

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

informed counsel for the Commission that Defendants have no objection to the relief sought herein.

Dated: New York, New York
May 3, 2021

SECURITIES AND EXCHANGE
COMMISSION

By: /s/Richard G. Primoff
Richard G. Primoff
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200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0148 (Primoff)
Attorneys for Plaintiff
Securities and Exchange Commission

1. The Commission's motion is **GRANTED**;

2. A Fair Fund is established pursuant to Section 308(a) of the Sarbanes Oxley Act of 2002, 15 U.S.C. § 7246(a), for all funds under the Court’s jurisdiction in this matter, including any accrued interest (the “Fair Fund”);

3. The Commission is ordered to include in the Fair Fund all amounts it currently holds in this action;

4. Richard G. Primoff is appointed as the Distribution Agent under the terms set forth in the Plan;

5. The Plan is approved;

6. The Fair Fund shall be distributed in accordance with Appendix A to the Plan; and

7. If a Residual remains in the Fair Fund after the distribution set forth in ¶ 5, above, the Residual may, in the discretion of the Commission acting through the Distribution Agent, be distributed in accordance with the Plan.

IT IS SO ORDERED.

Dated: _____, 2021

The Honorable Jed S. Rakoff
United States District Court Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|-----------------------------|---|
| -----X | |
| SECURITIES AND EXCHANGE | : |
| COMMISSION, | : |
| | : |
| Plaintiff, | : |
| | : |
| | : |
| v. | : |
| | : |
| ALKIVIADES DAVID and | : |
| HOLOGRAM USA NETWORKS INC., | : |
| | : |
| Defendants. | : |
| -----X | |

No. 19 Civ. 9013 (JSR)
ECF CASE

PROPOSED DISTRIBUTION PLAN

1. The Securities and Exchange Commission (the “Commission” or the “SEC”) submits this Distribution Plan (the “Plan”) to distribute the disgorgement, pre-judgment interest, and civil penalty paid by Defendants Hologram USA Networks Inc. (“Hologram”) and Alkiviades David (“David”) (collectively, the “Defendants”) to investors harmed by the actions described in the Amended Complaint.

2. The Commission incorporates by reference the background and history of this matter as set forth in the accompanying Memorandum in Support of its Motion for an Order Establishing a Fair Fund, Approving a Distribution Plan, and Appointing a Distribution Agent dated April 28, 2021 (the “Memorandum”).

3. By Order entered May 8, 2020 (DE 36), this Court appointed Miller Kaplan Arase LLP as tax administrator for all funds under the Court’s jurisdiction in this case (the “Tax Administrator”) and authorized payment of tax related obligations, fees, and expenses from those funds without further Court Order.

The Fair Fund

4. The Commission currently holds approximately \$119,223.39 in an interest-bearing account at the U.S. Treasury's Bureau of Fiscal Service ("BFS"), comprised of the \$100,000 civil penalty paid by David, the disgorgement and pre-judgment interest paid by Hologram, plus accrued interest, less any Administrative Costs¹ paid to date. If and when the Court establishes a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 (the "Fair Fund"), the Fair Fund, net a reserve for Administrative Costs (the "Net Available Fair Fund"), will be distributed for the benefit of Eligible Harmed Investors pursuant to the Plan.²

The Distribution Agent

5. Richard G. Primoff, a Commission employee, will serve as Distribution Agent in connection with the Plan.

6. The Distribution Agent:

(a) shall receive no compensation for the services performed in administering the Fair Fund, other than his regular salary as an employee of the SEC;

(b) shall perform such functions as are necessary to implement and administer the Plan. In performing these functions, the Distribution Agent shall be deemed to be acting within the scope of his employment with the Commission.

¹ Capitalized terms not immediately defined are defined below.

² If the Court does not establish a Fair Fund but approves the Plan, the distribution fund will hold \$22,419.26 plus accrued interest (the "Distribution Fund"); the "Net Available Distribution Fund" will be the Distribution Fund net a reserve for Administrative Costs; "Distribution Fund" and "Net Available Distribution" will substitute for the reference to "Fair Fund" and "Net Available Fair Fund" as used herein; any distribution will be *pro rata* (see ¶ 15) as opposed to the full compensation plus reasonable interest set forth on Appendix A.

In carrying out his duties, the Distribution Agent may be assisted by other Commission staff acting under his supervision;

(c) shall coordinate with the Tax Administrator to ensure that the Fair Fund, a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code, and related regulations pertaining to QSFs, 26 C.F.R. §§ 1.468B-1 through 1.468B-5, complies with all related legal and regulatory requirements, including without limitation, satisfying any reporting or withholding requirements imposed on distributions from the Fair Fund; and

(d) with his designees, agents and assistants, shall not be required to post a bond, and shall not be liable to any person for their actions hereunder, except on a finding of willful disregard of duty.

Definitions

7. The following definitions apply to the terms as used in the Plan:

(a) **Administrative Costs** are the costs and obligations associated with the Fair Fund and the Plan, including investment costs, taxes, and tax related fees and expenses. All Administrative Costs shall be paid out of the Fair Fund.

(b) **Distribution Payment** is the payment made to an Eligible Harmed Investor in accordance with the Plan.

(c) **De Minimis Amount** is \$20. No Distribution Payment shall be made under the Plan for less than the *De Minimis* Amount.

(d) **Eligible Harmed Investor** is any Harmed Investor who is determined eligible for a Distribution Payment under the methodology described in ¶¶ 8-9, below, and whose Distribution Payment equals or exceeds the *De*

Minimis Amount.

(e) **Excluded Party(ies)** are (i) Unresponsive Investors; (ii) Hologram, its agents, affiliates, assigns, subsidiaries, successors-in-interest, and any entity in which Hologram has a controlling interest; (iii) David, his spouse, agents, affiliates, heirs, assigns, household members, and successors-in-interest; (iv) an Investor whose Investment, in whole or in part, was funded by Hologram or David; (v) any entity controlled by Hologram or David or in whose Investment Hologram or David had or has an interest; and (vi) any purchaser or assignee of a Eligible Harmed Investor's right to obtain a recovery from the Fair Fund for value; provided, however, that this provision (vi) shall not be construed to exclude those Eligible Harmed Investors who obtained such a right by gift, inheritance, or devise or operation of law.

(f) **Harmed Investor** is an Investor who is not an Excluded Party and whose Recovery is less than their Investment.

(g) **Investment** refers to the aggregate out-of-pocket investment made by an Investor in Hologram. It does not include any interest, dividend, or paper profit.

(h) **Investor** refers to persons or entities that invested in Hologram.

(i) **Investor Notice** is the notice that the Commission sent to the last known physical and/or email address of each potential investor except those from whom the Commission staff had obtained written or testimonial confirmation that they are not a Harmed Investor, and any Investors for whom the Commission staff has been unable to locate or contact, despite reasonable efforts.

(j) **Net Available Fair Fund** is the Fair Fund less Administrative Costs.

(k) **Recovery(ies)** is the aggregate amount of an Investment previously recovered by an Investor, whether through refund from Defendants, or otherwise.

(l) **Investment Loss** is the difference between each Harmed Investor's Investment and Recovery.

(m) **Stale Date** is the date on which Distribution Payment checks expire.

(n) **Unresponsive Investor** is any Investor from whom information was sought in the Investor Notice and/or otherwise by the Commission staff and/or the Distribution Agent or his agents, and who does not timely provide information necessary to the distribution; and any Investor whom the Commission staff and/or the Distribution Agent have been unable to contact or locate, despite reasonable efforts. For purposes of the Plan, locating Investors through the use of commercial databases regularly available to the Division of Enforcement of the SEC, last known contact information, and the information provided in response to the Investor Notice, constitutes "reasonable efforts."

Methodology for Identifying Eligible Harmed Investors and Calculating Distribution Payments.

8. The objective of the methodology described below is to distribute the Net Available Fair Fund so that each Eligible Harmed Investor will receive a Distribution Payment equal to his or her Investment Loss.

9. Each Eligible Harmed Investor will receive a Distribution Payment equal to the amount set forth on the chart attached as Appendix A.³ The Distribution Payment was determined as follows:

- (a) The Distribution Agent determined the amount of the Net Available Fair Fund;
- (b) The Distribution Agent created a list of Harmed Investors who are not Excluded Parties (the “Preliminary List”), using the information obtained during the SEC investigation and in response to the Investor Notice;
- (c) Using the Preliminary List, the Distribution Agent then calculated each Harmed Investor’s Investment Loss.
- (d) Because the Net Available Fair Fund has funds in excess of that necessary to pay each Harmed Investor a Distribution Payment equal to the amount of their Investment Loss plus an additional amount to compensate each Eligible Harmed Investor for the time value of their respective Investment Loss (“Reasonable Interest”),⁴ the Distribution Agent has included Reasonable Interest in the Distribution Payments;
- (e) If for any Harmed Investor, the Distribution Payment is less than the *De Minimis* Amount, the Distribution Agent removed that Harmed Investor from the Preliminary List;

³ In order to maintain Harmed Investor privacy, Harmed Investors are identified on Appendix A by an investor number that was communicated to them in the Investor Notice.

⁴ “Reasonable Interest” will be calculated by the Commission’s Division of Economic and Risk Analysis (“DERA”) at a rate determined to be appropriate under the facts and circumstances of this case, compounded quarterly from the approximate date of the loss through the approximate date of the disbursement of the Distribution Fund.

(f) The Distribution Agent then deemed each remaining Harmed Investor on the Preliminary List an Eligible Harmed Investor eligible to receive a Distribution Payment equal to that set forth on Appendix A.

Administration of the Fair Fund

10. Prior to distributing any funds to Eligible Harmed Investors, the Distribution Agent will reserve or pay, as appropriate, any unpaid Administrative Costs.

11. Investors who relocate after being contacted by the Distribution Agent must promptly provide to the Distribution Agent new contact information in order to be considered for eligibility, or remain eligible, for a distribution.

12. The Net Available Fair Fund will be distributed to Eligible Harmed Investors in accordance with Appendix A and pursuant to the methodology described in ¶¶ 8-9, above. The Distribution Agent will make a payment to each Eligible Harmed Investor through BFS by electronically transferring funds through the Automated Clearing House or mailing a check to the payee. The Distribution Agent will compile the information, prepare a payment file, and verify the payment file's completeness and accuracy for submission to Commission staff who, without further Court Order, will make the disbursements through BFS. At or about the time that the Distribution Agent submits a payment file to BFS, the Distribution Agent will prepare and send to the last known physical and/or email address of each Eligible Harmed Investor a communication that includes, if and as appropriate: (a) a statement characterizing the distribution; (b) a description of the tax information reporting and other related tax matters; and (c) the name of a person to contact with questions concerning the distribution. The communication will clearly indicate that the money is being distributed in connection with the captioned case.

13. Checks that are not negotiated prior to the Stale Date shall be voided, and the distribution amount returned to the Fair Fund for disposition in accordance with the Plan. Electronic payments will be made only to cash equivalent accounts (*e.g.*, checking or savings accounts). No checks will be issued or reissued, or payments made to investors, after 12 months from the date of original or initial issuance.

Disposition of Remaining Funds after Distribution

14. A residual within the Distribution Fund (the “Residual”) will be established for any amounts remaining after completion of the Distribution Payments described above and the payment of incurred Administrative Costs. The residual may include, among other things, collections after the initial distribution, funds reserved for future Administrative Costs, amounts from Distribution Payment checks that have not been cashed, amounts from Distribution Payments that were not delivered or accepted upon delivery, and tax refunds. After all Administrative Costs have been paid, all funds remaining in the Residual that are infeasible to distribute to investors will be returned to the Commission, pending a final accounting. Upon completion of the final accounting the Commission staff will file a motion with this Court to approve the final accounting, which will include a recommendation as to the final disposition of the Residual, consistent with *Liu v. SEC*, 140 S. Ct. 1936 (2020). If distribution of the Residual to investors is infeasible, the SEC staff may recommend the transfer of the Residual to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Securities Exchange Act of 1934 (“Exchange Act”).⁵

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 Distribution Fund or otherwise distributed to victims, plus investment income, shall be deposited or credited into the SEC Investor Protection Fund.

15. If feasible, the Distribution Agent may, in his discretion, distribute the Residual, net a reserve for Administrative Costs (the “Net Residual”), in accordance with the Plan, to any Eligible Harmed Investors located or identified as eligible after the initial distribution, who provide documentation subsequent to the initial distribution, or who failed to negotiate the checks or receive the payment issued in the immediately preceding distribution (“Residual Distributees”), up to the Eligible Harmed Investors’ Investment Loss plus Reasonable Interest. If the Net Residual is less than the aggregate Investment Loss Amount of the Residual Distributees, each Residual Distributee will receive a Distribution Payment equal to the Net Residual multiplied by the ratio of the Residual Distributee’s Investment Loss to the aggregate Investment Losses of all Residual Distributees (“*Pro Rata*”).

Final Accounting and Termination of the Fair Fund

16. Upon completion of all distributions under the Plan, the payment of all Administrative Costs, and the completion of a final report and accounting, the Distribution Agent will seek an Order from the Court, as appropriate, approving the final accounting; discharging the Distribution Agent; transferring the remaining Residual, and any amounts returned to the Fair Fund in the future, to the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act; and terminating the Fair Fund.

17. The Fair 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 report and accounting has been submitted to, and approved by, the Court;
- (b) All Administrative Costs have been paid; and
- (c) The remaining Residual has been disposed of consistent with this

Court's Order.

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

Miscellaneous

19. The Distribution Agent and the Tax Administrator are entitled to rely on all outstanding rules of law and Court orders.

20. All proceedings with respect to the administration, processing, and determination of claims and the determination of all related controversies, shall be subject to the exclusive jurisdiction of this Court.

21. The Distribution Agent may implement immaterial changes to this Plan to effectuate its general purposes.

22. The Court reserves the right to amend the Plan from time to time, and retains jurisdiction over this matter for this purpose and for any and all other matters that may arise under or relate to the Plan.

APPENDIX A

Appendix A

| Investor Number | Investment | Recovery | Investment Loss | Reasonable Interest | Distribution Payment |
|-----------------|------------|----------|-----------------|---------------------|-----------------------|
| 15 | \$2,400 | \$1,600 | \$800 | \$40.34 | \$840.34 |
| 49 | \$800 | \$400 | \$400 | \$20.17 | \$420.17 |
| 68 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 69 | \$800 | \$0 | \$800 | \$40.34 | \$840.34 |
| 72 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 77 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 81 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 93 | \$4,000 | \$0 | \$4,000 | \$201.68 | \$4,201.68 |
| 97 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 98 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 ¹ |
| 101 | \$800 | \$400 | \$400 | \$20.17 | \$420.17 ² |
| 106 | \$1,400 | \$400 | \$1,000 | \$50.42 | \$1,050.42 |
| 121 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 128 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 129 | \$2,400 | \$0 | \$2,400 | \$121.00 | \$2,521.00 |
| 144 | \$2,000 | \$0 | \$2,000 | \$100.84 | \$2,100.84 |
| 145 | \$10,000 | \$5,000 | \$5,000 | \$252.10 | \$5,252.10 |
| 155 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 163 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 169 | \$800 | \$0 | \$800 | \$40.34 | \$840.34 |
| 178 | \$400 | \$0 | \$400 | \$20.17 | \$420.17 |
| 184 | \$1,600 | \$0 | \$1,600 | \$80.67 | \$1,680.67 |
| 192 | \$1,800 | \$1,000 | \$800 | \$40.34 | \$840.34 |
| 198 | \$5,000 | \$0 | \$5,000 | \$252.10 | \$5,252.10 |
| 200 | \$1,000 | \$0 | \$1,000 | \$50.42 | \$1,050.42 |
| 204 | \$2,000 | \$0 | \$2,000 | \$100.84 | \$2,100.84 |

¹ This individual is not presently an Eligible Harmed Investor, and no distribution is contemplated, unless the Commission staff is able to obtain confirmed contact information for this individual.

² This individual is not presently an Eligible Harmed Investor, and no distribution is contemplated, unless the Commission staff is able to obtain confirmed contact information for this individual.

2. After the entry of Final Judgments on March 19, 2020, and the payment in satisfaction thereof, the Commission currently holds approximately \$119,703.49 in an interest-bearing account at the U.S. Treasury’s Bureau of Fiscal Service (“BFS”), comprised of the \$100,000 civil penalty paid by David and \$22,419.26 in disgorgement and pre-judgment interest paid by Hologram (the “Fund”). Other than accrued interest, which will be added to the Fund, the Commission does not expect any additional funds.

3. On April 28, 2020, the Commission published on its public webpage for this matter, <https://www.sec.gov/divisions/enforce/claims/hologram.htm>, a summary of this action, links to the Amended Complaint and Final Judgments, and an email contact for further information about this matter.

4. Defendants' records initially reflected the possibility that more than 200 individuals had invested with Defendants. Defendants' records, however, were incomplete, and ambiguous as to whether each of these individuals had actually paid monies to Defendants, and if so, whether they had been fully or partially refunded. In addition, the records were incomplete and/or out of date with respect to contact information for certain of these individuals.

5. To compile an accurate list of actual investors ("Investors") and their losses, the Commission staff reviewed the Defendants' bank records, related payment processing records, and questioned potential investors. After reconciling the bank records and money processing records with information provided by investors, the staff concluded that 115 investors invested in Hologram (the "Investors"), of whom 24 did not receive any refunds or only partial refunds from Defendants, and who have lost an aggregate of \$31,600 (the "Eligible Harmed Investors").

6. To further confirm its conclusions, we prepared the Investor Notice (Exhibit A hereto) and on October 6, 9, and 13, 2020, sent them to 194 potential investors at their last known physical and/or email address.¹

¹ The Commission became aware of UPS delivery issues for nineteen of these potential investors, and the Commission then sent the Investor Notice to them by email.

There were also six potential investors for whom Commission staff had only email addresses, and no physical addresses: Investor Nos. 9, 17, 23, 56, 131, and 167. The Commission staff's investigation did not identify any of them as having sustained an Investment Loss. On October 6, Commission staff emailed them the Investor Notice, requesting delivery receipts and read receipts. Commission received delivery receipts for each of them, but no read receipts, but then subsequently received an "Undeliverable" message for Investor No. 17. The Commission staff had telephone numbers for only two of these six investors: Investor No. 17, whom I had

7. In view of the ambiguous and incomplete state of Defendants' records and to ensure the Commission would account for all actual investors who had not received full refunds, the notice pool was broader than those whom the Commission had preliminarily determined to be eligible for a distribution. Thus, the Investor Notice was also sent to individuals whose names appeared in Defendants' records, even though the Commission believed from its investigation that they had not invested or had already been fully refunded, although the Commission did not send notices to those persons who confirmed to the Commission in writing or testimony that they did not have an unrefunded investment in Hologram.

8. The Commission was unable to provide the Investor Notice to two potential investors (Investor Nos. 98 and 101) for whom Defendants' records suggest that these investors may have made a total of \$800 in unrefunded investments, because despite efforts to locate them, the Commission could not find sufficient identifying information to obtain a way to contact them.

9. The Investor Notice, among other things, alerted Investors of the Commission's intent to file this motion; informed Investors of the Commission's calculation of their "Investment," "Recovery," and "Net Investment Loss (Investment – Investment Recovery)"; provided directions on how to object to the Commission's calculations, as well as to the Commission's proposed plan methodology; requested from certain Investors a completed questionnaire, updating contact and payment information, and, as appropriate, completion of a tax form; and provided information concerning the tax consequences of distributions in this

previously and unsuccessfully attempted to reach by telephone several times, and Investor No. 9. I reached Investor No. 9 by telephone, who advised me that he did not believe he was owed any money, and was unsure if he had invested at all.

matter.² Objections and responses to the Investor Notice were due within thirty days of the Notice, or November 13, 2020.³

10. Two potential investors (Investor Nos. 28 and 91), respectively, responded telephonically to and disagreed with the Commission's preliminary determination that they did not have a Net Investment Loss. Investor No. 28 claimed telephonically to have a Net Investment Loss of \$1000, but despite the Commission staff having reached out to Investor No. 28 (and notwithstanding the absence of any written objection), this Investor has not been able to document the investment or an Investment Loss.

11. Investor No. 91 is a limited liability company associated with an individual investor, Investor No. 15. Despite having received no written objections from either Investor No. 15 or 91, the Commission reached out to Investor No. 15 telephonically. Investor No. 15 previously claimed to have invested over \$3,000 in total, collectively, with Investor No. 91. The Commission staff was able to confirm from Defendants' bank records only that Investor No. 15 had an investment of \$2,400, that Investor No. 15 was refunded \$1,600, and could not confirm any investment by Investor No. 91. The Plan therefore notes Investor No. 15 is entitled to a distribution of \$800. Were Investor No. 15's claim of having invested a collective amount of \$3,000 with Investor No. 91 credited, that would indicate at most the possibility of an additional claim by Investor No. 91 of \$600 (\$3,000, less the \$1,600 previously refunded by Defendants, and the Commission's anticipated distribution of \$800). However, the Commission staff has been unable to confirm this additional claim, nor has Investor No. 15 or 91 provided any

² Capitalized terms not defined herein are used as defined in the Plan.

³ Investors were assigned an Investor Number in order to identify them while still protecting their privacy in, for instance, public filings.

substantiating documentation, and it is therefore not credited in the Plan.⁴

Dated: May 3, 2021
New York, NY

s/Yitzchok Klug
Yitzchok Klug

⁴ As reflected on the certificate of service, these two investors are being served with this motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION

Plaintiff,

19 Civ. 9013 (JSR)

v.

ALKIVIADES DAVID and
HOLOGRAM USA NETWORKS
INC.,

Defendants.

INVESTOR NOTICE

TO:

INVESTOR:

Investor Number:

You are receiving this Notice because the Investor set forth in the subject line above (“You” or “Investor”) has been identified as an investor in Hologram USA Networks Inc. (“Hologram”). By this Notice, the Securities and Exchange Commission (the “SEC”) is informing you of its intent to seek Court approval of a Plan to distribute to investors certain funds described below and giving you the opportunity to review, in advance, the plan methodology and our record of your investment. The investor number referenced in the subject line will be used to protect your privacy in any public filings in which you are referenced; please keep a record of this number.

Receipt of this Notice DOES NOT mean you will be eligible for a distribution; your eligibility will be determined AFTER (and if) the Court approves a Plan of Distribution.

PLEASE READ THIS INVESTOR NOTICE IN ITS ENTIRETY

This Notice contains procedures and the DEADLINE (October 31, 2020) by which objections to the proposed distribution must be sent to the SEC in accordance with Section IV, below. It further **REQUIRES CERTAIN INVESTORS, AS EXPLAINED BELOW, TO SEND TO THE SEC A COMPLETED AND SIGNED QUESTIONNAIRE** and, if one is included in this package, a completed and signed tax certification, for receipt no later than the

DEADLINE (October 31, 2020), in accordance with Section IV, below. FAILURE TO COMPLY WITH THESE DEADLINES WILL RESULT IN A WAIVER OF OBJECTION(S) AND INELIGIBILITY FOR A DISTRIBUTION.

I. Background

The SEC filed its Complaint on September 27, 2019, and its Amended Complaint on December 2, 2019, against Defendants Hologram USA Networks Inc. (“Hologram”) and Alkiviades David (“David”), its founder, chairman, and CEO. The SEC alleged that from late November 2017 until late March 2018, the Defendants defrauded prospective investors in violation of the federal securities laws by inducing them to buy securities of Hologram and its subsidiary through materially false and misleading representations about Hologram’s business. Because the offerings of the Hologram securities were unregistered, the Commission further charged the Defendants with violations of the registration provisions of the federal securities laws.

In late March 2018, after they learned of the Commission’s investigation, Defendants stopped selling securities and refunded some investor money. On March 19, 2020, the Court entered Final Judgments against Defendants. The Final Judgments, to which the Defendants consented, required Hologram to pay a total of \$22,419.26 in disgorgement and pre-judgment interest, and David to pay a civil penalty of \$100,000. The Investor identified in the subject line at the top of this letter has been identified as an investor who may have been adversely affected by this conduct.

The SEC currently holds a total of \$122,419.26 plus accrued interest in an interest-bearing account at the U.S. Treasury (the “Fund”). After receiving all necessary information from investors pursuant to this Notice, the SEC intends to file a motion with the Court seeking approval of a plan to distribute the Fund, less the costs of distribution, to harmed investors in the manner described below.

You will be able to view updates, including the SEC’s filings with respect to a distribution and any Court Orders regarding the same, at the following public website:

<https://www.sec.gov/divisions/enforce/claims/hologram.htm>

II. The Proposed Plan Methodology

Insofar as the Fund exceeds Investor Net Investment Losses as currently calculated, the SEC intends to return to each Investor their Net Investment Loss, calculated as the difference between the Investor’s Investment and their Investment Recovery, meaning any amount thus far recovered by the Investor, from any source, on their investment.

III. SEC Record of the Investor’s Investment, Investment Recovery, and Net Investment Loss

The table below contains the SEC’s current record of your Investment, Investment Recovery, and Net Investment Loss:

| Investment | Investment Recovery | Net Investment Loss (Investment- Investment Recovery) |
|------------|---------------------|--|
| \$ | \$ | \$ |

Subject to the objection process below, the Net Investment Loss amount reflected in the above table will be the basis for determinations of eligibility for a distribution and distribution payments (if any).

IV. Objection(s) to the Plan Methodology and/or the Numbers in Sections II and III, Above

If you object to the proposed Plan Methodology or to your Net Investment Loss amount set forth above, you must submit that objection in writing to the undersigned at the address set forth below for receipt **no later than** October 31, 2020. Your objection must include, at a minimum, the following:

- The case name and number: *SEC v. Alkiviades David and Hologram USA Networks Inc.*, No. 19 Civ. 9013 (JSR) (S.D.N.Y.);
- The Investor's name, Investor Number, and contact information, including phone and email if available;
- A clear statement of the objection, and documentation sufficient to support the objection. If your objection is to the Net Investment Loss Amount set forth in Section III, above, please include all documentation necessary to support the proposed correction, including proof of the Investment amount (bank statements, credit card statements, and/or emails) and proof that any Investment Recovery was less than your Investment (such as bank or credit card statements from the month of your investment through the month of June 2018);
- If you are making assertions of fact in connection with the objection, you should submit the same with the following (if true) above the signature line:

“I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October __, 2020.”

- If the objection is coming from anyone other than the Investor or the Investor's attorney, signed authorization from the Investor authorizing the submission of the objection on their behalf;

The objection should be directed by **receipted mail** to:

Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400

New York, NY 10281-1022
Attn: Yitzchok Klug

If you fail to submit an objection in accordance with these directions for receipt by October 31, 2020, your objection(s) will be deemed waived.

Any objection that remains unresolved will be included in the SEC's motion to the Court seeking approval of a distribution plan, and a copy of that motion will be served upon all objecting parties whose objections have not been resolved.

V. Information Required from Investors Who Have a Net Investment Loss or Who Submit an Objection

If the Net Investment Loss set forth in Section III, above, is greater than \$0, or, regardless of the amount reflected in Section III, you are submitting an objection pursuant to Section IV, above, you must, for receipt **no later than** October 31, 2020 return to the undersigned the completed and signed **Questionnaire** (immediately following the signature page of this letter) and, if one is included with this Notice, a tax certification, to be considered for eligibility for a distribution under the Plan. We have enclosed a self-addressed, prepaid, overnight shipping envelope for this purpose.

Alternatively, **if you have the ability to send information securely**, you may submit the completed Questionnaire by email to:

NYRODistributions@sec.gov

Please include "*SEC v. Alkiviades David and Hologram USA Networks Inc.*, No. 19 Civ. 9013 (JSR) (S.D.N.Y.)" in the subject line of the email. **FOR YOUR PROTECTION**, please do not return the completed and executed Questionnaire, tax certification, or any document with sensitive information, by email **unless you can do so securely**, such as by saving it as a password protected PDF file and attaching it to your email, and sending the password in a separate email. **If you have any doubts about your ability to send the email securely, please return the documents to the SEC in the enclosed self-addressed, prepaid, overnight shipping envelope.**

THE FAILURE OF AN INVESTOR FILING AN OBJECTION TO TIMELY PROVIDE ALL OF THE INFORMATION REQUESTED ON THE QUESTIONNAIRE (AND, AS APPROPRIATE, THE COMPLETED TAX CERTIFICATION) MAY RESULT IN THAT INVESTOR BEING DEEMED INELIGIBLE TO RECEIVE A DISTRIBUTION UNDER THE PLAN.

VI. Tax Consequences of Distribution Payments

Also enclosed is a document entitled “Tax Consequences of Distribution Payments” that provides a description of potential tax consequences if you are determined eligible for a distribution (the “Tax Certification”). Please retain this document and, if you receive a distribution, provide it to your tax professional or review it if you prepare your own taxes. Please note that the information set forth in the Tax Certification is not, and should not be relied upon as tax advice; you should consult your tax adviser as to the specific tax consequences of a distribution to you.

Dated: October 1, 2020

Yitzchok Klug
Senior Counsel
Securities and Exchange Commission

Enclosures: Questionnaire;
Tax Consequence Certification; and
Addressed, Prepaid UPS Envelope

QUESTIONNAIRE

(Please carefully review the directions, fill out completely and legibly, sign and return to the SEC)

1. Name and Contact information of Person Signing Below:

Full Name:

Address:

Phone Number:

Email Address:

Relation to Investor:

2. Investor information (the precise name of the person or entity to which a distribution should be directed, i.e. the payee on the check.) If you provide below a name different from the Investor identified on the first page of the Investor Notice, YOU MUST provide **documentation for the change**, such as a marriage license if the change is to a married name; and proof of death and beneficiary if the change is due to an Investor's death.

Investor Name:

Investor Social Security or Tax Identification Number: _____

Investor Address and Contact Information (if different than #1 above):

Contact Full Name:

Address:

Phone Number:

Email Address:

3. I ___ do ___ do not (check one) have access to the Internet and can ___ cannot ___ (check one) access <https://www.sec.gov/divisions/enforce/claims/hologram.htm> for notifications regarding any distribution in this matter.

Date: _____, 2020

Signature: _____

Printed Name: _____

Tax Consequences of Distribution Payments

The Distribution Fund is a “Qualified Settlement Fund” (“QSF”) as defined in Section 468B(g) of the Internal Revenue Code, 26 U.S.C. Section 468B(g), as amended, and the Treasury regulations promulgated thereunder, 26 C.F.R. 1.468B-1 *et seq.* If you receive a distribution from this Distribution Fund, there may be tax consequences.

Generally, the losses component of a distribution is not income to you to the extent of your basis in your investment. However, you must reduce your basis by the amount of the distribution. If the distribution exceeds your tax basis in your investment, then the excess is includable in your income as capital gain. Any such capital gain is long-term capital gain unless you disposed of your investment before holding it for longer than one year. If you do not have reasonable access to records indicating the tax basis of your investment, then you may assume that your tax basis is zero and that the entire distribution is includable in your income as capital gain. ***The QSF is not required to – and will not – issue a Form 1099 to you with respect to the losses component of the distribution.***

Prejudgment Interest Component. The pre-judgment interest component – which comprises 1.98% of the distribution – constitutes taxable interest income to you; however, you will only receive a Form 1099-INT if the distribution contains \$600 or more of such interest. If you are, or are presumed to be, a nonresident alien of the U.S. (“NRA”), or a payee subject to withholding under the Foreign Account Tax Compliance Act (“FATCA”), you may receive Form 1042-S with respect to the interest component of the distribution. The interest component may also be subject to 30% NRA withholding or 30% FATCA withholding under certain circumstances, which will be remitted to the IRS on your behalf if applicable. To the extent the interest component in the distribution sent to you is subject to such withholding, it will be reflected on the Form 1042-S that will be issued to you in the first quarter of the year subsequent to the year you receive the distribution payment.

Please note that the parties to this matter, the Distribution Agent, and the Tax Administrator cannot provide tax advice to investors receiving distributions. The information contained herein is being provided for informational purposes only to assist you in determining the United States (“U.S.”) federal income tax consequences of the distribution payment if you are a citizen or resident of the U.S. The tax consequences of the distribution may vary depending on your individual circumstances. Except as provided above, the information provided herein may not be applicable if you are a nonresident alien of the U.S. or a FATCA-subject payee and it does not address the alternative minimum tax provisions of federal tax law, state, local and non-U.S. tax rules, or the effect of possible changes in laws. ***THE INFORMATION CONTAINED HEREIN IS NOT AND SHOULD NOT BE RELIED UPON AS TAX ADVICE. CONSULT YOUR TAX ADVISOR WITH RESPECT TO THE SPECIFIC TAX CONSEQUENCES OF THE DISTRIBUTION TO YOU.***

Tax Certifications

The interest component of the distribution payment is U.S. source income. To ensure that the Distribution Fund can comply with its reporting and/or withholding obligations, please complete and provide one (1) of the following forms, as applicable:

- IRS Form W-9; **OR**
- IRS Form W-8BEN, W-8BEN-E, or other W-8 series form

If you are a U.S. person, as that term is defined below, then you should complete the Substitute IRS Form W-9 below.

If you are **not** a U.S. person, then you should **not** complete the Substitute IRS Form W-9 below. Instead, you should complete IRS Form W-8BEN, W-8BEN-E, or other W-8 series form, which can be found by visiting the following IRS website: <https://www.irs.gov/forms-instructions>

The term “U.S. person” means:

- A citizen or resident of the United States,
- A partnership created or organized in the United States or under the law of the United States or of any State, or the District of Columbia,
- A corporation created or organized in the United States or under the law of the United States or of any State, or the District of Columbia,
- Any estate or trust other than a foreign estate or foreign trust (see Internal Revenue Code § 7701(a)(31) for the definition of a foreign estate and a foreign trust), or
- Any other person that is not a foreign person.

If the Distribution Fund does not receive a valid and complete Form W-9 or W-8 from you, the Distribution Fund may be required under the Internal Revenue Code to make certain presumptions about you for purposes of tax reporting and, as applicable, withholding. The Distribution Fund may be required to presume the interest is being paid to: (1) a payee subject to 30% withholding under the Foreign Account Tax Compliance Act (“FATCA”) and reporting on Form 1042-S; (2) a nonresident alien of the U.S. (“NRA”) subject to reporting and 30% NRA withholding and reporting on Form 1042-S; or (3) a U.S. person subject to 24% backup withholding and reporting on Form 1099-INT.

Substitute Form W-9
Taxpayer Identification Number Certification

Social Security Number / Employer Identification Number: _____

Exempt Payee Code (if any) _____ Exemption from FATCA reporting code (if any) _____

Check appropriate box for federal tax classification:

☐ Individual ☐ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate ☐ Other _____

☐ Limited Liability Company - choose tax classification ☐ C Corporation ☐ S Corporation ☐ Partnership

Print your name as it appears on your federal income tax return:

First Name and Last Name, for Individuals. Entity Name for businesses and trusts.

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number; **and**
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; **and**
3. I am a U.S. citizen or other U.S. person (including a U.S. resident alien); **and**
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Note: If you have been notified by the IRS that you are subject to backup withholding, you must cross out item 2 above.

Signature

of U.S. Person: _____ Date: _____

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Commission staff's calculation of their Investment(s) and Recovery(ies); provided directions on how to object to the Commission staff's calculations, as well as to the Commission's proposed plan methodology; requested from certain Investors a completed questionnaire, updating payment information, and, as appropriate, completion of a tax form; and provided information concerning the tax consequences of distributions in this matter.¹ The Investor Notice also provided to potential investors a link to the Commission's webpage for this matter, <https://www.sec.gov/divisions/enforce/claims/hologram.htm>, on which the Commission staff maintains a summary of this action; posts links to filings, including the Amended Complaint, Final Judgments, Commission motions, and Court Orders; and provides an email contact for further information.

As discussed in more detail below, in response to the Investor Notice, one individual and one limited liability company (the "Objecting Investors") contested the Commission staff's calculation of their Investment but notwithstanding repeated requests and substantial time afforded them, could provide no documentation to support their claims and thus, provided no basis for a change in those calculations.² No other recipient of the Investor Notice objected either to the Plan or the Commission staff's calculations. The Commission is serving both of the Objecting Investors with these papers. The Commission now requests that the Court establish a Fair Fund and approve the Plan so that the Commission can fully compensate Eligible Harmed Investors in the amounts set forth on Appendix A to the Plan.

¹ Capitalized terms not defined herein are defined as used in the Plan.

² If the Objecting Investors are hereinafter able to provide the necessary documentation, the Plan nonetheless (§ 14) provides for their compensation from the Fair Fund's Residual. *See* Sections I.B and II.C.3, *infra*.

I. BACKGROUND

A. The Civil Action

The Commission filed its Complaint (DE 1) on September 27, 2019, and its Amended Complaint (DE 22) on December 2, 2019 against Defendants Hologram—a company in the business of staging holographic shows featuring the likenesses of famous deceased performers—and David, its founder, chairman, and CEO. The Amended Complaint alleged that between November 2017 and March 2018, Defendants made a series of fraudulent misrepresentations to potential investors when raising money from them in unlawfully unregistered securities offerings. In late March 2018, after they learned of the Commission’s investigation, Defendants stopped selling securities and refunded some investor money.

On March 19, 2020, the Court entered a Final Judgment as to each of Hologram and David (DE 34 and 35), both on consent, which required Hologram to pay disgorgement in the amount of \$20,000, plus \$2,419.26 in pre-judgment interest (DE 34) and David to pay a civil penalty of \$100,000. These sums have since been paid in full, and pursuant to the Final Judgments, Defendants relinquished all legal and equitable right, title, and interest in such funds.

Pursuant to the Final Judgments, the Commission holds these funds pending further Order from the Court and may propose to the Court a plan to distribute the funds pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes Oxley Act of 2002, 15 U.S.C. §7246(a) (“Section 308(a)”). DE 34 and 35. By the Motion, the Commission requests an Order permitting such distribution.

The Commission currently holds approximately \$119,703.49 in an interest-bearing account at the U.S. Treasury’s Bureau of Fiscal Service (“BFS”), comprised of the \$100,000 civil penalty paid by David and \$22,419.26 in disgorgement and pre-judgment interest paid by

Hologram (the “Fund”). Other than accrued interest, which will be added to the Fund, the Commission does not expect any additional funds. As discussed below, in order to fully compensate Eligible Harmed Investors for their losses and also pay the costs of tax administration, the Commission requests the establishment of a Fair Fund so that the civil penalty can be distributed along with the disgorgement and prejudgment interest.³

On May 8, 2020, this Court appointed Miller Kaplan Arase LLP, a certified public accounting firm with an office in San Francisco, California, as Tax Administrator to execute all income tax reporting requirements of the Fund. DE 36.

B. Harmed Investors

Defendants’ records reflected the possibility of more than 200 individuals who invested with Defendants, but those records were unclear as to whether each listed individual or entity had actually invested in Hologram, and which, if any, recovered some or all of their investments. The records were also incomplete and/or out of date with respect to contact information for certain of the listed names. Klug Dec. ¶ 4.

In order to compile an accurate list of actual investors (“Investors”) and their losses, if any, the Commission staff reviewed the Defendants’ bank records, related payment processing records, and questioned potential Investors. After reconciling the bank records and money processing records with information provided by potential Investors, the staff determined there to be 115 Investors, 24 of whom did not recover their investment, in whole or in part, and suffered investment losses aggregating to \$31,600 (the “Eligible Harmed Investors”). A schedule of the 24 Eligible Harmed Investors is attached to the Plan as Appendix A.

To further confirm its conclusions, the Commission staff prepared and sent the Investor

³ If the Court does not establish a Fair Fund, the Plan provides for the *pro rata* distribution of the Net Available Fair Fund. Plan, ¶ 4, n. 2.

Notice (Klug Dec. ¶ 6, Exh. A) to 194 potential investors at their last known physical and/or email addresses.⁴ The Investor Notice, among other things, alerted the recipient of the Commission's intent to file this motion and of the distribution methodology to be used in the Plan; informed Investors of the Commission's calculation of their "Investment," "Recovery," and "Net Investment Loss" (Investment – Investment Recovery); provided directions on how to object to the Commission's calculations, as well as to the Plan methodology; requested from certain recipients a completed questionnaire, updating contact and payment information, and, as appropriate, completion of a tax form; and provided information concerning the tax consequences of distributions in this matter. Objections and responses to the Investor Notice were due within thirty days of the Notice.⁵

In response to the Investor Notice, the two Objecting Investors each objected to the Commission staff's calculation of their Investments: Investor No. 28 claimed to have invested \$1,000 with the Defendants. The second objection concerned Investor No. 91, a limited liability company associated with Investor No. 15, and individual. Investor No. 15 had previously told the Commission staff that he had invested more than \$3,000 and had not received any refund, and he took issue with the staff's assessment that his Net Investment Loss was actually \$800. Neither Investor No. 28 nor Investor No. 91 was able to provide any documentation of the claimed

⁴ The Commission staff sent the Investor Notice to all potential Investors identified in the Defendants' records except for those who previously confirmed to the Commission staff that they did not suffer an Investment Loss and two for whom the staff has been unable to obtain their contact information despite multiple efforts to do so. The two for whom the staff has been unable to obtain contact information are included on Appendix A insofar as the Commission staff has determined them to have suffered Investment Losses; the Commission staff will continue to attempt to locate them so that they can each receive a Distribution Payment. *See* Klug Dec. ¶¶ 5-8.

⁵ Investors were assigned an Investor Number in order to identify them while still protecting their privacy in, for instance, public filings.

Investments despite the staff's multiple requests for the same. Moreover, the records reviewed by the Commission staff, including the Defendants' bank records, do not reflect any Investment(s) by the Objecting Investors. Klug Dec. ¶¶ 10-11.⁶ Accordingly, the staff currently has no basis for including Investor Nos. 28 and 91 in the distribution, but will reconsider its position if they are able to provide documentation of their claimed Investment(s) in the future.⁷

C. The Plan

The Commission proposes to distribute the Fund to Eligible Harmed Investors as described more fully in the Plan, in the following manner.

1. Relevant Definitions

Eligible Harmed Investors are those individuals who invested in Hologram and who have suffered an Investment Loss (defined as the amounts invested, less any refunds received from Defendants) in excess of the *De Minimis* amount of \$20. Excluded from the definition of Eligible Harmed Investors are Excluded Parties, defined as: (i) Unresponsive Investors (defined as those Investors whom the Commission staff could not locate after reasonable efforts or those who did not provide timely information necessary to a distribution); (ii) Hologram, its agents, affiliates, assigns, subsidiaries, successors-in-interest, and any entity in which Hologram has a controlling interest; (iii) David, his spouse, agents, affiliates, heirs, assigns, household members, and

⁶ Investor No. 15, had claimed to have invested over \$3,000 in total, collectively with Investor No. 91. The Commission staff was able to confirm from Defendants' bank records that Investor No. 15 had an investment of \$2,400, and could not confirm any investment by Investor No. 91. Further, the staff determined from bank records that all but \$800 of Investor No. 15's investment of \$2,400 was refunded. The Plan therefore notes Investor No. 15 should be entitled to a distribution of \$800. The staff has also estimated that if it credited Investor No. 15's claim to have invested a total of \$3,000 collectively with Investor No. 91, the maximum additional claim would be \$600. However, the Commission staff has been unable to confirm this additional claim and it is therefore not credited in the Plan. Klug Dec. ¶ 11.

⁷ The Plan, ¶ 14, will allow the Fair Fund Residual to be distributed to the Objecting Investors if they are able to document their claims.

successors-in-interest; (iv) an Investor whose Investment, in whole or in part, was funded by Hologram or David; (v) any entity controlled by Hologram or David or in whose Investment Hologram or David had or has an interest; and (vi) any purchaser or assignee of a Eligible Harmed Investor's right to obtain a recovery from the Fair Fund for value; provided, however, that this provision shall not be construed to exclude those Eligible Harmed Investor who obtained such a right by gift, inheritance, devise or operation of law.

2. The Plan Methodology

Eligible Harmed Investors will receive a Distribution Payment as set forth on Appendix A to the Plan. As explained in paragraph 9 of the Plan, the Distribution Payments are the sum of each Eligible Harmed Investor's Investment Loss and Reasonable Interest, the latter calculated by the Commission's Division of Economic and Risk Analysis.⁸ All Harmed Investors are eligible for Distribution Payments in excess of the *de minimis* amount, thus none have been excluded because their payments were *de minimis*.

3. The Residual

The Plan, ¶ 14, provides that any amounts remaining after the distribution pursuant to Appendix A and the payment of incurred Administrative Costs, shall comprise the Residual. The Plan also provides that, if feasible, the Distribution Agent may distribute the Residual, net a reserve for Administrative costs ("Net Residual"), to any Eligible Harmed Investors located or identified as eligible after the initial distribution, who provide documentation subsequent to the initial distribution, or who failed to negotiate the checks or receive the payment issued in the immediately preceding distribution (the "Residual Distributees"), up to the Eligible Harmed Investor's Investment Loss plus Reasonable Interest. If the Net Residual is less than the

⁸ If the Court determines a Fair Fund should not be established, the Net Available Fund will be divided, *pro rata*, among the Eligible Harmed Investors. Plan, ¶ 4, n. 2.

aggregate Investment Loss Amount of the Residual Distributees, any such distribution will be *pro rata*.

**II. THE COURT SHOULD ESTABLISH A FAIR FUND,
APPROVE THE PLAN AND ORDER
DISTRIBUTION IN ACCORDANCE WITH THE APPROVED PLAN**

A. The Court Should Establish a Fair Fund

As a preliminary matter, the Commission moves this Court to establish a Fair Fund so that the collected civil penalty can be included in the distribution to Eligible Harmed Investors.

Section 308(a) of the Sarbanes-Oxley Act, as amended, provides, in relevant part:

[i]f, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

15 U.S.C. § 7246(a). *See Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006) (“As with disgorged profits, the SEC may now, if it chooses, use civil penalties that it sought for the purposes of deterrence to compensate injured investors.”)

The Commission brought this action under the federal securities laws and this Court has ordered payment of a civil penalty, thereby satisfying Section 308. Insofar as the current estimate of Eligible Harmed Investor losses exceeds the aggregate disgorgement and prejudgment interest, this Court should establish a Fair Fund, adding the civil penalty to disgorgement and prejudgment interest (the “Fair Fund”) so that Eligible Harmed Investors can be fully compensated and Administrative Costs paid.

B. The Court Should Approve the Plan

The Court, upon establishing the Fair Fund, should approve the Plan and the appointment of the Distribution Agent. A district court has broad discretion in approving a plan of

distribution, and that determination is reviewed for abuse of discretion. *WorldCom, Inc., supra*, 467 F.3d at 84. *See also 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 Commission 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).

In this case, where it is anticipated that, if a Fair Fund is created, the Fair Fund will exceed investor losses, the Commission's Plan is both fair and reasonable. The Commission proposes using the Fair Fund to fully compensate Eligible Harmed Investors for the full amount of their Investment Losses as confirmed by those Investors, including Reasonable Interest for the time value of the Investment Loss. The Plan also provides for the compensation of the Objecting Investors if they are able to document their claims.

Those excluded from the Plan do not detract from its fairness -- the Plan excludes the Defendants and their affiliates from benefitting from the distribution, directly or indirectly. *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). For practicality and efficiency, the Plan excludes any Investors who do not timely provide necessary information and/or who cannot be located by the Distribution Agent through reasonable efforts. It also excludes entities that seek to capitalize on the distribution through the exclusion of any entity that seeks to recover by purchasing for value an

Eligible Harmed Investor's purported right to a Distribution Payment.

In sum, the Commission believes the Plan to be fair and reasonable, and respectfully requests that it be approved.

C. The Court Should Appoint a Distribution Agent

In order to minimize administrative costs, the Commission proposes that the undersigned, Richard G. Primoff, Senior Trial Counsel in the Commission's Division of Enforcement, act as Distribution Agent for the Fund. In the absence of distribution agent costs, the Commission expects Administrative Costs will include only taxes, tax administration fees and costs, and costs of investment while held at BFS.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court grant the requested relief.

Dated: May 3, 2021
New York, NY

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

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