IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02461-MEH

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CETERA ADVISORS, LLC, and
CETERA ADVISOR NETWORKS LLC,

Defendants.

PLAINTIFF'S MOTION FOR AN ORDER APPROVING DISTRIBUTION PLAN

Plaintiff Securities and Exchange Commission (the "Commission" or "SEC") respectfully moves this Court for an Order approving the Commission's distribution plan ("Plan"). The Commission submits a proposed order contemporaneously herewith.

Factual and Procedural Background

On October 11, 2019, the SEC filed its Amended Complaint against Cetera Advisors, LLC and Cetera Advisor Networks LLC (collectively, "Defendants" or "Cetera"). [Dkt. No. 11]. According to the Complaint, Cetera invested and held clients in mutual fund share classes that charged 12b-1 fees—which are recurring fees deducted from the fund's assets—even when it knew these clients were eligible to invest in lower-cost shares of the same funds without 12b-1 fees. Clients whom Cetera invested in the higher-cost, otherwise identical share classes paid additional compensation to Cetera for as long as they held these investments. The Complaint also alleged that Cetera participated in a program offered by its clearing broker whereby it agreed to share with Cetera revenues and service fees it received from certain mutual funds. As a result, Cetera had an incentive to favor these mutual funds in the program over other investments when

advising clients. The Complaint further alleged that Cetera directed its clearing broker to mark-up certain fees charged to Cetera's advisory clients, which Cetera then received indirectly from these same clients.

According to the Complaint, Cetera failed to adequately disclose to its advisory clients each of these practices and the conflicts of interest associated with them. As a result of these failures, the SEC alleged that Cetera generated over $10 million in undisclosed compensation. The Complaint charged Cetera with violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder [15 U.S.C. §§ 80b-6(2), 80b-6(4), 80b-7 and 17 C.F.R. § 275.206(4)-7]. [Dkt. No. 11].

Defendants consented to the entry of a Final Judgment against them, enjoining them from violating the provisions of the federal securities laws that are the subject of the allegations in the Complaint. The Court entered the Final Judgment on October 13, 2022. [Dkt. No. 119]. In the Final Judgment, the Defendants were ordered to jointly or severally pay disgorgement of $5,614,509; prejudgment interest of $990,961; and combined penalties of $2,000,000. The total amount ordered to be paid by all Defendants was $8,605,470. Defendants satisfied this obligation and made full payment to the Commission. The funds are being held in an SEC-designated account with the United States Department of the Treasury.

On July 14, 2023, the Court established a Fair Fund so that the penalties, disgorgement and prejudgment interest collected can be distributed to harmed investors. [Dkt. 124]. On the same day, the Court appointed Heffler, Radetich & Saitta, LLP as Tax Administrator for the Fair Fund. *Id*.

On November 16, 2023, the Court appointed Epiq Class Action & Claims Solutions, Inc. ("Epiq"), as Distribution Agent for the Fair Fund. The Court also approved payment of Epiq's fees and expenses without further order of the Court. [Dkt. 128].

The Court Should Approve the Distribution Plan

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. *See, e.g.*, *SEC v. Wang*, 944 F.2d 80, 83-84 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989). The court's review of a proposed distribution plan focuses on whether the plan is fair and reasonable. *See Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006) ("unless the consent decree specifically provides otherwise[,] once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end" (citing *Wang*, 944 F.2d at 85)).

For the reasons articulated below, the Commission submits that the Plan, attached as Exhibit A, constitutes a fair and reasonable allocation of the funds available for distribution and should be approved.

The Commission's Distribution Plan Provides a Fair and Reasonable Allocation of the Fair Fund

The Commission seeks approval of its Plan to distribute the Fair Fund plus any interest earned less a reserve for taxes, fees and expenses of the tax administrator, distribution agent, administrative costs, and investment and banking fees ("Net Available Fair Fund"). The Plan

provides for a distribution to Defendants' clients who paid improperly disclosed fees and markups as described in the Amended Complaint.

The Commission's principal goal in fashioning a distribution plan for the Fair Fund was to identify a methodology that provides maximum compensation to investors given the amount of funds available. Here, the total in improperly disclosed fees and markups paid by clients of Defendants as calculated by the SEC during its litigation is $24,606,361. The Fair Fund, as of January 22, 2024 is $8,953,435.66. Because the Net Available Fair Fund is insufficient to fully compensate Defendants' clients, the SEC proposes distributing on a *pro rata* basis. The Commission's counsel has identified Preliminary Claimants, who are presumptively eligible to receive a Distribution Payment.

Upon completion of the distribution, the SEC staff will file a motion with this Court to approve the final accounting, including a recommendation as to the final disposition of the Residual, consistent with Sections 21(d)(3), (5), and (7)[1] of the Exchange Act and *Liu v. SEC*, 140 S. Ct. 1936 (2020). If distribution of the Residual to investors is infeasible, the SEC staff may recommend that the monies be transferred to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.[2] In moving this Court to approve the final accounting,

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[1] 15 U.S.C. § § 78u(d)(3), (5), and (7). Section 21(d)(7) was added to the Exchange Act by Section 6501(a) of the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, enacted January 1, 2021. The relevant provisions of the NDAA apply "to any action or proceeding that is pending on, or commenced on or after, the date of" the NDAA's enactment. NDAA, Section 6501(b).

[2] 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.

the SEC staff will also seek from the Court an Order that discharges the Distribution Agent and terminates the Fair Fund.

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: January 22, 2024

Respectfully submitted,

s/ *Amy A. Sumner*

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