

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

JOHN WAYNE ZIDAR, et al.,

Defendants.

No. C00-823C

**RECEIVER'S REPORT AND  
MOTION FOR ORDER  
DIRECTING DISBURSEMENT OF  
FUNDS**

**NOTE ON MOTION CALENDAR:  
April 15, 2011**

Pursuant to the Court's January 10, 2011 Order, the Receiver presents the following pro rata distribution plan.<sup>1</sup>

On November 12, 2009, the Court approved the Receiver's October 19, 2009 supplemental and final distribution proposal. On November 16, 2009, several investor/applicants appealed the Court's November 12, 2009 order. The appellants and the Receiver briefed the Ninth Circuit, and on September 21, 2010, the Ninth Circuit affirmed in part and remanded in part the District Court's rulings. Thereafter, the parties briefed this Court

<sup>1</sup>The Receiver intends to publish a copy of this brief and Final Distribution Plan on his website, [www.zidarreceivership.com](http://www.zidarreceivership.com).

1 on the remanded issues, and the Court made a final ruling on January 10, 2011.

2 On February 4, 2011, the Court denied investor/applicants Lynnette D'Mello and  
3 Elizabeth Dobis' motion for reconsideration of the January 10, 2011 ruling. Through counsel,  
4 D'Mello and Dobis have informed the Receiver that they will not appeal the February 4, 2011  
5 order. Hence, the Receiver presents this proposal to proceed with the final monetary  
6 distribution.  
7

8 The following proposal accounts for the Court's January 10, 2011 findings related to  
9 investors/applicants Tom Linardos and Hugh McLeod. Consistent with that Order, payment  
10 has been wired to counsel for Linardos and McLeod.<sup>2</sup> Linardos and McLeod will also be  
11 incorporated in the final pro rata distribution discussed below.  
12

### 13 I. Pro Rata Distribution

14 This brief incorporates the pro rata monetary distribution methodology and plan that  
15 was approved by the Court on November 12, 2009. The 2009 plan acknowledged the fact that  
16 this Court, on March 15, 2005, instructed the Receiver to implement the supplemental  
17 monetary distribution in the same fashion the Receiver distributed payments to  
18 investor/applicants in 2005. A Final Distribution Plan is attached as Exhibit A to the  
19 Declaration of Receiver Michael D. McKay in Support of Motion for Order Directing  
20 Disbursement of Funds at ¶2. The Final Distribution Plan models the 2005 template.  
21 Accordingly, the Receiver asks this Court to approve the Final Distribution Plan, which is  
22 discussed in detail below.  
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27 <sup>2</sup>Both Linardos and McLeod have received the equivalent of 41.48 percent of their initial investment loss; an  
28 amount identical to the payments made to investor/applicants in 2005.

*(a) The Final Pro Rata Distribution Rate*<sup>3</sup>

The pro rata distribution is calculated by dividing the total Receivership Assets by the total Verified Amount, or the total "net investment" lost by the 3,557 investor applicants.<sup>4</sup> The Receivership Assets total \$560,167.12.<sup>5</sup> The total Verified Amount lost by investors with approved claims equals \$61,678,922.93.<sup>6</sup> As a result, the Pro Rata Ratio distribution would be .0090818 percent of investment loss, or \$560,167.12 (Receivership assets) divided by \$61,678,922.93 (total Verified Amount of loss). We propose distributing the remaining assets pursuant to this formula and calculation. Exhibit A, the proposed Final Distribution Plan, lists the specific .0090818 percent pro rata payment for each investor.

1. Minor Adjustments that Distinguish Final Distribution Plan from February 24, 2005 Amended Distribution Report

As reported on August 22, 2006 and April 24, 2007, three (3) of the defrauded investors did not cash their April 14, 2005 pro rata distribution checks.<sup>7</sup> The August 22, 2006 Third Supplemental Report briefed the Court on the efforts the Receiver made to find these individuals (Richard Green, Orest Basil Iwaschuk and Benjamin Sher) to encourage them to accept the payment. After numerous efforts to contact them, the three aforementioned

<sup>3</sup>This report summarizes the factors that shaped the October 19, 2009 supplemental distribution proposal. The Receiver invites the Court to review that report, if necessary.

<sup>4</sup>The 3,557 total includes investors added to the Distribution Plan by Court order after the February 8, 2005, February 14, 2005, and January 10, 2011 orders.

<sup>5</sup>The Receivership Assets recently were reduced by \$46,160.60 to account for the 41.48 pro rata percentage payments to Linardos and McLeod. The total Receivership Assets will increase between now and the date of distribution due to accrued interest. The assets currently are managed in a money market account and the Receiver anticipates an additional \$1,400.00 in interest. The Receiver will report the final total when he files his final receivership wind up report after the distribution.

<sup>6</sup>The total Amount of Verified Loss is different than the total loss in the first distribution (\$61,602,302.95) due to court orders that adjusted certain claims after the first distribution and the fact that the Receiver now proposes a plan that does not include three other specific claims discussed in detail in §I.a.1. Also, the amount accounts for the verified amount of losses sustained by Linardos and McLeod.

<sup>7</sup>The Receiver invites the Court to review the Receiver's August 22, 2006 Third Supplemental Report Regarding Asset Recovery Efforts and Case Status for more details on this matter.

1 investors did not respond to the Receiver. On November 12, 2009, the Court ruled that Green,  
2 Iwaschuk and Sher shall not be included in the supplemental distribution plan. Hence, the  
3 Final Distribution Plan does not include them.

4 To avoid this problem during the final monetary distribution and case wind up, the  
5 Receiver proposes that each recipient cash his or her check within 90 days of the date the  
6 checks are placed in the U.S. Mail. The Receiver recommends that any funds not cashed  
7 within 90 days of presentation and delivery shall be cancelled, and the remaining funds shall be  
8 donated to the U.S. Department of Justice's Office for Victims of Crime.<sup>8</sup> A district court's  
9 power to supervise and determine the appropriate action in the administration of the  
10 receivership is extremely broad. *See S.E.C. v. Hardy*, 803 F.2d 1034 (9th Cir. 1986). A  
11 primary purpose of equity receiverships is to promote orderly and efficient administration of  
12 the estate. *Id.* at 1037. The Receiver respectfully suggests that the Court has discretion to  
13 direct the Receiver to wind up the receivership by directing unattended funds to the Office of  
14 Victims of Crime. With the Court's approval, the Receiver will notify each investor that his or  
15 her check will be donated to the Office for Victims of Crime if the check is not cashed within  
16 90 days.  
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20 The Final Distribution Plan also incorporates court orders that took effect after the April  
21 14, 2005 pro rata distribution. Notably, the Receiver has reduced Baron John Kuipers' total  
22 verified amount to reflect the Court's June 27, 2005 ruling, wherein the Court instructed the  
23 Receiver to reduce Baron John Kuipers' total Verified Amount to \$204,540.00. And the  
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25  
26 <sup>8</sup>The Office for Victims of Crime administers the Crime Victims Fund. The fund, established by the Victims of  
27 Crime Act of 1984, is a major funding source for criminal victim services throughout the United States. Federal,  
28 state, and tribal victim assistance programs receive formula grants, discretionary grants, and set-asides from the  
Crime Victims Fund. See [www.ojp.usdoj.gov/ovc](http://www.ojp.usdoj.gov/ovc).

1 Receiver also has reduced William Orazi's Verified Amount to \$0.00 consistent with that same  
2 June 27, 2005 Order. As well, the Receiver has approved James E. Harris for a Verified  
3 Amount of \$1,294.00 consistent with the July 22, 2005 Order.

4 2. Unique Issues Affecting Management of Final Distribution

5 (A) *Attorney David Smith's Clients*

6 Attorney David Smith represents 1,748 clients. Consistent with the Court's March 15,  
7 2005 Order, the Receiver proposes that he wire the entire amount of money owed Smith's  
8 clients directly to David Smith within twenty (20) days after the Fed. R. App. P. 4(a)(1)(B)  
9 deadline has passed. Mr. Smith will distribute the restitution payments directly to his clients  
10 pursuant to the supplemental pro rata distribution recommended above. A list of Smith's  
11 clients is attached as Exhibit B to the McKay Decl. at ¶3.  
12

13 (B) *Higher Education Student Assistance Foundation*

14 Mr. Roland Baldwin was the Administrator of the Higher Education Student Assistance  
15 Foundation (HESAF) in Panama City, Florida. HESAF was an investment plan purportedly  
16 designed to provide college graduates an account from which they could begin repaying federal  
17 student loans. Baldwin invested HESAF funds in Rosewood. On July 25, 2002, Baldwin  
18 informed the United States Attorney's Office in Seattle that he was no longer acting as  
19 HESAF's Administrator, and he advised his investors to seek restitution from our office. Our  
20 records verify that Baldwin deposited \$65,994.00 with one of the defendants' investment  
21 schemes.  
22

23 Baldwin did not file a claim with our office, but we received claims from 29 of the 64  
24 HESAF investors.  
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1 The Florida State Office of Financial Regulation confirmed that the 64 identified  
2 HESAF investors did indeed invest with Baldwin and HESAF. Pursuant to the Court's  
3 February 8, 2005 order, we transferred the pro rata equivalent of Baldwin's \$65,994.00  
4 Verified Amount directly to the 64 individual investors. We distributed Baldwin's Verified  
5 Amount to each HESAF investor based on his or her percentage share of the original  
6 \$65,994.00 HESAF investment. On November 12, 2009, the Court approved the proposal to  
7 treat these investors the same as in 2005.  
8

9 3. Notification of Final Distribution Not Necessary After Court's Initial 2005  
10 Review Process

11 Notice of the final monetary distribution is unnecessary since the Final Distribution  
12 Plan implements the framework set forth in the Amended Distribution Plan (the pro rata  
13 monetary distribution approved by this Court on March 15, 2005), and that plan was developed  
14 and approved after a thorough review and discussion of the original distribution proposal. The  
15 Final Distribution Plan, in essence, is an extension of the original 2005 court-ordered monetary  
16 distribution and any changes now would be inconsistent with prior Court orders. Accordingly,  
17 the Receiver recommends distributing the remaining Receivership Assets without delay.  
18 Indeed, this Court ruled on November 12, 2009, that "given the comment and review period in  
19 2004 and 2005, there is no need to allow for a notice and/or objection period prior to  
20 administering the final and supplemental monetary distribution." [Dkt. No. 545]  
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23 It is noteworthy to recall that on July 23, 2004, the Court ruled that each claimant had  
24 forty-five (45) days to object to the original distribution plan, and thereafter the Receiver had  
25 twenty (20) days to respond to objections. On August 4, 2004, the Receiver filed a notice of  
26 compliance with the Court, which confirmed that the Receiver had (1) posted the Distribution  
27 Report on its website, and (2) notified each claimant by U.S. Mail of the forty-five (45) day  
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1 objection period. The July 23, 2004 order also directed the Receiver not to accept new  
2 applications after the Receiver mailed the objection notice letter.

3 The Court extended the forty-five (45) day objection period to October 7, 2004 in  
4 response to a petition filed by attorney David Smith. The Court received submissions from  
5 new applicants throughout this period, and on September 16, 2004, the Court ordered that all  
6 outstanding claims must be filed with the Court by September 29, 2004. Claims filed after that  
7 date would be denied.  
8

9 Over 200 individuals filed objections or new applications. The Receiver responded to  
10 the objections and new applications on October 27, 2004. On December 3, 2004, the Receiver  
11 responded to new claims that were filed with the Court after the September 29, 2004 deadline.  
12

13 On November 2, 2004, the Court ordered all parties to show cause by November 12,  
14 2004, why an in-court hearing regarding the distribution plan was necessary. The Court  
15 subsequently extended the deadline to November 29, 2004, and it ordered the Receiver to  
16 notify new applicants and pro se claimants of the show cause order. The Receiver mailed the  
17 show cause order to pro se objectors and new applicants on November 10, 2004 and filed a  
18 notice of compliance with the Court on December 2, 2004.  
19

20 On December 3, 2004, the Receiver informed the Court that it would conduct a  
21 telephone conference with attorney David Smith in order to reduce the outstanding matters  
22 before the Court. The teleconference occurred on December 10, 2004, and the Receiver and  
23 Smith filed a "Joint Statement" on January 27, 2005.  
24

25 On February 8, 2005, the Court issued an order regarding both (1) matters raised in the  
26 Joint Statement and (2) objections filed by pro se claimants and new applicants. The Court  
27 amended the distribution plan to accommodate new applicants and adjust the Verified Amount  
28

1 for several investor applicants.

2 The February 8, 2005 order, which was amended on February 14, 2005, required the  
3 Receiver to recalculate the initial distribution report based on the Court's findings. The Court  
4 also ordered the Receiver to submit a revised distribution report to the Court and post the  
5 revised report on its website within ten (10) days of the February 14, 2005 order. The Receiver  
6 was required to confirm these steps and seek final approval from the Court before distributing  
7 funds.  
8

9 As a result, the Court and all interested parties have already reviewed and revised the  
10 distribution plan in this case. The final 2005 Amended Distribution Report was the result of a  
11 thorough and diligent review of all investor claims. To maintain consistency, it is appropriate  
12 to rely on the findings and conclusions in the Amended Distribution Report when making a  
13 final, supplemental monetary distribution. Accordingly, we respectfully submit that no issues  
14 warrant notification or further discussion at this time, and the Receiver should proceed without  
15 notice, as this Court directed on November 12, 2009.  
16

## 17 **II. Motion for Approval of Final Distribution Plan** 18 **and an Order Directing Disbursement of Funds**

19 The Receiver moves the Court to order the Receiver to distribute funds pursuant to the  
20 Final Distribution Plan set forth above. Accordingly, each investor would receive .0090818  
21 percent of his or her loss, after already receiving approximately 42 percent of his or her loss in  
22 the initial 2005 distribution. The Receiver requests that the Court order the Receiver to make  
23 the supplemental and final monetary distribution within twenty (20) days after the Fed. R. App.  
24 P. 4 deadline for filing a notice of appeal, but not before the Fed. R. App. P. 4 deadline has  
25 passed. It is possible that certain investor claimants might decide to appeal this plan, and the  
26 monetary distribution should not proceed before the potential for any legal challenges have  
27  
28

1 been exhausted.

2 On November 12, 2009, this Court ordered the Receiver to send checks to each  
3 investor's last known address by U.S. Mail within twenty (20) days of the Fed. R. App. P. 4  
4 deadline for filing a notice of appeal. Also, pursuant to attorney David Smith's 2005 request  
5 and the Court's July 23, 2004 order, the Receiver was instructed to forward the entire amount  
6 owed attorney David Smith's clients directly to David Smith via wire transfer. The Receiver  
7 recommends that this approach is still the best way to carry out the monetary distribution.  
8

9 This proposed Final Distribution Plan is the culmination of several years of  
10 investigation, asset recovery and asset liquidation. In sum, the Receiver moves the court to rule  
11 as follows:

- 12 (1) grant approval of the Receiver's proposed Final Distribution Plan and direct the  
13 Receiver to distribute funds to each claimant based on the Pro Rata Ratio  
14 recommended above and listed in Exhibit A;
- 15 (2) that the Court approves the Receiver's Pro Rata Ratio calculation;
- 16 (3) that the Pro Rata Ratio distribution is .0090818 percent of investment loss, or  
17 \$560,167.12 (Receivership assets) divided by \$61,678,922.93 (total Verified  
18 Amount of loss);
- 19 (4) that, given the comment period in 2004 and 2005, there is no need to allow for a  
20 notice and/or objection period prior to administering the final and supplemental  
21 monetary distribution;
- 22 (5) that the Court confirms its November 12, 2009 order that Richard Green, Orest  
23 Basil Iwaschuk and Benjamin Sher shall not be included in the final distribution  
24 due to their failure to respond to the initial April 15, 2005 monetary distribution  
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1 and subsequent communication from the Receiver;

- 2 (6) that the Final Distribution Plan shall be the final determination of approved  
3 investor claims in this matter;
- 4 (7) that the Receiver shall make distributions pursuant to the Final Distribution Plan  
5 by mailing the disbursement checks via U.S. Mail within twenty (20) days after  
6 the Fed. R. App. P. 4(a)(1)(B) deadline for filing a notice of appeal, but not  
7 before the Fed. R. App. P. 4(a)(1)(B) deadline has passed;
- 8 (8) that the Court confirms its November 12, 2009 order that the Receiver shall  
9 distribute the pro rata equivalent of Mr. Roland Baldwin's \$65,994.00  
10 investment in Rosewood to the 64 investors who invested in the Higher  
11 Education Student Assistance Foundation. The 64 investors shall receive a  
12 percentage distribution equivalent to their percentage of the \$65,994.00  
13 investment;
- 14 (9) that the Final Distribution Plan shall incorporate the rulings in all court orders  
15 related to the initial April 15, 2005 monetary distribution, including orders  
16 entered both before and after the April 15, 2005 distribution;
- 17 (10) that, consistent with the 2005 distribution, the Receiver shall forward the entire  
18 amounts owed attorney David Smith's clients directly to David Smith by wire  
19 transfer within twenty days (20) after the Fed. R. App. P. 4(a)(1)(B) deadline,  
20 but not before the Fed. R. App. P. 4(a)(1)(B) deadline. Attorney David Smith  
21 shall forward the disbursements to each of his clients identified in Exhibit B  
22 attached to the Declaration of Michael D. McKay in Support of Motion for  
23 Order Directing Disbursement of Funds at ¶3;  
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1 (11) that any funds not cashed within 90 days of the date of mailing shall be  
2 cancelled, and the remaining funds shall be donated to the U.S. Department of  
3 Justice's Office for Victims of Crime;

4 (12) and that the Receivership shall wind up once the Receiver distributes the assets  
5 pursuant to the Final Distribution Plan and confirms that each investor has been  
6 paid pursuant to the plan, or the remaining funds have been donated to the U.S.  
7 Department of Justice's Office for Victims of Crime.  
8

9 **III. CONCLUSION**

10 The Receiver respectfully asks the Court to approve the attached Final Distribution Plan  
11 and the analysis and methodology the Receiver employed when calculating the Pro Rata Ratio.

12 All viable assets have been recovered and legal claims resolved. The entire investigation is  
13 complete and the investor victims shall be paid appropriately. If approved in a final order, the  
14 final distribution will be implemented so long as no interested party appeals the Court's ruling  
15 that approves such a plan.  
16

17  
18 DATED March 25, 2011.

19 **McKAY CHADWELL, PLLC**

20 *s/ Michael D. McKay*

21 Michael D. McKay, WSBA #7040

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