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Richard Weissman  
Richard Weissman Law Offices  
12121 Wilshire Blvd Suite 600  
Los Angeles, CA 90025

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Joel BryanAnderson Krehbiel McCreary & Bryan31351 Via Colin  
asSte 204Westlake Village CA 91362,

Lisa M ChaitStephan Oringher Richman & Theodora2029 Century  
Pk E, 6th FlLos Angeles CA 90067-2907,

Richard WeissmanRichard Weissman Law Offices12121 Wilshire  
Blvd Suite 600Los Angeles CA 90025,

Mildred Stultz18905 Ross RoadBothell WA 98011,

Robert C AveryAscione Heideman and McKay2696 N University Av  
e, Suite 180Provo UT 84604-3848US--Case Participants: John

B Bulgozdy (bulgozdyj@sec.gov, larofiling@sec.gov, marcelom@  
sec.gov), Stephen Lawrence Cohen (cohens@sec.gov), John Will

iam Cotton (jcotton@cglp.com), Jerome H Friedberg (jfriedbe  
rg@tocounsel.com), Aaron C Gundzik (agundzik@cglp.com), Jus

tin D Heideman (jheideman@hmho-law.com), Stacey M Nahrwold (  
nahrwolds@sec.gov), Richard P Ormond (rormond@buchalter.com)

, Michael A Piazza (ayersl@gtlaw.com, leegr@gtlaw.com, oclit  
dock@gtlaw.com, osborn@gtlaw.com, piazzam@gtlaw.com, rhodes

d@gtlaw.com), David S Reidy (dreidy@reedsmith.com, jpingel@r  
eedsmith.com, navakian@reedsmith.com), Timothy Allen Scott (  
aarteaga@timscottlaw.com, dsilldorf@timscottlaw.com, tscott@

timscottlaw.com), Michael C Smith (michaelcsmith@mindspring.  
com), Michael L Wachtell (mwachtell@buchalter.com), Judge An

drew J. Guilford (crd\_guilford@cacd.uscourts.gov, david\_clar  
k@cacd.uscourts.gov, katie\_kramer@cacd.uscourts.gov), Magist

rate Judge Margaret A. Nagle (crd\_nagle@cacd.uscourts.gov)--  
Non Case Participants:--No Notice Sent:

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Exchange Commission v. Tri Energy Inc et al Order

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Case Number:5:05-cv-00351-AG-MAN

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Docket Text:

ORDER APPROVING DISTRIBUTION PLAN by Judge Andrew J. Guilford. (twdb)

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Justin D Heideman        jheideman@hmho-law.com

Stacey M Nahrwold        nahrwolds@sec.gov

Aaron C Gundzik         agundzik@cglp.com

John William Cotton      jcotton@cglp.com

Richard P Ormond        rormond@buchalter.com

Timothy Allen Scott      aarteaga@timscottlaw.com, dsilldorf@  
timscottlaw.com,  
tscott@timscottlaw.com

Stephen Lawrence Cohen    cohens@sec.gov

Michael L Wachtell       mwachtell@buchalter.com

David S Reidy            jpingel@reedsmith.com, dreidy@reedsmith.co  
m,  
navakian@reedsmith.com

Michael C Smith         michaelcsmith@mindspring.com

John B Bulgozdy         marcelom@sec.gov, bulgozdyj@sec.gov, lar  
ofiling@sec.gov

Jerome H Friedberg      jfriedberg@tocounsel.com

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Joel Bryan  
Anderson Krehbiel McCreary & Bryan

31351 Via Colinas  
Ste 204  
Westlake Village CA 91362

Lisa M Chait  
Stephan Oringher Richman & Theodora  
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Los Angeles CA 90067-2907

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Los Angeles CA 90025

Mildred Stultz  
18905 Ross Road  
Bothell WA 98011

Robert C Avery  
Ascione Heideman and McKay  
2696 N University Ave, Suite 180  
Provo UT 84604-3848  
US

1 UNITED STATES DISTRICT COURT  
 2 CENTRAL DISTRICT OF CALIFORNIA  
 3 SOUTHERN DIVISION

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 CENTRAL DISTRICT OF CALIFORNIA  
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4 SECURITIES AND EXCHANGE ) Case No.: ED-CV 05-00351- AG  
 5 COMMISSION, )  
 6 Plaintiff, )  
 7 vs. ) HEARING DATE: MARCH 21, 2011  
 8 TRI ENERGY, INC., H & J ) TIME: 10:00 AM  
 9 ENERGY COMPANY, INC., ) COURTROOM: 10D  
 10 MARINA INVESTORS GROUP, ) ASSIGNED JUDGE:  
 11 INC., LOWELL DECKER, ROBERT ) HON. ANDREW GUILFORD  
 12 JENNINGS, HENRY JONES, and )  
 13 ARTHUR SIMBURG, )  
 14 Defendants. )  
 15 and )  
 16 LA VIE D'ARGENT, R.P.J. ) ~~PROPOSED~~ ORDER APPROVING  
 17 INVESTMENT GROUP, INC., ) DISTRIBUTION PLAN  
 18 T.M.A. INVESTMENT )  
 19 ENTERPRISES, and THOMAS )  
 20 AVERY, ADRIENNE LAU, ET AL )  
 21 Relief )  
 22 Defendants. )

16 [PROPOSED] ORDER APPROVING DISTRIBUTION PLAN

17 The receiver, Richard Weissman ("Receiver") has moved the  
 18 Court for an order approving a distribution plan of the funds  
 19 he holds on behalf of defendants Tri Energy, Inc., Marina  
 20 Investment Group, Inc., Robert P. Jennings, Arthur Simburg,  
 21 Henry U. Jones, Jessica Jones, Yekaterina Jones (collectively,  
 22 the "Tri Energy Funds") and such funds deposited to the  
 23 Court's Registry Investments Account ("CRIS Funds")  
 24 (collectively, the (TRI/MIG Fund") pursuant to disgorgement  
 25 judgments entered in this action against certain Relief  
 26 Defendants, Nga Wing Lau (also known as Adrienne Lau), and  
 27 Daniel J. Merriman, DJM, LLC, Financial MD, Inc. and Financial  
 28

1 MD and Associates (collectively, "Merriman"). The Judgment  
2 Defendants and Relief Defendants are collectively referred to  
3 herein as "the Defendants". Plaintiff Securities and Exchange  
4 Commission ("Commission") concurs with the requested relief.  
5 After reviewing all the papers filed in connection with the  
6 motion, the Court hereby grants Receiver's motion, and it is  
7 hereby,

8  
9       **ORDERED** that the proposed Plan of Distribution described  
10 below is hereby approved and that the Receiver, Richard  
11 Weissman, is granted additional powers and duties over the  
12 TRI/MIG Fund and the CRIS Funds (collectively, "the  
13 Distribution Fund") arising out of this action to effectuate a  
14 distribution to injured claimants.

15  
16       **FURTHER ORDERED** that the Receiver shall have the following  
17 specific additional powers and duties:

18       1. The Receiver shall coordinate with the  
19 Court-appointed Tax Administrator, Damasco & Associates LLP,  
20 to insure that the Distribution Fund is deemed a Qualified  
21 Settlement Distribution Fund ("QSF") under Section 468B(g) of  
22 the Internal Revenue Code, and related regulations, 26 C.F.R.  
23 §§ 1.468B-1 through 5, and that the QSF complies with all  
24 related legal and regulatory requirements, including, but not  
25 limited to, satisfying any reporting or withholding  
26 requirements imposed on distributions from the QSF.

27       2. The Receiver may retain attorneys, accountants and  
28 other persons to assist in carrying out this Order. The

1 Receiver will take affirmative steps to ensure such persons  
2 and entities remain free of conflicts of interest that could  
3 keep them from fully and properly exercising their duties.

4       3. The Receiver shall, at such times as may be  
5 appropriate, petition the Court for interim approval and award  
6 of the Receiver's fees and expenses, and the reasonable fees  
7 and expenses for services of professionals he retains, prior  
8 to payment. The Receiver will be entitled to seek compensation  
9 at the same rates as previously charged in this action: (i)  
10 the Receiver, \$225 per hour for administrative duties  
11 performed, or \$295 per hour when rendering legal services on  
12 behalf of the Distribution Fund or in the distribution of the  
13 proceeds of the Distribution Fund; (ii) the Receiver's  
14 administrative employees, \$65-\$95 per hour; (iii) accounting  
15 employees, \$95 per hour; (iv) paralegal employees, \$40-\$65 per  
16 hour; and (v) senior paralegal staff, \$145 per hour.

17       4. The Receiver shall, as provided below, take  
18 appropriate and reasonable steps to distribute the  
19 Distribution Fund to persons who made loans to and invested  
20 funds with or through Defendants in the manner and during the  
21 relevant time period alleged in the complaint in this matter.

22       5. The Receiver shall administer a claims process to  
23 determine who are actual victims of the investment scheme and  
24 are eligible to receive a full or partial share of the  
25 Distribution Fund. The process shall include the following:

- 26           a. The Receiver shall, with the assistance of the  
27 Commission staff, review defendants' business  
28 records obtained during his investigation of this



1 matter to identify potential Claimants of the  
2 Distribution Fund ("Potential Claimants").

3 b. The Receiver shall provide the Potential  
4 Claimants with written notice by certified mail  
5 of the right to submit a claim ("Notice"). The  
6 notice shall consist of (i) a summary statement  
7 of the distribution plan and its purpose, (ii)  
8 instructions for filing a Claim Form, and (iii) a  
9 Claim Form (collectively, the "Claim Package").  
10 The Claim Package shall be submitted to the  
11 *Court and* Commission staff for review and approval before  
12 mailing to Potential Claimants.

13 c. The Receiver shall make reasonable attempts to  
14 locate any Potential Claimant whose Claim Package  
15 is returned by the U.S. Postal Service ("USPS")  
16 as undeliverable. The Receiver shall immediately  
17 remail by certified mail any returned undelivered  
18 mail for which the USPS has provided a forwarding  
19 address. Additionally, the Receiver may engage a  
20 third-party search firm to conduct more rigorous  
21 searches for Potential Claimants whose addresses  
22 are invalid. Any additional efforts to identify  
23 new addresses for returned undelivered mail will  
24 be conducted only as necessary and economically  
25 reasonable after consultation with the Commission  
26 staff.

27 d. In addition, the Receiver, in consultation with  
28 the Commission staff, shall publish Notice of the

1 Distribution Plan to other potential Claimants  
2 through the Commission's website at www.sec.gov.,  
3 the Receiver`s website, at  
4 www.richardweissmanreceiver.com and through  
5 similar private internet based means. The notice  
6 shall include the contact information of the  
7 Receiver, a copy of this Order, a Claim Package,  
8 and the deadline for the filing of claims ("the  
9 Bar Date"). The cost of private internet  
10 (website) notice shall not exceed \$25,000.

11 e. The Bar Date shall be 150 days from the date of  
12 initial publication of Notice on the Commission's  
13 website. Any claim postmarked after the Bar Date  
14 may be rejected by the Receiver as untimely. Each  
15 Potential Claimant must submit a proof of claim  
16 form (as prepared by the Receiver) and must  
17 certify the existence and the amount of any such  
18 claim under penalty of perjury and shall submit  
19 any records that the Receiver may require to  
20 substantiate the existence or amount of a claim  
21 (the "Proof of Claim"). Potential Claimants must  
22 also provide the Receiver on the Proof of Claim  
23 their Social Security Numbers for tax purposes  
24 and to certify that the potential distribution to  
25 them is not subject to any withholding of an  
26 amount to pay taxes due the Internal Revenue  
27 Service. The Receiver will maintain the  
28 confidentiality of all personal identification

1 information. "Potential Claimants" shall be  
2 deemed to include the claims of vendors and  
3 independent contractors approved in the Order  
4 entered on March 2, 2009.

5 f. The Receiver shall determine the amount to be  
6 paid to each Claimant by determining each  
7 Claimant's proportionate share of loss relative  
8 to the aggregate of other Claimants' established  
9 losses. The intention of this distribution is to  
10 compensate victims (investors) who loaned money  
11 to, or invested with the Defendants, pursuant to  
12 the fraudulent schemes alleged in the amended  
13 complaint or as otherwise set forth in the  
14 respective disgorgement judgments. Each person  
15 whom the Receiver determines is a "qualified"  
16 investor following a Potential Claimant's filing  
17 of a complete and fully supported Proof of Claim  
18 will be deemed an "Eligible Claimant" upon the  
19 Receiver's full or partial preliminary approval  
20 of the Claimant's Proof of Claim. The Receiver  
21 shall not make distributions to any Potential  
22 Claimant who was a defendant or Relief Defendant,  
23 a nominee or relative of a defendant or Relief  
24 Defendant, or anyone the Receiver determines to  
25 be affiliated with a defendant, or a Relief  
26 Defendant, in the proceedings.

27 g. The Receiver shall notify all Eligible Claimants  
28 of their pro rata share of the Distribution Fund

1 at the same time the Receiver submits to the  
2 Court his report on the claims process.

3 h. Where the Receiver denies a claim based on a  
4 deficiency in the submitted Proof of Claim, the  
5 Receiver shall notify the Claimant that he or she  
6 has 15 days to request reconsideration and to  
7 provide additional documentation to support the  
8 claim. A Potential Claimant's failure to cure  
9 satisfactorily the Claim deficiency shall result  
10 in the Claimant being reported as an Ineligible  
11 Claimant to the extent of the uncured deficiency.

12 i. Except as otherwise provided herein, the filing  
13 of a Proof of Claim with the Receiver shall  
14 constitute consent by the Claimant to the  
15 jurisdiction of the Court supervising the  
16 distribution of the Distribution Fund to  
17 adjudicate all aspects of the claims process.

18 j. Further, by filing a Proof of Claim, each  
19 Claimant also shall consent as follows:

20 (i) Any disapproval or dispute by the Receiver  
21 of a claim shall be submitted by the  
22 Receiver to the Court for final review and  
23 full or partial approval or disapproval,  
24 upon noticed motion, with notice to each  
25 disapproved Claimant. The failure of a  
26 Claimant to submit to the Receiver  
27 sufficient proof of his/her claim shall  
28 constitute grounds upon which the Receiver

1                    may base his preliminary denial or  
2                    objection to the claim, independently from  
3                    an untimely filed claim.

4                    (ii) Any opposition by a Claimant to the  
5                    Receiver's final denial or objection to a  
6                    claim shall be filed with the Court and  
7                    served by the Claimant on the Receiver and  
8                    counsel for the Commission, as required by  
9                    the Federal Rules of Civil Procedure and  
10                    the local rules of this Court following the  
11                    Receiver's notice of filing his final  
12                    report on the claims process and motion for  
13                    the Court's review thereof. Said Claimant's  
14                    objection or opposition shall be  
15                    accompanied by competent evidence submitted  
16                    by written declaration under penalty of  
17                    perjury as to the accuracy, veracity and  
18                    authenticity of such evidence. Any reply by  
19                    the Receiver and/or the Commission shall be  
20                    in accordance with the Federal and Local  
21                    Rules of Civil Procedure.

22                    (iii) All claims and distribution issues shall be  
23                    heard and adjudicated by the Court sitting  
24                    without a jury.

25                    k. To maintain a high-level of quality control, at  
26                    the Commission's request, the Receiver shall  
27                    retain an independent outside firm or party that  
28                    is acceptable to the Commission staff to perform

1 an independent review of agreed upon procedures  
2 designed to ensure that claims have been  
3 accurately processed, calculated, and validated  
4 based upon a statistically designed random  
5 sample. Upon completion of the independent  
6 review, the independent outside firm or party  
7 shall provide a report of its findings to the  
8 Commission staff in the manner prescribed by the  
9 Commission staff. Based upon the results of the  
10 review, the Receiver shall correct any individual  
11 errors identified and perform database searches  
12 or additional procedures to correct any errors  
13 that may have occurred during claims processing,  
14 and consult on any such corrections or additional  
15 procedures with the Commission staff.

- 16 1. The Receiver shall set aside a portion of the  
17 Distribution Fund to pay taxes on its income and  
18 the fees and expenses incurred or likely to be  
19 incurred in carrying out this Order (the  
20 "Administrative Reserves").
- 21 m. The Receiver shall then allocate the balance of  
22 the Distribution Fund, minus Administrative  
23 Reserves, to the Eligible Claimants pro rata,  
24 based on the amounts of their claims as allowed  
25 by the Receiver and approved by the Court.
- 26 n. The Receiver shall file a report of his findings  
27 of Eligible and Ineligible Claimants and apply to  
28 the Court for review and approval of the report

1 and proposed allocation of the Distribution Fund  
2 to approved Eligible Claimants and for  
3 Administrative Reserves (collectively, the "Final  
4 Distribution").

5 o. Upon Court approval of the Final Distribution,  
6 the Receiver shall pay from the Administrative  
7 Reserves all outstanding taxes payable by the  
8 Distribution Fund and pay all remaining fees and  
9 expenses incurred in carrying out this Order; and  
10 shall disburse the Distribution Fund to the  
11 Eligible Claimants as approved by the Court.

12 p. To enable the Receiver to distribute funds to  
13 Eligible Claimants and to pay Administrative  
14 Reserves, the Court, as part of its order  
15 approving the foregoing will issue an order to  
16 the Clerk of the Court authorizing him or her to  
17 transfer to the Receiver all CRIS Funds related  
18 to the Distribution Fund.

19 q. Upon receipt of the monies from the Court's CRIS  
20 Account(s) in this matter, the Receiver shall  
21 sign a receipt acknowledging his receipt of the  
22 funds, as requested by the Clerk of the Court.  
23 The Receiver shall then file such signed receipt  
24 with the Court and supply a copy thereof to  
25 counsel for the Commission.

26 r. All Distribution Funds shall be invested in  
27 short-term U.S. Treasury securities backed by the  
28 full faith and credit of the U.S. Government

1 and/or in fully FDIC insured non-interest bearing  
2 checking or interest bearing accounts at one or  
3 more U.S. commercial banks, all of a type and  
4 term necessary to meet the cash requirements of  
5 the payments to Eligible Claimants, tax  
6 obligations and fees; provided, however, that the  
7 investments in U.S. Treasury securities and/or  
8 the non-interest or interest bearing checking  
9 account(s) will not be made through repurchase  
10 agreements or other derivative products. The  
11 Receiver shall provide duplicate original bank  
12 and/or investment statements to the Tax  
13 Administrator as necessary upon request.

- 14 s. Presented investor checks will be subject to  
15 "positive pay" controls before they are honored  
16 and paid by the bank.
- 17 t. All payments to Eligible Claimants shall be  
18 preceded or accompanied by a communication that  
19 includes, as appropriate: (a) a statement  
20 characterizing the distribution; (b) a statement  
21 that checks will be void after 90 days; and (c)  
22 the name and contact information of the Receiver,  
23 to be used in the event of any questions  
24 regarding the distribution. The communication to  
25 recipients characterizing their distributions  
26 shall be first submitted to the Commission for  
27 review and approval. All distribution checks or  
28 the accompanying mailing will clearly indicate



1 that the money is being distributed from a  
2 Distribution Fund established by the Commission.

3 u. Receipt and acceptance by a Claimant of a payment  
4 from the Distribution Fund shall constitute a  
5 full release of all claims and rights of appeal  
6 that the Claimant may have against the Receiver,  
7 his Agents, and the Commission in connection with  
8 the administration of the Plan and Distribution  
9 Fund, and the Claimant shall be enjoined from  
10 prosecuting or asserting any such claims in any  
11 Court.

12 v. All checks will bear a "stale date" of 90 days  
13 from the date of the check. Checks that are not  
14 negotiated within the stale date shall be voided  
15 and the issuing financial institution shall be  
16 instructed to stop payment on those checks.

17 w. Checks returned as undeliverable by the USPS and  
18 for which a new address has been provided by the  
19 USPS will be remailed to the new address. For  
20 checks returned as undeliverable by the USPS and  
21 for which no new address is provided, the  
22 Receiver or his agent shall conduct an address  
23 update search. Additional efforts to identify  
24 current addresses for returned checks will be  
25 conducted as economically reasonable after  
26 consultation with Commission staff. Where new  
27 address information otherwise becomes available,  
28 the Receiver shall send the distribution check to

1 the new address. Where new address information is  
2 not available after a reasonable search (and in  
3 no event later than 90 days after the initial  
4 mailing of the original check), the check shall  
5 be voided and the Receiver shall instruct the  
6 issuing financial institution to stop payment on  
7 such check.

8 x. Where an Eligible Claimant's check has not been  
9 negotiated within 90 days from the date of issue  
10 and has been voided by the Receiver, that  
11 Claimant's claims herein shall be extinguished.  
12 All such funds will be returned to the  
13 Distribution Fund.

14 y. If any money remains in the Distribution Fund  
15 after all distributions to Eligible Claimants and  
16 all payments of taxes, fees and expenses have  
17 been made (including any funds resulting from  
18 stop payments on distribution checks that  
19 remained uncashed for more than 90 days), the  
20 Receiver shall pay such residual to the Commission  
21 for transfer to the United States Treasury.

22 z. Where the Receiver deems necessary, after  
23 consultation with the Commission, the Receiver may  
24 modify the distribution procedure to effectuate the  
25 general purposes of this Order.

26  
27 6. The Receiver shall give the Commission at least 30 days  
28 notice of all applications to the Court under this Order and shall

1 regularly report to the Commission on the status of the Receiver's  
2 activities in executing this Order.

3 7. The Receiver and his designees, agents, and employees  
4 are excused from any requirement to post a bond or other  
5 undertaking and shall not be liable to any person for their actions  
6 hereunder, except on a finding by this Court of malfeasance,  
7 reckless disregard of duty, or ~~gross~~ negligence.

8 8. The Receiver will file a status report with the Court and  
9 Commission in a format to be provided by the Commission, within  
10 ninety (90) days of entry of this Order; quarterly reports are to  
11 be filed thereafter; and a final accounting in a format to be  
12 provided by the Commission shall be filed when the Receiver's  
13 duties are completed. No hearing on the final accounting will be  
14 required unless the Court or the Commission requests a hearing.

15 9. The Receiver may be removed sua sponte at any time by the  
16 Court or upon motion of the Commission and replaced with a  
17 successor. In the event the Receiver decides to resign, he shall  
18 first give written notice to the Court and the Commission of his  
19 intention, and his resignation, if permitted by the Court, shall  
20 not be effective until the Court appoints a successor. The  
21 Receiver shall then follow such instructions as the Court gives in  
22 turning over custody, control, and management of the Distribution  
23 Fund and other property collected pursuant to the Court's orders.

24 10. Upon final distribution of the funds and the filing of a  
25 final accounting as provided above, the claims program shall be  
26 eligible for termination, and the Receiver shall be discharged  
27 therefrom when the following have occurred: (1) the final  
28 accounting has been submitted and approved by the Court, (2) all

1 taxes and fees have been paid and (3) all remaining Distribution  
2 Funds or residual have been paid to the Commission for transfer to  
3 the United States Treasury.

4 ORDERED, the Receiver is authorized to disburse monthly from  
5 the Distribution Funds the reasonable administrative fees and  
6 expenses necessary for the Receiver to carry out the claims  
7 administration under this Order, following the Receiver's  
8 submission of a monthly report to the Commission detailing the  
9 specific fees and expenses incurred and paid, or to be paid. The  
10 Receiver shall file quarterly reports of fees and expenses with the  
11 Court as part of his quarterly reports under paragraph 8, above.

12 All fees and expenses are subject to review by Commission staff and  
13 interim and/or final review and confirmation shall be by the Court.

14 If, in the Court's judgment, any of the fees and expenses paid on  
15 an interim basis are found not to be fair and reasonable, the Court  
16 may require that such amounts be offset against administrative fees  
17 and expenses subsequently incurred.

18 SO ORDERED.

19  
20  
21 DATED: MARCH 21, 2001

  
22 HON. ANDREW GUILFORD  
23 UNITED STATES DISTRICT JUDGE  
24  
25  
26  
27  
28