

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF LOS ANGELES**

MICHAEL R. SMITH, RICHARD GIRARD,  
and RICHARD YAMANE, on behalf of  
themselves and all others similarly situated and  
as private attorneys general on behalf of the  
members of the general public,

Plaintiffs,

v.

EASTERN PACIFIC ENERGY, INC.,  
a California corporation; TONY WAYNE,  
an individual; JAMES LEZIE, an individual;  
JEFF GIBSON, an individual; BETSY GIBSON,  
an individual; and DOES 1 through 20, inclusive,

Defendants.

---

Case No. BC 193285

**CLASS ACTION**

**NOTICE OF PENDENCY  
OF CLASS ACTION**

**TO: ANY PRESENT OR FORMER MANAGER OR SALES REPRESENTATIVE OF EASTERN PACIFIC ENERGY, INC. WHO IS A MEMBER OF "THE MANAGER CLASS" AND/OR "THE SALES REPRESENTATIVE CLASS" AS DEFINED IN THIS NOTICE**

YOU ARE HEREBY NOTIFIED, pursuant to Rule 15.18(f) of the Los Angeles County Superior Court Rules and an order of the Superior Court of the State of California for the County of Los Angeles ("the Los Angeles Superior Court") dated January 21, 2000, that there is now pending, before the Honorable Bruce Mitchell in the Los Angeles Superior Court, a class action on behalf of the following two classes: (1) the Manager Class; and (2) the Sales Representative Class.

The "**Manager Class**" includes all persons who were residents of the State of California as of June 24, 1998 and who, prior to that date, signed a version of the Sales Representative Management Agreement ("SRMA") with Eastern Pacific Energy, Inc. ("EPE") which contains either of the following recitals: (a) "EPE has established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and Avista Energy, wholly owned subsidiaries of Washington Water Power"; or (b) "EPE has established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage, a wholly owned subsidiary of Washington Water Power, both of Spokane, Washington."

The "**Sales Representative Class**" includes all persons who were residents of the State of California as of June 24, 1998 and who, prior to that date, signed a version of the Sales Representative Agreement ("SRA") with Eastern Pacific Energy, Inc. ("EPE") which contains either of the following recitals: (a) "EPE has established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and Avista Energy, wholly owned subsidiaries of Washington Water Power"; or (b) "EPE has established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage, a wholly owned subsidiary of Washington Water Power, both of Spokane, Washington."

**The purpose of this Notice is to inform you of the pendency of this class action, the manner and extent to which this class action may affect your rights, and what steps you may take in relation to this class action. This Notice is being sent to you because the records of EPE indicate that you may be a member of one or both classes.**

THIS NOTICE IS NOT AN EXPRESSION OF ANY OPINION BY THE LOS ANGELES SUPERIOR COURT AS TO THE MERITS OF THE CLAIMS OR DEFENSES BY ANY OF THE PARTIES TO THIS CLASS ACTION.

#### **PARTIES TO THE ACTION**

The plaintiffs who are pursuing this action on behalf of the members of the Manager Class and the Sales Representative Class are Michael R. Smith, Richard Girard and Richard Yamane (collectively, "Plaintiffs"). Michael R. Smith is a member of the Sales Representative Class and has been certified by the Los Angeles Superior Court to represent the interests of the Sales Representative Class in this action. Richard Girard and Richard Yamane are members of the Manager Class and have been certified by the Los Angeles Superior Court to represent the interests of the Manager Class in this action.

The defendants in this action are EPE, Tony Wayne, James Lezie, Jeff Gibson and Betsy Gibson (collectively, "Defendants"). Mr. Wayne, Mr. Lezie, Mr. Gibson and Mrs. Gibson (collectively, "the Individual Defendants") are each present or former officers and/or directors of EPE.

#### **DESCRIPTION OF THE ACTION**

The complaint in this action was filed by Plaintiffs on June 24, 1998. Defendants filed their answer to the complaint on September 14, 1998, generally denying the allegations in the complaint and asserting various affirmative defenses to the causes of action alleged in the complaint.

In their complaint, Plaintiffs allege that they were recruited to act as managers and/or sales representatives of EPE for the purpose of marketing to, and executing sales contracts with, electric power consumers in the State of California. Plaintiffs allege that they signed form contracts with EPE which included a standardized, common representation that EPE had established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and/or Avista Energy (together, "Avista"), wholly owned subsidiaries of Washington Water Power. Plaintiffs allege that, unbeknownst to them at the time, this representation was false.

Plaintiffs further allege that, prior to executing their contracts to act as a manager or sales representative of EPE, Defendants failed to disclose to, and concealed from, Plaintiffs the fact that EPE did not have established contractual agreements with Avista.

Plaintiffs allege that, in reliance upon the written representations which were made to them concerning the existence of an agreement between EPE, on the one hand, and Avista, on the other hand, for the provision of low-cost electric power to California consumers, Plaintiffs either executed an SRA and became a sales representative for EPE or executed an SRMA and became a manager for EPE. Plaintiffs allege that, thereafter, they invested their time and money and performed substantial marketing efforts on EPE's behalf. Plaintiffs allege that, as a result of their sales activities, EPE executed numerous contracts with California consumers for the provision of electric power.

Plaintiffs further allege that, in or about late 1997, Plaintiffs discovered that EPE did not have a contract with Avista for the provision of low-cost electric power to California consumers. Plaintiffs allege that, once this fact became known, numerous customers canceled their contracts, and many potential customers refused to sign contracts.

Defendants allege that the claims asserted by Plaintiffs are unfounded, deny all allegations of wrongdoing, and deny any liability to Plaintiffs or any other class members. Specifically, Defendants maintain that the alleged misrepresentation about which Plaintiffs complain was true, correct and reasonably made and that the claims which are asserted against Defendants are barred both by applicable law and by the express terms of the SRA and the SRMA.

### **CLASS ACTION DETERMINATION**

As a result of a series of hearings held before the Honorable Bruce Mitchell on July 7, 1995, October 5, 1999, October 22, 1999, November 12, 1999 and January 12, 2000, the Los Angeles Superior Court certified this action as a class action to be maintained by Plaintiffs, as the representatives of the Manager Class and the Sales Representative Class, and by their attorneys of

record, A. Barry Cappello, Esq. and J. Paul Gignac, Esq. of Cappello & McCann LLP, as Class Counsel. Communications with Class Counsel should be in writing and directed to:

J. Paul Gignac, Esq.  
CAPPELLO & McCANN LLP  
831 State Street  
Santa Barbara, California 93101

In certifying this case to proceed as a class action, the Court imposed the following limitations upon the case:

(1) The Manager Class and the Sales Representative Class are certified as to liability issues only and, with respect to the Individual Defendants, Plaintiffs are limited to trying to establish the Individual Defendants' liability as alter egos of EPE. As a result, while issues relating to Defendants' alleged liability will be determined on a class wide basis, each member of the Manager Class and/or the Sales Representative Class will be required to prove any alleged damages on an individual basis.

(2) The Manager Class and the Sales Representative Class are certified as to the following causes of action only: breach of contract; intentional misrepresentation; negligent misrepresentation; concealment; and fraudulent nondisclosure.

(3) Plaintiffs' theory of liability as to EPE shall be limited, now and at the time of trial, to the following:

(a) Plaintiffs were induced to enter into either an SRA or an SRMA with EPE based upon either (1) a written representation in the SRA and/or the SRMA that EPE had established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and/or Avista Energy or (2) the failure of EPE to disclose that EPE did not have established contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and/or Avista Energy; and/or

(b) EPE breached the SRA and/or the SRMA by failing to have the promised contractual agreements for the provision of electric power generation to California consumers through Avista Advantage and/or Avista Energy.

#### **EFFECT OF CLASS ACTION DETERMINATION**

**If you are a member of the Manager Class and/or the Sales Representative Class described above and wish to remain a member of that class, you need not respond to this Notice or take any action with respect to it at this time.** Your interests will be represented by Plaintiffs, as representatives of the Manager Class or the Sales Representative Class, and by their attorneys, as Class Counsel. Class members will be entitled to participate in the proceeds of any judgment or settlement in favor of their class. Under the legal doctrine of *res judicata*, the

judgment entered in this action, whether favorable or not, may include and bind all members of the Manager Class and/or the Sales Representative Class who do not request exclusion.

Since the Los Angeles Superior Court has certified this action to proceed as a class action, this action may not be dismissed, settled or compromised without the approval of the Los Angeles Superior Court. In the event of any proposed compromise or settlement, all members of the Manager Class and the Sales Representative Class shall receive a further notice informing them of the basis for and terms of any proposed compromise or settlement and affording them an opportunity to comment upon and/or object to the proposed settlement. If this action is not settled, you may be required to participate in discovery and you may be required to testify at the time of trial.

### **RIGHT TO BE EXCLUDED FROM THE CLASS ACTION**

**Any class member who wishes to exclude himself or herself from the Manager Class and/or the Sales Representative Class may do so by exercising his or her right to be excluded from such class.** If you request exclusion, then you will not be entitled to share in any recovery obtained for the benefit of the Manager Class or the Sales Representative Class; you will not be bound by any judgment, whether favorable or not, entered for or against the Manager Class or the Sales Representative Class; and you will be free to pursue or not pursue any legal rights you may have against Defendants. If you do not request exclusion, then you may be bound by the judgment entered in this action, whether favorable or not, under the legal doctrine of *res judicata*.

All requests for exclusion must be made in writing, must identify the class from which you request to be excluded (the Manager Class and/or the Sales Representative Class), and must be mailed to:

Eastern Pacific Energy Class Action  
2801 Ocean Park Boulevard  
PMB # 277  
Santa Monica, California 90405

**All written requests for exclusion must be post-marked no later than April 28, 2000,** and must include your name, address, telephone number and signature. Any request for exclusion made on behalf of a class member by a representative of that class member must state the capacity in which the representative is acting. **You may use the form which is attached to this Notice in order to request exclusion.**

### **RIGHT TO APPEAR IN THE CLASS ACTION**

Any class member who does not request exclusion, and who so wishes, may apply to the Los Angeles Superior Court for permission to appear in this class action as a named class representative. Prior to doing so, you must enter a formal appearance through your counsel.

The original of all documents relating to an appearance should be filed with the Clerk of the Superior Court located at 111 N. Hill Street, Los Angeles, California 90012-3117. Such documents shall be identified as filed in connection with this class action by including thereon the caption and case number appearing at the head of this Notice. Copies of all documents filed with the Los Angeles Superior Court must be served by mail upon the following counsel:

J. Paul Gignac, Esq.  
CAPPELLO & McCANN LLP  
831 State Street  
Santa Barbara, California 93101

If you do not enter an appearance through counsel of your choice at your own expense, you will be represented in this class action by Class Counsel appointed by the Los Angeles Superior Court. Class counsel are A. Barry Cappello, Esq. and J. Paul Gignac, Esq. of the law firm of Cappello & McCann LLP.

#### **ARBITRATION OF CLAIMS**

Defendants intend to request that the claims as to which Plaintiffs have been certified to proceed on behalf of the Manager Class and the Sales Representative Class be compelled to binding arbitration pursuant to a provision set forth in the SRA and the SRMA. The Court has stated that it likely will order these claims to arbitration. If these claims are compelled to arbitration, the issue of Defendants' liability on these claims will be decided by one or more arbitrators rather than in a jury trial. However, even were you to file a request for exclusion from the Manager Class or the Sales Representative Class in order to pursue individual claims on your own behalf, it is unlikely that you would be able to obtain a jury trial on your individual claims.

#### **RECOVERY BY CLASS MEMBERS**

The amount, if any, which any individual member of the Manager Class and/or the Sales Representative Class may recover by means of a judgment in this action is not known at this time and may depend on a variety of factors including, but not limited to, certain defenses raised by Defendants which, if established, may affect the nature or the amount of the recovery, if any, by individual members of the Manager Class or the Sales Representative Class.

Defendants assert that the recovery of damages in this action is limited by a provision in the SRA and the SRMA which states that EPE shall not, under any circumstances, be liable for special, indirect, incidental or consequential damages of whatever nature. Plaintiffs maintain that this provision is not enforceable against the members of the Manager Class or the Sales Representative Class and assert that California law precludes a waiver of such damages for non-negligent conduct such as is alleged by Plaintiffs in this action.

Any monetary settlement which is obtained for the benefit of the Manager Class and/or the Sales Representative Class as a whole will be distributed to members of that respective class pursuant to a plan of allocation approved by the Los Angeles Superior Court. The plan of allocation will be developed based upon discovery conducted in this action with respect to the damages suffered by individual class members, the suggestions of Class Counsel, and the recommendations of the Court.

In the event of a settlement in favor of the Manager Class and/or the Sales Representative Class, you will receive a further notice explaining the proposed plan of allocation and providing you with the opportunity to comment upon and/or object to the proposed plan of allocation.

#### **RESPONSIBILITY FOR ATTORNEYS' FEES AND EXPENSES**

In a class action, Class Counsel's entitlement, if any, to the payment of their attorneys' fees and the reimbursement of their expenses is determined by the Court at the conclusion of the case.

If this class action is successful and a monetary recovery or other relief is obtained for the benefit of the members of the Manager Class and/or the Sales Representative Class, either through settlement or judgment, Class Counsel will apply to the Los Angeles Superior Court for approval of the payment of their attorneys' fees and reimbursement of their expenses from the monetary recovery. Class Counsel anticipate seeking attorneys' fees which represent thirty percent (30%) of the gross amount of any recovery on behalf of the Manager Class and the Sales Representative Class. However, depending upon the amount of the monetary recovery obtained for the benefit of the Manager Class and/or the Sales Representative Class, as well as the nature of any other relief obtained for the benefit of the Manager Class and/or the Sales Representative Class, Class Counsel may seek a greater or lesser award of attorneys' fees.

Both the SRA and the SRMA contain a provision which permits the prevailing parties in this litigation to recover their attorneys' fees should the case be compelled to arbitration. Therefore, if the case is compelled to arbitration and if Defendants prevail in the defense of the claims being asserted against them, then you, as a member of the Manager Class or the Sales Representative Class, could be determined by the Court or the arbitrator(s) to be personally responsible for a portion of the attorneys' fees incurred by Defendants in defending the claims asserted against them.

Correspondingly, if the case is compelled to arbitration and if Plaintiffs prevail on the claims being asserted against Defendants, then you, as a member of the Manager Class or the Sales Representative Class, may be entitled to share in a recovery which includes both individual compensation to you for your damages and the payment of the attorneys' fees incurred by Class

Counsel in pursuing the claims asserted against Defendants. In such case, your individual recovery would not be diminished by the need to pay for attorneys' fees.

#### **PURPOSE OF NOTICE**

This Notice is not intended to be, and should not be understood as, an expression of any opinion by the Los Angeles Superior Court with respect to the truth of the allegations in this action or the merits of the claims and defenses asserted. This Notice merely serves to advise you of the pendency of this action, the conditions under which the Court has certified this case to proceed as a class action, and your rights in connection therewith.

#### **ADDITIONAL COPIES OF THIS NOTICE**

This Notice is being mailed to all individuals and entities who, on the basis of the books and records maintained by EPE, have been identified as potential members of the Manager Class and/or the Sales Representative Class. However, there can be no assurance that the books and records of EPE are necessarily complete or accurate in this regard. Therefore, **if you are a present or former EPE manager or sales representative, please inform any other EPE manager or sales representative with whom you have worked that he or she may obtain a copy of this Notice** by sending a written request for a copy of the Notice to the following address:

Eastern Pacific Energy Class Action  
2801 Ocean Park Boulevard  
PMB # 277  
Santa Monica, California 90405

Alternatively, any present or former EPE manager or sales representative may access a copy of this Notice over the Internet at the following web site:

<http://web.usxc.net/classaction/>

#### **ADDITIONAL INFORMATION**

The matters identified and described in this Notice do not purport to be comprehensive and should not be considered as such. Accordingly, class members who desire further information may wish to review the pleadings and other records on file with the Los Angeles Superior Court. The documents publicly filed in this class action are available for inspection and copying during regular business hours at the Office of the Clerk, Los Angeles Superior Court, 111 N. Hill Street, Los Angeles, California 90012-3117.

**Please do not telephone the Los Angeles Superior Court or the Office of the Clerk for information regarding this action.**

Dated: February 11, 2000

Clerk of the Los Angeles Superior Court