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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO

15 SECURITIES AND EXCHANGE
16 COMMISSION,

17 Plaintiff,

18 vs.

19 ALEXANDER JAMES TRABULSE,

20 Defendant.

21 and

22 FAHEY FUND, L.P., FAHEY FINANCIAL
23 GROUP, INC., INTERNATIONAL TRADE &
24 DATA, and ITD TRADING,

25 Relief Defendants.

Case No. C 07-4975 (WHA)

**MOTION FOR ORDER APPROVING
DISTRIBUTION PLAN AND
AUTHORIZING INTERIM DISTRIBUTION
TO HOLDERS OF ALLOWED CLAIMS**

[Notice of Motion, Declaration of Michael A. Grassmueck, Distribution Plan, and Proposed Order, Filed Concurrently Herewith]

Date: October 15, 2009

Time: 8:00 a.m.

Place: Courtroom 9, 19th Floor
United States District Court
Northern District of California-
San Francisco Division
450 Golden Gate Avenue
San Francisco, CA 94102

I.

INTRODUCTION

On December 17, 2007, this Court entered the Order Appointing Monitor And Other Ancillary Relief ("Monitor Order"), which authorized the appointment of Michael A. Grassmueck, as corporate monitor (the "Monitor") with regard to the Fahey Fund, L.P.; Fahey Financial Group, Inc.; International Trade & Data; and ITD Trading (collectively, the "Relief Defendants") and Alexander James Trabulse ("Trabulse"). Pursuant to the Monitor Order, the Monitor was empowered and directed to, among other things, conduct such investigation as would be necessary to locate and account for the Relief Defendants' assets, and review the overall operation of the Relief Defendants in accordance with the Monitor Order.

On February 13, 2008, the Court entered an Order implementing certain recommendations of the Monitor, and which also incorporated the terms of the Monitor Order (the "Modified Order"). The Modified Order authorized the Monitor to, among other things, determine the disallowance and allowance of claims, through a claims review process, and assist in the sale and liquidation of assets. The Modified Order further provided for the Monitor to distribute the recovered funds to investors. *See* Modified Order, Section 1, lines 13 to 14 ("The Parties anticipate that all assets of Relief Defendants will be liquidated as part of the settlement of this action and the funds distributed to the investors.").

After completing the claims review process, the Monitor filed an Omnibus Motion to seek approval of objections to certain claims filed in this case, and the approval of the allowance and disallowance, as applicable, of those claims. The Court entered an order approving the Omnibus Motion on September 2, 2009. In accordance with the foregoing orders, the Monitor now seeks approval of a distribution plan and interim distribution.

Based on the Monitor's calculations, the Monitor estimates a distribution return for investors and creditors of 37.72% on their allowed claims (the "Distribution Return"). The Receiver estimates that additional proceeds may be eventually realized from sales occurring following the filing of this Motion. It should be noted that this Distribution Return includes \$250,001 which constitutes funds obtained from a disgorgement and civil penalty judgment

1 against Trabulse in this proceeding, entered on April 7, 2008 ("Trabulse Judgment"). These funds
2 were earmarked for distribution to investors only pursuant to the establishment of a Fair Fund
3 under Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Funds"). The Fair Funds are not
4 subject to reduction for payment of any administrative fees and expenses of the Relief Defendants'
5 estate ("Estate"). The Clerk of this Court has received and deposited the Fair Funds in an interest-
6 bearing account with the Court Registry Investment System ("CRIS Account"), and they are held
7 in such CRIS Account pending further Court order. Pursuant to the Trabulse Judgment, the
8 Monitor seeks release of the Fair Funds from the CRIS Account for distribution of such Fair
9 Funds under a plan of distribution.

10 The Monitor currently holds approximately \$5,069,537.52 in cash for the Distribution
11 Return. This amount of the Distribution Return is exclusive of a holdback for payment of
12 remaining and estimated administrative fees and expenses of \$250,000 ("Hold-Back Funds"). Any
13 unapplied Hold-Back Funds will be included in any final distribution of Estate funds. To
14 implement the distribution of the Distribution Return and the Fair Funds, the Monitor has prepared
15 a Distribution Plan, which is concurrently filed herewith. The Monitor seeks approval of the
16 Distribution Plan and the release of the Fair Funds from the CRIS Account.

17 II.

18 FACTS

19 A. The SEC Action

20 On September 26, 2007, the Securities and Exchange Commission ("SEC") commenced an
21 action (the "SEC Action") against the Relief Defendants and Trabulse in this Court, for violations
22 of various federal securities laws. Following the commencement of the SEC Action, Trabulse and
23 the Relief Defendants sought dismissal of the SEC Action, and the SEC sought issuance of a
24 preliminary injunction and other ancillary relief against Trabulse and the Relief Defendants. On
25 December 7, 2007, the Court granted the SEC's request for a preliminary injunction and other
26 ancillary relief, and denied Trabulse's and the Relief Defendants' request for dismissal (the
27 "Injunction Order").
28

1 B. The Monitor Order

2 Following entry of the Injunction Order, Trabulse and the Relief Defendants entered into a
3 Stipulation for Appointment of Corporate Monitor, which was filed in the SEC Action on
4 December 14, 2007. On December 17, 2007, the Court entered the Monitor Order approving the
5 Stipulation, which authorized the appointment of the Monitor and other ancillary relief. Pursuant
6 to the Monitor Order, the Monitor was empowered and directed to, among other things, conduct
7 such investigation as would be necessary to locate and account for the Relief Defendants' assets,
8 and review the overall operation of the Relief Defendants in accordance with the Monitor Order.

9 C. The Modified Order

10 On February 13, 2008, the Court entered the Modified Order implementing certain
11 recommendations of the Monitor, and which also incorporated the terms of the Monitor Order.
12 The Modified Order authorized the Monitor to, among other things, undertake the determine the
13 disallowance and allowance of claims, through a claims review process, and assist in the sale and
14 liquidation of assets. The Modified Order further provided for the distribution of funds to
15 investors. *See* Modified Order, Section 1, lines 13 to 14 ("The Parties anticipate that all assets of
16 Relief Defendants will be liquidated as part of the settlement of this action and the funds
17 distributed to the investors.").

18 D. Final Judgment

19 On April 7, 2008, the Trabulse Judgment was entered as to Trabulse and the Relief
20 Defendants. Section VII of the Trabulse Judgment included the provision that Trabulse pay the
21 disgorgement amount of \$1 and a civil penalty in the amount of \$250,000, for a total of \$250,001,
22 to the Clerk of the Court. The \$250,001 was earmarked for distribution to investors only pursuant
23 to the establishment of a Fair Fund under Section 308(a) of the Sarbanes-Oxley Act of 2002, and
24 are not subject to reduction for payment of any Estate administrative fees and expenses. As set
25 forth in Section VII of the Trabulse Judgment, the Clerk of this Court has received and deposited
26 the Fair Funds in the CRIS Account, and they are held in such CRIS Account pending further
27 Court order. The Trabulse Judgment authorizes the release of the Fair Funds from the CRIS
28 Account in accordance with the distribution of such Fair Funds under a plan of distribution.

1 E. The Omnibus Claims Motion

2 After completing the claims review process, the Monitor filed an Omnibus Motion to seek
3 approval of objections to certain claims filed in this case, and the approval of the allowance and
4 disallowance, as applicable, of those claims. The Court heard the Omnibus Motion on July 9,
5 2009, and after the hearing, the Court entered the order on the Omnibus Motion on September 2,
6 2009.

7 F. The Fixed Amount of Allowed Claims and Determination to Proceed with
8 Distribution

9 The Monitor has determined that there are allowed claims of \$14,102,065.60 against the
10 Estate. Based on this figure for allowed claims against the Estate, the Monitor has determined the
11 amount available for interim distribution to the investors and creditors of the Estate, and seeks
12 Court approval of such distribution. The Monitor is currently holding approximately
13 \$5,069,537.52 in Estate cash. This Estate cash does not include the \$250,001 in Fair Funds which
14 are currently held in the CRIS Account.

15 The Monitor anticipates that the amount available for interim distribution, including the
16 Fair Funds, is \$5,319,538.52 ("Estate Proceeds"). This amount of the Estate Proceeds is exclusive
17 of the Hold-Back Funds. Based on the Monitor's calculations, the Monitor estimates a total
18 distribution return for investors and creditors of 37.72% on their allowed claims. The Monitor
19 further anticipates that additional proceeds from sale of Estate assets will be available, following
20 the filing of the Motion. Following the interim distribution, the Monitor anticipates a final
21 distribution of Estate funds from the sale of remaining Estate assets and unapplied Hold-Back
22 Funds.

23 III.

24 SUMMARY OF PROPOSED DISTRIBUTION PLAN

25 To implement the distribution, the Monitor prepared a Distribution Plan, which is
26 concurrently filed herewith. In developing and selecting the Distribution Plan, the Monitor
27 carefully analyzed and considered all options for distribution, determining that the one contained
28 in the Distribution Plan is the most equitable and practicable for all interested parties.

1 In general, the Distribution Plan contemplates distributions for three types of allowed
 2 claims against the Estate: (i) Administrative Claims¹, comprised primarily of the expenses
 3 incurred by the Monitor and his professionals, (ii) Creditor Claims, comprised of any claims of
 4 vendors or service providers for goods and services rendered to the Estate, and (iii) Investor
 5 Claims, comprised of claims held by persons or entities who invested funds in the Estate.

6 The Monitor proposes, and seeks Court approval thereof, to pay Creditor Claims and
 7 Investor Claims that are determined to be Allowed Claims *pro rata* from the Estate Proceeds. As
 8 contemplated under the Trabulse Judgment, the Monitor also requests the Court authorize the
 9 release of the Fair Funds from the CRIS Account, and the remittance of the Fair Funds to the
 10 Monitor, so that the Fair Funds may be included in the *pro rata* distribution from the Estate
 11 Proceeds under the Distribution Plan.

12 At this time, the Monitor estimates that each Allowed Claim will be paid based upon a *pro*
 13 *rata* distribution estimated to be 37.72% (the Monitor reserves the right to increase this estimated
 14 figure, to the extent additional Estate assets are sold and proceeds realized for distribution). The
 15 Monitor proposes that Administrative Claims, after Court approval, will be paid in full, out of a
 16 reserve of the Hold-Back Funds. The Monitor estimates that the remaining Monitor's fees and
 17 costs, and those of his professionals, owing through the close of the case, (the "Estate
 18 Administrative Expenses") will be approximately the amount of the Hold-Back Funds.

19 The Monitor will make the first interim distribution under the Distribution Plan as soon as
 20 practicable, but no later than sixty (60) days after a Final Order is entered by the Court approving
 21 the Distribution Plan. Subsequent interim distributions will be made when material amounts are
 22 available to distribute subject to Court order. Further, when and if appropriate, the Monitor will
 23 make a final distribution and close the case subject to Court order. Any distribution under the
 24 Distribution Plan which is unclaimed after ninety (90) days following the date of distribution shall
 25 be forfeited, and such distribution together with all interest earned thereon shall become part of,
 26 and increase the amount of, the Hold-Back Funds.

27
 28 ¹ All capitalized terms not defined herein shall have the same meanings as set forth in the
 Distribution Plan.

IV.

ARGUMENT

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3 The power of a district court to impose the appointment of a monitor, a receivership, or
4 grant other forms of ancillary relief, does not in the first instance depend on a statutory grant of
5 power from the securities laws. Rather, the authority derives from the inherent power of a court of
6 equity to fashion effective relief. *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The
7 "primary purpose of equity receiverships is to promote orderly and efficient administration of the
8 estate by the district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th
9 Cir 1986). As the appointment of a receiver, or a monitor in this instance, is authorized by the
10 broad equitable powers of the court, any distribution of assets must also be done equitably and
11 fairly. *See S.E.C. v. Elliot*, 953 F.2d 1560, 1569 (11th Cir. 1992).

12 *Pro rata* distribution is recognized by case law as an appropriate procedure for distributing
13 assets in this type of proceeding. *See, e.g., In re Golden Triangle Capital, Inc.*, 171 B.R. 79 (9th
14 Cir. BAP 1994) (individual investor's claims of constructive trust give way to requirement of an
15 equitable distribution); *In re Lemons & Associates, Inc.*, 67 B.R. 198 (Bankr. D. Nev. 1986); *see*
16 *also Cunningham v. Brown et al.*, 265 U.S. 1 (1924) (all of Ponzi's victims were creditors and
17 nothing more, and the Court holds strongly for the principle that equality is equity).

18 District courts have the broad power of a court of equity to determine the appropriate
19 action in the administration and supervision of an equity proceeding. *See SEC v. Capital*
20 *Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth Circuit explained (in respect to a
21 receivership, but which is equally applicable to a monitor proceeding):

22 A district court's power to supervise an equity receivership and to
23 determine the appropriate action to be taken in the administration of the
24 receivership is extremely broad. The district court has broad powers and
25 wide discretion to determine the appropriate relief in an equity
26 receivership. The basis for this broad deference to the district court's
27 supervisory role in equity receiverships arises out of the fact that most
28 receiverships involve multiple parties and complex transactions. A district
court's decision concerning the supervision of an equitable receivership is
reviewed for abuse of discretion.

1 *Id.* (citations omitted); *see also Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*,
 2 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's
 3 supervisory role, and 'we generally uphold reasonable procedures instituted by the district court
 4 that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit
 5 of creditors."). Accordingly, the Court has broad discretion to approve a plan of distribution, and
 6 authorize the Monitor to make an interim distribution.

7 A. Distributions to Claimants Should Be Made on a *Pro Rata* Basis

8 All claimants should be treated the same under the Distribution Plan. They are all victims
 9 of the same "Ponzi" scheme perpetrated by the Relief Defendants and Trabulse. Whether they lost
 10 a large or small amount, whether they sent money to the Relief Defendants early in the scheme or
 11 toward the end, all claimants have suffered a similar kind of injury, and therefore should receive
 12 the same treatment. Some claimants received a portion of their money back from the Relief
 13 Defendants. Others invested funds to the Relief Defendants and received no payments. The
 14 money-in, money-out (or "MIMO") formula for calculating allowance of claims, limits claims to
 15 the amount of each claimant's loss. The proposed Distribution Plan provides that all claimants
 16 will receive the same percentage of their allowed claims. This is the most fair and equitable
 17 method of distributing Estate funds. Therefore, the Monitor requests that the Court authorize the
 18 distribution on a *pro rata* basis, and approve the Distribution Plan, concurrently filed herewith,
 19 which implements such distribution.

20 B. Fair Funds

21 As set forth in Section VII of the Trabulse Judgment, the Clerk of this Court is holding the
 22 Fair Funds in the CRIS Account, pending further Court order. Pursuant to Section VII of the
 23 Trabulse Judgment, the Monitor seeks release of the Fair Funds from the CRIS account, so that the
 24 Fair Funds may be included in the distribution to investors under the Distribution Plan. The
 25 Monitor requests that (a) the Clerk of the Court issue a check drawn on the CRIS account for the
 26 \$250,001, plus any interest, (b) make the check payable to "Michael A. Grassmueck, Monitor of
 27
 28

1 Fahey Fund, L.P.", and (c) transmit such check for the Fair Funds to the Monitor for deposit in the
2 Monitor's account for the Estate.

3 C. Hold-Back Funds

4 The Monitor proposes to make this interim distribution prior to the closing of this case. As
5 a result, the Monitor must set aside sufficient funds to cover any administrative expenses of the
6 Estate, including any fees and costs. The Monitor seeks approval of the Hold-Back Funds as part
7 of this Motion, for payment of such administrative expenses. The Monitor expects that the Hold-
8 Back Funds will be sufficient to pay allowed administrative expenses, both unpaid to date, and
9 those anticipated through completion of this Monitor action, and to make a final distribution to
10 claimants. All administrative expenses for fees and costs of the Monitor and his professionals are
11 subject to Court review and approval. Any unused portion of the Hold-Back Funds will be
12 included in any final distribution of Estate funds to investors and creditors.


13 V.

14 CONCLUSION

15 Based on the foregoing, the Monitor respectfully requests that the Court enter an order:
16 (a) granting the Motion, (b) approving the Distribution Plan, (c) approving the release of the Fair
17 Funds from the CRIS Account to the Monitor for distribution under the Distribution Plan, (d)
18 authorizing the Monitor to make an interim distribution, on a *pro rata* basis, as set forth in the
19 Distribution Plan, of the Estate Proceeds, and (e) granting such other relief as the Court deems just
20 and necessary.

21 Dated: September 9, 2009

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26 By: 
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