UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, -against- STEPHEN WALSH, PAUL GREENWOOD, WESTRIDGE CAPITAL MANAGEMENT, INC., WG TRADING INVESTORS, LP, WGIA, LLC, Defendants, WESTRIDGE CAPITAL MANAGEMENT ENHANCEMENT FUNDS INC., WG TRADING COMPANY LP, WGI LLC, K&L INVESTMENTS, AND JANET WALSH, Relief Defendants.	Civil Action No.: 09-CV-1749 (GBD)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- WG TRADING INVESTORS, L.P., WG TRADING COMPANY LIMITED PARTNERSHIP, WESTRIDGE CAPITAL MANAGEMENT, INC., PAUL GREENWOOD, and STEPHEN WALSH, Defendants, ROBIN GREENWOOD and JANET WALSH, Relief Defendants.	Civil Action No.: 09-CV-1750 (GBD)

U.S. COMMODITY FUTURES TRADING COMMISSION'S AND U.S. SECURITIES AND EXCHANGE COMMISSION'S JOINT NOTICE OF RECOMMENDATION FOR A DISTRIBUTION PLAN

TABLE OF CONTENTS

Table of Authorities

Cases

Treatises

Plaintiffs U.S. Commodity Futures Trading Commission ("CFTC") and U.S. Securities and Exchange Commission ("SEC"), through their respective undersigned counsel, respectfully submit this joint notice of recommendation for a distribution plan.

The CFTC and SEC submit that any distribution plan ordered by the Court should be a fair and equitable distribution of the Receivership Estate's assets to defrauded investors. As explained more fully below and with these principles in mind, the CFTC and SEC recommend that the Court employ a net investment *pro rata* distribution plan because it squarely meets these goals.

I. PROCEDURAL HISTORY

On February 25, 2009, the SEC and CFTC filed complaints in these civil enforcement actions. On the same day the CFTC and SEC filed their Complaints, the agencies also filed and the Court granted a Statutory Restraining Order and a temporary restraining order, respectively, in which the CFTC and SEC sought the entry of orders freezing assets and preventing the destruction of records, the appointment of a receiver, expedited discovery, and an Order to show cause regarding preliminary injunction and other equitable relief.[1] On May 22, 2009, the Court converted the temporary restraining orders into Preliminary Injunctions as to the Defendants in both matters[2] (the PIs, SRO, and TRO are collectively referred to as the "Asset Freeze Orders").

The immediate goal of the Asset Freeze Orders was to preserve the *status quo* and to protect defrauded investors by freezing all funds under the control and management of Defendants and Relief Defendants to preserve those funds for eventual return to the defrauded

---

[1] The Court's February 25, 2009 Ex Parte Statutory Restraining Order ("SRO") (CFTC matter, Docket Entry ("D.E.") #2, and February 25, 2009 Temporary Restraining Order ("TRO") (SEC matter, D.E. #2).

[2] The Court's May 22, 2009 Preliminary Injunction (SEC matter, D.E. #100) and May 22, 2009 Preliminary Injunction (CFTC matter, D.E. #108) (collectively "PIs").

investors. Pursuant to the Asset Freeze Orders, the Court appointed Robb Evans & Associates, LLC ("Receiver") as Receiver, which, as an independent body appointed by and acting under the supervision of the Court, is empowered, among other things, to take control of, marshal and account for all the assets held by or under the control or management of Defendants and Relief Defendants and to locate any funds in addition to those already frozen that should be within the Receivership estate. Since appointment by the Court, the Receiver has diligently discharged its duties under the Asset Freeze Orders and subsequent orders of the Court.

On August 5, 2009, the Court entered its Order Granting the Receiver's Motion for an Order Approving the Receiver's Proposed Claims Administration Procedures (the "Claims Order") (CFTC D.E. 209; SEC D.E. 194). The Claims Order provides that investors, interested parties, and other known creditors had 45 days from when the Receiver served them with notice to provide the Receiver their proposals as to how the funds held by the Receiver should be distributed (the "Investors' Proposals"). On September 1, 2010, the Receiver sent out a notice commencing the 45-day period and, consistent with the Claims Order, the claimants submitted their proposals on or before October 22, 2010. Pursuant to the Claims Order, the CFTC and SEC are authorized to provide their views on both the Investors' Proposals[3] and then subsequently on the Receiver's proposed distribution plan once it is submitted by the Receiver.

The instant filing is the CFTC's and SEC's view on the Investors' Proposals and a joint recommendation for a claims distribution plan.[4]

---

[3] On November 16, 2010, the Court extended the deadline for the CFTC and SEC to file their submission to December 20, 2010. (CFTC D.E. 411; SEC D.E. 376).

[4] The SEC and CFTC will also file a response to the Receiver's motion seeking approval of its proposed distribution plan when it is filed pursuant to the Claims Order.

II. DISCUSSION

A. The Receiver Has Been A Dutiful and Fair Administrator of the Receivership Whose Analysis Is Invaluable

1. Receiver's Reports Provide Elucidatory and Critical Information and Analysis

Since appointment by the Court in February, 2009, the Receiver has been working as expeditiously as possible to discharge its duties in a fair, pragmatic, and diligent manner. It has engaged in a thorough examination of the facts and circumstances of these enforcement actions. As was evidenced by Receiver's May 27, 2009 initial report ("Receiver's Initial Report") and its June 3, 2010 Second Report ("Receiver's Second Report"), it has made significant strides in obtaining relevant documents, assessing the assets at issue, analyzing financial records, addressing issues with regard to purported property of Defendants and Relief Defendants acquired by use of misappropriated investor funds, and accomplishing other important tasks called for by the Court. (CFTC D.E. # 110 and 329; SEC D.E. # 102 and 303). These two detailed reports provide a wealth of information. The Receiver's financial analysis and reports are invaluable.

2. The Claims Administration Process Provided All Claimants With Due Process and Was Fair and Inclusive

The Receiver is extremely experienced and has created mechanisms for claims processes and distribution plans in other matters. The Receiver has been an important independent voice in these matters. As discussed in the Procedural History section, above, the Court has ordered the Receiver to carry out a Claims Administration Procedure ("Claims Process") that will result in an ultimate recommendation from the Receiver for a distribution plan. Throughout this litigation, the Receiver has proceeded in an inclusive manner that provided all investors, interested parties, and other known creditors an opportunity to be heard and access to relevant information.

The Receiver early on recognized the importance of giving everyone access to comprehensive financial information. The Receiver's conduct in these civil enforcement actions ensured that all interested parties were given comparable opportunities to opine and participate in the claims process. Under the auspices of the Court's April 8, 2010 Stipulated Protective Order, the Receiver provided all investors and/or groups of investors equal access to voluminous amounts of data regarding the subject entities, accounting data, supporting documents, and other pertinent information. Further, the Receiver affirmatively decided to initiate consultations with disparate investor groups to better understand their concerns and positions. On numerous occasions, the Receiver met with representatives of various investors and their forensic accountants to ensure that all of the interested parties had the information that they needed.

On June 8-10, 2010, the Receiver held a confidential settlement negotiation conference in Los Angeles, CA where the interested parties participated, and the CFTC, and the SEC observed. These negotiations allowed all of the investors to present their positions candidly and to debate the benefits and weaknesses of various proposals from the investor groups. The Receiver, the SEC, and the CFTC met with the investors in both large groups and in breakout sessions. Valuable insight was gained from these frank discussions.

In implementing a plan of distribution, courts have long approved summary proceedings to allow, disallow, and subordinate the claims of interested parties as an appropriate and efficient adjudication mechanism, so long as potential claimants are afforded an opportunity to be heard and present claims.[5] Indeed, the use of these summary proceedings "promotes judicial efficiency

[5] *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992) ("[A] district court does not generally abuse its discretion if its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts."); *McFarland v. Winnebago South, Inc.*, 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) ("[T]he receivership court has the power to use summary procedures in allowing, disallowing, and subordinating claims of creditors, so

and reduces litigation costs to the receivership, thereby preserving receivership assets for the benefit of [claimants]." *FDIC v. Bernstein,* 786 F. Supp. 170, 177 (E.D.N.Y.,1992) (internal citations omitted). The Claims Process employed by this Court and carried out the Receiver clearly meets all of these requirements. The due process of all interested parties was protected because everyone was provided an opportunity to be heard and had access to important documents.

B. The Best Interests of the Public and the Defrauded Investors Guides the CFTC and SEC in These Civil Enforcement Actions

The CFTC and SEC are under a duty in these civil enforcement actions to proceed in the best interests of the public and the defrauded investors. The CFTC and SEC seek a claims distribution proposal that will most closely afford complete relief in these actions consistent with the Court's equitable duties and the salutary purposes of the Commodity Exchange Act and the Federal securities laws. The ultimate goal of the CFTC and SEC by prosecuting these actions—and the Receiver through its execution of its court-ordered duties—is to ensure a fair and equitable return of funds to all investors, by an open, inclusive, and fair process. *See SEC v. Byers*, No. 08 Civ. 7104 (DC), 2008 WL 5102017, at *1 (S.D.N.Y. Nov. 25, 2008). ("Although not all investors and creditors share the same interests, it is in all their interests to maximize the value of the assets under the receivership. This is what the Receiver is charged with doing."); *CFTC v. Eustace,* No. Civ. A. 05-2973, 2005 WL 2862945, at *3 (E.D. Pa. Oct. 31, 2005) ("The sole purpose of this litigation is to protect the investors in any and all funds related or affiliated

---

long as creditors have fair notice and a reasonable opportunity to respond."); *FDIC v. Bernstein,* 786 F. Supp. 170, 177 (E.D.N.Y., Jan. 10, 1992) ("A district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration."); 13 Moore's Federal Practice (3d ed.) § 66.06[4][b] ("The powers of the courts include the allowance, disallowance, and subordination of the claims of creditors.").

to Defendants"). The CFTC and SEC submit that any recommendation made by the Receiver must ensure equity and fairness.

The CFTC and SEC have analyzed all of the Investors' Proposals. Further, the SEC's and CFTC's investigations and litigation of these civil enforcement actions have confirmed that the analysis provided in Receiver's Initial Report and the Receiver's Second Report are an accurate evaluation of the evidence adduced in these matters. Having met with investors, analyzed the Investor Proposals, and actively participated in the confidential settlement conference discussed above, the CFTC and SEC believe that the agencies have ample information to opine on a distribution plan.

The SEC and CFTC crafted their recommendations to assist the Court in adopting a distribution plan. The Court has made clear from the outset that it shares the same ultimate objective as the civil agencies, namely, a fair and equitable distribution of Receivership Estate assets to defrauded investors.

C. The Court Has Broad Discretion to Craft an Equitable Resolution of This Matter

In these civil enforcement actions, the Court is sitting in equity. The Second Circuit and numerous other Federal Appellate courts have repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest. The Second Circuit has routinely upheld district courts' exercise of that discretion. *See, e. g.*, *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 57 (1997); *SEC v. Posner*, 16 F.3d 520, 522 (2d Cir. 1994), *cert. denied*, 513 U.S. 1077 (1995); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103-04 (2d Cir. 1972). The district court "must be given wide latitude in these matters." *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (*quoting SEC v.*

Patel, 61 F.3d 137, 140 (2d Cir. 1995)); *see also SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) and *SEC v. Fischbach*, 133 F. 3d 170, 175 (2d Cir. 1997).

The Second Circuit has held that – in the exercise of this broad discretion – a district court may adopt any proposed plan of distribution that is "fair and reasonable." *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). Further, "[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy." *SEC v. Zubkis*, No. 97 Civ. 8086, 2003 U.S. Dist. LEXIS 16152, at *14-15 (S.D.N.Y. Sept. 10, 2003), *quoting Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972). The SEC and CFTC respectfully request that the Court consider the recommendations of the civil agencies as it exercises its broad equitable powers.

D. Walsh and Greenwood Engaged in a Massive, Unitary, and Pervasive Fraud

From at least 1996 to the present Defendants Walsh and Greenwood orchestrated a scheme involving the misappropriation of approximately $553 million from investors and commodity pool participants—mostly pension funds and university foundations—to pay for personal expenses and luxuries for the Defendants and Relief Defendants, engage in unauthorized investments for their own benefit, and to hide trading losses.[6] Defendants Greenwood and Walsh by and through various entities, including but not limited to WG Trading Company Limited Partnership ("WGTC") and WG Trading Investors, L.P. ("WGTI"), orchestrated a pervasive and unitary fraud that diverted funds of investors to effectuate their nefarious scheme in violation of the law. The massive scope of this fraud is astounding.

[6] Through 2009, Greenwood received approximately $80 million of misappropriated investor funds plus is liable for $292,790,352.05 in purported promissory notes and $5,325,939.05 in employee advances. Similarly, Walsh received approximately $51 million of misappropriated investor funds plus is liable for $260,690,994.00 in purported promissory notes and $3,478,363.24 in employee advances.

As part of this scheme, Defendants created and distributed demonstrably false account statements intended to mislead investors, materially overstated their rates of return and capital positions, commingled and improperly transferred funds between the various entities, and misappropriated investor funds for their personal benefit. These deceptions required the Receiver to carefully examine the account positions of each investor as well as to undertake financial reconstruction, and other reconciliation processes. As the Receiver's Initial Report states: "Total preliminary investors' open equities and positions as carried on the Receivership Defendant entities' books and records are overstated…" Receiver's Initial Report at p. 2, fn 2. (CFTC D.E. # 110; SEC D.E. # 102)

The evidence in the record shows that substantial commingling occurred—discussed at length in Section E below—and that the funds held in the various entities were transferred, dissipated, diverted, and/or misappropriated and then other investor funds were used to cover up the fraud. These commingled investor funds were dispersed without regard for corporate formalities or distinctions. This scheme resulted in clients not having their funds held or invested where Defendants represented they would be held or invested. In fact, the government's and Receiver's investigations uncovered that even as the Defendants represented to a client that his or her particular funds would be deposited in WGTI's account, it was actually deposited in WGTC's accounts and vice-versa. Further, it is clear that transactions were run through WGTI's accounts that were not transactions on behalf of WGTI investors and similarly transactions were run through WGTC's accounts that are not transactions on behalf of WGTC investors. Defendants used both WGTI's accounts and WGTC's accounts as if they were inter-changeable. This commingling of funds was part and parcel of the mechanism by which the Ponzi scheme to misappropriate clients' funds worked. This evidence of substantial

commingling militates against any claim that the assets of any entity, including WGTC or WGTI, are wholly or substantially intact or that any asset is exclusively an asset of either company.

As discussed in detail below, cash, securities, and other assets that an investor transferred to an entity that defrauds investors in a Ponzi scheme can be included in the entity's receivership estate for purposes of *pro rata* distribution to the victims. *See United States v. Durham*, 86 F.3d 70 (5th Cir. 1996) (affirming district court's approval of *pro rata* distribution plan even though the majority of funds were traceable to specific claimants); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 327 (5th Cir. 2001) (upholding *pro rata* distribution plan over objection of investor who claimed his investment could be traced and should not be distributed to other investors).[7] The fact that assets may be potentially traceable to a particular investor creates no superior claim to the money. *See Durham*, 876 F.3d at 70 (approving *pro rata* distribution and rejecting investors' tracing argument because the "merely fortuitous fact that the defrauders spent the money of the other victims first" does not give investor priority). Walsh and Greenwood represented, and investors reasonably relied upon their representations, that their funds would all end up in WGTC's index arbitrage strategy no matter which investment form or vehicle they chose. *See CFTC v. Eustace*, No. 05-2973, 2008 U.S. Dist. LEXIS 11810 (E.D. Pa. Feb. 15, 2008) (Court approved *pro rata* distribution plan where "joint marketing of the funds … encouraged investors to perceive the funds as a part of a whole). To attribute the return of any

[7] *SEC v. AmeriFirst Funding, Inc*, 2008 WL 919546, at *5 (N.D. Tex 2008) (approving *pro rata* distribution plan where legally separate entities were involved in a unified scheme to defraud and were controlled by the same individual); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 747 (9th Cir. 2005) (noting that, in equitable distribution, whether legal documents identified by investors established them as the title holders of assets is irrelevant); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-89 (2d Cir. 2002) (collecting cases imposing *pro rata* distribution).

funds to some investors, and not to others, when there was substantial commingling and misappropriation of funds, and overall misstated rates of returns, would require the sort of tracing of investors' assets that courts have routinely rejected when considering distribution plans in Ponzi schemes.

E. A Net Investment *Pro Rata* Distribution Plan Should Be Implemented Here

The CFTC and SEC recommend, for the reasons discussed below, that the Court employ a net investment *pro rata* distribution plan because it is fair and reasonable and well within the Court's discretion to balance the competing interests of the defrauded investors.

1. *Pro Rata* Distribution Plans Have Been Endorsed By The Second Circuit and Its Sister Appellate Courts

In Ponzi schemes, law, equity, and practice favor a *pro rata* distribution. In the seminal Ponzi scheme case, *Cunningham v. Brown*, 265 U.S. 1, 12-13 (1924), the Supreme Court held that equity dictated that all of the victims of the fraud be treated equally. "In the Second Circuit, the *pro rata* distribution of funds to fraud victims is generally presumed to be the most equitable relief." *CFTC v. Efrosman*, No. 05 Civ. 8422, 2009 WL 2958389, at *8 (S.D.N.Y. Sept. 16, 2009), *citing SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-89 (2d Cir. 2002). Further, various Courts of Appeals have joined the Second Circuit in routinely affirming district court approvals of *pro rata* distributions in civil enforcement actions involving Ponzi-schemes. *See In re Harvey Goldberg v. New Jersey Lawyers' Fund for Client Protection*, 932 F.2d 273, 280 (3rd Cir. 1991) ("In general, courts favor a *pro rata* distribution of funds when such funds are claimed by creditors of like status"); *Provencher v. Berman*, 699 F.2d 568, 570 (1st Cir. 1983) (taking a proportionate share of property purchased with commingled funds); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1116 (9th Cir. 2000) (*citing United States v. Durham*, 86 F.3d 70, 73 (5th

Cir. 1996) and *U.S. v. Real Property Located at 13328 and 13324 State Highway 75 North, Blaine County, Idaho,* 89 F.3d 551, 554 (9th Cir. 1996) (hereafter "*Real Property*")("the equities demand[ ] that all victims of the fraud be treated equally"; "As in *Cunningham*, 265 U.S. at 13, this is a case where 'equality is equity."') *quoting SEC v. Elliott*, 953 F.2d 1560, 1569 (11th Cir. 1992).

Courts have almost uniformly held that a district court acts within its discretion in ordering the *pro rata* distribution of a Ponzi scheme's assets, even when particular investors' contributions can be identified. *See In re Dreier LLP*, 429 B.R. 112, 134 (Bankr. S.D.N.Y. 2010) ("The right of a Ponzi scheme victim to trace his investment, and gain priority over other victims, is severely limited."). In *Elliott*, the court approved a *pro rata* distribution even though some of the investors' securities that Elliott had retained still bore the investors' names on them. *Elliott,* 953 F.2d at 1569 (11th Cir. 1992). Courts have recognized that in Ponzi schemes the perpetrators treat the cash and assets contributed by investors as fungible, commingling the investors' contributions and randomly selling assets or depleting cash to pay other investors in the scheme. It is therefore purely fortuitous that one investor's cash or assets may be disposed of before another's. *See United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996) ("[t]he ability to trace the seized funds … is the result of the merely fortuitous fact that the defrauders spent the money of the other victims first"); *Elliott*, 953 F.2d at 1570 ("the equities weigh against allowing some to benefit from the fortuity that Elliott had not sold all of the securities"); *see also Real Property*, 89 F.3d at 552-53 (noting commingling of funds); *Franklin*, 652 F. Supp. at 168 (stressing that "the funds of [Franklin's] investors were truly 'commingled"'). In these situations, courts act with eminent reasonableness in not favoring one investor over others by implementing *pro rata* distribution plans.

In the receivership context, courts frequently approve a *pro rata* distribution to similarly situated victims, relying on the equitable maxim that "equality is equity."

2. The Second Circuit Standard For *Pro Rata* Distribution in *Credit Bancorp* Is Met Here

The Second Circuit clearly favors *pro rata* distribution plans and adopted a clear standard for implementing them in *Credit Bancorp*, 290 F.3d 80. In *Credit Bancorp*, the Second Circuit affirmed the district court's approval of the receiver's proposed *pro rata* plan of distribution, and set out a two part test for using a *pro rata* approach:

(1) Funds of the defrauded victims were commingled; and

(2) Victims were similarly situated "with respect to their relationship to the defrauders." *Credit Bancorp*, 290 F.3d at 88-89 (citing cases omitted). Both elements are clearly present here.

As discussed above, there was extensive commingling of investor funds by and among WGTC and WGTI. In the Receiver's Initial Report, the Receiver found: "based upon the above, it is clear that the investor funds were commingled between WGTC and WGTI. There were instances in which limited partners' funds were received by WGTI while note holders' funds were received by WGTC, and limited partners were paid by WGTI while a note holder was paid by WGTC. In addition, WGTC advanced the variation margin deposits on behalf of certain note holders of WGTI." Receiver's Initial Report, at p. 17. Also, s*ee* Receiver's Initial Report, at p. 15-17 for a detailed list of examples of commingling. Further, in the Receiver's Second Report, the Receiver's analysis concludes: that "WGTC and WGTI in reality were financially inseparable and had to be operated as a single entity to support the myth that they were stand alone entities." Receiver's Second Report, at p. 1.

Importantly, a recent decision in this district addressed the extent of commingling necessary to satisfy the *Credit Bancorp* test. In *SEC v. Byers*, 637 F. Supp. 2d 166, 177 (S.D.N.Y. 2009), the court held that the commingling requirement was satisfied because "there [was] some evidence that commingling occurred, and the law does not appear to require more than that." *Id.* The extensive commingling of hundreds of millions of dollars of investor funds by WGTC and WGTI here is substantially more pronounced than what occurred in *Byers.* The first prong of the *Credit Bancorp* test is satisfied.

The second prong of the *Credit Bancorp* test justifying the use of a *pro rata* approach is the existence of similarly situated investor-victims. This test is easily satisfied. Indeed, there are numerous similarities among the investor stakeholders, as chronicled in the Receiver's two reports, including but not limited to:

- All of the investors believed—based on representations of the Defendants—that regardless of the mechanism by which they chose to invest, they all would have their funds invested in the same index arbitrage strategy.
- All investors received the same or substantially similar marketing materials and presentations about their investments.
- All of the subject companies were controlled and operated by the same individuals, namely Walsh, Greenwood and Duffy, as a single economic unit.
- All investors were offered the choice of investing path, either as a noteholder of WGTI or as a limited partner of WGTC. Regardless of path chosen, the investors were told that they would receive the same return on their investment.
- These entities were managed collectively by the same people who promised the same returns across all companies.

- All investors, regardless of the investment path, were led to believe that they could rely upon the protections offered by the registered status of WGTC.

These similarities support the conclusion that investors all believed they were investing in the same venture and were therefore similarly situated. Similarly situated does not mean exactly the same; investors "circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances." *Byers*, 637 F. Supp. 2d at 180. That reasonably close resemblance is present here. As such, the second prong of the *Credit Bancorp* test is met.

The SEC and the CFTC believe that, based on the facts and pleadings in this case, the findings of the Receiver as set forth in its two reports, and applicable case law, a *pro rata* distribution plan is appropriate in this case. The fairest and most reasonable approach to distributing the Receivership Estate in this case is to return to each investor a ratable share of its gross investment in the subject enterprises, less any cash distributions or like-kind benefits already received during the life of the investment.[8] There is overwhelming evidence that, as in *Credit Bancorp*, the funds of the defrauded investors were commingled and the victims were similarly situated with respect to their relationship to the Defendants. Thus, a *pro rata* distribution is appropriate.

3. Walsh and Greenwood Used The Various Entities Interchangeably To Carry Out A Unitary Fraud

In balancing the competing equities at issue here, the CFTC and SEC respectfully submit that fundamental fairness must control. A court sitting in equity should ensure that equitable

[8] A potential Receiver's Plan may also provide a mechanism for the partial or complete disqualification of certain former WG Trading or Westridge employees and associates (who are also investors) from inclusion in any distribution based on evidence that their conduct facilitated the scheme.

principles trump any claim to corporate forms and reject attempts to view facts through contractual lenses. Alleged contractual terms cannot defeat equitable considerations.

In Ponzi cases, courts rely on evidence of a lack of adherence to the corporate form by managers of the Ponzi-scheme to justify *pro rata* distributions. Courts frequently look to factors such as undercapitalization, the absence of accurate corporate records, commingling of corporate assets originally intended to remain separate, and the failure to adhere to the traditional corporate formalities articulated in the law and the entities' respective corporate governance documents. As discussed above, there is overwhelming evidence that Walsh and Greenwood, and their employees failed to adhere to corporate formalities with the subject entities. The information adduced to date evidences an intent by Walsh and Greenwood to treat the WGTC, WGTI, and the other entities at issue here as a single economic unit. These entities were managed collectively by overlapping groups of individuals in the same locations, and each individual company had little discernable separate identity or existence. Further the rampant commingling of funds and improper transfers show that Walsh and Greenwood employed all of the entities interchangeably without regard to corporate formalities and as their own personal piggy-banks. In fact, Greenwood admitted this at his Allocution before Judge Cedarbaum:

> Q. That is, you treated these partnerships as your own personal bank account?
> A. Correct.
> Q. And you drew as you wished?
> A. Correct.

Transcript of July 28, 2010 Criminal Hearing ("Allocution") at 24:10-14, attached hereto as Exhibit A. Under similar circumstances, federal courts in equity receiverships involving multiple corporate entities permitted a *pro rata* distribution of the pooled assets of the entire

enterprise. *See e.g. CFTC v. Topworth Inter'l*, 205 F.3d at 1110 (the Ninth Circuit affirmed a federal equity receiver's *pro rata* plan that proposed combining multiple entities into one fund).

Likewise, in *SEC v. Elliott*, 953 F.2d at 1569, an equity receiver was appointed for the principal defendant (Elliott) and three of his affiliated companies. The Eleventh Circuit affirmed the district court's decision to "treat[ ] the various companies as one entity for the purpose of the receivership proceedings," because "Elliott had commingled funds between the various companies and had failed to maintain a strict separation of the companies . . . ." *Id.* at 1565 n.1 . At the conclusion of the *Elliott* proceedings, the court approved a *pro rata* distribution across the multiple entities. The SEC and CFTC submit that the Court should treat as one unit all of the entities under the control of Walsh and Greenwood because this clearly was a unitary fraud that did not respect corporate formalities and aggressively commingled funds between the various entities.

Finally, in his Allocution, Greenwood admitted that he and Walsh engaged in a form of a Ponzi scheme:

> Q. So this was a Ponzi scheme, as it is loosely called?
> A. Well, sort of, because we actually had --
> Q. You were using other monies to make up for what you couldn't give?
> A. That's correct.
> Q. But, of course, you never could make it up entirely?
> A. Well, initially we thought we could and as time went on the hole got bigger and bigger and at a point we couldn't.
> Q. Well, if you were taking money out for yourselves, you could never make it up, right, unless you made huge profits?
> A. That's correct.
> Q. And you knew that from the beginning, that if you were taking it for personal use?
>
> MR. HAFETZ: May I have one minute, your Honor.
> THE COURT: Sure.
> (Pause)
>
> A. Early on after the partnership was established and the investors had given us the money, it became apparent we

couldn't give back the money we were taking out.

Greenwood's admission is clearly corroborated by the both the Receiver's Initial Report and the Receiver's Second Report. A qualitative analysis of the totality of the circumstances shows that Greenwood's and Walsh's fraud had the elements of a Ponzi scheme. Thus, the use of a net investment, pro-rata, distribution plan is "especially appropriate" under such circumstances. *See Credit Bancorp*, 290 F.3d at 89 (affirming use of pro rata distribution plan where "earlier investors' returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity.").

4. Net Investment Approach Best Affords The Most Complete Relief to the Victims And Basing A Distribution Plan Upon Fictitious Customer Statements Would Be Inequitable

In this case, the Defendants' records are unreliable to substantiate customer claims for profits and inadequate to identify the owners of contracts with losses due to the massive fraud, improper commingling, and intentionally deceptive accounting employed by Walsh and Greenwood. Under these circumstances, the Court should approve a distribution plan that employs a "net investment" method. A net investment approach looks solely at dollars in and dollars out and makes distributions to the victims based on their net contributions. It also demands a return of funds from those investors who received more funds than they contributed, *i.e.* Ponzi winners, either by offsets or clawback actions against fully redeemed investors.[9]

The net investment method mirrors how courts generally treat claims and claimants in Ponzi scheme cases. When faced with the particular circumstances of Ponzi schemes, where there is not enough money to repay all victims in full, courts have routinely taken the position that investors are entitled to share proportionally to their actual losses on dollars invested, not based on the "fictitious" profits, and that funds that they received back during the course of the

[9] The Receiver has initiated clawback actions against alleged Ponzi winners to recoup funds for the Receivership Estate.

scheme must be deducted. Such an approach is consistent with the fundamental principle, whether under equity or bankruptcy law, that similarly situated investors must be treated alike.

All similarly situated investors in a Ponzi scheme must be treated equally. Accordingly, courts generally hold that when a Ponzi scheme collapses, and there is not enough money to repay all the funds invested by victims, the victims should recover proportionately in accordance with their respective actual losses, *i.e.*, their unrecovered cash investments, not their phony inflated profits. *See, e.g., Credit Bancorp* 2000 WL 1752979, at *40-41, aff'd, 290 F.3d 80 (2d Cir. 2002); *Topworth*, 205 F.3d at 1115-16; *Official Cattle Contract Holders Comm. v. Commons (In re Tedlock Cattle Co.)*, 552 F.2d 1351 (9th Cir. 1977) (*per curiam*); *CFTC v. Equity Fin. Group, LLC*, No. Civ. 04-1512, 2005 WL 2143975, at *22-24 (D.N.J. Sept. 2, 2005), *adopted in* No. Civ. 04-1512, 2005 WL 2864783 (D.N.J. Oct. 26, 2005); *In re Old Naples Sec., Inc.*, 311 B.R.607, 616-17 (M. D. Fla. 2002).

The use of fictitious customer statements, or any attempt to calculate net equity based upon fictitious accounts or transactions, is imprudent and inequitable. In his Allocution, Greenwood admits that the creation and distribution of false account statements and fictitious returns was part and parcel of the Defendants' fraud. He admitted:

> Q. On your own books, you mean?
> A. On the books of -- yes, yes. So we would report to the investors the same rate of return that we earned on the WG Trading index arbitrage trading.
> Q. And that was simply flatly untrue?
> A. Correct.
> Q. That is, you did not make that money that you reported to investors that you made?
> A. That's correct.

See Allocution at p. 24:18-25:1. Although all of the victims are sympathetic, the fact remains that there are insufficient funds available to make everyone whole. Treating the phony "profits"

concocted by Walsh and Greenwood as anything but false would reward claimants who have already received back substantial capital at the expense of those who have not. An adherence to the final fictitious customer statements—in spite of all of the evidence demonstrating the falsity of those statements—would undermine the reliability of any distribution plan. A net investment approach is the most equitable means to allocate limited resources among equally deserving victims. To allocate limited resources based upon or taking into account the fictitious customer statements would be poor public policy that would set a harmful precedent. Such a precedent would undermine the obligations of the CFTC and SEC to proceed in the best interests of the public and the defrauded investors.

In *SEC v. Credit Bancorp, Ltd.*, the district court was presented with competing distribution proposals in a Ponzi-scheme receivership. The court adopted a net investment approach instead of a fictitious profits approach: "[I]t is in the nature of a Ponzi scheme that customer returns are generated not from legitimate business activity but, rather, through the influx of resources from new customers. To allow some investors to stand behind the fiction that [the] Ponzi scheme had legitimately withdrawn money to pay them 'would be carrying the fiction to a fantastic conclusion.'" *Credit Bancorp*, 2000 WL 1752979 at *40 (internal quotations omitted). As the court pointed out, "permitting customers to retain such gains comes at the expense of the other customers." *Id*. Moreover, the court reasoned, "recognizing claims to profits from an illegal financial scheme is contrary to public policy because it serves to legitimate the scheme." *Id*. (internal citations omitted). These rationales apply with equal force here and militate for a net investment *pro rata* distribution here.

The civil agencies believe net investment—dollar in, dollar out—*pro rata* distribution plan is the best and most fair approach under the circumstances of this Ponzi-scheme case

because it yields a substantial recovery for all investors. Some long-term investors have advocated that rather than employing a net investment model, the Court should instead implement a constant dollar approach —adding an inflation adjuster—when calculating an investor's distribution.[10] Although the use of a constant dollar approach may be appropriate in certain instances, the facts of this matter do not, at the outset, warrant its use here. Currently, the Receiver has marshaled sufficient assets so that under a *pro rata* distribution method, it will distribute to each investor approximately 89% of their net contributions or investment. The CFTC and SEC believe that these funds should be distributed without an inflation adjustment.

The SEC and CFTC hope, however, that the Receiver will be able to obtain additional funds through the liquidation of various assets owned by the Defendants and Relief Defendants, as well as through several clawback actions the Receiver has filed. In the event that the Receiver acquires funds to distribute in excess of 100% of the net contributions of investors, the Court may wish to consider ordering a hybrid approach where future distributions in excess of 100% of the net contributions be calculated on a *pro rata* basis and adjusted to give effect to inflation.

5. Courts Have Latitude To Balance the Sometimes Competing Interests Of The Defrauded Investors

The CFTC and SEC sincerely appreciate that the potential recipients of these funds are innocent victims of Walsh and Greenwood, and that each would like to maximize its recovery. As in *Cunningham*, this is a case where "equality is equity" and so a net investment based *pro*

[10] The use of a constant dollar adjuster to account for inflation (or deflation) above a certain threshold level of return of capital recognizes the economic reality of inflation. Such an adjustment is not the equivalent of "interest" or a "rate of return" on funds. *See Kansas v. Colorado*, 533 U.S. 1 (2001) (Special Master's Third Report, found at 2000 WL 34508307, which the Court adopted, distinguished an inflation adjustment from a prejudgment interest award, stating that adjusting past money to present-day dollar amounts "simply ensure that inflation does not erode the value of money, it does not compensate for the lost use of the money in the intervening time.")

rata distribution plan should be implemented. The Courts must be given latitude to balance the sometimes competing interests of the defrauded investors. *See SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989) (district courts' broad discretion in fashioning distribution plans in civil enforcement actions "includ[es] the flexibility to decide that certain groups of claimants would receive payments and others would not"). The civil agencies believe that a net investment *pro rata* distribution plan best balances the competing interests of the defrauded investors and should be adopted by the Court.

Finally, some investors advocate for a *pro rata* rising tide distribution plan. A *pro rata* rising tide approach is designed to "catch up" investors with minimal, or no, withdrawals over the life of the fraud to investors who had made substantial prior withdrawals. While a *pro rata* rising tide approach can be appropriate under certain circumstances, those circumstances do not appear to be present here. First, almost all of the investors have made substantial prior withdrawals. Therefore, no investor is significantly improved through a *pro rata* rising tide approach. Second, under a net investment *pro rata* approach, each investor will receive a distribution equal to approximately 89% of their net capital contribution. With each investor receiving such a distribution, there is only incremental benefit to some investors from a rising tide approach (with a corresponding incremental reduction in the distribution to other investors). Third, a *pro rata* rising tide adds a layer of administration not associated with a net investment *pro rata* distribution. Finally, under these facts, a rising tide approach might result in some investors not receiving a distribution. *See Byers*, 637 F. Supp. 2d at 182 (rejecting a rising tide approach because some investors got no return).

Employing a net investment *pro rata* distribution plan is fair and reasonable and well within the Court's discretion to balance the competing interests of the defrauded investors here.

III. CONCLUSION

The CFTC and SEC are under a duty in these civil enforcement actions to proceed in the best interests of the public and the defrauded investors. In considering the best interests of the public, primary consideration is given to the avoidance of unequal relief and unfair prejudice among all investors and to making the victims as whole as possible under the circumstances. The CFTC and SEC believe this proposal most closely affords complete relief in these actions consistent with the Court's equitable duties and the salutary purposes of the Commodity Exchange Act and the Federal securities laws.

Employing a net investment *pro rata* distribution plan is fair, equitable, and reasonable and well within the Court's discretion to balance the competing interests of the defrauded investors here.

Dated: December 20, 2010

Respectfully submitted:

/s/ JonMarc P. Buffa
Attorneys for Plaintiff
Paul G. Hayeck
Peter M. Haas
JonMarc P. Buffa
COMMODITY FUTURES TRADING COMMISSION
1155 21st Street, N.W.
Washington D.C. 20581

/s/ Thomas P. Smith, Jr.
Attorneys for Plaintiff
Paul G. Gizzi
Thomas P. Smith, Jr.
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center
New York, NY 10281

Joseph Rosenberg
COMMODITY FUTURES TRADING COMMISSION
140 Broadway
New York, New York 10005

CERTIFICATE OF SERVICE

The undersigned certify that on December 20, 2010, they electronically filed the foregoing U.S. COMMODITY FUTURES TRADING COMMISSION'S AND U.S. SECURITIES AND EXCHANGE COMMISSION'S JOINT NOTICE OF RECOMMENDATION FOR A DISTRIBUTION PLAN with the Clerk of this Court in the respective actions using the CM/ECF system, and they are relying upon the transmission of the Clerk's Notice of Electronic Filing for service upon all parties of record in these cases.

In CFTC v. Walsh, 09-CV-1749

/s/ JonMarc Buffa

-and-

In SEC v. WG Trading Investors, L.P., 09-CV-1750

/s/ Thomas P. Smith, Jr.

EXHIBIT “A”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 09 Cr. 722 (MGC)

PAUL GREENWOOD,

Defendant.

----------x

July 28, 2010
10:45 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
JOHN O'DONNELL
MARISSA MOLE,
Assistant United States Attorneys

FREDERICK HAFETZ, ESQ.,
TRACY SIVITZ, ESQ.,
Attorneys for Defendant

BY THE COURT:
Q. Mr. Greenwood, I understand that you would like to enter a plea of guilty to the charges against you.
A. That's correct.
Q. Before I can enter your plea, I have to satisfy myself that you understand exactly the consequences of entering a plea of guilty and that you are entering this plea of your own free will and that you understand everything concerning the plea, all of its consequences so for those purposes, I would like to ask you some questions.
First of all, where were you born?
A. Los Angeles, California.
Q. And how much education have you had?
A. I have a Bachelor's degree in psychology and MBA and doctorate in economics.
Q. So there is no question that you have a clear knowledge of the English language?
A. Yes.
Q. That you are highly literate in English, but nevertheless if I say something that you don't understand or ask you something that is not clear to you, please tell me and I will explain it further.
Within the last 24 hours, have you taken any substance or drugs that might affect the clarity of your mind?
A. No.

Q. Nothing at all, not even an aspirin?
A. Nothing.
Q. And within the last 48 hours, have you had any alcoholic beverages?
A. Yes.
Q. What and when?
A. A Margarita last night.
Q. All right. And what is contained in a Margarita?
A. Tequila and I'm not sure what else. Some sort of a juice, lime juice, I think.
Q. I see.
Is your mind clear this morning?
A. Yes.
Q. The effects of the Margaretta, whatever it is, I take it, has worn off entirely?
A. Completely.
Q. Very well.
Have you carefully discussed the charges against you with your lawyer?
A. Yes, I have.
Q. And have you discussed with him the consequences of this plea?
A. Yes, I have.
Q. Nevertheless, I would like to review that with you because I want to be sure that you really know what you are doing and

most important what you are giving up.
Let me turn first to what you are giving up when you enter a plea of guilty because under our law you have an absolute right to continue to plead not guilty and to put the government to its proof beyond a reasonable doubt of each of the charges against you.
You have the right at a trial at which you put the government to its proof to a judgment by a jury of twelve persons, and at that trial you have the right to question the witnesses against you and at that same trial you have the right not to yourself testify in any respect, because nobody can compel you to incriminate yourself, and your silence may not be used against you in any way at a trial.
Do you understand all of that?
A. Yes, I do.
Q. But if I enter your plea of guilty, it is as if that jury of twelve persons brought in a verdict of guilty after a full trial at which the government proved your guilt beyond a reasonable doubt. If I enter your plea of guilty there will be no further trial of any kind, you will stand convicted as if that jury had brought in a verdict against you.
Do you understand that?
A. I understand.
Q. At a trial you would have the power of the court to subpoena witnesses in your behalf. You are giving all of that

up if I enter your plea of guilty.
A. I understand.
Q. Now I would like to review with you the charges against you to which you wish to enter a plea of guilty.
There are six counts against you.
Count 1 charges you with conspiracy to commit securities fraud and wire fraud. That is a charge of violating the general conspiracy statute of the criminal law, Section 371 of Title 18, and if I enter your plea of guilty to that charge you are subject to a sentence of up to five years in prison to be followed by a term of supervised release of up to three years. In addition, you are subject to a fine.
THE COURT: Now, which is it? This is just boilerplate. It doesn't tell the defendant whether you are talking about twice the pecuniary loss or twice the pecuniary gain and what that is. The formulaic statements are menseless. I have it all the time in plea agreements and I don't understand why.
MR. O'DONNELL: It is the greatest of those three categories here, your Honor.
THE COURT: Which is?
MR. O'DONNELL: In this case conservatively the greatest of the three categories would be twice the loss to the investors, which is approximately, according to the receiver's calculations, approximately at least eight or nine hundred

million dollars.
BY THE COURT:
Q. You are subject to a fine of twice that if I enter your plea of guilty to Count 1 of the indictment.
Do you understand that?
A. Yes, I do.
Q. I should also tell you, because this will apply to all of the supervised release provisions, that if you should violate the -- if you are sentenced to prison and to supervised release following your release from prison, if you should violate any of the conditions of supervised release you are subject to an additional term of imprisonment of the length of supervised release without regard to the initial sentence of imprisonment.
Do you understand that?
A. Yes, I do.
Q. Very well.
And that applies to every part of a sentence of supervised release, that is, the supervised release on any or all of the counts against you.
Count 2 of the indictment charges you with securities fraud. And I see you are being charged with both securities fraud and aiding and abetting securities fraud.
If I enter your plea of guilty to that charge you are subject to a term of imprisonment of up to 20 years, and if you are sentenced to a term of imprisonment you are subject to a

term of up to three years of supervised release following your release from prison. In addition, you are subject to a fine of up to $5 million. And on each of these counts you are subject to a special assessment of $100, which although it is not a fine, it is collectible as if it were a fine.

Do you understand all of that?

A. Yes, I do.

Q. Count 3 of the indictment charges you with commodities fraud, that is, it charges you with engaging in transactions and practices and courses of business which operated as a fraud upon clients and participants of a commodities pool that you operated from at least 1996 through February of 2009.

If I enter your plea of guilty to that charge, you are subject to a sentence of up to ten years in prison to be followed by a term of up to three years of supervised release upon your release from prison?

THE COURT: And which is the fine here?

MR. O'DONNELL: Again, your Honor, I think for purposes of the plea allocution the fine should be the highest number, which would be twice the gross loss of all of the investors.

THE COURT: Very well.

BY THE COURT:

Q. You are subject to a fine on this charge of twice the gross pecuniary loss to all of those who participated in this

commodities pool that you operated.
Do you understand that?
A. Yes, I do.
Q. Very well.
Now, each of Counts 4 and 5 charge you with wire fraud in violation of the Criminal Code of the United States, Section 1343 and, again, you are charged with aiding and abetting as well.
If I enter your plea to those charges, Counts 4 and 5, on each of them you are subject to a sentence of up to 20 years in prison and upon your release to a term of up to three years of supervised release and in addition you are subject to a fine.
THE COURT: And what is the fine here?
MR. O'DONNELL: Again, your Honor, I think the same analysis would be appropriate.
THE COURT: I can't tell from looking. Which is the biggest number?
MR. O'DONNELL: The biggest number would be the loss to the investor that the receiver preliminarily calculated to the eight to nine hundred million dollar range, so the potentially greatest fine could be twice that number.
THE COURT: Very well.
BY THE COURT:
Q. Do you understand that that fine of up to twice the gross

pecuniary loss to your investors is the fine on each of those charges?
A. Yes, I do.
Q. That is, Counts 4 and 5 of the indictment.
And Count 6 of the indictment charges you with money laundering in violation of the Criminal Code of the United States from about 1996 through about February of 2009, and that you engaged -- it is charged that you engaged in a monetary transaction in criminally derived property that was more than $10,000 in value and was derived from the unlawful activity to which you are pleading in the other counts.
You understand that?
A. Yes, I do.
Q. If I enter your plea of guilty to Count 6, you are subject to a sentence of imprisonment of up to ten years, and if you are sentenced to a term of imprisonment upon your release from prison you are subject to a term of up to three years of supervised release, and, again, you are subject to a fine.
THE COURT: Now, which is it here?
MR. O'DONNELL: Again, your Honor, the same analysis would apply. It should be --
THE COURT: Right, but which is the largest?
MR. O'DONNELL: The largest would be twice the gross pecuniary loss to the investors which is approximately twice eight or nine hundred million dollar.

THE COURT: Very well.
BY THE COURT:
Q. Do you understand that?
A. Yes, I do.
Q. Now, this is a cooperation agreement and I am less interested in your agreement to cooperate than in making sure you understand what you are facing.
I see you also have admitted to the forfeiture allegation in the indictment.
A. That's correct.
Q. Is that correct?
A. Yes.
MR. HAFETZ: Your Honor, I'm sorry.
With regard to the statement of the amount of fine that Mr. O'Donnell has put on the record, my understanding is that potentially the amount that it could be --
THE COURT: It is up to that amount, that is the maximum, that is correct, but it is the maximum that I want to be sure Mr. Greenwood understand, that he is subject to that in the event that the numbers warrant it.
MR. HAFETZ: Right, if the numbers warrant it, right, correct, yes.
THE COURT: It's not -- well, you can see in this agreement that we have boilerplate recitation from the statute.
MR. HAFETZ: Yes.

THE COURT: But I want to be sure that Mr. Greenwood has some conception of what it means and what we are talking about.
MR. HAFETZ: Yes.
THE COURT: I am not a lover of boilerplate when people's liberty is very clearly very much at stake.
MR. HAFETZ: Yes.
BY THE COURT:
Q. Have you familiarized yourself with the forfeiture allegation in the indictment?
A. Yes, I have.
Q. And do you understand how much you are likely to forfeit here?
A. Yes, I do.
Q. Now, you also have received the agreement of the government to give you credit for the value of any assets that you disgorged in the enforcement proceeding, that is, that you turned over to the receiver or the Securities and Exchange Commission or the Commodities Futures Trading Commission.
Do you understand that?
A. Yes, I do.
Q. That is actually a concession to you.
THE COURT: Now, much of this later boilerplate I don't see the relevance of it at all.
I am not governed by the sentencing guidelines. I

don't understand what difference it makes that the conduct constitutes relevant conduct under the sentencing guidelines. Why is this all boilerplate here?

I keep urging the government to drop the formulas which have no meaning to the defendant and really don't have much meaning to the judge anymore.

MR. O'DONNELL: Your Honor, it is part of the defendant's proffer before his plea. He acknowledged that certain of the conduct predated the times alleged in the indictment and we put it in the agreement simply to reflect the defendant was accepting responsible for that conduct, so that's really why it is in our agreement with the defendant.

THE COURT: Yes. But what is the relevance of his agreeing that it is relevant conduct pursuant to the United States sentencing guidelines?

MR. O'DONNELL: Your Honor, I think it just demonstrates he is accepting responsibilities for --

THE COURT: Well, I think it is because you are so accustomed to including a lot of formulaic verbiage is the only way I can put it which has no bearing on sentence, especially now that the guidelines no longer apply. You are still repeating language that was written at a time when they did apply.

MR. O'DONNELL: Yes, your Honor.

THE COURT: Why is that?

MR. O'DONNELL: Well, we think it is important that the defendant accept responsibility for that conduct and --

THE COURT: Why don't you have him agree that he accepts responsible instead of that the conduct set forth in subsection 2 constitutes relevant conduct, relevant conduct pursuant to the sentencing guidelines.

You know, I keep urging the government that putting in formulaic words that have no real meaning -- if what you wanted him to take responsible for something, you should say so. That's not what this says.

I keep trying to send that message back.

MR. O'DONNELL: I think basically --

THE COURT: That the plea agreement should not be a form that covers any possible plea, it's only this plea that I'm taking at the moment.

MR. O'DONNELL: Very well, your Honor. This is designed so that that conduct can be considered by the court in fashioning a sentence.

THE COURT: And otherwise it could not, is that what you're saying?

MR. O'DONNELL: I think --

THE COURT: That is, I don't want to -- this is too important an act for Mr. Greenwood for me to get sidetracked, but I really wish the government would leave some of this form, would mar some of its form, let me put it that way, would not

just copy forms mindlessly.
MR. O'DONNELL: Okay, your Honor.
THE COURT: Because they have much less impact and they really have no meaning.
I'm interested in what the defendant is giving up and he is interested in what he is facing and the other legal issues are a different matter and a lot of this language doesn't apply to him.
I'm trying to look through and find out what does and make sure that he understands that.
BY THE COURT:
Q. There is no question, Mr. Greenwood, and I see it has been told to you many times, that the government cannot set your sentence, that only I have the responsible for setting your sentence, and I will determine your sentence without any participation by the government in my decision.
A. I understand.
Q. But you have other cooperation arrangements that you have agreed to with the government that really don't bear on my sentence.
I am looking to make sure that you understand what it is that your giving up, and I see that you are giving up a very important right, which is the right of appeal in your agreement.
For example, you have in here --

THE COURT: We know that Mr. Greenwood is a citizen. You have in here a whole paragraph on what would happen if he were not, but he is. So why is that paragraph here?
MR. O'DONNELL: Your Honor, in light of the recent Supreme Court decisions on ineffective assistance involving the immigration consequences we put that in all our agreements.
THE COURT: Even on people that can't possibly be deported.
MR. O'DONNELL: Yes, your Honor.
THE COURT: Well, does that make sense, Mr. O'Donnell? You are much too intelligent to think that makes sense.
MR. O'DONNELL: Obviously, your Honor, in this case it doesn't apply.
THE COURT: It has no application at all. Why would you put in surplus irrelevant verbiage when a plea agreement is a serious agreement between two parties and this does not apply to either party.
MR. O'DONNELL: That's a fair point, your Honor.
THE COURT: You are telling me that you have formed, that you are afraid to change a word, even if they clearly have no relevance. When I say you, I'm not talking about you individually.
MR. O'DONNELL: I understand that. I am not taking this personally.
THE COURT: I am sending back to your office a message

that you should never leave a form up marred. The fact that there is a case that applies to a different circumstance is not a reason for including it in this plea agreement.

MR. O'DONNELL: That's a fair point, your Honor.

THE COURT: It makes no sense and it is a distraction from what does matter here.

BY THE COURT:

Q. In any event, you have a very important right of appeal from my sentence and which in this agreement you have given up.

Did you discuss that carefully with your lawyer before you agreed to it?

A. Yes, yes, I did.

Q. And do you understand the importance of what you are giving up?

A. Yes, I do.

Q. And are you giving that up of your own free will?

A. Yes, I am.

Q. With a full understanding of what you are giving up?

A. Yes. Yes.

Q. Very well.

Now, it is also accurate that once you enter this plea, you will not be able to withdraw it, so this is the time to be sure that you want to plead to everything that you are pleading to because you will not be able to change your mind.

A. I understand.

Q. That is, you will not be able to raise any reason why what will result in a judgment of conviction can be attacked legally either by appeal or any other method, by collateral attack of some kind. You are giving up all of those rights in this agreement, and I hope you discussed that carefully with your lawyer.
A. I did.
Q. And you understand what you are giving up?
A. I do.
Q. Very well.
THE COURT: Why does he need to recognize what would happen if he is not a citizen of the United States?
Well, I have made my point, Mr. O'Donnell. You really should carry that back.
MR. O'DONNELL: Yes, your Honor, I will.
THE COURT: It demeans the office.
Now, I seem to have a copy of this plea agreement that is only signed by one side.
MR. O'DONNELL: Your Honor, I have the original which Mr. Greenwood --
THE COURT: Thank you. I would like to see it.
MR. O'DONNELL: May I hand it up to your court deputy, your Honor?
THE COURT: Please.
(Handing to the court)

(Pause)
MR. HAFETZ: Your Honor, may I just clarify one thing. With respect to the giving up the right of appeal, I believe the language in the cooperation agreement with respect to that, which is on page 6, is in the paragraph that relates -- it is on the bottom of page 6, I think that's what your Honor is referring to. That is in a paragraph that relates --
THE COURT: Well, there are two references here to appeal.
MR. HAFETZ: Yes.
THE COURT: One is the full paragraph two, that is the second full paragraph, gives up any right to attack the conviction on appeal.
The one down below has to do with someone who is not a citizen of the United States, which is not this defendant.
MR. HAFETZ: That's correct. But Mr. Greenwood, as I understand it from the plea agreement, I don't think the government disagrees with him, does not give up the right to appeal the sentence should he decide to appeal the sentence. He is giving up the right to attack the guilty plea and his conviction and he is giving up the right --
THE COURT: Well, the conviction, the sentence is the conviction. The plea of guilty, if I accept it and enter it today, is a conviction. It becomes a final conviction when

sentence is pronounced. But I read this as giving up the right of appeal.

MR. HAFETZ: I don't think so, your Honor. I think what he is giving up is the right to attack -- your Honor is correct that ultimately --

THE COURT: It says not only to withdraw the plea, but to attack his conviction, and I understand that as meaning either directly or collaterally that he is giving up the right to appeal his sentence.

Now, if that's not what it means, we should be clear on that.

MR. O'DONNELL: Your Honor, I think the waiver is limited to the grounds that are articulated in the paragraph, which is that the defendant can't appeal on the grounds that the government failed to produce discover, Jencks Act material or exculpatory material other than material that would establish the defendant's factual innocence.

THE COURT: All right. Then I take it you do not think that this is an agreement not to appeal the sentence?

MR. O'DONNELL: I agree with defense counsel's position. It's a limited waiver on --

THE COURT: That's fine, as long as the defendant understands what he is agreeing to and what he is giving up.

MR. HAFETZ: Correct.

THE COURT: I have no interest in changing the

agreement.
I see. Well, that is a change in your form.
All right. That is, you are both agreeing that this does not mean that Mr. Greenwood is giving up his right to argue to the Court of Appeals that my sentence is not reasonable?
MR. O'DONNELL: I think that's right.
MR. HAFETZ: That's correct.
THE COURT: You are the ones who have agreed so you should know what you agreed to, but I just want the defendant to be clear as to what he is agreeing to.
BY THE COURT:
Q. Now I am going to ask you several things:
I am going to ask you, number one, apart from this agreement, has anybody promised you anything in connection with this plea?
A. No.
Q. Has anybody threatened you in connection with this plea?
A. No.
Q. Why do you want to plead guilty?
A. Because I am guilty.
Q. Do you have any doubt of that?
A. No.
Q. Very well.
Then I am going to ask Mr. Daniels to place you under

oath.
PAUL GREENWOOD,
the defendant, having first been duly sworn, was
examined and testified as follows:
BY THE COURT:
Q. Now I would like you to tell me in your own words exactly what you did that you are pleading guilty to.
See if you can really make it your own words rather than reading it from a paper.
Did you enter in an agreement with other people? That's what a conspiracy is.
A. Yes. My partners, Steve Walsh and I, basically told investors that we were investing the money in a strategy called equity index arbitrage.
Q. I see. This was what you called the strategy of your companies?
A. Yes.
Q. And what companies were those?
A. The company that was the commodity pool and broker-dealer was WG Trading.
Q. What was the other?
A. The other company, WG Investors, was a Peter fund into WG Trading.
Q. And you and your partner were the --
A. Commodity pool operators --

Q. Were these corporations?
A. No, they were partnerships.
Q. They were actually partners ships?
A. Yes.
Q. And you and your partner agreed to what?
A. To present it so we were investing all of the funds into the index arbitrage strategy and, in fact, we didn't.
Q. What was the index arbitrage strategy?
A. The strategy is the equivalent of a cash management strategy. We would buy stocks in, for example, the S&P 500 and we would sell futures against them and once the trade is on the profits would be locked in, we would receive the dividends on any of the stocks that paid dividends and we would pay the costs of carrying the positions, but the net of all of that would be a small profit, and then you do that on a leveraged basis.
Q. And what do you mean by that?
A. Because there were stocks involved and because we were a broker-dealer, we could theoretically leverage 20 to one. As a practical matter, we rarely leveraged more than ten to one, meaning for every dollar we would invest, we would have $10 in a position.
Q. And, in fact, what did you do with the money that you received on those representations?
A. With, with, with a large percentage of the money we did

exactly that. With another part of the money we invested in other investments that the investors were not aware of and misled the investors.
Q. That is, you issued statements that were not accurate?
A. That's correct. Mostly what we did is, there were notes that were issued to certain investors and the interest rate on those notes was the same return as we made with the money that was invested in the arbitrage strategy and the return was manufactured.
Q. There was no return?
A. The interest rate was manufactured based on whatever the return was based on the strategy.
Q. I see.
A. And then we used that money -- I don't know how much detail you want me to go into --
Q. I would like to understand exactly what you were doing.
A. Okay.
We were trying -- we had an investment in a company called Signal Apparel which had done very bad and we ended up losing a lot of money and the attempt was to make back the money that we lost in the Signal Apparel investment.
Q. How did you try to do that?
A. By making other investments that had higher returns than the index arbitrage would give and so we would give the investors the return on the index arbitrage and hopefully we

would make more money on the investment.
Q. I understand, but what is it that you cheated the investors in? When you say you made return, what is it that you didn't make return on?
A. On all the money that was lost in the other investments, in the initial investments in Signal Apparel, in other investments that were made and didn't produce the returns that we expected them to produce and in money that we took out personally for basically our own use.
Q. That is, you treated these partnerships as your own personal bank account?
A. Correct.
Q. And you drew as you wished?
A. Correct.
Q. What is it that you reported to your investors?
A. Well, we treated the money that we took out as a loan so we would --
Q. On your own books, you mean?
A. On the books of -- yes, yes. So we would report to the investors the same rate of return that we earned on the WG Trading index arbitrage trading.
Q. And that was simply flatly untrue?
A. Correct.
Q. That is, you did not make that money that you reported to investors that you made?

A. That's correct.
Q. And none of your investors asked for the money?
A. When they asked for the money we would give them money back so in some sense --
Q. So this was a Ponzi scheme, as it is loosely called?
A. Well, sort of, because we actually had --
Q. You were using other monies to make up for what you couldn't give?
A. That's correct.
Q. But, of course, you never could make it up entirely?
A. Well, initially we thought we could and as time went on the hole got bigger and bigger and at a point we couldn't.
Q. Well, if you were taking money out for yourselves, you could never make it up, right, unless you made huge profits?
A. That's correct.
Q. And you knew that from the beginning, that if you were taking it for personal use?
MR. HAFETZ: May I have one minute, your Honor.
THE COURT: Sure.
(Pause)
A. Early on after the partnership was established and the investors had given us the money, it became apparent we couldn't give back the money we were taking out.
Q. So you knew it for a long time?
A. We did know it for a long time and we continued to do it.

Q. And you continued to take money out for your own use?
A. Yes, we did.
Q. And how much money were you taking out?
MR. HAFETZ: Does your Honor mean over the entire period?
BY THE COURT:
Q. As you were going along, what were you doing every year, starting when? In the beginning, you said.
A. In excess of $75 million.
Q. You mean in total?
A. Yes.
Q. And roughly how much did you take out annually?
A. It, it, it varied.
Q. What determined that?
A. What investments we wanted to make outside. We have a house, we have antiques, we have a horse farm.
Q. What things you wanted to buy for yourself?
A. That's correct. And all of that has been turned over to the receiver. They auctioned for all the antiques and the collectibles scheduled for the latter part of this year and the horse farm is on the market.
Q. But all of that was stolen money, correct?
A. That's correct.
Q. And you did this for how many years? During what period of time?

A. Before 1996 through 2009.
Some of the wire transfers that we sent for the money were in Manhattan, some were outside of Manhattan, some were outside of New York.
Q. And where were your investors? How did you get them?
A. The investors were all large institutions. They were either the pension funds or investment funds of the institutions and we got the money from them and they were all over the country, including, including Manhattan. Yeah, including Manhattan.
Q. Manhattan and Westchester presumably, or did you have nobody in Westchester?
A. I would have to go back. I don't think there was anybody in Westchester.
Q. Didn't your partner have an office in -- maybe it was farther north than Westchester?
A. No, I live in North Salem.
Q. You are the one who had an office in, in --
A. No, no. We had offices in Greenwich and Long Island and Jersey City.
Q. I see. And both of you worked in those offices?
A. I worked in Connecticut and Steve Walsh worked in Long Island.
Q. Do you have any doubt that what you were doing was a crime?
A. No.

Q. All right.
THE COURT: Is there anything else that you would like me to inquire about, Mr. O'Donnell?
MR. O'DONNELL: Your Honor, I think -- I'm just thinking in terms of the technical jurisdictional requirements.
THE COURT: Yes. I understand you are concerned about venue.
MR. O'DONNELL: And I think that is sufficiently established, because wires came into New York City and the defendant made that clear.
BY THE COURT:
Q. In any event, I understand that you want to be tried or you want to be prosecuted here in the Southern District of New York, so if you have any right to complain about venue, you are prepared to give that up?
A. Yes, I understand that.
Q. You are waiving any possible complaints about venue?
A. Most of the funds, most of the funds, in fact, all of the funds that were in the index arbitrage strategy specifically were in Manhattan.
Q. So you are satisfied in any event that your crime was committed in the Southern District of New York?
A. That's correct.
MR. O'DONNELL: Yes. Mr. Greenwood has made clear that the means and instrumentality of interstate commerce were

used to facilitate this scheme. I believe that is true.
THE COURT: He was working from Connecticut.
MR. O'DONNELL: And they were sending wire transfers.
BY THE COURT:
Q. And you were sending money back and forth between Connecticut and New York.
A. And New York, yes.
Q. New York City, that is Manhattan?
A. Yes.
MR. O'DONNELL: With respect to money laundering, I don't think there is any dispute that there were financial transactions in excess of $10,000 involving the fraud proceeds.
BY THE COURT:
Q. Is there any question about that?
A. No.
Q. You have given me millions as a number which clearly exceeds $10,000.
A. Yes.
MR. O'DONNELL: I think that's all I had, your Honor.
I had a few other things in terms of the defendant's rights that I may have --
THE COURT: Yes.
MR. O'DONNELL: I think it is pretty clear from the record that Mr. Greenwood understands that he has a right to be represented by counsel.

THE COURT: Well, he's got counsel.
MR. O'DONNELL: He has counsel.
THE COURT: It is only concerned if he doesn't have counsel that I will appoint him counselor, not if he doesn't need counsel.
MR. O'DONNELL: Exactly, your Honor.
I also think it is pretty clear from the record that Mr. Greenwood understands that although he certainly does not have to testify at a trail and no inference to be drawn for not testifying, he could, if he wanted, could testify.
THE COURT: Are you concerned about that?
What I told him is he has no obligation to testify and nobody can draw any inference from his silence.
MR. O'DONNELL: But the other side of that --
THE COURT: That is a constitutional right.
MR. O'DONNELL: The other side of that, your Honor, is he could testify if he wanted to.
THE COURT: I'm sure that -- well, I'm interested to see where you see that here.
MR. O'DONNELL: Your Honor, it has just been my practice to make sure that the defendant understands he has the option either way.
THE COURT: I understand. I really don't mind overkill.
MR. O'DONNELL: Exactly.

BY THE COURT:
Q. You understand if you wanted to go to trial and if you wanted to testify, you certainly have the constitute right to do so?
A. I understand.
Very well.
After listening to you, Mr. Greenwood, I am satisfied that you understand what the charges against you are and the rights that you are giving up when you enter a plea of guilty and that your mind is clear today, so I am going to now turn to the indictment and ask you as to each count how you plead.
How do you plead to Count 1 of the indictment?
A. Guilty.
Q. Count 2?
A. Guilty.
Q. Count 3?
A. Guilty.
Q. Count 4?
A. Guilty.
Q. Count 5?
A. Guilty.
Q. Count 6?
A. Guilty.
Q. Very well.
And are you familiar with the forfeiture provisions in

the indictment?
A. Yes, I am.
Q. And you agree to be bound by them?
A. Yes, I do.
Q. Very well.
I am satisfied that you understand what you are doing and are doing it of your own free will and with careful advice from lawyers and I will enter your pleas of guilty, and I will request a presentence report from the Probation Department and I will set a date for sentence.
I also grant the government's application -- well, I guess its a point application -- that you be continued on bail pending sentence.
A. Thank you, your Honor.
MR. HAFETZ: Thank you, your Honor.
THE COURT: Very well. You may be seated.
It is my experience that I will not get a presentence report in less than 60 days and I will we lucky if I get it within 60 days.
MR. O'DONNELL: That's correct. And in addition, your Honor, we expect that Mr. Greenwood will testify at trial against Mr. Walsh so we would request that the sentencing be held after the trial is heard.
MR. HAFETZ: We consent to that.
THE COURT: Very well.

Now we have not yet set sentence and I don't know -- -- set a trial. We will discuss tomorrow how far off that is.
MR. O'DONNELL: Actually, Friday, but I agree.
THE COURT: Thank you, yes.
This week has run together for other reasons. There are other matters, including an enforcement action, and I am beginning to think that it really is not efficient to separate enforcement actions in criminal cases and distribute them among two different judges, because I have now had three different ones this year. As you know, in this one I have tried to collaborate with Judge Daniels because that is the only efficient way to do it.
MR. O'DONNELL: We agree, your Honor.
THE COURT: And there is a lot to be said for a relatedness concept in these cases where the enforcement action and the criminal action are so clearly related and so intertwined in many aspects.
So, again, I'm going to send a message through you to the U.S. Attorney's office that I think that that should really be re-examined whether there should be a relatedness concept.
MR. O'DONNELL: Your Honor, I have always wondered why they are not assigned to the same judge myself.
THE COURT: Exactly, exactly.
MR. O'DONNELL: I don't know if it is from our office or the court.

THE COURT: I think it is in part that we do not have a relatedness concept on the criminal side of the court. But here is an area that the relationship is so close and so intertwined where one case really affects the other that I think it would be very sensible.

MR. O'DONNELL: Your Honor, it may very well be a court rule as opposed to something from the government.

THE COURT: Well, yes and no.

No, I understand that. I suppose it is in a loose way. But I don't think that anybody has really considered the relationship between these enforcement actions and the criminal action and I think that if -- I am going to raise it with the court, also, but I would like the U.S. Attorney's office to recognize that this is a setting in which the normal rules that we don't have a relatedness doctrine which really means among criminal cases that come out of the same, loosely the same course of conduct should not really preclude that in these cases where efficiency really requires that there be coordination.

MR. O'DONNELL: I certainly understand the court's observations and I will pass them along.

THE COURT: Thank you. And I am going to raise them with my own colleagues as well.

If there is really a court rule, it's a vague long buried rule that has no obvious reason in these particular

cases. I am going to pursue it and I would like you to pursue it as well.

MR. O'DONNELL: Very well, your Honor.

THE COURT: All right.

Well, let me ask you, Mr. O'Donnell, what are the chances of getting the rest of this case to trial this year?

MR. O'DONNELL: Your Honor, I really can't answer that question without obviously having Mr. Walsh and his counsel here.

THE COURT: Well, I understand, but it looks to me as if their interest is in delaying it as much as possible.

MR. O'DONNELL: Certainly I would like to have the case tried before the end of the year if the court schedule --

THE COURT: As am I, because I'm a great proponent of speedy trials.

MR. O'DONNELL: We plan to make that argument on Friday that the court should set a trial date and basically force us to work toward a trial date.

THE COURT: Very well. Then I will -- I don't like to have any date dangle and I would like to get a presentence report even if we don't go to trial immediately. So I'm going to set a date which may be postponed if the trial does not go forward for sentence.

I don't really like to put it over so far, but I am going to tentatively set it for December 1.

MR. HAFETZ: Your Honor, I'm just wondering, if I may, your Honor --
THE COURT: Yes.
MR. HAFETZ: -- whether in view of the fact that Mr. Greenwood has entered into a cooperation agreement to testify against Mr. Walsh at trial, I'm just wondering if it might make sense to do the PSR after the trial.
THE COURT: Well, I don't think that the U.S. Attorney's office depends on the PSR for its understanding whether Mr. Greenwood is really cooperating. I don't think the Probation Department understands whether that's the case. There is no way that they can.
MR. HAFETZ: Okay, fine.
THE COURT: They depend on the U.S. Attorney's office about any report about cooperation rather than the other way.
MR. HAFETZ: Okay.
THE COURT: So I'm going to set a tentative date of December 1 at 10:30 in the morning, which may well be moved. But I hope that the trial may start before that. We will see.
Is there anything further?
MR. HAFETZ: Your Honor, if I may, I gather with regard to the court conference on Friday, our appearance would be excused from that in view of the --
THE COURT: Yes, you are excused.
MR. HAFETZ: And the other thing, your Honor, I would

request that Mr. Greenwood be permitted to travel to North Carolina, South Pines, North Carolina, August 6 through the 12.

THE COURT: It is his daughter's school?

MR. HAFETZ: It's not the school, it's the same area where his wife has a residence and they have friends and they visited in the past. My understanding the government does not oppose the application, your Honor.

MR. O'DONNELL: We don't, your Honor.

THE COURT: And when is this?

MR. HAFETZ: The dates are August 6 to August 12, your Honor. The place is Southern Pines, North Carolina.

THE COURT: Very well. I will permit that.

MR. HAFETZ: Thank you, your Honor.

THE COURT: You have deposited your passport with the court, I take it?

THE DEFENDANT: Yes.

THE COURT: Very well.

All right. Is there anything further?

MR. O'DONNELL: No, your Honor. Thank you for making yourself available on such short notice.

THE COURT: Very well. Then you are all excused.

- - -