

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:11-CV-24438-GAYLES

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**STIEFEL LABORATORIES INC.
and CHARLES W. STIEFEL,**

Defendants.

**SECURITIES AND EXCHANGE COMMISSION'S MOTION
TO APPROVE DISTRIBUTION PLAN**

I. Introduction

Plaintiff Securities and Exchange Commission moves the Court to approve the Distribution Plan attached as Exhibit 1 to allow the Commission to distribute the Fair Fund in this case, which consists of \$37 million in disgorgement, prejudgment interest on disgorgement, and civil penalties paid by Defendants Stiefel Laboratories, Inc. (“Stiefel Labs” or “the Company”) and Charles W. Stiefel (“Stiefel”). Under the Distribution Plan, eligible defrauded shareholders in Stiefel Labs will receive a *pro rata* distribution of the \$37 million based on the harm they suffered due to the Defendants’ fraudulent buyback of Company shares, as described in more detail below and in the Distribution Plan.

II. Background Of The Case

The Commission filed its Complaint against the Defendants in December 2011, alleging they violated Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Exchange Act Rule 10b-5. In general, the Complaint alleged fraudulent conduct by Stiefel Labs

and Stiefel during the repurchase of Stiefel Labs stock shares from certain employees and other shareholders from 2006 through April 20, 2009.

The Commission staff and the Defendants entered into a proposed settlement at Court-ordered mediation on February 26, 2020, which the Commission later approved. As a result, on June 4, 2020, the Court created a Fair Fund and entered Final Judgments by consent against Stiefel Labs and Stiefel. Under terms of the Final Judgments, Stiefel Labs and Stiefel neither admit nor deny the allegations of the Complaint and agreed to pay in the aggregate \$37 million. The Final Judgment against Stiefel Labs orders the Company to pay disgorgement of \$23 million, prejudgment interest on disgorgement of \$2,210,000, and a civil penalty of \$1.3 million. The Final Judgment against Stiefel orders him to pay disgorgement of \$9.3 million, prejudgment interest on disgorgement of \$930,000, and a civil penalty of \$260,000. The Defendants have made all of those payments, which, subtracting expenses and adding interest earned, now constitute the Fair Fund in this case.

On June 12, 2020, the Court entered an Order appointing Miller Kaplan Arase, LLP the Tax Administrator in the case to handle the tax obligations of the Fair Fund, and Robert Levenson and Christopher Martin, Commission employees, as Distribution Agents to administer the distribution of the Fair Fund. On August 4, 2020, the Court entered an Order appointing Epiq Class Action & Claims Solutions, Inc. as the Third Party Administrator to assist in the implementation of the Distribution Plan in consultation with the Distribution Agents.

The Commission is holding the Fair Fund, including any interest and income earned, pending further order of the Court. The Commission, with Court approval, will distribute the Fair Fund in accordance with this Distribution Plan to eligible Stiefel Labs shareholders.

III. Summary Of The Distribution Plan¹

The Distribution Plan, attached as Exhibit 1, sets forth the roles and responsibilities of the Distribution Agents, the Tax Administrator, and the Third Party Administrator in distributing the Fair Fund to eligible shareholders. It then explains the methodology and the procedure by which the Commission proposes to distribute the funds.

As to the methodology, the Distribution Agents, in consultation with the Commission's Office of Distributions and its Division of Economic Research and Analysis, analyzed the violations alleged in the Complaint as well as certain documentation obtained during the investigation and litigation, and determined there are 287 Potentially Eligible Shareholders² who sold shares to the Company from December 12, 2006 through April 20, 2009. The start and end dates are explained in the Distribution Plan. Of the 287 Potentially Eligible Shareholders, there were 258 Eligible Shareholders. The remaining 29 Potentially Eligible Shareholders are Excluded Shareholders based on having a Net Loss of zero or falling into one of the other categories of Excluded Shareholders set forth in the Distribution Plan.

The 258 Eligible Shareholders fall into one of four separate categories, depending on the date they sold shares to the Company, and whether the shares they sold had been obtained as part of Stiefel Labs' Employee Stock Bonus Plan ("Stock Plan") or separately from the Stock Plan. The four categories are: (1) Stock Plan shareholders who sold at the as of March 31, 2006 Valuation Price of \$13,012 per share; (2) Stock Plan shareholders who sold at the as of March 31, 2007 Valuation Price of \$14,517; (3) Stock Plan shareholders who sold at the March 31, 2008

¹ The Distribution Plan attached as Exhibit 1 is the controlling document and the language of the Distribution Plan will govern any differences between this summary and the Distribution Plan.

² All capitalized terms in this motion have the same meaning as defined in the Definitions section of the Distribution Plan.

Valuation Price of \$16,469 per share; and (4) non-Stock Plan shareholders who sold at various prices from March 27, 2007 through June 23, 2008.

Each group of shareholders suffered a different amount of harm based on the number of shares they sold and the amount by which Stiefel Labs shares were undervalued as of March 31, 2006, 2007, and 2008. During its litigation against the Defendants, the Commission retained Marc J. Brown of AlixPartners to determine the true value of the Company's stock on each of these respective dates. Using several well-accepted valuation methods, Mr. Brown determined the true value of the Stiefel Labs Stock Plan shares – the price the Company should have paid Stock Plan shareholders - during the various periods the Company purchased shares from employees. Those values were then used to calculate the amount of ill-gotten gains the Company realized from undervaluing Stiefel Labs shares in the buybacks at issue. The differences in price between what Stiefel Labs paid shareholders and what the shares were actually worth, and the corresponding amounts of the Distribution Payments, are explained in the Distribution Plan.

The Distribution Plan also explains how Potentially Eligible Shareholders who previously received payments from Stiefel Labs as a result of prevailing in or settling private lawsuits against the Company had those payments factored into their Distribution Payments. Those who recovered amounts greater than their scheduled Distribution Payment will become Excluded Shareholders and not receive a Distribution Payment. Finally, the Distribution Plan explains how all Eligible Shareholders will receive a *pro rata* payment of approximately 90 percent of their Net Loss.

The Distribution Plan also discussed the procedure for making Distribution Payments. Within 14 days of the Court Order approving the Distribution Plan, the Third Party Administrator, at the direction of the Distribution Agents, will send a Notice to each Eligible Shareholder by U.S. Postal Service. The Notice will provide each Eligible Shareholder with a copy of the Distribution

Plan and information to allow each Eligible Shareholder to determine his or her proposed Distribution Payment. The Notice will request certain tax and contact information from Eligible Shareholders sufficient for the Distribution Agents to authorize distribution of funds. Eligible Shareholders will have 45 days from the postmark date of the Notice to submit the requested information to ensure an efficient and accurate delivery of the full Distribution Payment as described in the Notice, or to file any written objection with the Distribution Agents to the Net Loss or proposed Distribution Payment.

Also at the authorization of the Distribution Agents, the Third Party Administrator will, within 14 days of the Court Order approving the Distribution Plan, send a separate notice to all Excluded Shareholders explaining why they will not be receiving a distribution. That notice will explain procedures for the Excluded Shareholders to object to their status and how to submit documentation supporting their objection. Excluded Shareholders will also have 45 days from the postmark of the notice to submit their objection and documentation.

After receiving the requested tax information and addressing any responses or objections from the Eligible Shareholders or Excluded Shareholders, the Distribution Agents will then file a motion with the Court for an Order approving the final Distribution Payments. The Distribution Plan goes into much greater detail on the timing and procedures for making the Distribution Payments. Eligible Shareholders who receive a Distribution Payment will have 120 days to cash or deposit their checks, which will be explained in a letter the Distribution Agents prepare and approve to accompany the checks.

IV. Notice

The Commission will send a copy of the Distribution Plan to all Potentially Eligible Shareholders with the notice letters discussed above – after the Court enters an order approving

the Distribution Plan. Prior to approval, the Defendants will receive a copy of the Distribution Plan through CM-ECF, although the Final Judgments the Court entered against both Defendants make it clear they do not have standing to object to distribution of the Fair Fund. In addition, the Commission will publish a copy of this motion and the proposed Distribution Plan on the Commission's Information for Harmed Investors website, which can be found at: <https://www.sec.gov/divisions/enforce/claims.htm>. The Distribution Agents will also email a courtesy copy of the Distribution Plan to all shareholders for whom we have email addresses, and will direct any other shareholders or attorneys who contact us after the motion is filed to that website or provide them a copy of this motion and the Distribution Plan by email.

As a result, the Commission is confident the Distribution Plan will be widely disseminated after we file it. However, to ensure the widest notice and opportunity for shareholders to see the plan, the Commission asks the Court not to rule on this motion for 30 days after it is filed. At that point if there are no objections, the Commission will submit a notice and proposed order approving the Distribution Plan setting forth all of the efforts the Commission undertook to disseminate the Distribution Plan. If there are objections, the Commission will submit a proposed order approving the Distribution Plan after the Court rules on all of them.

V. Memorandum Of Law

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, Courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. *SEC v. Wang*, 944 F.2d 80, 83-84 (2nd Cir. 1991); *SEC v. Levine*, 881 F.2d 1165, 1182 (2nd Cir. 1989). Courts have historically deferred to the

Commission's decisions regarding how to distribute disgorgement and prejudgment interest. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997). The Court's review of a proposed distribution plan focuses on whether the plan is fair and reasonable. See *Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2nd Cir. 2006) (citing *Wang*, 944 F.2d at 85 (“[u]nless the consent decree specifically provides otherwise, once 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.”)).

The Commission believes the proposed Distribution Plan is fair and reasonable. The Distribution Payments are based on standard economic and stock share valuation methods, and the proposed *pro rata* distribution provides all Eligible Shareholders with the same percentage of their Net Losses. The proposed procedure and notice periods provide all Potentially Eligible Shareholders with more than adequate time to review the Distribution Plan, object to it if desired, provide the Commission with requested information, object to the proposed Distribution Payment, and cash the Distribution Payment checks. For all those reasons, the Commission asks the Court to approve the Distribution Plan.

VI. Conclusion

For all of the reasons set forth in this motion, the Commission asks the Court to enter an order approving the Distribution Plan 30 days after the filing of this motion.

September 24, 2020

Respectfully submitted,

Robert K. Levenson, Esq.
Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov

Christopher E. Martin, Esq.
Senior Trial Counsel
SD Fla. Bar No. A5500747
Direct Dial: (303) 844-1106
Email: martinc@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1950
Miami, Florida 33131
Telephone: (305) 982-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Robert K. Levenson
Robert K. Levenson, Esq.