**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **SECURITIES AND EXCHANGE COMMISSION,** | ) | |
| **PLAINTIFF,** | ) | |
| **v.** | ) | **Civil Action No.: 3:17-CV-00420-L** |
| **PATRICK O. HOWARD; HOWARD CAPITAL HOLDINGS, LLC; AND OPTIMAL ECONOMICS CAPITAL PARTNERS, LLC,** | ) | |
| **DEFENDANTS.** | ) | |

**PLAINTIFF'S UNOPPOSED MOTION TO ENTER AGREED INTERLOCUTORY JUDGMENT AGAINST DEFENDANT PATRICK O. HOWARD**

Plaintiff Securities and Exchange Commission ("SEC") and Defendant Patrick O. Howard ("Howard") have reached a settlement agreement, and the SEC now moves the Court to approve the settlement and enter an agreed interlocutory judgment against Howard (also referred to herein as a consent decree). The consent decree resolves the SEC's claims against Howard for injunctive relief and will provide for resolution of the SEC's remaining claims for monetary relief upon future motion of the SEC. The SEC shows as follows:

## I. Summary of the SEC's Complaint

The SEC filed this emergency civil action under seal on February 14, 2017. The Complaint, which was unsealed by this Court on February 16, 2017, summarized the SEC's allegations as follows:

> 1. Since February 2015, Howard Capital and OE Capital—companies owned and controlled by Howard—have raised more than $13 million by selling securities in the form of membership units ("Units") in three Texas limited liability companies: (1) Insured Liquidity Partners CFG I, LLC ("CFG I"), (2) Insured Liquidity Partners CFG II, LLC ("CFG II"), and (3) OE Capital Ventures, LLC

("OE Fund") (collectively, the "Funds"). Howard operated each company as an investment fund. He offered and sold Units in the funds personally and through sales agents he employed at OE Capital. He also retained two other firms—C4 Benefits Group, Inc. ("C4 Benefits"), and Trajan Income, Inc. ("Trajan Income")—paying them a 5% commission to sell the Units.

2. Howard has pursued an aggressive solicitation effort to sell the Units. He used offering proceeds to fund a radio-advertising campaign to attract investors. The advertisements, along with numerous written offering materials, contained representations that investors would earn a 12% annual return at a minimum. The Funds purportedly generated this return over a three-year investment period by investing in third-party portfolio companies in exchange of a share of the companies' revenue. Howard Capital, OE Capital, Howard, C4 Benefits, and Trajan Income and sales agents they employed have offered and sold the Units in investment seminars, in personal meetings, and by telephone and email.

3. In reality, the Defendants have perpetrated an egregious fraud on the Funds' investors. They have misappropriated and misapplied offering proceeds. They have issued investors phony account statements showing returns, which in fact did not exist. And they have disseminated written offering materials containing numerous untrue and misleading statements as to material facts, including the following:

- That investors would receive a minimum return of 12%, paid quarterly. In reality, quarterly cash payments to investors were mostly Ponzi payments—taken from other investors' contributions.

- That the Funds achieved average growth of 20%. In reality, the Funds have earned just $33,334 since inception, a growth rate of only 0.25%.

- That, for CFG II, "the Company is backing the minimum preferred yield and principal with insurance based assets." In reality, CFG II never purchased any such insurance-based assets.

- That OE Fund would pay no sales commissions. In reality, OE Fund paid at least $175,000 in sales commissions.

- That Howard was a Registered Investment Adviser ("RIA"). In reality Howard was never an RIA.

4. The Defendants' misappropriation and misapplication of offering proceeds began shortly after the first fund's inception in early 2015. For example, CFG I's private-placement memorandum ("PPM") represented that it would invest 89% of the offering proceeds in third-party companies. In reality, CFG I raised $833,993, but it invested only $50,000 in one portfolio company. Howard used the remaining proceeds to pay himself and expenses unrelated to CFG I's stated

objectives.

5. Of the approximately $12.26 million raised in the CFG II and OE Fund offerings, combined, Howard invested only approximately $7.4 million in portfolio companies as promised. While the PPMs for these funds represented that they would use a minimum of 75% of the offering proceeds for portfolio-company investment, the $7.4 million invested represented just 60% of the total proceeds raised in these funds, far below the promised minimum. Moreover, in addition to paying himself salary and bonus, Howard transferred $226,000 to his personal bank account and paid an additional $197,000 to buy out a former business partner in CFG I. Finally, Howard used at least $146,000 of the offering proceeds from the CFG II and OE Fund Investment programs to pay so-called returns to investors. In reality, these were Ponzi payments.

6. Howard and his companies continue to offer and sell the Units at present. But CFG I, CFG II, and OE Fund are each financially incapable of meeting their obligation to pay even the minimum return owed as of December 31, 2016, within the three-year investment period.

7. By reason of the foregoing, Howard, Howard Capital, and OE Capital violated and are continuing to violate Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a), 77e(c), and 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78o(a)], and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5].

Doc. 2 (Compl.), at pp. 1-3.

## II. The Settlement Agreement

Shortly after filing suit on February 14, 2017, the SEC and Howard, through their respective attorneys, engaged in settlement discussions and negotiations that yielded this partial settlement. Howard has signed a written consent, setting out the terms of the agreement and consenting to the entry of an interlocutory judgment.[1] Similarly, Howard's counsel has reviewed the consent and judgment, and has signed the consent to reflect its approval as to form. The Consent is filed herewith as Exhibit A. Under the terms of the Consent, Howard: (a) acknowledges having been served with the summons and the Complaint in this action; (b) enters

[1] The proposed judgment is interlocutory, because it does not dispose of all issues in the Commission's case against Howard. Specifically, the issues of disgorgement, prejudgment interest thereon, and a civil money penalty to be assessed by the Court against Howard remain open and unresolved. As discussed, the parties will present these issues to the Court for resolution on a motion by the SEC at a later point.

a general appearance; (c) admits the Court's jurisdiction over him and over the subject matter of this action; and (d) consents to the entry of the attached [proposed] interlocutory judgment (Exhibit B), without admitting or denying the allegations in the Complaint (except as to jurisdiction, which he admits).

This proposed interlocutory judgment – which is attached hereto as Exhibit B – provides the full injunctive relief sought by the SEC and permanently enjoins Howard from future violations of the federal securities laws. The SEC's claims for disgorgement, prejudgment interest, and a civil penalty will remain unresolved. As reflected in the Consent and proposed interlocutory judgment, however, the SEC and Howard have agreed to submit these matters to the Court for resolution on a motion to be filed by the SEC. Under this framework, there would be no need for a trial. Moreover, in light of the permanent injunction contemplated in the proposed interlocutory judgment, there would be no need for a preliminary-injunction hearing as to Howard, currently scheduled for February 27, 2017.

## III. Brief in Support of Motion

### A. Standard of Review

Federal courts greatly favor the "voluntary resolution of litigation through settlement." *Armstrong v. Board of Sch. Dirs. of Milwaukee,* 616 F.2d 305, 312 (7th Cir.1980) (citations omitted). "The Supreme Court has long endorsed the propriety of the use and entry of consent judgments." *U.S. v. Wallace*, 893 F. Supp. 627, 630–31 (N.D. Tex. 1995) (*citing SEC v. Randolph,* 736 F.2d 525, 528 (9th Cir.1984) (citations omitted). "Consent decrees provide informal resolution of disputes, thereby lessening the risks and costs of litigation, as well as providing more security to the parties than a settlement agreement where 'the only penalty for failure to abide by the agreement is another suit.'" *Id.*

Consent decrees have "the same force and effect as any other judgment." *U.S. v. Kellum*, 523 F.2d 1284, 1287 (5th Cir. 1975). They are the product of careful negotiation by opposing parties and embody a considered compromise mindful of the time, expense, and inevitable risk of litigation. *U.S. v. Armour & Co.*, 402 U.S. 673, 681 (1971). And they have the "force of res judicata, protecting the parties from future litigation." *U.S. v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981).

Complete agreement on all issues is no bar to entry of a consent decree. *Id.* at 440. "[T]he parties may agree on as much as they can, ask the court to incorporate that agreement into a consent decree, and call upon the court to decide the issues they cannot resolve." *Id*. So there may be a consent decree—like the ones under consideration in this case—that is "partially consensual and partially litigated." *Id*. (quoting *High v. Braniff Airways, Inc*., 592 F.2d 1330, 1335 (5th Cir. 1979)).

In reviewing a proposed consent decree, the Court "need not reach any ultimate conclusions concerning how the case would be decided at trial." *U.S. v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980), *on reh'g*, 664 F.2d 435 (5th Cir. 1981). Rather, the Court is to give the proposed consent decree a "presumption of validity." *Id*. at 1333. The Court "need only determine that the proposed settlement is not unconstitutional, unlawful . . . contrary to public policy, or unreasonable before approval is granted." *Id*.

Finally, when considering entry of a consent decree, "courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." *SEC v. Randolph*, 36 F.2d at 529 (citations omitted).

### B. The Court should approve and enter the proposed judgment because it is not unconstitutional, unlawful, contrary to public policy, or unreasonable.

The SEC respectfully submits that the Court should approve the proposed interlocutory judgment because, in keeping with the Fifth Circuit's standard, the judgment is not unconstitutional, unlawful, contrary to public policy, or unreasonable.

#### 1. Constitutionality and Lawfulness

The relief contained within the proposed consent decree is neither unconstitutional nor unlawful. The SEC's claims arise under federal securities statutes that have endured for more than eight decades, specifically the Securities Act [15 U.S.C. § 77a *et seq*.] and the Exchange Act [15 U.S.C. §§ 78a *et seq*.]. These acts authorize the SEC to investigate acts or practices that may constitute violations and to bring a civil action in district court to enjoin such acts and practices. 15 U.S.C. §§ 77t(a) and (b); 78u(a)(1) and (d)(1). They also authorize the SEC to seek, and courts to impose, money penalties in such civil actions. 15 U.S.C. §§ 77t(d); 78u(d)(3).

In addition, the SEC is permitted to invoke the court's equitable powers to seek an order requiring a defendant to disgorge any profits causally connected to the violation. *See*, *e.g.*, *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007). The court's power to order disgorgement includes the power to assess prejudgment interest on the amount to be disgorged. *Blatt*, 583 F.2d at 1335; *SEC v. United Energy Partners, Inc.*, 88 F. App'x 744, 747 (5th Cir. 2004).

#### 2. Public Policy

The settlement and the proposed interlocutory judgment are consonant with public policy. "Settlement of lawsuits by agreement has always been favored." *U.S. v. City of Miami.*, 614 F.2d at 1334. To express the public policy served by favoring settlements, the Fifth Circuit has

adopted a formulation stated by the Sixth Circuit as follows:

> Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

*Id*., n. 25 (quoting *Aro Corp. v. Allied Witan Co*., 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976)).

Moreover, no third party will be injured by entry of the proposed consent decrees. As the Second Circuit recently stated when formulating its standard of review for consent decrees:

> [I]f there are potential plaintiffs with a private right of action, those plaintiffs are free to bring their own actions. If there is no private right of action, then the S.E.C. is the entity charged with representing the victims, and is politically liable if it fails to adequately perform its duties.

*SEC v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014).

**3. Reasonableness**

The proposed judgment is reasonable. The settlement in this matter is the product of arms-length negotiation made in good faith. Howard's signed consent and the proposed interlocutory judgment carefully delineate the scope of the injunctive relief and the motion process designed to efficiently resolve the SEC's claims for civil penalties, disgorgement, and prejudgment interest.

Without admitting or denying the underlying allegations, Howard has consented to the entry of a final judgment that permanently enjoins him from violating the very provisions that are alleged to have been violated in the complaint. The injunctive relief found within the proposed consent decree matches the relief requested by the SEC in its complaint.

These terms take into account careful assessment by both parties of the risks likely to be presented in litigation of this matter, the benefits of avoiding those risks, and other

considerations. This "balance of advantages and disadvantages" reflects a reasonable resolution of this case. *See SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (setting forth many of the factors considered by the parties when settling SEC enforcement actions).

## IV. Conclusion

As shown above, the proposed settlement is not unconstitutional, unlawful, contrary to public policy, or unreasonable. Therefore, the SEC asks the Court to enter the agreed Interlocutory Judgment against Howard.

DATED: February 23, 2017

Respectfully submitted,

*/s/ B. David Fraser*

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**CERTIFICATE OF CONFERENCE**

On February 22-23, 2017, I conferred with Barrett Howell and Phil Bezanson (both of Bracewell LLP), counsel for Defendant Patrick O. Howard, about the content of this motion. Consistent with their client's signed consent, Messrs. Howell and Bezanson advised me that they are unopposed to the SEC's motion to enter interlocutory judgment against Howard.

*/s/ B. David Fraser*
B. DAVID FRASER

**CERTIFICATE OF SERVICE**

On February 23, 2017, I electronically filed the foregoing *Plaintiff's Unopposed Motion to Enter Agreed Interlocutory Judgment against Defendant Patrick O. Howard* via the Court's CM/ECF filing system, which will send a notice of electronic filing to all CM/ECF participants. I further certify that I served a true and correct copy of the foregoing document and the notice of electronic filing via UPS and electronic mail on all non-CM/ECF parties and/or their counsel as detailed below:

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