”), to perform some of the administrative tasks associated with administering the Plan. Plan ¶ 29. Analytics’ fees and expenses will be paid from the Distribution Fund pursuant to a cost proposal submitted to and approved by the SEC staff.² Plan ¶ 29.

Persons, or their lawful successors, identified by the SEC staff based on its review and analysis of records obtained during its investigation and litigation of this matter as

² Although this may change if and as Analytics is asked to do work not initially contemplated, the SEC anticipates Analytics’ fees and expenses to be less than or equal to \$10,000 through the completion of an initial distribution, and up to \$5,000 for additional distributions.

possibly having suffered a loss from the misconduct described in the Complaint will be considered for eligibility for a payment under the Plan (“Preliminary Claimants”).³ Plan ¶ 23. Those Preliminary Claimants who are determined to have suffered a recognized loss as calculated under the Plan of Allocation attached as Exhibit A to the Plan (“Recognized Loss”), and who are not excluded under the Plan or unresponsive to attempts to obtain information necessary to the distribution, will be deemed to be “Eligible Claimants,” and will receive a distribution payment if their distribution amount is equal to or exceeds \$10.00 (the “Minimum Distribution Amount”). Plan ¶¶ 13, 19.

The Plan excludes from distribution the Defendants and those related to the Defendants. *See SEC v. McGinn, Smith & Co.*, 10-cv-457, 2019 U.S. Dist. LEXIS 35678, *5-7 (N.D.N.Y. Mar. 6, 2019) (and the cases cited therein) (district courts have discretion to exclude claimants involved in the underlying scheme). It also excludes Analytics and its employees to avoid any conflicts of interest, as well as entities that seek to capitalize on the distribution through the exclusion of any entity that seeks to recover by purchasing for value a Preliminary Claimant’s purported right to a Distribution Payment. Plan ¶¶ 14, 25.

Under the Plan of Allocation, Recognized Losses will be calculated as the sum of Markup Fees paid during the Markup Relevant Period with the sum of 12b-1 Fees paid during the 12b-1 Relevant Period. The Distribution Fund will be divided among the Payees pro rata unless there are sufficient funds to pay Recognized Losses in full. Plan of

³The Plan does not include a claims process because, through its investigation and litigation of this matter, the SEC has identified those persons who may have suffered a loss from Markup Fees paid during the Markup Relevant Period and/or a loss from 12b-1 Fees paid during the 12b-1 Relevant Period. Plan ¶ 32. Preliminary Claimants will be informed of their calculated Recognized Loss through the Plan Notice, defined in the Plan at ¶ 21. Plan ¶¶ 21, 29, 40.

Allocation, “Allocation of Funds.” If there are sufficient funds, harmed investors may receive reasonable interest on their losses. Plan of Allocation, “Reasonable Interest.”

Because multiple distributions are expected under the Plan if and as the SEC collects additional funds, an Eligible Claimant who did not receive a distribution payment in a prior distribution because their distribution amount was less than the Minimum Distribution Amount will be reconsidered in subsequent distributions, with their new distribution amount including the unpaid distribution amount(s) from prior distributions. Plan of Allocation, “Subsequent Distributions”. When a determination is made by the Distribution Agent that additional distributions are not feasible, the Distribution Agent, working with the Tax Administrator, will complete a final accounting for submission to the Court. Plan ¶ 60.

Upon completion of the final accounting, the SEC staff will file a motion with the Court to approve a final accounting, discharging the Distribution Agent, and terminating the Distribution Fund. Plan ¶¶ 61, 62. That motion will include a recommendation as to the final disposition of any 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)⁴, such as the transfer of the Residual to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.⁵

⁴ 15 U.S.C. § 78u(d)(7) provides: Disgorgement -- In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement. 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).

⁵ 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.

The SEC believes that the Plan fairly and reasonably distributes the Distribution Fund to clients harmed by the conduct underlying the Complaint and accordingly, respectfully requests that it be approved.

III. Conclusion

For all of the foregoing reasons, the SEC respectfully requests that the Court approve the Plan and grant such other relief as the Court deems appropriate.

Respectfully submitted,

/s/ Catherine E. Pappas
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Facsimile: (215) 597-2740
Email: pappasc@sec.gov

Dated: December 8, 2022