

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**VINEET KALUCHA, GEORGE PALATHINKAL,
AND APHELION FUND MANAGEMENT, LLC**

Defendants.

Case No.: 14 Civ. 3247 (RMB)

ECF Case

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO
APPOINT PLAN ADMINISTRATOR AND APPROVE DISTRIBUTION PLAN**

Plaintiff Securities and Exchange Commission (the "Commission" or "SEC") moves the Court to: (1) appoint a Plan Administrator; and (2) approve the Commission's proposed plan to distribute funds collected from defendant Vineet Kalucha ("Kalucha") to harmed investors (the "Distribution Plan").

RELEVANT PROCEDURAL HISTORY

On May 5, 2014, the Commission filed a complaint alleging, *inter alia*, that Kalucha, the majority owner, managing partner, and Chief Investment Officer of Aphelion Fund Management LLC ("Aphelion Management"), an investment adviser located in New York City, lied to prospective investors about the amount of Aphelion Management's assets under management and misused investor funds invested into Aphelion Management itself. Kalucha caused Aphelion Management to raise \$1,550,000 from six investors.

On July 30, 2015, the Court entered a Final Judgment against Kalucha that, among other things, permanently restrained and enjoined him from violating Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5, Section 17(a) of the Securities Act of

1933 (the “Securities Act”), Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) and Rule 206(4)-8, and ordered him to pay a total of \$503,713, which is the sum of \$326,496 in disgorgement, \$17,217 in prejudgment interest, and a civil penalty in the amount of \$160,000. (Dkt. No. 50.) The Final Judgment provides that the Commission may propose a plan to distribute the funds collected from Kalucha. (*Id.* at § V.)

On November 18, 2015, the Court entered an order authorizing the distribution of \$322,200.01 (less reasonable banking and wiring fees) to the six investors of Aphelion Management on a ratable basis. Pursuant to this Order, Investor #1 (who invested \$500,000) received 32% of this sum, Investors #2, #3, #4, and #5 (each of whom invested \$200,000) received 13% of this sum, and Investors #6 (who invested \$250,000) received 16% of this sum. (Dkt. No. 63.)

On January 5, 2016, the Commission filed a Notice of Satisfaction of Monetary Provisions Only as to Final Judgment against Defendant Vineet Kalucha in which the Commission acknowledged that Kalucha has paid in full the monetary amount he owed (\$503,713) for disgorgement, prejudgment interest, civil penalty, and post-judgment interest. (Dkt. No. 67.) Kalucha’s payment to the Commission has been accruing interest, and as of May 2, 2016, has grown to approximately \$504,097.

On April 21, 2016, the SEC filed a motion seeking the appointment of a Tax Administrator, and authorization of the payment of future tax obligations and reasonable tax administrator fees and expenses. (Dkt. No. 71.) The Court granted this motion on May 11, 2016. (Dkt. No.72.)

The Commission now moves the Court to approve the Distribution Plan so that the funds paid by Kalucha pursuant to the Final Judgment (the “Distribution Fund”) can be distributed to investors harmed by Kalucha’s conduct.

THE COURT SHOULD APPOINT A PLAN ADMINISTRATOR

The Commission requests that the Court appoint Michael S. Lim, a Commission employee in the Office of Distributions, as Plan Administrator to administer and implement the Distribution Plan. As a Commission employee, the Plan Administrator shall receive no compensation, other than his regular salary as a Commission employee, for his services in administering the Distribution Fund. As there are only six harmed investors, the appointment of a Commission employee will expedite the distribution process and avoid the costs and expenses that would ordinarily be incurred by appointing a third-party administrator, thus maximizing investor return.

THE COURT SHOULD APPROVE THE DISTRIBUTION PLAN

The Commission also seeks approval of the Distribution Plan to distribute the Distribution Fund to the investors who were harmed by Kalucha vis-à-vis their investment in Aphelion Management and Kalucha's subsequent misuse of those invested funds. The Distribution Plan contemplates that a total of approximately \$504,097, less any tax obligations and fees and expenses of the Tax Administrator, will be distributed on a *pro rata* basis for the harm that Kalucha caused as follows:

Aphelion Management Investor	Amount Invested in Aphelion Management	Pro Rata Amount of Distribution Fund
#1	\$500,000	32%
#2	\$200,000	13%
#3	\$200,000	13%
#4	\$200,000	13%
#5	\$200,000	13%
#6	\$250,000	16%

The pro rata percentages set forth above are the same as those set forth in the Court's November 18, 2015 Order (Dkt. No. 63 at ¶ 5.)

The Distribution Plan provisions are:

a. Following approval of the Distribution Plan by the Court, the Plan Administrator will send a notice ("Notice") to each investor by electronic mail and First Class U.S. Mail that includes a copy of this Motion and, for each investor, identifies the Investor Number that corresponds to him or her to allow him or her to know the percentage of the Distribution Fund that is being proposed to be distributed to them. The Plan Administrator will send the Notice within seven (7) days of the date of the order approving the Distribution Plan.

b. Each investor will have twenty (20) days from the date of the order approving the Distribution Plan to submit any objections to the proposed distribution. Each investor must submit his or her objection, along with any supporting documentation, to the Plan Administrator via return receipt requested mail and/or electronic mail.

c. The Plan Administrator will have fourteen (14) days from the date of the order approving the Distribution Plan to resolve any objections by the investors and thereafter to file with the Court a summary of timely filed objections and a response by the Plan Administrator identifying any unresolved objections.

d. A hearing date, if necessary, to resolve any unresolved objections will be set by the Court thereafter and the Plan Administrator will give notice to all investors of said date.

e. After the Court has ruled on any objections, or if there are no objections, the Court will issue an order for disbursement.

f. Pursuant to the disbursement order, the Plan Administrator will provide the SEC's Office of Financial Management with the names, addresses, and amounts to be disbursed to

investors. The SEC's Office of Financial Management shall promptly thereafter cause checks to be issued to the investors in the amounts of their *pro rata* distribution. Each check issued to the investors will state on the face of the check that it is valid for one year. After one year from the date on the distribution check, the SEC's Office of Financial Management will notify the Plan Administrator of the amount of all uncashed checks. The amount of all uncashed checks shall be placed in the Distribution Fund as a residual.

g. Forty-five days after the remittance of the checks, the Plan Administrator shall obtain information from the SEC's Office of Financial Management concerning checks that have not been negotiated. The Plan Administrator shall then undertake good faith efforts for thirty (30) days to locate and contact the intended recipients of the uncashed checks to ensure that the intended recipients have a reasonable opportunity to participate in the distribution.

h. The Plan Administrator will submit a final report to the Court prior to termination of the Distribution Fund that includes a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Distribution Plan. The SEC's Office of Financial Management shall provide the Plan Administrator and the Tax Administrator with any account information relating to the funds held in the Distribution Fund that may be required for the final accounting, including providing copies of any account statements that the Plan Administrator or Tax Administrator may request.

i. The Distribution Fund shall be eligible for termination after all of the following have occurred: (1) the final accounting has been submitted and approved by the Court; (2) all taxes and fees and expenses have been paid; and (3) all remaining funds or any residual have been paid to the SEC for transfer to the U.S. Treasury. When the Court has approved the final

accounting, the Commission shall seek an order from the Court to terminate the Distribution Fund and to discharge the Plan Administrator.

ARGUMENT

Generally, courts have broad discretion to approve plans to distribute funds collected in SEC enforcement actions. *SEC v. Wang*, 944 F.2d 80, 84 (2d Cir. 1991). In evaluating a proposed distribution plan, a court should “decide whether, in the aggregate, the plan is equitable and reasonable.” *Id.* “Unless the consent decree specifically provides otherwise, once the District Court satisfies itself that the distribution of proceeds in a proposed Securities and Exchange Commission disgorgement plan is fair and reasonable, its review is at an end.” *Id.* at 85.

As the amount of money lost by the six investors in Aphelion Management (\$1,550,00) is significantly more than the amount of funds that were collected for disbursement (approximately \$504,097), the payments to investors will be calculated on a *pro rata* basis as described in the Distribution Plan. The Commission believes that the Distribution Plan should be approved as fair and reasonable.

CONCLUSION

For the reasons stated above, the Commission hereby moves the Court to (1) appoint Commission employee Michael S. Lim as Plan Administrator; and (2) approve the Distribution Plan.

Dated: May 16, 2016

Respectfully submitted,

s/ Michael S. Lim
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CERTIFICATE OF SERVICE

I hereby certify that, on May 16, 2016, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Southern District of New York, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Michael S. Lim

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