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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

PLAINTIFF,

v.

MICHAEL P. ZENGER

DEFENDANT.

**[PROPOSED] DISTRIBUTION PLAN**

Civil No.: 2:14-cv-00065

Judge: Bruce S. Jenkins

**A. Introduction**

1. On January 31, 2014, the United States Securities and Exchange Commission (“Commission”) filed a Complaint against Michael P. Zenger (“Zenger” or “Defendant”) seeking permanent injunctions, disgorgement of ill-gotten gains, a civil monetary penalty, and other relief. The Complaint alleges, that beginning in June 2013, defendant solicited investor funds for the purported purpose of raising capital to trade futures contracts, commodities, and government securities. While some investor money was used as represented, approximately \$100,000 of the \$200,000 raised from investors was used to pay for personal expenses such as airplane rentals, monthly credit card bills, payments to BMW and Mercedes Benz, purchases at Saks Fifth Avenue, Nordstrom and Costco, and to pay other personal expenses.

2. On May 19, 2015, this Court entered a Final Judgment against Defendant. Pursuant to the Final Judgment, Defendant paid \$121,000 in disgorgement, \$3,362.92 in prejudgment interest, and \$60,000 in civil penalties for a total of \$184,362.92. By making this payment, Defendant relinquished all legal and equitable right, title, and interest in such funds.

3. On August 24, 2017, the Court entered an order establishing a Fair Fund, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended [15 U.S.C. § 7246(a)], so that civil penalties collected could be distributed to injured investors, along with the disgorgement and prejudgment interest. By that same order, the Court appointed Miller Kaplan Arase LLP, a certified public accounting firm located in San Francisco, California, as Tax Administrator to fulfill all income tax reporting requirements, including the preparation and filing of tax returns for the Fair Fund.

4. The Distribution Plan proposes that Adriene Mixon, a Commission employee, be appointed as Plan Administrator for the distribution proposed herein. The Plan Administrator will implement the distribution of money to the investors harmed by the violations alleged in the Complaint. The Plan Administrator will carry out this task in coordination with the staff of the Commission, pursuant to this Distribution Plan, and subject to oversight by the Court.

5. The Distribution Plan sets forth the method and procedures for distributing the Fair Fund. The Commission proposes to distribute the Net Available Fair Fund (as defined below) to designated investors.

6. The Court shall retain jurisdiction over the Distribution Plan and the effectuation thereof.

## **B. Definitions**

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

7. **“Actual Loss”** means the amount invested by each designated investor.
8. **“Eligible Recipients”** means the two investors determined by the Plan Administrator to be eligible for a distribution from the Net Available Fair Fund as a result of the conduct described in the Complaint.
9. **“Fair Fund”** includes the \$184,362.92 paid by Defendant, comprised of \$121,000 in disgorgement, \$3,362.92 in prejudgment interest, and \$60,000 in civil penalties.
10. **“Net Available Fair Fund”** shall mean the Fair Fund, plus interest, less any taxes that may be assessed against the Fair Fund, and any approved fees and expenses.
11. **“Plan Administrator”** means Adriene Mixon, an employee in the Commission’s Office of Distributions. The Plan Administrator will report directly to the Court.
12. **“Time Value of Money”** means interest awarded, if feasible, to the two Eligible Recipients in addition to their Actual Losses to compensate them for the foregone time value of money since the investor injury occurred. The interest paid is based on the quarterly short-term Applicable Federal Rate published by the Internal Revenue Service, applied from the time of the investor injury.

**C. Responsibilities of the Tax Administrator**

13. The Fair Fund is a “Qualified Settlement Fund” within the meaning of the regulations issued under Section 468B(g) of the Internal Revenue Code of 1986, as amended. The Tax Administrator is the administrator of such Qualified Settlement Fund, 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) timely requests for funds necessary for the timely paying of all applicable taxes, the timely 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 required for distributions from the Fair Fund.

14. The Plan Administrator shall cooperate with the Tax Administrator in providing any information necessary to ensure income tax compliance.

**D. Responsibilities of the Plan Administrator**

15. The Plan Administrator, Adriene Mixon, is a Commission employee in the Office of Distributions. As a Commission employee, the Plan Administrator shall receive no compensation, other than her regular salary as a Commission employee, for her services in administering the Fair Fund. The Plan Administrator will be deemed to be acting within the scope of her employment with the Commission in administering this Plan. The Plan Administrator shall be responsible for, among other things, overseeing the administration of the Fair Fund, preparing accountings, disbursing the Fair Fund to the Eligible Recipients in accordance with the Distribution Plan, and preparing a final accounting. In carrying out her duties, the Plan Administrator may be assisted by other Commission staff acting under her supervision.

16. The Plan Administrator may be removed *sua sponte* at any time by the Court or upon motion of the Commission and replaced with a successor. The Plan Administrator and her designees, agents and assistants are excused from all legal requirements to post a bond or give an undertaking of any type in connection with their duties and obligations under this Distribution Plan. They shall not be liable to any person for their actions hereunder.

**E. General Administrative Procedures**

17. All determinations of the Plan Administrator that are made in accordance with the provisions of the Distribution Plan are final and not subject to appeal.

18. To carry out the purposes of the Distribution Plan, the Plan Administrator may make immaterial adjustments to the Distribution Plan, consistent with the purposes of the Distribution Plan. Material adjustments, however, must be approved by the Court.

19. All fees and expenses incurred in the administration of the Distribution Plan, as well as any federal, state or local taxes payable in connection with the Distribution Plan, shall be paid out of the Fair Fund, pursuant to further order of the Court.

20. The Commission does not currently anticipate receiving additional funds, however, in the event that additional funds are received in this matter, the Plan Administrator may, but is not required to, make adjustments to the Distribution Plan as necessary, where those funds may be, deposited into the Fair Fund, and distributed in accordance with the Distribution Plan.

**F. Procedures for Handling Objections**

21. Since this Fair Fund is not being distributed according to a claims-made process, the procedures for providing notice and for making and approving claims are not applicable.

22. Within thirty (30) days following the entry of an order by this Court approving the Distribution Plan, the Plan Administrator will mail a copy of the Distribution Plan to each of the Eligible Recipients. Any person wishing to comment on or object to the Distribution Plan must do so in writing by filing their comments with the Court within sixty (60) days from the date this Distribution Plan is approved with the Court.

23. The Eligible Recipient must clearly explain his or her disagreement with the Distribution Plan and must provide all relevant supporting documentation to the Clerk of the Court for the District of Utah, Central Division, with copies to Judge Jenkins and the Plan Administrator. A failure to properly and timely object to the proposed Distribution Plan shall permanently waive the Eligible Recipient's right to object. The burden of proof in any objection shall be upon the Eligible Recipient.

24. The Plan Administrator shall review each comment or objection to determine its validity; should it be deemed proper, the Plan Administrator can make any immaterial changes to the Distribution Plan as necessary. Any material changes to the Distribution Plan must be approved by the Court.

25. The Plan Administrator shall respond to any comments so filed within sixty (60) days from the last date a comment was filed, with copies of any such response to be filed with the Court.

26. General information about filing with the Court can be obtained from the Court's website at [www.utd.uscourts.gov](http://www.utd.uscourts.gov). Questions may be directed to the Plan Administrator by mail at the following address: Adriene Mixon, Assistant Chief Litigation Counsel, United States Securities and Exchange Commission, 444 South Flower Street, Los Angeles, CA 90071.

**G. Payment to Eligible Recipients**

27. The Plan Administrator shall provide the Commission's Office of Financial Management with all necessary information to effectuate the distribution including the distribution amounts, addresses, and Social Security numbers or taxpayer identification numbers for each Eligible Recipient.

28. Upon further Order of the Court, the Commission shall make payments by check to each Eligible Recipient, representing each Eligible Recipient's Actual Losses resulting from Defendant's conduct, and if feasible, reasonable Time Value of Money. All Fair Fund payments to Eligible Recipients shall 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 recipient and that the recipient should consult his or her tax advisor for advice regarding the tax treatment of the distribution;
- (c) a statement that checks are valid for one year; and
- (d) the name of a person or entity to contact, if the Eligible Recipient has any questions regarding the distribution.

29. The Fair Fund distribution checks, on their face, or in the accompanying communication shall clearly indicate that the money is being distributed from a Fair Fund established by the Commission to compensate investors for harm as a result of the conduct described in the Complaint.

30. To the extent that an Eligible Recipient, his or her representative, heir or assign requests a distribution check to be issued or reissued in a different name than the Eligible Recipient (e.g., as the result of a name change because of marriage or divorce, or as the result of death), the Plan Administrator shall honor such request upon receipt of documentation which the Plan Administrator, in her sole discretion, deems appropriate to substantiate the request.

31. After one year from the date on the distribution checks, the amount of all uncashed checks will be credited to the Fair Fund.

32. Under no circumstances shall the Commission, Plan Administrator or his or her agents incur any liability to any person if the Commission, Plan Administrator or her agents make a distribution in accordance with the list of Eligible Recipients and their Actual Losses and any awarded interest as set forth in the Distribution Plan approved by the Court. Upon receipt and acceptance by a Eligible Recipient of a distribution check from the Fair Fund, such Eligible Recipient shall be deemed to have released all claims that such Eligible Recipient may

have against the Commission, Plan Administrator or his or her agents, and shall be deemed enjoined from prosecuting or asserting any such claims.

**H. Accountings**

33. The Plan Administrator shall file with the Court a final report when the distribution is completed but prior to the termination of the Fair Fund and discharge of the Plan Administrator. The final report will be substantially in the form of the Commission's Standardized Final Accounting Report, and shall include, among other things, a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Distribution Plan, and a request for approval of any unpaid fees and costs.

**I. Fair Fund Termination**

34. The Plan Administrator shall make arrangements for the final payment of taxes and tax-related fees and shall submit a final accounting to the Court substantially in the form of the Commission's Standardized Final Accounting Report.. The Fair Fund shall be eligible for termination, and the Plan Administrator shall be discharged, after all of the following have occurred: (a) the final accounting has been submitted by the Plan Administrator for approval, and has been approved, by the Court; (b) all taxes fees, and expenses have been paid; and (c) any amount remaining in the Fair Fund has been paid to the Commission for transfer to the U.S. Treasury.

**J. Remaining Funds in the Fair Fund**

35. A residual account within the Fair Fund is established for any amounts remaining after distribution of the Fair Fund to Eligible Recipients, as described above. The residual account may include, but is not limited to, funds reserved for taxes and fees and expenses; the funds underlying uncashed, undelivered, or returned checks; and tax refunds. If any funds remain in the residual account after completion of all distribution and the payment of all taxes and fees and expenses, those funds shall be transferred to the U.S. Treasury after the final accounting is approved by the Court.