

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,
100 F Street, N.E. Washington, D.C. 20549

Plaintiff,

vs.

DELL INC., MICHAEL S. DELL, KEVIN B.
ROLLINS, JAMES M. SCHNEIDER, LESLIE L.
JACKSON, NICHOLAS A.R. DUNNING

Defendants.

Civil Action No. 1:10-cv-01245
(RJL)

**PLAINTIFF SEC'S MOTION FOR AN ORDER DIRECTING THE DISTRIBUTION
AGENT TO DISBURSE THE FAIR FUND TO ELIGIBLE CLAIMANTS**

Plaintiff, the United States Securities and Exchange Commission ("SEC" or the "Commission") respectfully requests that the Court enter an order:

- 1) Directing the Distribution Agent to:
 - a. Distribute the funds remaining in the Fair Fund¹ to those Eligible Claimants² who cashed their distribution checks received in the initial tranche of the distribution, pursuant to the Final Payee List reviewed and accepted by the Commission staff.
 - b. Pay any remaining taxes and related fees and expenses of the Tax Administrator, and fees and expenses of the Distribution Agent from the Fair Fund upon written

¹ The amount to be distributed will be the funds remaining after the completion of the first tranche of the distribution, less a reserve for the payment of taxes and fees and expenses related to the administration of the second tranche of the distribution.

² Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Distribution Plan approved by the Court.

direction and approval of the Commission staff, without further order from the Court.

I. Procedural Background

On July 22, 2010, the Commission charged Dell and others with failing to disclose material information to investors and using fraudulent accounting to make it falsely appear that the company was consistently meeting Wall Street earnings targets and reducing its operating expenses. The SEC entered into settlements with defendants in three civil law enforcement actions in this district relating to Dell Inc. (“Dell”).³ The Final Judgments entered on October 13, 2010 against each of the Dell defendants provided that monies paid may be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Pursuant to their settlement agreements, the Dell defendants consented to pay a total of \$111,418,947 in disgorgement, prejudgment interest, and civil penalty money, plus accrued interest, which was ultimately consolidated into one fund under this case number and thereafter invested in an interest bearing account at the court registry (the “Dell CRIS Account”).

On November 15, 2011, the Court ordered the establishment of a fair fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended (the “Dell Fair Fund”) to distribute the civil money penalties along with the disgorgement and prejudgment interest paid by Defendants and ordered the appointment of Garden City Group, Inc. (“Garden City”) as the Distribution Agent charged with assisting the Commission in developing a plan of distribution

³ The civil actions are SEC v. Dell Inc., Michael S. Dell, Kevin B. Rollins, James M. Schneider, Leslie L. Jackson, Nicholas A.R. Dunning, Case No. 1:10-cv-01245; SEC v. Robert W. Davis, Case No. 1:10-cv-01464; and SEC v. Randall D. Imhoff, Case No. 1:10-cv-01465. The defendants in these three civil actions are collectively referred to as the “Dell defendants.”

and administering the distribution. (Dkt.36).⁴ On December 11, 2012, this Court entered an Order Approving Distribution Plan for the Fair Fund. (Dkt.41).

Pursuant to the Order to Transfer Funds to the Distribution Agent for Disbursement, dated July 25, 2014, GCG commenced distribution of an initial tranche of the Fair Fund to Eligible Claimants (the “Initial Tranche”) on September 29, 2014. Pursuant to the Distribution Order, a total of 103,853 claims were paid via check or wire totaling \$111,518,590.77. As a result of GCG’s follow-up efforts, payments totaling \$107,632,103.45, which is approximately 96% of the amount distributed in the Initial Tranche, have been cashed by or successfully wired to Eligible Claimants. Of the more than \$111 million distributed in the Initial Distribution, \$4,018,650.14 remains in the distribution account as of June 30, 2018 and is held by the Distribution Agent in an escrow account.

II. Distribution of Remaining Funds to Eligible Claimants

If approved by the Court, in order to return as much of the Fair Fund as possible to investors, GCG will distribute the remaining balance, less the reserve for any fees, expenses, and taxes, on a *pro rata* basis to all Eligible Claimants who cashed their Initial Tranche checks and who will receive at least \$25.00 from the remaining funds (the “Second Tranche”). Completing the Second Tranche of the distribution would provide the approximately 8,200 investors who receive payments from both distributions with a total rate of return of approximately 1.85%, comprised of approximately 1.78% from the Initial Tranche and approximately 0.07% from the Second Tranche. Payments in the Second Tranche are estimated to range from \$25.00 to approximately \$88,000.00.

⁴ On December 29, 2010, Damasco & Associates LLP was appointed by the Court as Tax Administrator to execute all income tax reporting requirements. As of October 1, 2016, Damasco became a part of Miller Kaplan Arase, LLP. The firm’s engagement with the SEC is not impacted, nor is there any anticipated impact on the firm’s ability to carry out its duties as Tax Administrator in this case.

The Commission staff recommends that the Fair Fund pay the costs of administration of the Second Tranche. While Defendant Dell paid the fees and expenses of the administration of Initial Tranche of the distribution, the Distribution Plan does not contemplate a second tranche of the distribution. Given the passage of time and the logistics of preparing for the Second Tranche of the distribution, the Commission staff believes it is appropriate for the Fair Fund to pay the costs of administering the Second Tranche.

After consultation with the Tax Administrator, the Distribution Agent has recommended that a reserve of \$140,893.88 for anticipated future tax obligations and fees and expenses of the Tax Administrator and the Distribution Agent.⁵

Pursuant to the Distribution Plan, the Distribution Agent has prepared and submitted to the Commission a list of Eligible Claimants, the amount of the asserted claim of each Eligible Claimant, and the Approved Claim for each Eligible Claimant (the "Final Payee List").⁶ Each Eligible Claimant will receive a *pro rata* share of the approximately \$4,018,650.14 available for distribution, minus the amount set aside in reserve, based upon the Eligible Loss Amount. The Distribution Agent has also submitted the Declaration of Lorri Staal in Support of the Securities and Exchange Commission's Motion for an Order Directing Distribution Agent to Disburse the Fair Fund to Eligible Claimants (the "Declaration"), which provides a detailed explanation of the procedures the Distribution Agent used to develop the Final Payee List, filed herewith as Exhibit A. The Final Payee List and the Declaration have been reviewed by the undersigned Commission counsel who has no objections.

⁵ Dell has agreed to pay the portion of the preparation of the Consolidated Final Accounting Report ("CFAR") that relates to the Initial Tranche of the distribution.

⁶ The Final Payee List was provided to the Commission for review and will be provided to the Court upon request under seal.

III. Conclusion

WHEREFORE, for all the foregoing reasons, Plaintiff Securities and Exchange Commission respectfully requests that this Court grant its Motion for an Order Directing Distribution Agent to Disburse the Fair Fund to Eligible Claimants and grant such other relief as it deems necessary and proper.

Dated: August 6, 2018

Respectfully submitted,

/s/Susan S. Pecaro
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CERTIFICATE OF SERVICE

I, Susan S. Pecaro, hereby certify that, on August 6, 2018, I caused a copy of the foregoing document to be filed with the Court's CM/ECF system, which will automatically send a copy of the document to all counsel of record.

/s/ Susan S. Pecaro
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