UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **ANDREW DEFRANCESCO, MARLIO MAURICIO DIAZ CARDONA, CARLOS FELIPE REZK, NIKOLA FAUKOVIC, AND CATHERINE DEFRANCESCO,** **Defendants.**	**No. 1:23-CV-00131-JSR**

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN ORDER ESTABLISHING A FAIR FUND, INCLUDING POST-JUDGMENT INTEREST IN THE FAIR FUND, AND APPOINTING A TAX ADMINISTRATOR

NOTICE

PLEASE TAKE NOTICE, that based upon the accompanying Motion and Proposed Order, Plaintiff Securities and Exchange Commission (the "SEC" or the "Commission") will move this Court, the Honorable Jed S. Rakoff, United States District Judge, Courtroom 14-B, United States Courthouse, 500 Pearl Street, New York, New York, 10070, at such time as the Court may designate, for an order establishing a fair fund, including post-judgment interest in the fair fund, and appointing a tax administrator.

MOTION

The Commission respectfully moves this Court for an order with respect to the funds under the Court's jurisdiction in this case: (1) establishing a fair fund (the "Cool Holdings Fair Fund" or "Fair Fund") pursuant to Section 308(a) of Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Act of 2010 [15 U.S.C. § 7246], (2) including post-judgment interest in the Fair Fund, and (3) appointing Heffler, Radetich & Saitta, LLP ("HRS"), a certified public accounting firm with an office in Philadelphia, Pennsylvania, as tax administrator ("Tax Administrator") to execute all income tax reporting requirements of the Fair Fund. The creation of the Fair Fund is a necessary precursor to the creation of a plan, proposing a plan and ultimately distributing any funds. The appointment of the Tax Administrator is necessary to ensure that the funds are maintained and distributed in compliance with federal and state tax laws.

MEMORANDUM

A. Background

On January 6, 2023, the SEC filed a Complaint against Andrew DeFrancesco ("DeFrancesco"), Marlio Mauricio Diaz Cardona ("Diaz"), Carlos Felipe Rezk ("Rezk"), Nikola Faukovic ("Faukovic"), and Catherine DeFrancesco (collectively, the "Defendants"). *See* Dkt. No. 1. In the Complaint, the SEC alleged that beginning in March of 2018, the Defendants DeFrancesco, Diaz, and Rezk, officers and directors of Cool Holdings, Inc. ("Cool Holdings"), orchestrated a fraudulent scheme to deceive the investing public about the operations and prospects of their company through repeated, materially false and misleading misstatements and omissions in SEC filings and in a promotion campaign. *See id.* at para. 1-2. From March 2018 through early June 2019, Cool Holdings made materially false and misleading statements and omissions in its SEC filings including about its critical business relationship with Apple Inc. Certain Defendants signed Cool Holdings' false and misleading quarterly reports, annual reports, and registration statement and amendments (collectively, the "Registration Statement"). The Registration Statement, which never became effective, sought to offer and sell up to $25,000,000 worth of securities. *See id.* at para. 3.

The Defendants also orchestrated a "pump and dump" of Cool Holdings' stock which included secretly funding a series of fraudulent articles promoting Cool Holdings as a profitable and expanding company; this promotional campaign caused Cool Holdings' share price and trading volume to increase significantly. *See id.* at para. 4. During the promotional campaign, DeFrancesco secretly sold, through accounts controlled by nominee entities and nominally controlled by his ex-wife Catherine DeFrancesco, millions of shares of Cool Holdings generating proceeds of more than $11.5 million. *See id.* at para. 5-7. Diaz, Faukovic, and Rezk also sold Cool Holdings stock while the company was disseminating false and misleading information in its SEC filings. *See id.* at para. 8.

On June 15, 2023, the Court entered final judgments as to Faukovic and Catherine DeFrancesco. *See* Dkt. No. 67, 68. The Court found Faukovic liable for disgorgement of $11,779.43, prejudgment interest of $2,570.89, and a civil penalty of $111,614.00 for a total of $125,964.32 and found Catherine DeFrancesco liable for a civil penalty of $122,782.00. *See id.* On July 5, 2023, the Court entered final judgment as to Andrew DeFrancesco and ordered him liable for disgorgement of $1,034,051.52, prejudgment interest of $242,018.97, and a civil penalty of $1,737,224.52 for a total of $3,013,295.01. *See* Dkt. No. 72. On November 21, 2023, the Court entered final judgments as to Diaz and Rezk and ordered them each liable for a civil penalty of $223,229. *See* Dkt. Nos. 116, 117.

Catherine DeFrancesco has paid in full. The remaining Defendants have made either no payments or have made partial payments. The Commission holds $1,808,443.64 collected from the Defendants pursuant to the final judgments in an SEC-designated account with the United States Department of the Treasury (the "Fund") and any accrued interest will be added to the Fund. An additional $88,508.06 in post-judgment interest has been collected from the Defendants.

B. Establishment of a Fair Fund

To facilitate any ultimate distribution, the Commission moves the Court to establish a Fair Fund for the funds paid by the Defendants and any future funds collected from the Defendants, pursuant to Section 308(a) of the Sarbanes-Oxley Act, as amended, which provides in relevant part:

> If in any judicial or administrative action brought by the Commission under the securities laws…the Commission obtains an order requiring disgorgement against any person for a violation of such laws…, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

See 15 U.S.C. § 7246(a).

The final judgments expressly authorize the Commission to "propose a plan to distribute the Fund subject to the Court's approval." The Commission brought this action under the securities laws and the Defendants paid disgorgement, prejudgment interest and civil penalties pursuant to the final judgments. Accordingly, the requirements of Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, have been satisfied, and the Court should establish a Fair Fund to facilitate ultimate distribution of the funds in the Fair Fund to investors harmed by Defendants' conduct alleged in the Complaint.

The creation of the Fair Fund is a necessary precursor to proposing a plan of distribution for the Court's approval and ultimately distributing any funds. The Fair Fund will be comprised of any disgorgement, prejudgment interest, post-judgment interest (if authorized), and civil penalties collected pursuant to the final judgment and any future amounts collected from the Defendants.

C. Inclusion of Post-Judgment Interest in the Fair Fund

To maximize recovery to victims harmed by the Defendants' conduct as alleged in the Complaint, the SEC requests that this Court order all post-judgment interest collected in this matter be included in the Fair Fund, including any future post-judgment interest payments.

D. Appointment of a Tax Administrator

The Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code, 26 U.S.C. § 468B(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5. A tax administrator, on behalf of the Fair Fund, should be appointed and authorized to take all necessary steps to enable the Fair Fund to obtain and maintain the status of a taxable QSF. The reasonable costs, fees, and other expenses incurred in the performance of the tax administrator's duties should be paid from the Fair Fund.

The SEC recommends the appointment of HRS as Tax Administrator for the QSF. HRS is experienced in the taxation of QSFs and has agreed to reasonable fees for its services.[1] HRS will provide the following services:

(a) obtain a federal employer tax identification number for each QSF;

(b) prepare and file federal and state income tax returns, as required;

(c) when required, calculate quarterly estimated tax payments, and provide information to the SEC so that payments may be made timely;

[1] HRS is one of the firms that the SEC has engaged to render tax consulting services on its behalf for QSFs established in administrative proceedings for calendar years 2022 through 2024 at agreed upon rates. *See* Omnibus Order Directing the Engagement of Two Tax Administrators for Appointment on a Case-by-Case Basis in Administrative Proceedings that Establish Distribution Funds, Exchange Act Rel. No. 94845 (May 4, 2022). As part of HRS's engagement with the SEC, HRS has agreed to render those same services at the agreed upon rates for calendar years 2022 through 2024, for any QSF it is appointed to serve as the tax administrator, including appointments made by a Court in civil actions brought by the SEC in federal district court.

(d) make arrangements with the SEC staff to pay the tax liability of the QSF;

(e) calculate and recommend retention of a reserve for penalties and interest to be assessed as a result of any late filing of tax returns and/or late payment of taxes;

(f) determine and comply with information reporting obligations of the QSF for payments to vendors; and

(g) all administrative tasks necessary to the foregoing services.

Additional tax compliance services would be provided at the SEC's request and billed in accordance with HRS's agreement with the SEC.

6. HRS has served as a tax administrator for numerous QSFs requiring compliance similar to the Fair Fund. Therefore, the SEC staff respectfully requests that the Court appoint HRS as Tax Administrator to execute all income tax reporting requirements, including the preparation and filing of tax returns, with respect to the Fair Fund under this Court's jurisdiction.

WHEREFORE, for all the foregoing reasons, the SEC respectfully requests that this Court enter the attached proposed Order and grant such other relief as the Court deems just and proper.

Dated: June 25, 2024

Respectfully submitted,

/s/ *Jennifer Cardello*

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CERTIFICATE OF SERVICE

I, Jennifer Cardello, hereby certify that, on June 25, 2024, I caused the foregoing document to be electronically filed with the clerk of the court for the U.S. District Court of Southern District of New York, using the electronic case filing system of the court. The electronic case filing system sends a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ *Jennifer Cardello*
Jennifer Cardello