

**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.

**MOTION FOR FINAL APPROVAL TO DISTRIBUTE THE ENTIRE FAIR FUND
TO ELIGIBLE SHAREHOLDERS**

I. Introduction

The Court-Appointed Co-Distribution Agents Robert Levenson and Christopher Martin, on behalf of the Plaintiff Securities and Exchange Commission, move the Court to approve final distribution of the Fair Fund in this case and the decisions made by the Distribution Agents to effectuate the Distribution Plan in a fair and equitable manner. Approval will allow the Commission to distribute the entire Fair Fund, which consists of \$37 million in disgorgement, prejudgment interest on disgorgement, and civil penalties paid by the Defendants and accrued interest, less expenses, to eligible shareholders. Under the Distribution Plan and in accordance with attached Exhibit A, eligible defrauded shareholders in Stiefel Labs who have responded and provided the required information will receive a *pro rata* distribution of the Fair Fund 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.¹

¹ All capitalized terms have the same meaning in this report as in the Court-approved Distribution Plan.

At the request of the Distribution Agents, the Third Party Fund Administrator mailed notices to all 258 Eligible Shareholders and 29 Excluded Shareholders on June 2, 2021. None of the Excluded Shareholders have objected to their exclusion from a distribution. In addition, we have received the information we need from the vast majority of Eligible Shareholders for them to receive their Fair Fund Distribution, and as further described below, only a few claims required determination by the Distribution Agents.

However, despite multiple efforts to reach non-responsive Eligible Shareholders and setting a final deadline of November 10, 2021, we still have not received responses from 42 Eligible Shareholders (a 43rd responded but has not provided the necessary documentation). We believe we have taken all reasonable steps to contact those shareholders, including at least two attempts to contact them by mail, and publicly posting notice of the Fair Fund, pleadings, Court Orders, and status updates at www.stiefellabsfairfund.com. At this juncture, we believe the non-responding Eligible shareholders have had notice and a full and fair opportunity to respond and that the fairest and most equitable course of action is to distribute the entire Fair Fund to the remaining 215 responding Eligible Shareholders. Accordingly, we propose that the funds that would have gone to the non-responding Eligible Shareholders be re-distributed on a *pro rata* basis to the responding Eligible Shareholders, who now will receive a *pro rata* distribution of 93.46% of the amount they were harmed instead of 90.55% as originally proposed.

II. Background

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

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 the Fair Fund and entered Final Judgments by consent against Stiefel Labs and Stiefel (DE 233-35). Under the terms of the Final Judgments, Stiefel Labs and Stiefel neither admitted nor denied the allegations of the Complaint and agreed to pay in the aggregate \$37 million in disgorgement, prejudgment interest, and civil penalties. The Defendants have made those payments, which now constitute the Fair Fund in this case.²

On September 24, 2020, the Commission proposed a Distribution Plan, which called for a *pro rata* distribution of funds among the 258 Eligible Shareholders (DE 240 and 240-1). The Distribution Plan also described the criteria for determining Eligible and Excluded Shareholders, how the Distribution Agents determined the *pro rata* distribution formula, and a series of events and deadlines for the distribution process. *Id.* On November 10, 2020, two sets of shareholders filed objections to the Distribution Plan (DE 250 and 253). After briefing and a hearing on the objections, the Court overruled the objections and entered an Order approving the Distribution Plan on May 21, 2021 (DE 286). On September 15, 2021, the Co-Distribution Agents filed a Status report updating the Court about the status of the Fair Fund distribution process (DE 288).

III. The Distribution Process

The Distribution Plan called for the Distribution Agents to mail notices to all 258 Eligible Shareholders and 29 Excluded Shareholders within two weeks of the Court's Order approving the Distribution Plan. As a result, at the request of the Distribution Agents, the Third Party Fund

² As further described below, the final distribution amount will vary slightly from \$37 million, based on the fees and costs of the Tax Administrator and the Third Party Fund Administrator the Court previously appointed, the amount of taxes owed by the Fair Fund, and the amount of interest earned by the Fair Fund.

Administrator mailed notice packages to all shareholders on June 2, 2021. All notices contained a copy of the Distribution Plan, and the Eligible Shareholder notices contained further information about forms the shareholders needed to fill out and return to either receive a roll-over distribution into a qualified retirement plan or to receive the funds directly. Excluded Shareholders had 45 days, or until July 17, 2021, to object to their status; Eligible Shareholders had the same 45 days to object to their distribution amount and to return one of the forms choosing how they wanted to receive their distribution. Copies of the forms and the notice letters were attached to the Commission's Motion to Approve the Distribution Plan. DE 240 and 240-1.

In addition to sending the notice packages to all shareholders, we took the following steps to contact Eligible Shareholders:

- (1) We created and regularly posted status updates, pleadings, and Court Orders on the aforementioned publicly available website;³
- (2) We had frequent contact with investors via email and phone;
- (3) We urged shareholders in this relatively small community of former Stiefel Labs' employees to reach out to other shareholders to alert them to the existence of the Fair Fund and to contact the Distribution Agents; and
- (4) For the 78 Eligible Shareholders that did not respond to the original notice package, we had the Third Party Fund Administrator run additional database research, which found additional or updated addresses for many of them. As a result, the Distribution Agents sent second notice letters to all 78 of those shareholders using the additional or updated addresses we found, making it clear the shareholders needed to respond with a completed form or other documentation or they would not receive a Fair Fund distribution.

Based on these efforts, the Distribution Agents are pleased to report that we reached and obtained the appropriate documentation from a high percentage of Eligible Shareholders who

³ Among other things, the website listed the contact information for the Co-Distribution Agents.

collectively represent the vast majority of total harm the shareholders suffered, and not a single Excluded Shareholder objected to their status. The 215 Eligible Shareholders who responded suffered losses of \$39,555,904, representing almost 97% of the total losses of \$40,860,885 (in other words the 43 Eligible Shareholders who will not receive a distribution represent only 3% of the total losses).

As described above, we believe we have taken all reasonable steps to contact the Eligible Shareholders who have not responded. At this time, we believe the non-responding Eligible Shareholders have had notice and a full and fair opportunity to respond and that the fairest and most equitable course of action is to distribute the entire Fair Fund to the remaining Eligible Shareholders. We therefore ask the Court to approve the final distribution list attached as Exhibit A to this motion, which provides for the 215 responding Eligible Shareholders to receive a *pro rata* distribution of 93.46% of the amount by which they were harmed.

Moreover, we request that the Court approve the decisions by the Court-appointed Co-Distributions Agents that were necessary to implement the Plan in a fair and equitable fashion, including the following decisions:

- (1) Eligible Shareholder 32. The widow of this deceased shareholder objected to the distribution amount by just a few dollars based on her claim that her husband's account showed .00050 more shares than the records provided by Stiefel Labs of the shares her husband sold back to the company that the Distribution Plan used to determine harm and distribution amounts. However the wife did not provide documentation to support her claim of the additional fraction of a share, and we therefore overruled this objection based on the lack of documentation.
- (2) Eligible Shareholder 36. This shareholder was also deceased. We received competing

claims from two different relatives, but only one of the two relatives was able to provide documentation (a will) showing she was entitled to receive the deceased shareholder's Fair Fund distribution. Based on that documentation, we determined that relative should receive the Fair Fund distribution for Eligible Shareholder 36, and denied the claim of the other relative.

(3) Eligible Shareholder 47. This shareholder was also deceased, and we received documentation from his widow showing she was entitled to receive proceeds from the shareholder's IRA, where the proceeds should have gone but for the fraud. The shareholder's will provided for his estate to be divided between the wife and several children. We did not receive any documentation or response from any of the children. Because the proceeds of the fraud should have gone into the IRA and then distributed to the widow, we believe it is fair and equitable to distribute the Fair Fund proceeds to the wife.

(4) Eligible Shareholder 238. We received information from the shareholder's former wife who claimed he was deceased. However, despite repeated requests, the former wife did not provide documentation showing her husband was deceased or that she was eligible to receive his distribution. In addition, we did our own research and we were not able to determine if the shareholder is deceased. Therefore, we have denied this claim because the appropriate documentation was not provided.⁴

We, therefore, request that the Court approve all of these decisions by the Court-appointed

⁴ In addition, we received notice from a former shareholder (who was not listed on Stiefel Labs records as having sold during the relevant time-period) who claimed she was entitled to a distribution but could not provide documentation that she sold during the relevant dates. Accordingly, we have denied this claim.

Co-Distributions Agents, because they were necessary to implement the Plan in a fair and equitable fashion.

IV. Final Fair Fund Amount For Distribution

The final Fair Fund amount for distribution is \$36,974,849, which takes in account the interest accrued and amounts we have been advised to withhold for expenses. According to information provided by the Tax Administrator, after adding accrued interest and subtracting taxes already paid, the Fair Fund now contains \$37,015,299. The Tax Administrator has advised us to withhold the following amounts from distribution: \$16,500 for Tax Administrator fees, \$19,250 (the contracted amount) for the Third Party Administrator fee, and \$4,700 for 2022 taxes, leaving a balance of \$36,974,849 to distribute.⁵ That is the amount we propose to distribute as set forth in Exhibit A.

V. Conclusion

In conclusion, we are pleased to propose to distribute the Fair Fund to eligible defrauded shareholders. For all of the reasons set forth in this motion and in the Distribution Plan, we ask the Court to enter the attached Order, which, among other things, approves the distribution of the entire Fair Fund in accordance with Exhibit A and approves the decisions of the Distribution Agents, which were necessary to distribute the Fair Fund in a fair and equitable manner.

We are separately attaching a proposed order to this motion. We ask the Court to enter the order in 14 days if no objections are filed to this motion. We are posting a copy of this motion on the website to ensure maximum notice to all affected parties.

November 19, 2021

Respectfully submitted,

⁵ Per the terms of the Distribution Plan, we have up to six months after the distribution takes place to provide the Court with a final accounting of all fees paid by the Fair Fund.

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