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**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
SOUTHERN DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ALTERNATE ENERGY HOLDINGS, INC., et al.,

Defendants and Relief Defendants.

Case No. 1:10-cv-621-EJL-REB

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MOTION FOR AN ORDER
APPROVING DISTRIBUTION
PLAN; MEMORANDUM OF LAW**

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiff United States Securities and Exchange Commission (“SEC” or the “Commission”) will, and hereby does, move this Court, the Honorable Edward J. Lodge, for an Order approving the proposed distribution plan. The Commission’s motion is supported by the following Memorandum of Law, the [Proposed] Order Approving the Distribution Plan, and the Distribution Plan.

MEMORANDUM OF LAW

I. PROCEDURAL BACKGROUND

On December 16, 2010, the Commission initiated this action by filing a complaint, accompanied by a motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 1, 4-5.) The Commission charged defendant Alternate Energy Holdings, Inc. (“AEHI”) and its former management with violations of the antifraud provisions of the federal securities laws, namely Section 17(a) of the Securities Act of 1933 (the “Securities Act”), 15 U.S.C. §§ 77q(a), Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b). On July 29, 2011, the Commission filed an amended complaint, adding charges that AEHI and its chief executive officer violated the registration provisions of the securities laws, under Sections 5(a) and (c) of the Securities Act, 15 U.S.C. §§ 77e(a) & 77e(c). In 2012, the Commission again supplemented the complaint to address additional conduct that was then occurring and simultaneously requested the freeze of \$2 million in funds AEHI had obtained from investors and then unlawfully transferred to a law firm in Nevada. (Dkt. Nos. 216-17, 219-20, 258). The Court ultimately granted the requested freeze over the \$2 million. (Dkt. No. 281.)

In 2012, the Commission also moved for summary judgment on its claims that AEHI

violated the securities laws through its offer and sale of securities in unregistered transactions; using untrue statements of material fact and materially misleading omissions of fact. (Dkt. No. 166.) In its motion and supporting papers, the Commission proved the facts not reasonably disputed detailing the defendants' fraudulent offering of securities to members of the public through false and misleading "private placement memorandum."¹ In 2014, the Court entered a Memorandum Decision and Order granting in its entirety the Commission's motion for summary judgment against AEHI. (Dkt. No. 281.) Thereafter, based upon the Court's grant of summary judgment and upon further motion by the SEC, the Court entered final judgment against AEHI, ordering, among other things, that AEHI pay disgorgement with prejudgment interest in the amount of \$14,812,066, and a \$200,000 civil penalty. (Dkt. No. 323.)

The Court also entered judgments resolving all claims against the remaining defendants and relief defendants, through a combination of litigated and consensual filings. (*See* Dkt. Nos. 323, 326, 334 and 346.) Importantly for the instant motion, the Court also ordered the party, Relief Defendant Black & LoBello, who had received the \$2 million in investor funds that AEHI had wrongfully transferred to a Nevada bank account to turn over the funds to the SEC (Dkt. No. 335), which it did in 2016. (*See* Dkt. No. 345.)

The funds were transferred to the Commission on January 25, 2016 and are herein referred to as the "Distribution Fund." As the Commission described in its motions seeking disgorgement orders from AEHI and the Relief Defendant, and reiterated in status conference statements to the Court, it has consistently been the Commission's intention to the return investor funds collected to the extent feasible to the victims of defendants' fraud. Copies of the proposed

¹ The SEC's motion for summary judgment emphasized that other violations of the antifraud statutes alleged in the complaint, such as the manipulation of the public market for AEHI's stock by defendants, were not the subject of the motion. (Dkt. 167 at 1.)

Distribution Plan and accompanying Plan of Allocation are attached to this motion as Exhibit A and Appendix 1, respectively.

II. LEGAL STANDARD FOR CONSIDERATION OF DISTRIBUTION PLAN

The Court's determination as to whether to approve a distribution plan proposed by the SEC is guided by equitable principles. *See United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (writing that in equity, the district court is a court of conscience). In cases involving multiple victims and commingled funds, the equities require that "all victims of the fraud be treated equally." *See United States v. Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551, 553 (9th Cir. 1996) (citing *Cunningham v. Brown*, 265 U.S. 1, 12-13 (1924)).

Nearly every plan to distribute funds obtained in SEC enforcement actions requires choices to be made regarding the allocation of funds among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, courts give the Commission significant discretion to design and set the parameters of the distribution plan. *See SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165 (2d Cir. 1989). This Court's should review the proposed distribution plan to determine whether the plan is fair and reasonable. *SEC v. Fishbach*, 133 F.3d 170, 175 (2d Cir. 1997); *See Official Comm. of Unsec. Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006). ("[U]nless the consent decree specifically provides otherwise[,] once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end."), *citing Wang*, 944 F.2d at 85. As described below, the proposed Distribution Plan constitutes a fair and reasonable allocation of the limited funds available and should therefore be approved.

III. THE PROPOSED DISTRIBUTION PLAN IS FAIR AND REASONABLE

The Commission's principal goal in fashioning a distribution plan is to identify a methodology to allocate the available funds fairly and reasonably to the investors who were harmed by the conduct at issue, in a manner proportional to the injury that investors suffered as a result of the actions of the defendant. As the SEC proved in its motion for summary judgment that resulted in the disgorgement order against AEHI, the defendant company raised more than \$12 million through illegal, unregistered transactions by making materially false and misleading statements in private placement memorandum and related statements made to members of the public who paid funds to AEHI to participate in the so-called private placements. *See* Court's Mem. Dec. and Order at 7-8 (Dkt. No. 281) (upholding Magistrate Judge's Report and Recommendation, and finding that defendants made materially misleading, and possibly false, statements with the requisite scienter in connection with the securities offerings as alleged in the first and second causes of action).

The Distribution Plan is designed to compensate persons who purchased AEHI common stock directly from the company through so-called "private placement" offerings, from October 1, 2006 and continuing until December 13, 2010 (when the instant action was first filed). These are the same persons whose contributions formed the basis of the approximately \$12 million the SEC proved were wrongfully obtained by AEHI.²

² As previously described by the SEC in response to arguments raised by defendants during the course of the litigation (*see, e.g.*, Dkt. No. 314 at 3-5), the settlement of a separate, private action brought by a putative class of AEHI shareholders who purchased AEHI shares in the secondary, public markets (i.e., through the Over-the-Counter Bulletin Board, or other exchanges) is not relevant to this proposed distribution. The allegations of fraud in that case and the alleged class do not overlap with the proven fraud in this matter, particularly since the SEC's proof in summary judgment related solely to the purchasers in the offerings directly from the company. *See Teague v. AEHI*, Case No. 1:10-cv-00634 BLW (D. Ida.) ("the Litigation is hereby preliminarily certified as a class action on behalf of all persons who purchased the *publicly*

The proposed distribution methodology allocates the Distribution Fund among eligible claimants, as defined in the plan itself. Thus, an eligible claimant's particular eligible loss amount (as determined in accordance with the Plan of Allocation contained in Appendix 1 to Exhibit A) will be used to determine the amount of the claimant's distribution payment. Should the eligible loss amounts of all eligible claimants exceed the amount of funds to be distributed, the distribution agent shall determine the appropriate distribution payment amount for each eligible claimant on a *pro rata* basis. Because the SEC has only collected \$2 million but has previously quantified the harm to such persons as totaling just over \$12 million, the SEC foresees such a *pro rata* distribution. In no event, however, will an eligible claimant receive a distribution payment greater than the harm the claimant suffered. Accordingly, the SEC's plan represents a fair and reasonable means of redressing the harm caused by defendants' fraud and should therefore be approved.

traded common stock of Alternate Energy during the period from October 23, 2006 through December 14, 2010, inclusive.” *Teague* Dkt No. 91 (July 20, 2012)).

IV. CONCLUSION

The proposed Distribution Plan is fair and reasonable, as it directs the amounts collected against disgorgement ordered by this Court to investors who were harmed by the conduct proven by the Commission. For the reasons discussed above, the Commission respectfully requests that the Court approve the Plan.

Date: August 14, 2017

Respectfully Submitted

s/ Keshia W. Ellis

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Securities and Exchange Commission