UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case Number 06-14891
Honorable David M. Lawson

DELPHI CORPORATION, J.T. BATTENBERG, III, ALAN DAWES, PAUL FREE, JOHN BLAHNIK, MILAN BELANS, CATHERINE ROZANSKI, JUDITH KUDLA, B. N. BAHADUR, ATUL PASRICHA, LAURA MARION, STUART DOYLE, and KEVIN CURRY,

Defendants.

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ORDER APPROVING THE DISTRIBUTION PLAN FOR A FAIR FUND AND TERMINATING APPOINTMENT OF *AMICUS CURIAE*

This matter is before the Court on the plaintiff's motion for an order approving the distribution plan for a Fair Fund. The facts underlying this matter have been discussed in recent filings in this case. To summarize, on November 7, 2006, the Court entered judgments against defendants Alan Dawes and B. N. Bahadur for violations of various federal security laws caused by fraudulent accounting practices at the Delphi Corporation in 2000 and 2001. Under those judgments, defendants Dawes and Bahadur paid to the Clerk of the Court $687,000 and $569,257, respectively, representing disgorgement, prejudgment interest, and civil penalties. Those funds presently are held in the Court's Registry. The judgments contemplated that the SEC would "propose a plan to distribute the Fund subject to the Court's approval . . . pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002 [15 U.S.C. § 7246(a)]." ECF No. 10, PageID.130; ECF No. 11, PageID.133. That statute authorizes the SEC to use disgorged funds and civil penalties to compensate injured investors. *See Off. Comm. of Unsecured Creditors of WorldCom, Inc. v. Sec. & Exch. Comm'n*, 467 F.3d 73, 82 (2d Cir. 2006) (Sotomayor, J.).

The SEC never proposed a distribution plan until recently. Instead, in July 2022, it filed a motion asking that the funds in the Court's Registry be turned over to the United States Treasury. At that time, the SEC asserted that it was "infeasible" to identify the investors that were injured by the defendants' fraud in this case. The Court questioned that representation and the propriety of the remedy requested, and it appointed *amicus curiae* to file a brief addressing the issues.

In April of this year, after taking a second look at the task of identifying injured investors, the SEC moved to withdraw its turnover motion and suggested that it could propose a plan for distribution. The Court agreed to hold the turnover motion in abeyance and scheduled a status conference. Later, in lieu of a conference, the SEC filed a motion to establish a Fair Fund, appoint certain administrators, cause a transfer of the Registry funds to the Fair Fund in its control, and establish a deadline for submitting a distribution plan. The Court granted that motion in part but ordered the SEC to file a proposed distribution plan before it granted the SEC's request to transfer the funds from the Court's Registry.

The SEC now seeks the Court's approval of its proposal. The SEC's plan identifies as eligible claimants approximately 96 institutional investors, representing 63.3 percent of the owners of Delphi's outstanding shares during the period covering the defendants' illegal conduct. *Amicus curiae* reviewed the SEC's proposal and recommended approval. He states that he engaged in detailed and extended conversations with the SEC to explore alternative distribution schemes that could provide compensation to additional harmed investors. *Amicus* pointed out that after investigating, there were other methods that could be used to identify more harmed investors, particularly since the Delphi fraud was the subject of several lawsuits that were consolidated into a multidistrict litigation, and two settlements were approved, which required the services of a claims administrator. However, *amicus* and the SEC determined that administering an alternative, broader distribution scheme likely would require significant additional costs, thereby reducing the funds available to harmed parties. *Amicus* ultimately concluded that the SEC's proposed plan is appropriate in scope.

After reviewing the proposal, the Court ordered the SEC to provide a supplemental submission clarifying statements in the briefs that describe the number of harmed investors that might recover under the proposed distribution plan. *See* ECF No. 419. The Court directed the SEC to detail the number of investors it will deem to be "preliminary claimants" under the distribution plan, what proportion of the total shares they represent, and if readily calculable, an estimate of the percentage of shares held by the total pool of harmed investors that will be eligible to participate in the distribution plan. On November 22, 2023, the SEC filed a brief and a declaration of economist Dr. Thomas A. Dunn, addressing the Court's questions. The Court has reviewed the parties' submissions and finds that the proposed distribution plan is fair and reasonable.

It is well recognized that in cases like this one, "disgorged profits are paid to the district court, and it is 'within the court's discretion to determine how and to whom the money will be distributed.'" *Kokesh v. Sec. & Exch. Comm'n*, 581 U.S. 455, 464-65 (2017) (quoting *Sec. & Exch. Comm'n v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). Congress and the courts have expressed a preference that disgorged funds and civil penalties be used to compensate injured investors and not to benefit the Treasury unless other options have been attempted. *See Liu v. Sec. & Exch. Comm'n*, 591 U.S. ---, 140 S. Ct. 1936, 1948 (2020) (discussing "the SEC's obligation to award relief 'for the benefit of investors.'") (citing 15 U.S.C. § 78u(d)(5)). Ultimately, the distribution must be "fair and reasonable" to the investors harmed by the fraud. *See Creditors of WorldCom, Inc.*, 467 F.3d at 82. Courts have recognized that selecting a plan may result in some investors being excluded and therefore have permitted the SEC to "engage in the 'kind of line-drawing [that] inevitably leaves out some potential claimants.'" *Sec. & Exch. Comm'n v. J.P. Morgan Sec. LLC*, 266 F. Supp. 3d 225, 229 (D.D.C. 2017) (quoting *Creditors of WorldCom, Inc.*, 467 F.3d at 83). "[O]nce the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end." *Sec. & Exch. Comm'n v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991).

The Court believes that the SEC's proposal is fair and reasonable. Relying on its economist Dr. Thomas A. Dunn, the SEC states that it is feasible to identify and compensate the holders of 63.3 percent of shares, all of whom were harmed by the defendants' conduct because they were net buyers of Delphi stock during the inflation period, that is, when the value of the stock was inflated as a result of the fraudulent disclosures. This harm constituted a minimum of $179 million in losses. The SEC identified these investors through the Form 13F filings. These are quarterly reports of equity holdings by institutional investment managers with at least $100 million under management. According to Dr. Dunn, in 2011, Dr. Eugene Canjels, the SEC's previous economist, analyzed the Form 13F filings of 236 investors to assess how many had experienced harm as a result of the defendants' conduct. These investors held approximately 82 percent of the outstanding shares. Of those investors, Dr. Canjels determined that 96 institutional investors, representing 63.3 percent of outstanding shares, lost approximately $179 million by purchasing Delphi stock during the period that the price was artificially inflated and held that stock through the dates on which Delphi corrected its disclosures. Not all these investors' shares were harmed, however, and Dr. Canjels calculated that approximately half of their shares were bought at inflated prices. He determined that there were an additional 50 institutions, representing 5.1 percent of shares outstanding, for which Dr. Canjels could not determine harm. He additionally found that 90 institutions, representing 13.2 percent of the outstanding shares, did not suffer any harm from the defendants' conduct because they were net sellers during the inflation period.

The SEC proposes to treat as preliminary claimants eligible for compensation the 96 institutional investors identified in Dr. Canjels' analysis. The SEC also represents that it intends to contact and solicit supporting documentation from the 50 institutions, representing approximately 5.1 percent of shares outstanding, for which Dr. Canjels could not make a harm determination to assess their eligibility.

There are some flaws in that approach. For instance, the proposed methodology leaves out retail and smaller investors who are not required to file Form 13F with the SEC. Still, though, some smaller investors will be compensated. As the SEC explains, some of the institutional investors purchase securities on behalf of their individual and entity clients. Those institutional investors have a fiduciary obligation to allocate Fair Fund proceeds to their individual beneficial owners without collecting a separate fee from the fund. Moreover, the alternate means of identifying a pool of investors through data collected by the settlement administrator in the MDL (who would not give up that data in the absence of consent by plaintiff's counsel in that case, which was not forthcoming) is not cost-efficient.

The plan contemplates identifying the harmed investors and sending notices and a claim package. This method contrasts with the MDL settlement protocol, which used the conventional notice-and-claims process. The SEC rejected the latter alternative because the costs of claims administration was prohibitive. *Amicus*, after investigation, concurs, and the Court agrees. The

SEC does not have the means of administering a claims procedure in-house, and the cost of hiring a claims administrator would deplete the fund significantly.

The proposed plan provides a fair measure of justice to a significant portion of the investors harmed by the defendants' conduct. The eligible claimants represent the owners of 63.3 percent of Delphi's outstanding shares during the relevant period, and this figure may increase with the SEC's additional outreach to the 50 investors for which Dr. Canjels could not make a harm determination, which would be an additional 5.1 percent if all were eligible. Although the proposal does not contemplate the direct compensation of retail and other investors, many of these investors will still benefit from the distribution since some of the potential claimants identified by the SEC are institutional investors that make investments on behalf of clients. As *amicus* explained in detail, the administrative costs of schemes structured to identify and compensate additional victims would deplete the Fair Fund, inordinately reducing the amount available to victims compared to its size.

The SEC's proposed pool of eligible claimants is appropriate in scope. Although using Form 13F to identify the harmed investors will not capture all those who might be eligible for a distribution, the use of those forms is reasonable and equitable under the circumstances — circumstances that confront the reality of the substantial delay in proposing a distribution of the disgorged funds. The proposed non-claims process is the most cost-effective way to administer the distribution of the fund, and it better preserves the net amount of the fund for distribution to harmed investors, avoiding considerable administrative expenses.

The Court therefore will grant the SEC's motion and approve the distribution plan. The SEC may file a motion seeking the transfer of the funds from the Court's Registry once it is prepared to distribute funds per the approved distribution plan.

Accordingly, it is **ORDERED** that the plaintiff's motion for an order approving the distribution plan for the Fair Fund (ECF No. 415) is **GRANTED IN PART**.

It is further **ORDERED** that the Fair Fund which the plaintiff established according to the Court's previous order (ECF No. 413, PageID.22937) shall consist of the $1,256,257.00 paid by the defendants following entry of the final judgments against them, ECF Nos. 10 & 11, plus any accrued interest minus Court registry fees. Any additional funds collected in connection with this matter will be added to the Fair Fund. The Fair Fund will remain in an interest-bearing account in the Court Registry Investment System until after the completion of the events described below, and any accrued interest will be added to the Fair Fund. The SEC shall distribute the Fair Fund according to its proposed Distribution Plan, ECF 415-1, PageID.22962-76, which is **APPROVED**.

It is further **ORDERED** that, following the procedures set forth in the Distribution Plan, the court-appointed distribution agent, Joshua Braunstein, will compile a Payee List consisting of the name, address, calculated Recognized Loss, calculated Distribution Payment, and the amount to be withheld from the Distribution Payment for taxes, if applicable, also including the total amount to be disbursed to the Bank, as defined in Paragraph 47 of the Distribution Plan, along with the total amount to be disbursed to the Tax Administrator and transferred to the U.S. Treasury as tax withholdings. Thereafter, the SEC may apply to the Court for transfer of the funds in the Court's Registry for administration and distribution according to the Distribution Plan.

It is further **ORDERED** that that the services of *Amicus Curiae* are terminated, with thanks. *Amicus* may apply to the Court for compensation for its services by filing a motion for approval **on or before December 27, 2023**. The compensation shall be paid from the fund on deposit in the Court's Registry. *Amicus* shall provide a copy of its application to the SEC before filing it with the Court.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: November 30, 2023