

**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLORADO**

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	09-cv-01114 (MSK-KLM)
	:	
v.	:	ECF Case
	:	
WELLS FARGO ENERGY L.L.C., JUSTIN WILLIAM RIFKIN, PATRICK V. LOOPER, RICHARD G. PACHECO, and DUSTIN D. WHITE	:	MOTION TO APPOINT A TAX ADMINISTRATOR
	:	
Defendants.	:	
	:	
	:	

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MOTION TO APPOINT  
PLAN ADMINISTRATOR, APPROVE DISTRIBUTION PLAN AND TRANSFER FUNDS**

Plaintiff Securities and Exchange Commission (the “Commission” or “SEC”) moves the Court to: 1) appoint a Plan Administrator, 2) approve the Commission’s proposed plan to distribute funds paid by Wellco Energy L.L.C. (“Wellco”), Justin William Rifkin (“Rifkin”), and Dustin D. White (“White”) (collectively, “Defendants”), and any future funds to be paid by Defendants to harmed investors (the “Distribution Plan”) and 3) transfer funds previously paid to the Clerk of Court by Defendants (principal plus interest less the Registry fee) to the Commission.

The Commission proposes to distribute approximately \$39,751 and any interest earned in the Court Registry Investment System, less fees and expenses of the Tax Administrator (“Fund”), to approximately fifty investors who suffered economic harm by the Defendants.

The Commission proposes that the Fund be distributed to investors on a *pro rata* basis based on each investor's loss as a percentage of the total of all investors' losses.

### **PROCEDURAL BACKGROUND**

On September 14, 2009, the Commission filed a Complaint alleging that Defendants violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and with respect to Rifkin, Looper, Pacheco and White violating Section 15(a) of the Exchange Act by offering and selling securities in the form of fractional interests in oil and gas wells through boiler room cold-calls to investors in which they misrepresented Wellco's role in operating the wells, Rifkin's experience in producing oil and gas and how investors' funds were to be used. Defendants engaged in the business of selling securities for the accounts of others but did not register as brokers with the Commission. Additionally, Defendants sold the securities even though they did not file a required registration statement with the Commission which would have disclosed information about the nature of Wellco's business and its financial statements. The complaint sought permanent injunctions, disgorgement, prejudgment interest, and civil penalties from Defendants.

On February 5, 2016, the SEC filed a motion seeking the appointment of a Tax Administrator for the Distribution Fund and to authorize payment of future tax obligations and tax administrator fees and expenses (Dkt. #88). The Court granted this motion on February 5, 2016 (Dkt. #89). The Commission moves the Court to transfer the total amount held in the Court's registry in this matter to the Commission. The Commission will distribute to injured investors as described below.

Rifkin submitted an Offer of Settlement which the Commission accepted on January 11, 2012. Pursuant to Section 15(b)(6) of the Exchange Act, Rifkin was barred from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. Reapplication for association by Rifkin is subject to applicable laws and regulations governing the reentry process and reentry may be conditioned upon a number of factors, including but not limited to, satisfaction of the disgorgement ordered, arbitration awards and any restitution ordered by a self-regulatory organization.

On August 31, 2011, a Final Judgment was entered against Wellco and Rifkin (Dkt. #80). Rifkin was permanently enjoined from future violations of Sections 5(a), 5(c), 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and rule 10b-5 thereunder. Wellco and Rifkin were held jointly and severally liable for disgorgement in the amount of \$782,751, prejudgment interest in the amount of \$46,875 and a civil penalty in the amount of \$782,751. Wellco and Rifkin were to satisfy the obligation by paying \$1,612,377 within fourteen (14) days after entry of the Final Judgment. Wellco and Rifkin also had \$40,123.88 in bank accounts frozen to be paid into the registry of the Court upon a later motion by the Commission. A receipt indicating that \$39,927.51 was transferred into the registry of the Court was filed on October 11, 2011 (Dkt. #84). As of May 11, 2016, there is \$56.24 in accrued interest in the Court Registry Investment System (“CRIS”). The \$39,927.51 payment is comprised of \$39,751.67 of disgorgement and \$175.84 of post-judgment interest. Post-judgment

interest will be sent to the United States Treasury and is not part of the proposed distribution. It is possible that the Commission may collect additional money from Wellco and Rifkin. If, and when the Commission collects additional money, Commission staff will evaluate whether an additional distribution of funds to harmed investors is feasible.

On March 25, 2010, a Permanent Injunction and Final Judgment was entered against Looper (Dkt. #67). Looper was found liable for disgorgement in the amount of \$107,200 and prejudgment interest in the amount of \$4,133.82 for a total amount of \$111,333.82. Based on sworn representations in the Statement of Financial Condition dated June 15, 2009, and other documents and information submitted to the Commission, the Court did not order Looper to pay a civil penalty and payment of \$111,333.82 representing disgorgement and prejudgment interest was waived.

On March 25, 2010, a Permanent Injunction and Final Judgment was entered against Pacheco (Dkt. #68). Pacheco was found liable for disgorgement in the amount of \$69,250 and prejudgment interest in the amount of \$1,944.44 for a total amount of \$71,194.44. Based on sworn representations in the Statement of Financial Condition dated June 15, 2009, and other documents and information submitted to the Commission, the Court did not order Pacheco to pay a civil penalty and payment of \$71,194.44 representing disgorgement and prejudgment interest was waived.

On August 31, 2011, a Final Judgment was entered against White (Dkt. #80) which permanently enjoined him from future violations of Sections 5(a), 5(c), 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and rule 10b-5 thereunder. White was found liable for disgorgement in the amount of \$64,618, prejudgment interest in the amount of \$3,296 and a civil penalty in the amount of \$64,618. White had fourteen (14) days within to

satisfy the total obligation amount of \$132,525. White has not paid any money to date. It is possible that the Commission may collect money from White. If, and when the Commission collects additional money, Commission staff will evaluate whether an additional distribution of funds to harmed investors is feasible.

The Final Judgment against Wellco, Rifkin and White (Dkt. #80, ¶8) states that the Commission may propose a plan to distribute the funds collected from them. The Commission now moves the Court to approve a distribution plan so that the funds already paid by Wellco and Rifkin and any future funds to be paid by Defendants can be distributed to injured investors harmed by the Defendant's conduct.

**THE COURT SHOULD APPOINT A PLAN ADMINISTRATOR**

The Court should appoint Michael S. Lim, a Commission employee in the Office of Distributions, as Plan Administrator to administer and implement the proposed Distribution Plan, as described below. 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 the harmed investors are relatively few in number and known, 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 A DISTRIBUTION PLAN**

The Commission seeks approval of its proposed Distribution Plan to distribute the funds already collected from Defendants and any future funds to be paid by Defendants ("Distribution Fund"). The Distribution Plan provides for a distribution to certain individuals (the "Eligible Recipients") who were harmed by the Defendants because Defendants had misrepresented

Wellco's role in oil and gas projects, Rifkin's experience with oil and gas projects, the use of investors' funds and Rifkin sold securities when no registration statement was in effect or filed with the Commission and Rifkin was not registered as a broker at the time when he offered and sold the securities. The Distribution Plan contemplates that a total of approximately \$39,808 (comprised of \$39,751.67 of disgorgement and \$56.24 in accrued interest in the CRIS), less any tax obligations and fees and expenses of the Tax Administrator, will be distributed to Eligible Recipients on a *pro rata* basis for the harm created by Defendant's conduct. Commission staff also plans to distribute any future funds received, less any tax obligations and fees and expenses of the Tax Administrator, on a *pro rata* basis to Eligible Recipients when and if those future funds are received.

#### **THE PROPOSED DISTRIBUTION PLAN**

The Commission proposes the following methodology to determine the allocation of the Distribution Fund and any future payments received into the Distribution Fund pursuant to the Defendant's payment plan:

- (Step 1) Determine each Eligible Recipient's total loss ("Eligible Recipient's Total Loss") and calculate total losses suffered by all harmed Eligible Recipients ("Total Losses") by adding up each Eligible Recipient's Total Loss;
- (Step 2) Divide each Eligible Recipient's Total Loss by the Total Losses. This fractional result, expressed as a percentage, represents the Eligible Recipient's proportion of losses to the pool of total losses ("Eligible Recipient's Proportional Loss"); and
- (Step 3) Multiply each Eligible Recipient's Proportional Loss times the Distribution Fund less any reserve for tax obligations and fees and expenses of the Tax Administrator ("Net Distribution Fund"). The resulting figure represents the amount of the Net Distribution

Fund to be distributed to that Eligible Recipient (“Eligible Recipient’s *Pro Rata* Share”).

The Plan provisions are:

- a. There will be a distribution of the Distribution Fund and any future funds received into the Distribution Fund *pro rata* among all of the Eligible Recipients based upon the investor’s *pro rata* investments with Defendant.
- b. Following approval of the Distribution Plan by the Court, the Plan Administrator will send a notice (“Notice”) to each Eligible Recipient by First Class U.S. Mail. The Notice will provide each Eligible Recipient with the distribution plan, setting forth that investor’s amount of his or her share of the proposed distribution. The Plan Administrator will send the Notice within seven (20) days of the date of the order approving the Distribution Plan.
- c. Eligible Recipients will have twenty (20) days from the date of the order approving the Distribution Plan to submit any objections to the proposed distribution. Eligible Recipients must submit their objections, along with any supporting documentation, to the Plan Administrator via return receipt requested mail.
- d. The Plan Administrator will have forty-five (45) days from the date of the order approving the Distribution Plan to resolve any objections by Eligible Recipients and thereafter to file with the Court a summary of timely filed objections and a response by the Plan Administrator identifying any unresolved objections.

- e. 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 Eligible Recipients of said date.
- f. After the Court has ruled on any objections, or if there are no objections, the Court will issue an order for disbursement.
- g. Pursuant to the disbursement order, the Plan Administrator will provide the SEC's Office of Financial Management with a list of harmed investors containing the names, addresses and amounts to be disbursed to Eligible Recipients. The SEC's Office of Financial Management shall promptly thereafter cause checks or bank wires to be issued to the Eligible Recipients in the amounts of their *pro rata* distribution. Each check issued to the Eligible Recipients 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.
- h. 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.

- i. The Plan Administrator will submit a final accounting to the Court prior to termination of the Distribution Fund. The final accounting shall include 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.
- j. 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 staff shall seek an order from the Court to terminate the Distribution Fund and to discharge the Plan Administrator.

**THE COURT SHOULD TRANSFER FUNDS TO THE COMMISSION**

As of May 10, 2016, the total amount held with the Clerk of Court is \$39,927.51 and any interest earned in the Court Registry Investment System ("CRIS"). The staff respectfully requests that the Court transfer funds held in the CRIS, and any accrued interest, to the Commission for distribution to harmed investors pursuant to the Distribution Plan.

**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 Eligible Recipients is significantly more than the amount of funds that were collected for disbursement, the payments to investors will be calculated on a *pro rata* basis as described in the proposed Distribution Plan. The Commission believes that the proposed Distribution Plan for the Distribution Fund 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;
- (2) approve the Commission’s plan to distribute funds collected from Defendants, and any future funds to be collected from Defendants to harmed investors;
- (3) transfer the total amount held in the Court’s registry in this matter (principal plus interest less the Registry fee) to the Commission for distribution to harmed investors pursuant to the Distribution Plan;

Dated: May 23, 2016

Respectfully Submitted,

/s/ Michael S. Lim

Michael S. Lim

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