

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

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

DAVID RONALD ALLEN, et al.,

Defendants.

**Civil Action No.
3:11-CV-882-O**

**SECURITIES AND EXCHANGE COMMISSION’S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR AN ORDER CONSOLIDATING FUNDS,
DIRECTING FINAL JUDGMENT PAYMENTS TO THE SEC, APPROVING A
DISTRIBUTION PLAN, AND APPOINTING A DISTRIBUTION AGENT, WITH
ATTACHED PROPOSED DISTRIBUTION PLAN**

The Securities and Exchange Commission (the “SEC”) respectfully submits this memorandum in support of its Motion for an Order Consolidating Funds, Directing Final Judgment Payments to the SEC, Approving a Distribution Plan, and Appointing a Distribution Agent (the “Motion”), and asks that the accompanying proposed Order be entered for the reasons set forth below. The proposed distribution plan (the “SEC Plan”) is attached as Exhibit A

Prior to filing this motion, the SEC sent notice, in the form attached to its Rule 7.1 Certification (the “Investor Notice”), to the last known address of the investors previously identified by the receiver appointed in this action (the “Receiver”) as having a claim against the receivership estate (“Identified Claimants”). Of particular relevance, the Investor Notice informed Identified Claimants of the SEC’s intent to recommend to the Court a second distribution based on the claim determinations and methodology used by the Receiver and

approved by the Court; identified a public website on which the SEC will post its filings in this case and any other updates; sought from Identified Claimants updated information necessary to any distribution; and provided to Identified Claimants information from the appointed tax administrator on the tax consequences of distributions in this matter.

I. BACKGROUND

A. The Civil Action

The SEC filed its complaint in this action on April 28, 2011. Dkt. No. 1. On June 20, 2011, the SEC filed a Second Amended Complaint. Dkt. No. 75. In its pleadings, the SEC alleged an ongoing, evolving, multi-million dollar fraudulent scheme perpetrated by the defendants. Between August 2011 and the end of 2012, the Court entered judgments against all of the defendants and several of the relief defendants.¹ See Dkt Nos. 126, 129, 132, 133, 170, 175, 176, 177, 185, 208, 238, 242, 243, 252, 253, 256, and 272.

B. The Receivership and the Prior Distribution

By order dated January 12, 2012, the Court established a receivership estate comprised of the assets and records of the Defendants and Relief Defendants, and appointed Michael J. Uhl as the Receiver. Dkt. Nos. 192, 206. On July 6, 2012, this Court established a fair fund in accordance with Section 308(a) of the Sarbanes-Oxley Act of 2002 so that civil penalties could be distributed to harmed investors, and on January 8, 2015, the Court authorized the Receiver to make an interim distribution from the receivership estate and approved a distribution pursuant to a “rising tide” distribution method (the “Receiver’s Distribution Plan”). Dkt. Nos. 237, 334.

¹ Judgments have not been entered against Relief Defendants Debt Management Associates, Ltd., Community of Pleasant Ridge, Ltd., and D-Cap (II-XVII) Partners, Ltd. Records from the Texas Secretary of State reflect canceled or forfeited registrations for each of these entities, and the Receiver has indicated that all have been dissolved.

Pursuant to the Receiver's Distribution Plan, the Receiver distributed approximately \$995,000 to ninety-four (94) investors.² *See* Dkt. No. 356-1.

By Order dated June 18, 2018, this Court terminated the receivership and ordered the Receiver to transfer all remaining assets to the SEC to hold pending further Court order (the "Termination Order," Dkt. No. 353). Pursuant to the Termination Order, the Receiver transferred approximately \$153,000 to the SEC.

C. The Fair Fund

This Court has approximately \$1.1 million under its jurisdiction in this matter, comprised of the funds transferred by the Receiver to the SEC, approximately \$732,000 paid to the SEC in satisfaction of judgments, approximately \$42,000 paid to the Clerk of the Court (the "Clerk") in satisfaction of judgments and held in the Court Registry account (the "CRIS Account"), and accrued interest (the "Fair Fund"). Pursuant to this Court's Order dated March 10, 2019 (Dkt. No. 364), all amounts at the SEC have been consolidated into an account at U.S. Treasury's Bureau of Fiscal Service (the "BFS Account"). Although collection activity continues, the SEC does not anticipate any significant additional collections, and any additional collections prior to distribution will be included in the distribution.³ By the attached proposed Order, the SEC seeks to have all funds held by the Clerk, all future payments to the Clerk, and any additional payments due from Defendants or Relief Defendants, directed to the SEC for inclusion in the Fair Fund and/or disposed of as set forth in the SEC Plan.

² The Receiver originally anticipated distributing approximately \$1 million to eligible Identified Claimants (*see* Dkt. No. 331) but reduced one (1) eligible Identified Claimant's distribution upon learning late in the process that the Identified Claimant had received a \$5,000 finder's fee.

³ At least one defendant, William Burbank, continues to make periodic payments on the judgment entered against him.

II. THE PROPOSED DISTRIBUTION AND THE SEC PLAN

The SEC now proposes to the Court a distribution substantially like that previously approved by this Court. Under the SEC Plan, there will be no claims process; rather, the SEC Plan uses as its universe of claimants the approximately 140 investors identified by the Receiver as having claims against the receivership estate. The SEC Plan similarly credits the Receiver's findings as to each claimant's Investment⁴ and Recoveries.⁵ Finally, like the Receiver, the SEC will use the rising tide methodology to determine Distribution Payments.

A. The Universe of Potential Distributees

Pursuant to Court Order (Dkt. No. 236), the Receiver previously conducted a claims process (*see* Dkt. No. 231, p. 10). The SEC proposes to include in distribution calculations the claimants identified by the Receiver as claimants to the receivership. (Dkt. No. 331, p. 11).

B. The Receiver's Determination of Investment and Recoveries of Each Identified Claimant

Following the return of claim forms, the Receiver's staff verified the value of claims submitted by investors, comparing the submitted claims against the reports of experts retained by the SEC; bank records, general ledger summaries, and summary schedules from 23 accounts belonging to the receivership entities; private placement memoranda and other investment documents obtained from various sources; investor provided documentation; documents obtained by the Receiver through subpoenas; documents located at the offices of receivership entities; and tax returns, including K-1s, of the receivership entities. (Dkt. No. 331, pp. 10-11). Through this

⁴ All capitalized terms used herein but not defined shall have the same meanings ascribed to them in the SEC Plan.

⁵ In response to the Investor Notice, some individuals contacted the SEC and sought to reopen the claim process. In his filings, summarized below, the Receiver describes a thorough claims review process and the SEC has no basis to disturb his findings. Accordingly, the SEC has informed investors that it is not requesting that the Court reopen the claims process or reevaluate the Receiver's conclusions on claims.

process, the Receiver determined each Identified Claimant's Investment and Recoveries for use in applying the rising tide methodology described below. Under the SEC Plan, the Receiver's determinations of Investments and Recoveries will be used to determine Distribution Payments except that Recoveries will be increased to include the amounts distributed to each Identified Claimant through the Receiver's distribution.

C. The Distribution Methodology

Like the Receiver, the SEC proposes distributing the Fair Fund, less the Administrative Costs discussed below (the "Net Fair Fund"), to eligible Identified Claimants using the rising tide methodology. *See* Dkt. Nos. 331, pp. 9-10, 334 (it is Ordered that the Receiver is authorized to distribute under the Rising Tide distribution method). Under the SEC Plan, however, there will be a "*De Minimis* Amount" threshold of \$10, below which distribution payments will not be made. Moreover, Identified Claimants who cannot be located through reasonable efforts and/or who have failed to respond to the Investor Notice with information necessary to the distribution may be excluded from the distribution ("Unresponsive Claimants"). Any amounts preliminarily allotted to Unresponsive Claimants or Identified Claimants with a Distribution Payment less than the *De Minimis* Amount will remain with the Fair Fund and distributed to Identified Claimants deemed eligible for a distribution under the SEC Plan.

D. The Proposed Distribution Agent and Administrative Costs

In order to minimize administrative costs, the SEC proposes that the undersigned, Catherine E. Pappas, Senior Adviser in the SEC's Division of Enforcement, act as Distribution Agent for the Fair Fund. The SEC estimates that administrative costs, largely comprised of tax administration costs and taxes, will not exceed \$16,000 (the "Administrative Costs").

E. Investor Notice

As described above, on or about May 13, 2019, SEC sent the Investor Notice, in the form attached to its Rule 7.1 Certification, to the last known addresses of all Identified Claimants. In relevant part, the Investor Notice:

- notified Identified Claimants of the SEC’s intent to recommend to the Court a second distribution that will use the methodology and claim determinations previously approved by this Court;
- identified a public website on which the SEC will post its filings in this case and any other updates (<https://www.sec.gov/divisions/enforce/claims/china-voice-holding.htm>) (the “Public Website”); and
- requested completion of a Questionnaire that, among other things, sought confirmation of Internet access.

The SEC will send a copy of the Motion and accompanying papers to those Identified Claimants who have indicated that they do not have access to the Internet, but the SEC will otherwise rely on its posting of the filing on the Public Website as notice to investors of the filing of the Motion.

III. DISCUSSION

A district court has broad discretion in approving a plan for distribution, and that determination is reviewed for abuse of discretion. *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001). *See also SEC v. Quan*, 870 F.3d 754 (8th Cir. 2017); *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010); *SEC v. Malek*, 397 Fed. Appx. 711, 715 (2d Cir. 2010), *citing SEC v. Loewenson*, 290 F.3d 80, 87 (2d Cir. 2002); *WorldCom, Inc. v. SEC*, 467 F.3d 73, 84 (2d Cir. 2006). The job of the district court is to ensure that the proposed plan of distribution is fair and reasonable. *SEC v. Terax Energy, Inc.*, Civ. Act. No. 3:07-CV-1554-BD, 2009 U.S. Dist. LEXIS 100897, *6 (N.D. Tx. Oct. 28, 2009) (Kaplan, J.). *See also Quan*, 2017 U.S. App. LEXIS 16663, *16; *Wealth Mgmt.*, 628 F.3d at 332; *WorldCom*, 467 F.3d at 83-85

(because the SEC is fulfilling a statutory role in determining how to distribute recovered funds to investors, it is entitled to the deference of a “fair and reasonable” standard—that the plan fairly and reasonably distributes limited funds among the potential claimants).

By its Order dated January 8, 2015 (Dkt. No. 334), this Court approved the claims process and methodology underlying the Receiver’s Distribution Plan, thus finding the Receiver’s proposed plan methodology to fairly and reasonably distribute the limited funds among the Identified Claimants. The SEC Plan largely tracks the Receiver’s Distribution Plan and thus much of it has already been determined by the Court to be fair and reasonable.

The small variations in the SEC Plan do not change this determination. The inclusion of a *de minimis* amount is practical; small checks often remain uncashed and their underlying amounts sent to Treasury as opposed to harmed investors. The discretion of the Distribution Agent to exclude uncooperative claimants or those who cannot be located through the use of reasonable efforts is similarly practical and is intended to encourage Identified Claimants to timely respond to the SEC’s efforts to gather necessary documentation through the Investor Notice process, and to ensure that payments are directed to Identified Claimants who will negotiate the checks. None of these differences significantly affect the distribution methodology as previously approved by the Court and, accordingly, the SEC respectfully requests that the Court enter the proposed Order approving the SEC Plan.⁶

The SEC also seeks from the Court the appointment of the undersigned as Distribution Agent to perform such functions as are necessary to implement and administer the SEC Plan,

⁶ Also included in the SEC Plan is the Distribution Agent’s authority to pay the identified Administrative Costs without further Court Order. This authority has already been granted by the Court in connection with taxes and tax administration costs; the only additional authority obtained through this Plan provision is the ability to pay, without applying to the Court, the investment fees, which are relatively insubstantial. All Administrative Costs paid by the Distribution Agent will be reported to the Court in the Distribution Agent’s final accounting.

including coordinate with the Tax Administrator to ensure compliance with applicable tax laws. As set forth in the SEC Plan, the Distribution Agent, an SEC employee, shall receive no compensation other than her regular salary for her services in administering the Fair Fund. The appointment of an SEC employee will expedite the distribution process and avoid the costs and expenses that would ordinarily be incurred by the appointment of a third-party administrator, thus maximizing return to Identified Claimants eligible for a distribution.

Finally, the SEC seeks from the Court an Order directing the Clerk of the Court to transfer all amounts in the CRIS Account, including any future collections, to the SEC for inclusion in the Fair Fund, and directing all payments pursuant to Final Judgments to the SEC. This will ensure that all collections up through the point of distribution are consolidated in one location, and also facilitate the tax administration of, and final reporting with respect to, the Fair Fund.⁷

IV. CONCLUSION

For the reasons set forth above, the SEC respectfully requests that the Court grant the requested relief.

Dated: August 7, 2019

Respectfully submitted,

s/Catherine E. Pappas
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Att: Exhibit A (Proposed Distribution Plan)

⁷ If sufficient funds are collected subsequent to the distribution and another distribution is feasible, the Distribution Agent will proceed with a subsequent distribution in accordance with paragraph 11 of the SEC Plan.

EXHIBIT A
(Proposed Distribution Plan)

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Distribution Plan

Introduction and Background

1. The Securities and Exchange Commission (the “SEC”) submits this Distribution Plan (the “Plan”) to fairly and reasonably distribute the Fair Fund established in this matter (the “Fair Fund”) to investors harmed by the actions described in the Complaint.

2. The SEC incorporates by reference the background and history of this matter as set forth in the accompanying Motion for an Order Consolidating Funds, Directing Final Judgment Payments to the SEC, Approving a Distribution Plan, and Appointing a Distribution Agent.

The Distribution Agent

3. Catherine E. Pappas, an SEC employee, will serve as Distribution Agent in connection with the Plan.

4. The Distribution Agent:

(a) shall receive no compensation for the services performed in administering the Fair Fund, other than her regular salary as an employee of the SEC;

(b) shall perform such functions as are necessary to implement and administer the Plan. In performing this function, the Distribution Agent shall be deemed to be acting within the scope of her employment with the SEC. In carrying out her duties, the Distribution Agent may be assisted by other SEC staff acting under her supervision;

(c) shall coordinate with the Tax Administrator to ensure that the Fair Fund, a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code, and related regulations pertaining to QSFs, 26 C.F.R. §§ 1.468B-1 through 1.468B-5, complies with all related legal and regulatory requirements, including without limitation, satisfying any reporting or withholding requirements imposed on distributions from the Fair Fund; and

(d) with her designees, agents and assistants, shall not be required to post a bond, and shall not be liable to any person for their actions hereunder except on a finding of willful disregard of duty.

Definitions

5. The following definitions apply to the terms as used in the Plan:

(a) **Administrative Costs** are all taxes, fees, and expenses of the Fair Fund and the implementation of the Plan, including tax administration and investment fees and expenses. All Administrative Costs will be paid by the Fair Fund.

(b) The ***De Minimis Amount*** is \$10; no Distribution Payments will be made for less than \$10.

(c) **Distribution Payment** is an Eligible Claimant's distribution under the Plan.

(d) **Eligible Claimant** is any Identified Claimant who is not an Unresponsive Claimant, whose Distribution Payment equals or exceeds the *De Minimis* Amount, and who is determined eligible for a Distribution Payment under the methodology described in ¶ 7, below.

(e) The **Fair Fund** is comprised of collections on judgments in the captioned matter, funds paid to the SEC by the Receiver, and accrued interest.

(f) **Identified Claimants** are the claimants to the receivership previously identified by the Receiver. *See* Docket No. 331 (Receiver's Request for First Interim Distribution).

(g) **Investment** is the amount invested by an Identified Claimant as determined by the Receiver and used in the calculations underlying the Receiver's Distribution.

(h) **Net Fair Fund** is the Fair Fund less Administrative Costs.

(i) **Investor Notice** is the notice that the SEC sent to the last known address of each Identified Claimant prior to filing a motion with the Court to approve the Plan. Each Identified Claimant was assigned an Investor Number in the Investor Notice. The Investor Notice, among other things, alerted Identified Claimants to a possible second distribution in the captioned matter, provided information about the tax consequences of distributions, and provided contact information for questions about the distribution.

(j) The **Receiver** is the Court-appointed Receiver in this action.

(k) The **Receiver's Distribution** is the distribution approved by the Court and conducted by the Receiver, as further described in Docket Nos. 331 and 334.

(l) **Recovery** is the sum of the amount recovered by an Identified Claimant as determined by the Receiver and used in the calculations underlying the Receiver's Distribution, and the amount distributed to the Identified Claimant by the Receiver in the Receiver's Distribution.

(m) **Recovery Ratio** is a calculation of Total Recovery as a fraction of the Eligible Claimant's Investment. Interim calculations of the Recovery Ratio will change until the Distribution Agent has identified all Eligible Claimants.

(n) **Tentative Distribution** is an interim calculated distribution amount under ¶ 7 of this Plan.

(o) **Total Recovery** is an Eligible Claimant's Recovery plus any Distribution Payment.

(p) **Unresponsive Claimant** is any Identified Claimant from whom information has been or is being sought by the staff of the SEC, the Tax Administrator, and/or the Distribution Agent, including tax compliance related information, and who does not timely provide that information; and any Identified Claimant who the SEC cannot locate through reasonable efforts. Identified Claimants who relocate after being contacted by the Distribution Agent must promptly provide to the Distribution Agent new contact information in order to not be classified as an Unresponsive Claimant. For purposes of the Plan, attempting to locate Identified Claimants through the use of commercial databases regularly available to the Division of Enforcement of the SEC,

review of the SEC investigative file, and/or obtained through the Investor Notice, are reasonable efforts.

**Methodology for Identifying Eligible Claimants
and Determining Distribution Payments.**

6. The methodology used under the Plan will be the same as that used by the Receiver in the Receiver's distribution – the rising tide methodology. *See* Docket No. 331, p. 7. The objective of the rising tide methodology is to distribute the Net Fair Fund so that each Identified Claimant's Recovery Ratio is the same for all Eligible Claimants.

7. The Distribution Agent will identify Eligible Claimants, and the amount to be distributed to each Eligible Claimant, in the following manner:

(a) The Distribution Agent will create a list of Identified Claimants who are not Unresponsive Claimants (the "Preliminary List");

(b) Using the Preliminary List, the Distribution Agent will calculate the Recovery Ratio;

(c) For each Identified Claimant on the Preliminary List, the Distribution Agent will calculate the Identified Claimant's Tentative Distribution by multiplying the Recovery Ratio by the Identified Claimant's Investment, and subtract from that product the Identified Claimant's Recovery;

(d) If for any Identified Claimant the Tentative Distribution is less than the *De Minimis* Amount, the Identified Claimant will be removed from the Preliminary List, and steps (b) through (d) will be repeated until each remaining Identified Claimant's Tentative Distribution is equal to or greater than the *De Minimis* Amount. Such amount will be the Identified Claimant's Distribution Payment and each remaining Identified Claimant on the Preliminary List will be deemed an Eligible Claimant.

Distribution of the Fair Fund

8. Prior to distributing any funds to Eligible Claimants, the Distribution Agent will reserve funds for, or pay, as appropriate, any unpaid Administrative Costs.

9. The Net Fair Fund will be distributed to Eligible Claimants pursuant to the methodology described in ¶7, above. The Distribution Agent will make a payment to each Eligible Claimant through the United States Department of the Treasury's Bureau of the Fiscal Service ("BFS") by electronically transferring funds through the Automated Clearing House or mailing a check to the payee. The Distribution Agent will compile the information, prepare a payment file, and verify the payment file's completeness and accuracy for submission to SEC staff who, without further Court Order, will make the disbursements through BFS.

10. Checks that are not negotiated prior to their stale date shall be voided, with the distribution amount remaining in the Fair Fund for disposition in accordance with this Plan. Electronic payments will be made only to cash equivalent accounts (e.g., checking or savings accounts).

11. If funds remain in the Net Fair Fund after an initial distribution and/or additional funds are collected, the Distribution Agent in her sole discretion, and without further Order of the Court, will make an assessment as to whether it is feasible and justifiable to attempt to distribute the remaining funds ("Additional Distribution"). Any Additional Distribution will be made pursuant to the Plan but will not be made to any Eligible Claimant who failed to negotiate the immediately prior Distribution Payment.

Final Accounting and Termination

12. Upon completion of all distributions under this Plan and the payment of all Administrative Costs, the Distribution Agent will file a final accounting with the Court and seek,

as appropriate, an Order terminating the Fair Fund, directing the SEC to remit any residual funds to the U.S. Treasury, and discharging the Distribution Agent.

13. All proceedings with respect to the administration, processing, and determination of claims and the determination of all related controversies, shall be subject to the exclusive jurisdiction of this Court.

14. The Court reserves the right to amend the Plan from time to time, and retains jurisdiction over this matter for this purpose and for any and all other matters that may arise under or relate to the Plan.