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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

DAREN L. PALMER and TRIGON GROUP, INC., a Nevada Corporation,

DEFENDANTS.

Civil No. 09-75-E-EJL-LMB

Judge Edward J. Lodge
Magistrate Larry M. Boyle

**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF PLAN OF PARTIAL DISTRIBUTION**

Plaintiff, Securities and Exchange Commission (the "Commission"), respectfully submits this Reply Memorandum in Support of its Motion for Approval of Plan of Partial Distribution (the "Plan"). Docket #s 72 and 73. On August 4, 2010 the Commission received an objection to the Plan from Mark Rudd ("Rudd"), Breck Barton ("Barton"), David Taylor, Gerald Taylor (collectively the "Taylors"), James Cameron ("Cameron"), Dick Fitzek ("Fitzek"), and Darryl Harris ("Harris") (Docket # 84). On August 5, 2010 the Commission received an additional objection to the Plan from Harris, Harris Publishing, Cameron, David Taylor and Gerald Taylor (Docket # 88). Finally, on August 9, 2010 the Commission received an objection to the Plan by Elaine Talbot ("Talbot") (Docket # 91).

Having reviewed the objections, the Commission requests that the Court approve the Plan as proposed. The objections filed by Rudd, Barton, the Taylors, Cameron, Fitzek, and Harris represent an attempt by those investors who received the largest payouts from Trigon to obtain an unfair distribution from the Receivership Estate. Talbot was not a Trigon investor or creditor, and, on that basis alone, her objection should be rejected by the Court.

## I. INTRODUCTION

On February 26, 2009, the Commission filed a Complaint seeking to enjoin Daren L. Palmer ("Palmer") and Trigon Group, Inc. ("Trigon") (collectively, the "Defendants") from future violations of the federal securities laws. The Complaint alleged Defendants raised at least $60 million from at least 55 investors in a classic Ponzi scheme. On February 26, 2009, this Court granted the Commission's *ex parte* motions and appointed Wayne Klein as Receiver (the "Receiver") for Trigon. Docket #s 8 and 9. The Receiver

was charged with marshalling Defendants' assets for ultimate distribution to defrauded investors. Docket # 8. The Court established a claims process by which defrauded Trigon investors could submit a claim to receivership assets. Docket # 54. On June 9, 2010, the Commission proposed a Plan of Partial Distribution, which identified the process by which the Receiver will distribute funds in the Receivership Estate. Docket #s 72 and 73 at Ex. B.

The Plan divides Claims against Defendants and their property into five (5) classes. Class 1 consists of Administrative Expense Claims. Class 2 consists of Tax Claims. Class 3 consists of Investor Claims, but excludes Claims by Non-Participants as defined in Article II of the Plan. Class 4 consists of Claims for amounts outstanding to non-investor creditors. Finally, Class 5 consists of Non-Participant Claims.

The Plan proposes a *pro rata* distribution of the Receivership Estate's assets to each Class 3 claimant. Any and all distributions to Class 3 claimants will be made after the Receiver's determination of a benchmark percentage return level in light of funds available for distribution in the Receivership Estate and upon consideration of all distributions made to such claimants before and after commencement of this action. The Plan dictates that the Receiver shall make distributions first to those Class 3 claimants who have not yet received the benchmark percentage return on their original and verified investment. Those Class 3 claimants who have previously received in excess of the benchmark percentage return level through payments by Palmer, Trigon and/or the Receiver prior to the initial distribution will receive no distribution unless and until all investors receive the same percentage return.

A total of eight Class 3 claimants have objected to the Plan. Objecting Class 3

claimants include Mark Rudd, Breck Barton, David Taylor, Gerald Taylor, James Cameron, Dick Fitzek, and Darryl Harris and Harris Publishing. The objecting claimants assert that the Commission has arbitrarily set a benchmark percentage for *pro rata* distribution, that "late" investors were entitled to greater protections under the Plan than "early" investors, and that the plan is not equitable. Docket #s 84 and 85.

In contrast to the objectors' assertions, the Commission's Plan calls for equal treatment of investors. The Plan proposes that Class 3 claimants will be paid in a manner to assure a *pro rata* recovery for claimants based on the principle amount invested with Defendants minus any funds received from Defendants to date. The Commission finds that this *pro rata* distribution is the most equitable solution for all claimants. This is especially true in this case, because Trigon had no revenue generating activity. Palmer invested less than 10% of the money he raised. None of those investments generated net positive returns. Palmer used the balance of investor funds to pay for personal expenses, to make loans to friends and family members, or to make returns to investors as Ponzi payments. Investor returns range from 0% to over 90%, depending on whether investors chose to reinvest their purported returns, take out quarterly distributions, or withdraw funds altogether. All those distributions to investors came from funds deposited by later investors, because Trigon had no other source of income. All purported profits paid to investors were simply other people's money.

Only one Class 5 claimant, Talbot, has objected to the Plan. Quite simply, Talbot did not invest in Trigon. On that basis alone, this Court should overrule her objection. Talbot further claims that moving forward with the Plan does not provide her with sufficient procedural protections or due process. Despite Talbot's objection, well

established precedent dictates that summary proceedings provide adequate due process in receivership cases.

## II. STANDARD OF REVIEW

In formulating a plan of distribution, the Commission must propose a plan that is fair and reasonable. "Once the district court satisfies itself that the distribution of funds in a proposed Commission disgorgement plan is fair and reasonable, its review is at an end." See SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). A district court reviewing a plan of distribution is acting pursuant to its inherent equitable powers. In shaping equity decrees, the trial court is vested with broad discretionary power, and appellate review is correspondingly narrow. SEC v. Forex Asset Mgmt., LLC, 242 F.3d 325 (9th Cir. 2002). The Commission's Plan meets these requirements. The Plan sets forth a fair and reasonable *pro rata* distribution of funds currently in the Receiver's possession.

## III. THE PLAN SHOULD BE APPROVED AS PROPOSED

The Plan proposed by the Commission is fair and reasonable and should be approved as proposed. The objections fail to demonstrate that the Plan is unfair or unreasonable in any way.

### A. The Court Should Reject the Objection of the Investors Who Received the Highest Returns

Eight Class 3 claimants have objected to the Plan. Despite their objections, the equities of this case demand that the Plan be approved as proposed to ensure equal treatment for all Class 3 claimants. Generally, where funds available to compensate are limited, a *pro rata* distribution of funds from a receivership is an equitable remedy. CFTC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1116. This is based on the principle that similarly-situated investors should be treated alike.

While the Court has the interest of all the investors in mind, each individual investor's sole concern is the return of his or her entire investment. Here, such returns are simply impossible. A uniformly applied *pro rata* distribution protects the general interest of each investor by protecting each from other investors who would seek to recoup more than their fair share. While there is no doubt that the objecting investors were harmed by Defendants, so, in fact, were other investors. Here, the Plan proposes that the Receiver distributes approximately $2 million to defrauded investors. This will permit the Receiver to distribute funds to investors in a manner the ensures all investors will have received a benchmark return of 24.89% on their investment.

Not surprisingly, the objecting claimants are the individuals who received the highest percentage payouts of all investors and have already received payments from Trigon in excess of the benchmark. From March 2005 to January 2008 Rudd invested $150,000.00 and received distributions totaling $137,786.00 representing a net return of 91.86% if his investment. Declaration of R. Wayne Klein, Receiver, dated August 16, 2010 ("Klein Decl."), attached hereto as Ex. A, at ¶ 8. From February 2003 to July 2007 Barton (with checks drawn on the bank account of Breck Barton & Associates Profit Sharing Plan) invested $705,000.00 with Trigon. Id. at ¶ 3. During this same time period Trigon made payments of $621,930.71 to Barton, which equal an 88.22% payout. Id.

David Taylor, Gerald Taylor and Taylor Chevrolet submitted a combined Proof of Claim Form (Claim No. 2015). The Taylors invested $8,400,000.00 from April 1999 to May 2008 and received distributions of $4,495,482.00 during this same time period. Id. at ¶ 7. This represents a 53.52% return of investment in distributions. Id.

James Cameron submitted two claims to the receiver totaling $9,430,000.00. Id. at ¶ 4. The Receiver found that Cameron did not report all transactions with Trigon, including entities that had received net profits on their investments with Trigon. Id. Including these transactions, the Receiver determined that Cameron entities paid $12,653,250.00 directly to Trigon and received $5,205,156.00 in distributions for a 41.14% return. Id.

Dick Fitzek invested a total of $250,000 with Trigon through Duane Yost ("Yost") between September 2006 and June 2008. Id. at ¶ 5. Fitzek received payments of $65,000.00 for a 26% return. Finally, Darryl Harris submitted two Proof of Claim Forms for himself and Harris Publishing, for a total investment of $5,045,000.00, made between October 2003 and September 2008. Id. at ¶ 6. Distributions to Harris and his entities totaled $2,200,353.00 for a 43.61% return. Id.

These objecting Class 3 claimants received the highest percentage payouts of any Trigon investors. The funds they received were deposits from other investors. Trigon had no revenue generating activity. Palmer invested less than 10% of the money he raised. None of those investments generated net positive returns. The balance of investor funds were used by Palmer for personal expenses, lent to friends and family members, or returned to investors as Ponzi payments. As detailed in the Receiver's earlier reports to this Court, the money paid to these investors was simply newly deposited funds from later investors. Fairness dictates that these returns be included in determining the appropriate *pro rata* distribution.

Some of the claimants assert that the Plan favors later investors at the expense of early investors. Docket #s 84 and 88. However, payments under the Plan are based on

the withdrawal pattern of the individual investors, not the date of the investment. For example, Claimant No. 2017 began making investments in September 2002 but withdrew only 6.59%. Klein Decl. at ¶ 9. Similarly, Claimant No. 2027 first made investments in March 2004, Claimant No. 2016 in March 2005 and Claimant No. 2023 in May 2005. None of these claimants made any withdrawals. Id. Claimant No. 2004 began investing in August 2004 and withdrew only 1.44%. Id. Despite receiving returns as high as 91%, the objecting investors contend that they should receive more money as part of the initial distribution. This is not fair or reasonable. Many other Class 3 claimants received little or no returns from Palmer even though they invested as early as 2004. Based on fairness to all investors, this Court should approve the *pro rata* distribution set forth in the Commission's Plan as proposed.

**B. This Court Should Reject Talbot's Claim Because Talbot is Not a Trigon Investor.**

Talbot is not a Class 3 claimant, because she did not invest in Trigon. On that basis alone, this Court should deny Talbot's claim. Talbot asserts that her interest in several family companies that she sold to her brother, Yost, was invested in Trigon. Docket #91 at 8. There is no evidence to support her claim. Talbot transferred no funds to Trigon. There is no evidence indicating that any transfers to Trigon were made on her behalf. In fact, Talbot admits in her objection that it was not her, but her brother, Yost, who invested with Trigon. Docket # 91 at 3. "Instead of paying [the] value from the Yost entities to Talbot, Yost apparently paid these amounts to Trigon." Id. at 8.

The Receiver reviewed all transfers from Yost or any of his entities to Trigon in the month before the August 5, 2004 purchase agreement between Yost and Talbot and the five months after the agreement was executed to determine whether any of the

purchase price of the contract was actually paid by Yost to Trigon. As detailed in the Receiver's declaration, a review of those records reveals no evidence to support Talbot's claim that the purchase price of the entities she sold to her brother was deposited with Trigon. Klein Decl. at ¶ 10. Instead, the records demonstrate that the Yost entities subject to the purchase agreement were net winners in the Trigon scheme, receiving more money from Trigon than those entities deposited. Id. Thus, even if Talbot had a claim for the payments made to Trigon on behalf of those entities, those payments would be offset by the distributions paid to those companies. Id.

Talbot also did not submit a claim form in accordance with this Court's Order, and her claim should be denied on this basis as well. See Docket # 53. Talbot's claim form is devoid of any indication that she invested at all. See Docket # 91-1 at Ex. A. Moreover, the claim form fails to account for amounts Talbot admits she received on the purchase agreement. Id. These amounts include $31,381.18 from Yost at the time the contract was signed, two payments of $100,000 from Trigon, $82,500 from the storage units, and $150,000 interest in a cabin for a total of $463.881.18. See Talbot Dep. 7:2-25:1, Jun. 11, 2009, Docket # 91-2 at Ex. A. Talbot also received an additional $100,000 on October 5, 2006, which came from a deposit by a Trigon investor. Klein Decl. at ¶ 10(d). Talbot's total returns on the purchase contract equal $563,881.18 for a 40% return. This percentage return exceeds the benchmark return in the initial distribution. Thus, even if Talbot had a valid claim, she would not be entitled to a distribution.

Fundamentally, Talbot has a breach of contract claim against Yost. The purchase agreement between Talbot and Yost, did not involve Trigon. Trigon was not a party to the purchase agreement, note or security agreement. Trigon received no benefit from the

purchase agreement and no funds were deposited with Trigon as a result of the purchase agreement. In fact, Talbot still has a security interest in the Yost entities pursuant to the security agreement executed at the time of the purchase agreement. Talbot's claim, if any, would be a derivative of Yost and/or the Yost entities. However, Yost has no claim because he is an insider. Additionally, the Yost entities have no claim, because they are net winners. See Klein Decl. at ¶ 10(e).

**C. Summary Proceedings Meet Due Process Requirements**

Talbot further claims that the Plan approval process does not afford her due process. See Docket #91 at 9. For the claims of nonparties to receivership property, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard. SEC v. Wencke, 783 F.2d 829, 836-38 (9th Cir. 1986); see also SEC v. Am. Capital Invs., 98 F.3d 1133 (9th Cir. 1996); SEC v. Lewis, 173 Fed. Appx. 565 (9th Cir. 2006); SEC v. Ross, 504 F.3d 1130 (9th Cir. 2007). A full hearing is not required. SEC v. Elliott, 953 F.2d 1560, 1571. The Wencke Court noted that summary proceedings can resolve disputes "without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte*. 783 F.2d at 837 n.9. Moreover, no due process violation occurs unless Talbot can establish some prejudice flowing from the process adopted by the Court. Id. at 837-38.

In this case, Talbot has been provided notice an opportunity to be heard. The Court established a process by which Trigon investors could file a claim against the receivership estate and set a bar date for filing such claims. See Docket # 54. After the bar date, the Commission proposed its Plan and provided notice to all potential claimants. Docket #s 71 and 72. The Plan provided ample time for objections. Id. Talbot has

made her objection and had an opportunity to present her arguments to the Court. Due process requires no more.

Talbot cannot establish any prejudice flowing from the procedures adopted by the Court. Talbot contends that she has been denied discovery or the opportunity to dispute the information in the possession of the Commission or the Receiver. Docket # 91 at 9-10. The Commission's position with respect to Talbot's objection is based on evidence that she provided and Trigon's bank records. Talbot admits she did not invest with Trigon. Id. at 3 and 8. Her improperly filed claim form is an exhibit to her memorandum. Docket # 91-1 at Ex. A. She also admits to receiving payments from Trigon and Yost on the purchase agreement that exceed the benchmark percentage. Docket #91-2 at Ex. A. Talbot has not and cannot point to any disputed evidence to which she does not have access, and, thus, she simply cannot establish any prejudice.

Finally, these proceedings do not resolve the receiver's claim against Talbot. Instead these proceedings only determine whether Talbot is a Class 3 claimant who has properly submitted a claim form and is entitled to a distribution from the receivership estate.

## IV. CONCLUSION

The Plan represents a fair and equitable means of distributing the Receivership estate and maximizes returns to all investors. For the foregoing reasons, the Commission respectfully requests that this Court adopt the Plan as proposed.

Respectfully submitted this 23rd day of August 2010.

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