

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

WESTON CAPITAL ASSET MANAGEMENT,
LLC, *ET AL.*

Defendants.

Civil No. 14-cv-80823-JIM

Hon. James I. Cohn

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO APPOINT A
FUND ADMINISTRATOR, ESTABLISH A FAIR FUND, AND APPROVE DISTRIBUTION
PLAN**

Plaintiff, Securities and Exchange Commission (“SEC” or “Commission”), respectfully requests that the Court enter an Order to: (1) appoint a Fund Administrator, (2) establish a fair fund under section 308(a) of the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Act of 2010 [15 U.S.C. §7246], and (3) approve the Commission’s plan to distribute funds paid by the defendants and relief defendant.

The creation of a Fair Fund and appointment of a Fund Administrator are necessary precursors to creating a distribution plan for the Fair Fund, proposing a distribution plan for the Fair Fund, and ultimately distributing any funds from the Fair Fund to investors harmed by Defendants’ misconduct. The Commission proposes to distribute approximately \$596,040.40 (“Fair Fund”), less fees and expenses of the Tax Administrator, plus any future funds received, to twenty (20) investors who suffered economic harm by the defendants. The Commission proposes that the Fair 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.

Memorandum

Procedural History

On June 23, 2014, the Securities and Exchange Commission filed this action against Weston Capital Asset Management, LLC ("Weston Capital") and its founder and president Albert Hallac ("A. Hallac"), for violations of antifraud provisions, and against the firm's former general counsel, chief compliance officer, and chief operating officer Keith Wellner ("Wellner"), for aiding and abetting violations. The complaint also named A. Hallac's son, Jeffrey Hallac ("J. Hallac"), a managing member at Weston Capital, as a relief defendant.

The complaint alleged that, from 2011 through at least July 2012, Weston Capital and A. Hallac illegally drained more than \$17 million from a hedge fund they managed, and transferred the money to a consulting and investment firm known as Swartz IP Services Group Inc. ("Swartz IP"). The transaction went against the hedge fund's stated investment strategy and was not disclosed to investors, who received account statements that falsely portrayed that their investment performed as well or even better than before. Wellner assisted in these activities. The SEC further alleged that out of the transferred investor proceeds, A. Hallac, Wellner, and J. Hallac collectively received \$750,000.00 in payments from Swartz IP. Weston Capital and A. Hallac also wrongfully used \$3.5 million to pay down a portion of a loan from another fund managed by the firm.

On July 7, 2014, the Court entered a final judgment against the relief defendant, J. Hallac. The final judgment required the relief defendant pay a total of \$128,010.52 in disgorgement and prejudgment interest.

Also on July 7, 2014, the Court entered a judgment of permanent injunction against Wellner. The injunction permanently enjoined Wellner from violating Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rules 10b-5(a) and (c) thereunder, and Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 (the “Advisers Act”) and Rule 206(4)-8(a)(2) thereunder, and required him to pay a total of \$122,405.79 in disgorgement and prejudgment interest.

Further, on July 7, 2014, the Court entered a judgment of permanent injunction as to Weston Capital and A. Hallac. The injunction permanently enjoined them from violating Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder, and Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder.

On June 22, 2015, the Court entered a final judgment as to A. Hallac. The final judgment required him to pay a total of \$567,496.36 in disgorgement, prejudgment interest, and penalties.

Also on June 22, 2015, the Court entered a final judgment as to Weston Capital. The final judgment required it to pay a total of \$858,773.68 in disgorgement, prejudgment interest, and penalties. The SEC terminated collection activity against Weston Capital because a review of its financial status showed that collections would either be impossible and/or not cost effective.

On December 7, 2015, the Court entered an Order that dismissed the civil penalty claim against Wellner.

On May 2, 2017, the Court appointed Miller Kaplan Arase LLP as the Tax Administrator to fulfill the tax obligations of the Fair Fund.

As of August 15, 2017, the defendants and relief defendant have paid a total of \$596,040.40 into the Fair Fund for distribution to harmed investors, and any additional monies collected will be added to the Fair Fund for distribution.

THE COURT SHOULD APPOINT A FUND ADMINISTRATOR

The Court should appoint Michael S. Lim, Commission employee, as Fund Administrator to implement the Distribution Plan, as described below. As the harmed investors are few in number and are known, the appointment of a Commission employee will avoid the costs and expenses that would ordinarily be incurred by appointing a third party administrator.

THE COURT SHOULD ESTABLISH A FAIR FUND

The Commission now moves the Court to establish a fair fund for the \$596,040.40 paid, and any future funds collected, from defendants and relief defendant, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, which provides in relevant part:

If in any judicial or administrative action brought by the Commission under the securities laws...the Commission obtains an order requiring disgorgement against any person for a violation of such laws..., or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

See 15 U.S.C. § 7246(a). The Commission brought this action under the securities laws and defendants and relief defendant paid disgorgement pursuant to their final judgments.

Accordingly, the requirements of Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, have been satisfied, and the Court should establish a Fair Fund to facilitate ultimate distribution of the funds to investors harmed by Defendants' conduct.

THE COURT SHOULD APPROVE A DISTRIBUTION PLAN

The Commission seeks approval of its distribution plan to distribute the funds already collected, and any future funds to be paid by defendants and relief defendant (“Distribution Plan”). The Distribution Plan provides for a distribution to certain individuals (the “Eligible Recipients”) who were harmed by the defendants when the defendants illegally drained more than \$17 million from a hedge fund they managed, and transferred the money to a consulting and investment firm known as Swartz IP. The transaction went against the hedge fund's stated investment strategy and was not disclosed to investors, who received account statements that falsely portrayed that their investment performed as well or even better than before. The Distribution Plan contemplates that a total of approximately \$596,040.40, 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 defendants’ conduct. The Commission 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 any future funds are received.

THE PLAN OF ALLOCATION

The Commission proposes the following methodology to determine the allocation of the Fair Fund:

- (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 Fair Fund, less any reserve for tax obligations and fees and expenses of the Tax Administrator ("Net Fair Fund"). The resulting figure represents the amount of the Net Fair Fund to be distributed to that Eligible Recipient ("Eligible Recipient's *Pro Rata Share*").

The Fair Fund provisions are:

- a. There will be a distribution of the Net Fair Fund *pro rata* among all of the Eligible Recipients based upon the investor's *pro rata* investments with the defendants.
- b. Following approval of the Distribution Plan by the Court, the Fund Administrator will send a notice ("Notice") to each Eligible Recipient by First Class U.S. Mail. The Notice will provide each Eligible Recipient with a description of the Fair Fund, setting forth that investor's amount of his or her share of the proposed distribution. The Fund Administrator will send the Notice within seven (7) 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 Distribution Plan. Eligible Recipients must submit their objections, along with any supporting documentation, to the Fund Administrator via return receipt requested mail.

- d. The Fund 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 Fund 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 Fund 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 Fund 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 Fund Administrator of the amount of all uncashed checks. The amount of all uncashed checks shall be placed in the Fair Fund as a residual.
- h. Any residual in the Fair Fund will be redistributed to the other Eligible Recipients on a *pro rata* basis based on those Eligible Recipients' proportional losses, as previously described above.

- i. Forty-five (45) days after the remittance of the checks, the Fund Administrator shall obtain information from the SEC's Office of Financial Management concerning checks that have not been negotiated. The Fund 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.
- j. The Fund Administrator will submit a final accounting to the Court prior to termination of the Fair Fund. The final accounting shall include all monies received, earned, spent, and distributed in connection with the administration of the Fair Fund. The SEC's Office of Financial Management shall provide the Fund Administrator and the Tax Administrator with any account information relating to the funds held in the Fair Fund that may be required for the final accounting, including providing copies of any account statements that the Fund Administrator or Tax Administrator may request.
- k. The Fair 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 Fair Fund and to discharge the Fund 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 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 Distribution Plan. The Commission believes that the Distribution Plan for the Fair 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 Fund Administrator;
- (2) establish a Fair Fund for the \$596,040.40 paid, and any future funds collected, from the defendants and relief defendants ;
- (3) approve the Commission’s plan to distribute funds collected, and any future funds to be collected, from the defendants and relief defendant to harmed investors;

WHEREFORE, for all the foregoing reasons, the Commission respectfully requests that this Court enter the Proposed Order and grant such other relief as the Court deems just and proper.

LOCAL RULE 7.1 CERTIFICATION

I hereby certify that there are no claims pending in this case and all matters have been reduced to judgment or dismissed.

/s/ Michael Shueyee Lim
Michael Shueyee Lim

Dated: October 12, 2017

Respectfully submitted,

/s/ Michael Shueyee Lim
Michael Shueyee Lim
U.S. Securities and Exchange Commission
100 F Street, N.E., Mail Stop 5876
Washington, D.C. 20549-5876
Phone: (202) 551-4659
Fax: (202) 572-1372
E-mail: limm@sec.gov
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on **October 12, 2017**, I caused the foregoing document to be electronically filed with the clerk of the court for the U.S. District Court, Southern District of Florida, 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
Michael S. Lim
UNITED STATES SECURITIES
AND EXCHANGE COMMISSION
100 F Street, NE, Mail Stop 5876
Washington, D.C. 20548-5876
202-551-4659
limm@sec.gov
Attorney for Plaintiff