

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 Distribution Fund should be approved as fair and reasonable.

In further support of its motion, the SEC states as follows:

PROCEDURAL BACKGROUND

On September 11, 2009, the Commission filed a Complaint alleging that Falor violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder by fraudulently offering and selling approximately \$9,127,667 of securities to at least 51 investors in the form of membership interests in various limited liability companies controlled by Falor. The complaint also named Falor’s wife, Jennifer Falor, as a relief defendant to recover approximately \$930,000 in investor funds that she either received directly or were spent for her benefit. The complaint sought disgorgement, prejudgment interest, and civil penalties from Falor and disgorgement and prejudgment interest from Jennifer Falor.

On October 15, 2009, pursuant to court order, Jennifer Falor deposited \$500,000 into the registry of this Court pursuant to FRCP 67(a). Jennifer Falor asserted that both Hotel 71 Mezz Lender, LLC and the Commission had competing claims against her with regard to the funds deposited, and that Hotel 71 Mezz Lender, LLC's claim arose by virtue of a pre-existing judgment in the amount of \$52,404,066.52 rendered by a New York State Court in a breach of contract proceeding captioned *Hotel 71 Mezz Lender, LLC v. Robert Falor, David Falor, Chris Falor, Jennifer Falor, Geoffrey Hockman, Guy Mitchell, and Amy Mitchell, Case No. 601175/07* (N.Y. Sup. Ct. August 27, 2008 (Dkt. No.16)). By agreement of the parties, \$375,000 was transferred to Hotel 71 Mezz LLC on April 22, 2011 in partial satisfaction of its claim against Jennifer Falor, with \$125,000 remaining in the court's registry pending final resolution of this matter (Dkt. No.70).

On August 6, 2013, the Court entered an agreed Final Judgment against Relief Defendant Jennifer Falor in which she consented to the entry of a final judgment finding her liable for disgorgement of \$930,243 plus prejudgment interest of \$508,473.26, totaling \$1,438,716.26, but waiving payment of all but \$140,100 based on her sworn representations in her Statement of Financial Condition dated February 19, 2013, and other documents and information submitted to the Commission (Dkt. No. 120). Relief Defendant's \$140,100 obligation was satisfied by the \$125,000 that was being held in the Court's registry and payment to the Clerk of Court of \$15,100. As of February 29, 2016, the total amount held with the Clerk of Court is \$141,332.65.

On February 27, 2015, the Court entered an agreed Final Judgment against Defendant in which he consented to the entry of a final judgment finding him liable for disgorgement of \$8,987,567 plus prejudgment interest of \$5,391,803.49, and a civil penalty of \$130,000. (Dkt. No. 137). Defendant was ordered to satisfy this obligation by paying the Commission a total

\$14,509,370.49 within 14 days after entry of the Final Judgment. Falor has been incarcerated since August 30, 2011 on two charges of tax evasion, and to date, Falor has failed to make any payments. The matter has been referred to the Commission's Office of Collections. On February 1, 2016, the SEC collected \$20,865 from the Florida Department of Financial Services in unclaimed funds held in the name of Robert Falor.

On May 1, 2015, the SEC filed a motion seeking the appointment of a Tax Administrator for the Distribution Fund and to authorize payment of future tax obligations and tax administrator fees and expenses (Dkt. No.143). The Court granted this motion on May 21, 2015 (Dkt. No.146). The Commission moves the Court to transfer the total amount held in the Court's registry in this matter to the Commission. The Commission will combine this amount with the \$20,865 collected from Florida Department of Financial Services, and distribute to injured investors as described below.

The Final Judgment against Defendant and Relief Defendant states that the Commission may propose a plan to distribute the funds collected from them. The Commission now moves the Court to approve a distribution plan so that the funds already paid by Relief Defendant, the funds collected from the Florida Department of Financial Services, and any future funds to be paid by Defendant can be distributed to injured investors harmed by the Defendant's conduct.

APPOINTMENT OF A PLAN ADMINISTRATOR

The Court should appoint Michael S. Lim, a Commission employee in the Office of Distributions, as Plan Administrator to administer and implement the proposed Distribution Plan, as described below. As a Commission employee, the Plan Administrator shall receive no compensation, other than his regular salary as a Commission employee, for his services in administering the Distribution Fund. As the harmed investors are relatively few in number and

known, the appointment of a Commission employee will expedite the distribution process and avoid the costs and expenses that would ordinarily be incurred by appointing a third party administrator thus maximizing investor return.

APPROVAL OF DISTRIBUTION PLAN

The Commission seeks approval of its proposed Distribution Plan to distribute the funds already collected from Relief Defendant, funds collected from the Florida Department of Financial Services, and any future funds to be paid by Defendant (“Distribution Fund”). The Distribution Plan provides for a distribution to certain individuals (the “Eligible Recipients”) who were harmed by the Defendant because Defendant had misappropriated investor funds for his personal use. The Distribution Plan contemplates that a total of approximately \$162,197, less any tax obligations and fees and expenses of the Tax Administrator, will be distributed to Eligible Recipients on a *pro rata* basis for the harm created by Defendant’s conduct. Commission staff also plans to distribute any future funds received, less any tax obligations and fees and expenses of the Tax Administrator, on a *pro rata* basis to Eligible Recipients when and if those future funds are received.

THE PROPOSED DISTRIBUTION PLAN

The Commission proposes the following methodology (*see* Exhibit A) to determine the allocation of the Distribution Fund and any future payments received into the Distribution Fund pursuant to the Defendant’s payment plan:

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

- (Step 2) Divide each Eligible Recipient's Total Loss by the Total Losses. This fractional result, expressed as a percentage, 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 Distribution Fund less any reserve for tax obligations and fees and expenses of the Tax Administrator ("Net Distribution Fund"). The resulting figure represents the amount of the Net Distribution Fund to be distributed to that Eligible Recipient ("Eligible Recipient's *Pro Rata* Share").

The Plan provisions are as follows:

- a. There will be a distribution of the Distribution Fund and any future funds received into the Distribution Fund *pro rata* among all of the Eligible Recipients based upon the investor's *pro rata* investments with Defendant as set forth in Exhibit A.
- b. Following approval of the Distribution Plan by the Court, the Plan Administrator will send a notice ("Notice") to each Eligible Recipient by First Class U.S. Mail. The Notice will provide each Eligible Recipient with a redacted copy of Exhibit A, setting forth that investor's amount of his or her share of the proposed distribution. The Plan Administrator will send the Notice within seven (7) days of the date of the order approving the Distribution Plan.
- c. Eligible Recipients will have twenty (20) days from the date of the order approving the Distribution Plan to submit any objections to the proposed distribution. Eligible Recipients must submit their objections, along with any supporting documentation, to the Plan Administrator via return receipt requested mail.
- d. The Plan Administrator will have forty-five (45) days from the date of the order approving the Distribution Plan to resolve any objections by Eligible Recipients and thereafter to file with the Court a summary of timely filed objections and a response by the Plan Administrator identifying any unresolved objections.
- e. A hearing date, if necessary, to resolve any unresolved objections will be set by the Court thereafter and the Plan Administrator will give notice to Eligible Recipients of said date.
- f. After the Court has ruled on any objections, or if there are no objections, the Court will issue an order for disbursement.

- g. Pursuant to the disbursement order, the Plan Administrator will provide the SEC's Office of Financial Management with an unredacted version of Exhibit A containing the names, addresses and amounts to be disbursed to Eligible Recipients. The SEC's Office of Financial Management shall promptly thereafter cause checks to be issued to the Eligible Recipients in the amounts of their *pro rata* distribution. Each check issued to the Eligible Recipients will state on the face of the check that it is valid for one year. After one year from the date on the distribution check, the SEC's Office of Financial Management will notify the Plan Administrator of the amount of all uncashed checks. The amount of all uncashed checks shall be placed in the Distribution Fund as a residual.
- h. Forty-five days after the remittance of the checks, the Plan Administrator shall obtain information from the SEC's Office of Financial Management concerning checks that have not been negotiated. The Plan Administrator shall then undertake good faith efforts for thirty (30) days to locate and contact the intended recipients of the uncashed checks to ensure that the intended recipients have a reasonable opportunity to participate in the distribution.
- i. The Plan Administrator will submit a final report to the Court prior to termination of the Distribution Fund. The report shall include a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Distribution Plan. The SEC's Office of Financial Management shall provide the Plan Administrator and the Tax Administrator with any account information relating to the funds held in the Distribution Fund that may be required for the final accounting, including providing copies of any account statements that the Plan Administrator or Tax Administrator may request.
- j. The Distribution Fund shall be eligible for termination after all of the following have occurred: (1) the final accounting has been submitted and approved by the Court; (2) all taxes and fees and expenses have been paid; and (3) all remaining funds or any residual have been paid to the SEC for transfer to the U.S. Treasury. When the Court has approved the final accounting, the staff shall seek an order from the Court to terminate the Distribution Fund and to discharge the Plan Administrator.

TRANSFER OF FUNDS TO THE COMMISSION

As described above, Relief Defendant's \$140,100 obligation was satisfied by the \$125,000 that was being held in the Court's registry and payment to the Clerk of Court of \$15,100. As of February 29, 2016, the total amount held with the Clerk of Court is \$141,332.65. The staff respectfully requests that the Court transfer funds held in the Court's registry, and any

accrued interest, to the Commission for distribution to harmed investors pursuant to the Distribution Plan.

**AUTHORIZING COMMISSION STAFF TO MAKE FUTURE
TAX PAYMENTS AND PAY TAX ADMINISTRATOR FEES**

In an effort to meet future tax payment deadlines, avoid the assessment of late payment penalties, and make timely payment to the Tax Administrator for services provided, the Commission further requests that Commission staff be authorized to approve and arrange payment of all future tax obligations and Tax Administrator fees and expenses from the Distribution Fund without prior Court approval. Authorizing Commission staff to approve and pay future tax obligation and tax administrator fees and expenses from the Distribution Fund without prior Court Approval will expedite the payment process, reducing the risk of late tax payments and penalties. All tax payments and tax administrator fees will be reported to this Court in the final accounting of the Distribution Fund once the distribution is complete.

CONCLUSION

For the reasons stated above, the Commission hereby moves the Court to (1) appoint Commission employee Michael S. Lim as Plan Administrator; (2) approve the Commission's plan to distribute funds collected from Relief Defendant, funds collected from the Florida Department of Financial Services, and any future funds to be collected from Defendant Robert Falor to harmed investors; (3) transfer the total amount held in the Court's registry in this matter to the Commission for distribution to harmed investors pursuant to the Distribution Plan; (4) authorize the Commission staff to approve and arrange payment of all future tax obligations and tax administrator fees and expenses owed by the Distribution Fund directly from the Distribution Fund without further order of the Court; and (5) to grant such other and further relief as this Court deems just and proper.

Dated: April 14, 2016

Respectfully submitted,

s/ Jonathan S. Polish

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EXHIBIT A

Exhibit A

Eligible Recipient	Eligible Recipient's Loss in South Beach Investors, LLC	Eligible Recipient's Loss in Printers Row Investors, LLC	Eligible Recipient's Loss in Tides Hotel Investors, LCC	Eligible Recipient's Total Loss	Eligible Recipient's Proportional Loss
Eligible Recipient #1	\$50,000	\$50,000	\$50,000	\$150,000	1.64%
Eligible Recipient #2	\$50,000	\$50,000	\$50,000	\$150,000	1.64%
Eligible Recipient #3			\$50,000	\$ 50,000	.55%
Eligible Recipient #4		\$50,000	\$50,000	\$ 100,000	1.10%
Eligible Recipient #5		\$100,000	\$50,000	\$150,000	1.64%
Eligible Recipient #6		\$100,000	\$100,000	\$200,000	2.19%
Eligible Recipient #7			\$50,000	\$ 50,000	.55%
Eligible Recipient #8	\$200,000	\$200,000	\$200,000	\$600,000	6.57%
Eligible Recipient #9	\$100,000	\$100,000	\$120,000	\$320,000	3.51%
Eligible Recipient #10		\$50,000	\$50,000	\$100,000	1.10%
Eligible Recipient #11			\$100,000	\$100,000	1.10%
Eligible Recipient #12			\$50,000	\$ 50,000	.55%
Eligible Recipient #13			\$50,000	\$ 50,000	.55%
Eligible Recipient #14			\$100,000	\$100,000	1.10%
Eligible Recipient #15	\$50,000		\$75,000	\$125,000	1.37%
Eligible Recipient #16	\$100,000	\$100,000	\$100,000	\$300,000	3.29%
Eligible Recipient #17	\$100,000		\$100,000	\$200,000	2.19%
Eligible Recipient #18	\$250,000	\$150,000	\$200,000	\$600,000	6.57%
Eligible Recipient #19		\$100,000	\$100,000	\$200,000	2.19%

Eligible Recipient #20	\$301,667		\$300,000	\$601,667	6.59%
Eligible Recipient #21	\$100,000	\$50,000	\$150,000	\$300,000	3.29%
Eligible Recipient #22	\$50,000			\$ 50,000	.55%
Eligible Recipient #23	\$50,000			\$ 50,000	.55%
Eligible Recipient #24	\$50,000			\$ 50,000	.55%
Eligible Recipient #25	\$100,000			\$100,000	1.10%
Eligible Recipient #26	\$160,000			\$160,000	1.75%
Eligible Recipient #27	\$50,000			\$ 50,000	.55%
Eligible Recipient #28			\$50,000	\$ 50,000	.55%
Eligible Recipient #29		\$100,000		\$100,000	1.10%
Eligible Recipient #30		\$100,000		\$100,000	1.10%
Eligible Recipient #31		\$50,000		\$ 50,000	.55%
Eligible Recipient #32		\$50,000		\$ 50,000	.55%
Eligible Recipient #33	\$50,000	\$50,000		\$100,000	1.10%
Eligible Recipient #34		\$50,000		\$ 50,000	.55%
Eligible Recipient #35		\$200,000		\$200,000	2.19%
Eligible Recipient #36	\$200,000			\$200,000	2.19%
Eligible Recipient #37	\$100,000	\$100,000		\$200,000	2.19%
Eligible Recipient #38	\$75,000	\$50,000		\$125,000	1.37%
Eligible Recipient #39	\$50,000			\$ 50,000	.55%
Eligible Recipient #40	\$300,000			\$300,000	3.29%
Eligible Recipient #41			\$250,000	\$250,000	2.74%
Eligible Recipient #42		\$50,000		\$ 50,000	.55%

Eligible Recipient #43		\$100,000		\$100,000	1.10%
Eligible Recipient #44	\$60,000		\$70,000	\$130,000	1.42%
Eligible Recipient #45	\$200,000			\$200,000	2.19%
Eligible Recipient #46	\$225,000	\$400,000	\$300,000	\$925,000	10.13%
Eligible Recipient #47		\$50,000	\$50,000	\$100,000	1.10%
Eligible Recipient #48		\$100,000		\$100,000	1.10%
Eligible Recipient #49	\$250,000			\$250,000	2.74%
Eligible Recipient #50	\$250,000			\$250,000	2.74%
Eligible Recipient #51			\$241,000	\$241,000	2.64%
Total Losses	\$3, 521,667	\$2,550,000	\$3,056,000	\$9,127,667	100.00%