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 REPLY TO 100079 CANADA, INC. AND RICHARD MACKAY'S AMENDED OBJECTIONS TO THE COMMISSION'S DISTRIBUTION PLAN

I. Introduction

In its Complaint, the Securities and Exchange Commission alleged two fraudulent schemes – (1) a scheme from 2006 through April 2009 where Defendants Stiefel Laboratories, Inc. ("Stiefel Labs" or "Company") and Charles Stiefel ("Stiefel") (collectively "Defendants") misstated the true value of Stiefel Labs' shares ("Valuation Fraud"); and (2) a scheme where the Defendants failed to update numerous statements that they would not sell the Company, which became false starting in late 2008 when the Defendants decided to explore the previously "taboo" subject of selling the Company, engaged an investment bank to explore a possible sale, and took other steps to sell the Company ("Failure to Update Fraud").

Former Stiefel Labs Director and Board of Directors Vice President Richard MacKay, and 100079 Canada, an entity owned and controlled by MacKay, now challenge their exclusion from the Commission's Distribution Plan (DE 240-1) primarily based on their claim that they were *victimized* by the Defendants' fraud. *See* 100079 Canada and MacKay's Amended Objections to the Distribution Plan ("Objection") (DE 267). In reality, neither McKay, a classic insider, nor his company was a victim and they have already benefitted greatly from selling their shares. MacKay and 100079 Canada sold a fraction of their Stiefel Labs shares in May 2008 for nearly $9 million *months* before the Failure to Update Fraud began and they had knowledge of the Valuation Fraud. A sister court in this District and the 11th Circuit have already found that MacKay (and therefore, 100079 Canada) had knowledge of the facts giving rise to the Valuation Fraud when they sold in May 2008,[1] and they received *more than $177 million* from selling the remainder of their Stiefel

[1] As further explained below, Judge Scola granted summary judgment against 100079 Canada in a private lawsuit that it filed against the Defendants on statute of limitations grounds, because MacKay/100079 Canada waited too long after MacKay had knowledge of facts giving rise to the Valuation Fraud in 2008 to bring the lawsuit. 100079 Canada appealed to the 11th Circuit, which affirmed the District Court's grant of summary judgment.

Labs shares in July 2009 when GlaxoSmithKline ("GSK") bought Stiefel Labs. Given these facts we would have expected that MacKay and 100079 Canada would have been satisfied with their take from the GSK purchase and not object to being excluded from the Distribution Plan so the Commission could distribute the Fair Fund to the true victims of these fraudulent schemes.

Nonetheless, MacKay and 100079 Canada have filed an objection to the Distribution Plan (DE 240), having the chutzpah to claim they were *victimized* by the fraud.[2] *See* Objection at 6, 9, and 12. In addition, to MacKay and 100079 Canada not being victims of the fraud, because they had knowledge of the Valuation Fraud (as the principal of 100079 Canada, MacKay's knowledge of the fraud is imputed to 100079 Canada), and it being absurd to call them victims when they received *more than $177 million* from selling the remainder of their Stiefel Labs shares, this argument is meritless for two additional reasons: (a) the Distribution Plan uniformly excludes all insiders (defined in part as members of the Stiefel Labs' Board of Directors), which is a routine practice in distributions; and (b) based on the factual findings in their dismissed private lawsuit, they are collaterally estopped from arguing here that they did not have knowledge of the Valuation Fraud. In sum, the Court should deny the inequitable and unconscionable objection.

MacKay and 100079 Canada also make two other arguments why the Court should not exclude them from receiving a massive Fair Fund distribution, which are equally meritless. First, they claim MacKay was only an "honorary" member of Stiefel Labs' Board. In addition to not explaining why this distinction is of any legal significance, they ignore contemporaneous evidence showing he was a full-fledged member of the Board. In reality, MacKay attended board meetings, voted on board matters, and received material information about third-party valuations from

[2] Notably, if the Court granted the Objection more than a third of the Fair Fund would unfairly go to an insider who had knowledge of the facts giving rise to the Valuation Fraud, and who has already received more than $177 million from selling his stock!

sophisticated investment banks (these valuations, which MacKay was aware of while ordinary shareholders were not, provide the factual underpinnings of the Valuation Fraud). Lastly, the Plan of Distribution does not draw any distinction between "honorary" and non-honorary members of the Stiefel Labs' Board. All members of the Board are uniformly barred from receiving a Fair Fund distribution.

Second, they claim that since MacKay used 100079 Canada to sell his shares that the Plan of Distribution does not bar 100079 Canada from receiving a Fair Fund distribution. However, the Plan of Distribution, clearly excludes "members of the Stiefel Labs' Board of Directors (or any of their affiliates, . . . or *controlled* persons or *entities*) . . ." (DE 240-1 at 3, ¶4, emphasis added). Since there is no legitimate dispute that MacKay served on Stiefel Labs' Board and controlled 100079 Canada, the Plan of Distribution expressly excludes both MacKay and 100079 Canada. Moreover, it is fair and reasonable to exclude 100079 Canada because MacKay's knowledge of the fraud is imputed to 100079 Canada. Hence, both MacKay and 100079 Canada had knowledge of the fraud, so they both should be excluded from receiving a Fair Fund distribution.

For all of these reasons and as further explained below, the Court should deny MacKay's objection.

II. Factual And Procedural Background

As described above, the Commission alleged two overlapping fraudulent schemes – the Valuation Fraud and Failure to Update Fraud.

A. The Commission's Complaint

The Commission filed suit against the Defendants in December 2011, alleging that from late 2006 through April 2009, the Defendants engaged in a fraudulent scheme to purchase shares of Stiefel Labs stock, primarily from current and former employees, at severely undervalued

prices. Complaint, DE 1 at ¶1.

To determine the price Stiefel Labs would pay Employee Stock Bonus Plan ("Plan") shareholders for stock buybacks (and other purposes, such as the price, plus an additional discount, that Stiefel Labs would pay for non-Plan shares),[3] Stiefel Labs engaged a third-party accountant, Terence Bogush, to value the stock who relied on the company's financial statements and other information Stiefel Labs gave him. *Id.* at ¶¶18, 29. The accountant valued the stock price as of March 31 of each year and Stiefel communicated the stock price valuation to shareholders each year. *Id.* However, this third-party accountant used a flawed methodology and was not qualified to perform the valuations. *Id.* Also, the Defendants failed to disclose to the accountant crucial information about offers and valuations the company received from investment firms. *Id.* at ¶19.

The Complaint goes on to allege the Defendants defrauded shareholders selling shares back to the Company in three different time periods – those shareholders selling following the as of March 31, 2006 valuation, the as of March 31, 2007 valuation, and the as of March 31, 2008 valuation. *Id.* at ¶¶21-36. The allegations of fraud in each year follow an identical pattern – the third-party accountant undervalued Stiefel Labs' shares because Stiefel and the Company failed to disclose to him (and subsequently to shareholders) significant financial events involving outside parties' interest and investment in Stiefel Labs. *Id.*

For example, the Complaint alleges that in 2006, prior to the as of March 31, 2006 share price being valued and communicated to shareholders, Stiefel Labs engaged a financial advisor to explore interest from private equity firms in investing in the company. *Id.* at ¶21. Shortly after the $13,012 share value was announced, five private equity firms offered to acquire $200 million of Stiefel Labs' preferred shares at valuations 50% to 200% higher than $13,012 per share. *Id.* at

[3] All of the shares owned by MacKay/100079 Canada were owned outside of the Plan.

¶23. The Defendants failed to disclose this crucial information to shareholders selling stock back to the company at $13,012 per share in late 2006 and for much of 2007. *Id.* at ¶24.

Similarly, before the as of March 31, 2007 price was calculated and announced, a subsidiary of one of the private equity firms, Blackstone Healthcare Partners ("Blackstone"), offered first to buy Stiefel Labs and later invested approximately $500 million in the company. *Id.* at ¶¶25-26. For this, Blackstone received preferred shares valued at amounts far higher than the $14,517 valuation price as of March 31, 2007. *Id.* at ¶¶26-27. The Defendants did not disclose this important information to the accountant, and they also failed to disclose to most shareholders selling stock back to the company in late 2007 and for most of 2008 the offers from the five equity firms in 2006, Blackstone's offer to buy Stiefel Labs, the valuation Blackstone placed on the Company when it purchased 19% of the company, and other information. *Id.* at ¶¶28-29. Thus, the Complaint's detailed factual allegations laid out the Valuation Fraud, which followed an identical pattern each year and was egregious in each year. *Id.* at ¶¶21-36.

Moreover, we alleged the Failure to Update Fraud, which occurred after the as of March 31, 2008 share price of $16,469 was announced in October 2008. Thereafter, the Defendants failed to disclose to numerous selling shareholders in December 2008 and the first three months of 2009 that Stiefel and Stiefel Labs were actively trying to sell the company – in direct contravention of statements Stiefel and other family members had made over the years that they intended to keep Stiefel Labs a private company. *Id* at ¶¶30-36.[4]

[4] The Valuation Fraud occurred during the time period when MacKay decided to sell his shares in May 2008 to Stiefel Labs, while the Failure to Update Fraud did not began until late November 2008. Hence, for the purposes of this Reply, we will be focusing on MacKay's knowledge of the Valuation Fraud, because it was the fraudulent scheme that existed when MacKay sold shares in mid-2008. Stated another way, the Failure to Update Fraud did not occur until months after he decided to sell his shares in May 2008 to Stiefel Labs, so that fraudulent scheme is irrelevant to the Objection.

B. Procedural History

The Commission's Complaint alleges the Defendants violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act"), and sought, among other things, injunctions, disgorgement of ill-gotten gains, and civil penalties. *Id.* at pp. 19-22.

After years of extensive litigation, the Defendants and the Commission mediated the case for a second time on February 26, 2020, and agreed on a proposed settlement that the Commission subsequently 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 (DE 233-35). Under terms of the Final Judgments, Defendants have paid in the aggregate $37 million, which, subtracting expenses and adding interest earned, now constitute the Fair Fund in this case.

Thereafter, the Court entered additional orders appointing undersigned Commission counsel as the Distribution Agents, a Tax Administrator, and a Third Party Fund Administrator for the Fair Fund (DE 237, 239). Then on September 24, 2020, the Commission moved the Court to approve its Distribution Plan (DE 240), leading to the Objection.

C. The Distribution Plan

The Commission proposes a Distribution Plan methodology that will distribute the $37 million Fair Fund to Eligible Shareholders based on the work of an independent third-party expert, who has determined the amounts by which Stiefel Labs undervalued its shares each year in the as of March 31 valuations. The Distribution Plan uniformly excludes Stiefel Labs' Board members, entities they control, and anyone who had knowledge of the fraud.[5] The Distribution Plan is thus based on objective evidence, proposes an equitable distribution to all groups of harmed

[5] *See* Commission's Reply to Objections to Distribution Plan by Four Objectors, which is being filed contemporaneously with this Reply, and the Distribution Plan (DE 240-1) for a more robust discussion of the Plan of Distribution.

shareholders, and consistently applies uniform standards when it excludes shareholders. *See* Distribution Plan at pp. 6-9.

Currently, the Distribution Plan provides 258 victims approximately 90.5% of their Net Loss as calculated by the SEC's Valuation Expert. *See* Distribution Plan, DE 240-1, at pp. 6-9. If the Court allowed MacKay's single claim for $26 million, the actual victims of the fraud would lose almost 40% of the amount they would otherwise receive from the Fair Fund, and MacKay would receive $14.4 million, or nearly 38% of the Fair Fund.

D. 100079 Canada's Private Lawsuit Against Stiefel Labs and Stiefel

On July 1, 2011, 100079 Canada filed suit against the Defendants and others for violations of Section 10(b) and Rule 10b-5 of the Exchange Act and state law, stemming from the sale of shares by MacKay/100079 Canada to Stiefel Labs during mid-2008.[6] (*100079 Canada v. Stiefel Labs, et al.*, 1:11-cv-22389-RNS - DE 1). On November 20, 2012, the plaintiff filed an amended complaint (DE 46), which made the following allegations (emphasis added):[7]

- *100079 Canada* is a corporation organized and existing under the laws of Canada *formed for the purpose of holding and owning Stiefel Labs shares*. *Plaintiff is owned and controlled by MacKay*, his wife and a family trust controlled by MacKay. *Id.*, at ¶6.
- *MacKay was appointed to the Board of Directors of Stiefel Labs in 2002. The new board consisted of* Stiefel, *MacKay*, and others. *In April 2007, MacKay was appointed Vice Chairman of the Board of Stiefel Labs* while continuing as

[6] The other defendants were dismissed prior to final judgment being entered against 100079 Canada.

[7] The amended complaint does not include the word "honorary."

President and CEO of Stiefel Canada. *Id.*, at ¶11.

On that same day, the Defendants filed a motion for summary judgment against 100079 Canada, alleging the statute of limitations barred 100079 Canada's claims. (DE 47). After extensive briefing, on June 21, 2013, Judge Scola granted summary judgment against 100079 Canada and entered final judgment in favor of the Defendants. (DE 145-46).[8] In his summary judgment order, Judge Scola made the following factual findings (emphasis added):[9]

- *100079 Canada, Inc. was a holding company set up, owned, and controlled by MacKay*. MacKay's Stiefel Labs shares were transferred to 100079 Canada for holding purposes and to achieve certain tax benefits. *As of May 2008, it owned approximately 3,300 shares of Stiefel Labs stock.* (DE 145, at 3 of 17).
- *In 2002, MacKay was appointed to the board of directors of Stiefel Labs. In 2007, he became vice chairman of the board. As a board member, MacKay was required to, and did, attend quarterly board meetings*. While MacKay claims he was not sophisticated or well versed in matters of finance, *as a board member he bore responsibility for appointing fiduciaries of the employee stock bonus plan, appointing the company's officers, and voting on items that required board approval, including significant corporate transactions*. *Id.*
- In late 2006, Stiefel Labs began considering a private equity investment to fund the acquisition of another pharmaceutical company. In December, *MacKay was informed that the company had received preliminary term sheets from*

[8] Judge Scola's opinion does not include the word "honorary."

[9] Consistent with Federal Rule of Civil Procedure 56, the facts cited by Judge Scola were material and undisputed, and construed in the light most favorable to the nonmoving party (100079 Canada). (DE 145, at 3 of 17).

several potential investors and that a decision had been made to negotiate exclusively with Blackstone. *On December 18, 2006, the board, including MacKay, received an updated term sheet from Blackstone stating that its proposed private equity investment would be based on a pre-money equity valuation of $1.8 billion*. The Board also received drafts of the securities purchase agreement. *Id*., at 4 of 17.

- Later in the month, Stiefel Labs terminated the private equity negotiations with Blackstone and secured a more than $500 million loan to fund its acquisition of another pharmaceutical company. *Id*., at 4-5 of 17.
- *In mid-2007, the board, including MacKay, received an updated private equity offer letter from Blackstone with a $2.9 billion enterprise valuation*. *MacKay* and the Board were informed by Stiefel *that Blackstone's valuation of Stiefel Labs was higher than it was in December 2006 and also higher than the private equity valuation provided by TA Associates, another private equity firm*. *Id.*, at 5 of 17.
- Stiefel also forwarded current and updated documents drafts to the board members from August 1-3. Those documents defined the "conversion price" and the *"stated value" of the Stiefel Labs preferred stock at $60,407.60 per share. On MacKay's motion, the board approved Blackstone's private equity investment on August 6, 2007. MacKay also voted 100079 Canada's shares in favor of the deal*. *Id*.
- On January 23, 2008, MacKay's financial advisor and tax lawyer, advised him

to consider selling some of his stock shares for estate planning purposes.[10] He further advised MacKay that *"[n]otwithstanding that [plaintiff] may be selling these Stiefel shares 'cheap,'* it does not make sense for you to keep hoarding these Stiefel shares for future generations. . ." *Id.*

- MacKay then started to negotiate with the Company to sell some of his shares and he received a spreadsheet that included the per share price set forth in the then-current 2007 Bogush valuation and a schedule of the discounted prices for non-Plan buybacks. A few minutes after receiving the email and spreadsheet, MacKay told the Company that he wanted proceed with a stock sale at those prices, based on the 2007 Bogush valuation. *The 2007 Bogush valuation was* $14,517 per share, or *$785 million for all common shares*. *Id.*, at 6 of 17.
- On May 15, 2008, MacKay sent Stiefel an email advising him that he had decided to sell some shares, even though "[his] own inclination would have been not to sell the shares since I strongly believe in the future of Stiefel." *Id.*, at 6-7 of 17.
- The next day, on May 16, 2008, MacKay sent Stiefel another email formally offering to sell 750 of Plaintiff's shares pursuant to the schedule attached to May 14, 2008 email that MacKay had received from the Company. Stiefel accepted the offer on behalf of the Company that same day. *Id.*, at 7 of 17.
- After the Company approved the transaction and the necessary paperwork was completed, on June 18, 2008payment was sent to 100079 Canada, care of

[10] Previously, MacKay sold some of his Stiefel Lab shares to fund the construction of a spectacular ski chateau on Mont Tremblant. *See* DE 145, at 3 of 17 and DE 267, Ex. B, at 5 of 6.

MacKay. *The decision to sell 750 shares (as opposed to more shares or less) was made by MacKay,* and he admits that the company did not pressure him into the 2008 transaction. In addition, *MacKay sold the stock even though he expected the value of the Company's stock bonus plan shares to go up every year*. *Id.*

- More than a year later, GSK acquired Stiefel Labs for approximately $2.9 billion in cash. The merger closed on July 22, 2009. *As a result of the merger transaction, MacKay received over $177 million for the remaining shares of common stock*. *Id.*, at 8 of 17.[11]

After final judgment was entered, 100079 Canada appealed to the 11th Circuit. On December 31, 2014, the 11th Circuit issued its opinion affirming the final judgment against 100079 Canada and the factual findings of the District Court. *See 100079 Canada v. Stiefel Labs, et al.*, 596 Fed.Appx. 744 (unpublished) (11th Cir. 2014).[12] Therein, the 11th Circuit held the following:

- In August 2007, MacKay became aware of the private equity investment from Blackstone based on a multi-billion valuation. On June 18, 2008, MacKay knew that he sold his shares at a depressed per share rate compared to the valuation Blackstone had made in August 2007. *Id.*, at 748.
- MacKay was the Vice Chairman of the Board of Directors and a corporate

[11] Notably, the document sent by Stiefel Labs to solicit its shareholders regarding GSK's acquisition of the Company listed MacKay as a Vice President of Stiefel Labs, the owner of 2,300 Stiefel Labs shares, and the controlling shareholder of 100079 Canada. *See* Information Statement and Consent Solicitation ("Solicitation"), April 20, 2009, attached as Exhibit A, at pp. 14-15, fn. 4. Moreover, the Solicitation does not include the word "honorary."

[12] As part of briefing on appeal, 100079 Canada admitted that: "*MacKay 'had access to more information than the average shareholder*.'" *Id.*, at 750 (emphasis added). Furthermore, the 11th Circuit opinion does not include the word "honorary."

fiduciary. As such, MacKay had greater access to information regarding the status of the company than an ordinary investor who is forced to rely on those in power for information. *Id.*, at 750.

- Allowing MacKay to toll the statute of limitations could serve to reward an abdication of fiduciary duties by corporate fiduciaries. In essence, a corporate fiduciary could abandon his fiduciary duty to the detriment of ordinary shareholders, but still avail himself of an avenue of recovery intended for an ordinary shareholder."[13] *Id.*

III. Memorandum Of Law

A. The Fair And Reasonable Standard

The Commission's proposed Distribution Plan is fair and reasonable, and that under that standard the Court should give deference to the Commission's plan. As the two courts that adopted the fair and reasonable standard stated, while District Courts always have discretion to determine how disgorged funds will be distributed,[14] the fair and reasonable standard does not give the Court open-ended discretion. Under that standard, "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." *Worldcom*, 467 F.3d at 82, quoting *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). Because the Commission is charged by statute with enforcing the securities laws, courts should

[13] This is analogous to the situation here – where MacKay claims he did not know what was going on so he should be able to participate in the Fair Fund designed for ordinary shareholders. For this claim to be colorable he would have had to abdicate his fiduciary obligations and ignore information that he was given as a Stiefel Labs' Board member. Just as the 11th Circuit did, this Court should rule against the Objectors in order to protect ordinary shareholders from being victimized by this brazen attempt to take more than a third of the Fair Fund.

[14] *Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006).

"defer to its 'experience and expertise' in determining how to distribute the funds." *Id.*, quoting *Wang*, 944 F.2d at 88.

Under the fair and reasonable standard, District Courts should not weigh competing plans and decide which is the most fair and reasonable. *SEC v. J.P. Morgan Securities, Inc.*, 266 F. Supp. 3d 225, 227 (D.D.C. 2017) (when the Commission "devises a settlement distribution plan, a court does not consult a looking glass and ask whether it is the fairest of them all. The only question is whether such a plan is sufficiently fair and reasonable"); *Worldcom*, 467 F.3d at 84 ("limits are inevitable because the government did not recoup some endless wellspring of funds . . . when funds are limited, hard choices must be made"); *SEC v. CR Intrinsic Investments*, 164 F. Supp. 3d 433, 435 (S.D.N.Y. 2016) ("The standard of review for a proposed Fair Fund distribution plan 'fairly and reasonably distributes the limited Fair Fund proceeds among the potential claimants . . . nearly every plan to distribute funds obtained in an [SEC] enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered").

Courts routinely approve Commission Fair Fund distribution plans over the objections of claimants, particularly when, as here, the Commission's goal is to achieve an equitable and *pro rata* distribution of limited recovered funds. *Intrinsic Investments*, 164 F. Supp. 3d at 435-36 (overruling investors' objections and approving a Commission distribution plan "because the SEC provides a reasonable and detailed justification for doing so in the interest prioritizing equitable distribution to injured investors"); *J.P. Morgan*, 266 F. Supp. 3d at 231 (overruling objections because "[e]ven if the Objector's alternative makes some sense, the Amended Plan's proportional scheme is still a fair and reasonable one. Courts have favored *pro rata* distribution of assets where, as here . . . victims were similarly situated with respect to their relationship to the defrauders");

Worldcom, 467 F.3d at 84 ("It is clear that the SEC considered carefully how best to apportion investors"). As set forth in the following sections, the Commission's proposed Distribution Plan more than satisfies the fair and reasonable standard, and the Court should approve it.

B. The Commission's Plan Is Fair And Reasonable.

The Commission's Distribution Plan treats all defrauded shareholders equally because the Commission determined each shareholder's Net Loss using an identical methodology and it uniformly excludes insiders, any entity controlled by an insider, and those with knowledge of the fraud, such as MacKay and 100079 Canada, from participating in the Fair Fund distribution. In addition, each non-excluded shareholder gets the same *pro rata* share of their Net Loss.

Those factors alone lead to the conclusion that the Distribution Plan is fair and reasonable. *J.P. Morgan*, 266 F. Supp. 3d at 231 (overruling objections because "[e]ven if the Objector's alternative makes some sense, the Amended Plan's proportional scheme is still a fair and reasonable one. Courts have favored *pro rata* distribution of assets where, as here . . . victims were similarly situated with respect to their relationship to the defrauders"); *Worldcom*, 467 F.3d at 84 ("It is clear that the SEC considered carefully how best to apportion investors"); *Intrinsic Investments*, 164 F. Supp. 3d at 435-36 (overruling investors' objections and approving a Commission distribution plan "because the SEC provides a reasonable and detailed justification for doing so in the interest prioritizing equitable distribution to injured investors").

1. It is Fair and Reasonable to Exclude Insiders

The Distribution Plan is fair and reasonable because it uniformly excludes all insiders (defined in part as members of the Stiefel Labs' Board of Directors) and any entity controlled by an insider. Barring insiders of the company that carried out the fraud is a routine practice in distributions. *See e.g.*, *SEC v. Pension Fund of America, L.C.*, 377 Fed.Appx. 957, 962-63 (11th

Cir. 2010) (unpublished) ("The district court did not abuse its wide discretion when it categorically precluded the Pension Fund's former Regional Directors and sales agents from recovering from the receivership estate.").[15] Hence, barring all insiders from receiving a Fair Fund distribution is fair and reasonable and the Court should deny MacKay's claim that it is arbitrary for the Commission to bar all insiders, including himself, from receiving a distribution.

MacKay's claim that the Court should not exclude him because he was purportedly only an "honorary" member of Stiefel Labs' Board is also meritless for three reasons. First, MacKay fails to explain why this distinction is of any legal significance. Second, MacKay ignores contemporaneous evidence showing he was a full-fledged member of the Board. The private lawsuit complaint, the District Court and the 11th Circuit opinions, and the merger documents all do *not* refer to MacKay as an "honorary" board member. In reality, MacKay operated as a full member of the Board. He attended board meetings, voted on board matters, and received material information about third-party valuations from sophisticated investment banks (these valuations, which MacKay was aware of while ordinary shareholders were not, provide the factual underpinnings of the Valuation Fraud). *See* above Section II.D. Lastly, the Plan of Distribution does not draw any distinction between "honorary" and non-honorary members of the Stiefel Labs' Board. All members, "honorary" or not, who sold stock prior to January 1, 2009 are uniformly barred from receiving a Fair Fund distribution. Accordingly, MacKay's objection on these grounds is also meritless.

[15] In *Pension Fund of America*, a Commission receivership case, the objector argued that the district court erred in denying his claim on the basis of his status as a former regional director and sales agent of the Pension Fund *since he did not personally commit fraud* and could not be held responsible for the fraud of the Pension Fund, its principals, or other regional directors and sales agents. *The Court rejected those arguments*. *Id*.

2. It is Fair and Reasonable to Exclude Entities Controlled by Insiders

MacKay claims that since he used 100079 Canada to sell his shares that the Plan of Distribution does not bar 100079 Canada from receiving a Fair Fund distribution. However, the Plan of Distribution, clearly excludes "members of the Stiefel Labs' Board of Directors (or any of their affiliates, spouses, partners, parents, children, siblings, or *controlled* persons or *entities*) . . ." (DE 240-1 at 3, ¶4, emphasis added). As demonstrated above, there is no legitimate dispute that MacKay served on Stiefel Labs' Board of Directors and controlled 100079 Canada. *See* above Section II.D. Hence, the Plan of Distribution expressly excludes both MacKay, as a member of Stiefel Labs' Board, and 100079 Canada, as an entity controlled by a member of the Board.

Also, by excluding entities controlled by an insider makes complete sense, since the insider's knowledge is imputed to the principal. *See In re Spear & Jackson Securities Litigation*, 399 F.Supp.2d 1350, 1361 (S.D. Fla. 2005) ("knowledge of individuals who exercise substantial control over a corporation's affairs is properly imputable to the corporation"), citing *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 270–71 & n. 16 (5th Cir. 1981); *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999) (the scienter of corporate officers is properly imputed to the corporation). Thus, there is not any valid reason to exclude an insider, but not a corporation used by an insider, especially since both MacKay and 100079 Canada had knowledge of fraud.

In addition, if the Objection was granted, it would lead to a totally unfair and arbitrary outcome, which would allow an insider who had knowledge of the fraud to receive more than a third of the Fair Fund merely because he used to a wholly controlled entity to sell his shares. The Court should, therefore deny, the Objection that the Court should allow 100079 Canada to receive a Fair Fund distribution.

3. It is Fair and Reasonable to Exclude Individuals and Entities Who Had Knowledge of the Fraud

MacKay and 100079 Canada were not victimized by the fraud, because they had knowledge of the Valuation Fraud. Simply stated, at the time MacKay sold his shares in May 2008, he had knowledge of the much higher valuations sophisticated investment banking firms placed on Stiefel Labs, while ordinary shareholders had no such knowledge. *See* above Section II.D. Moreover, as the principal and control person over 100079 Canada, MacKay's knowledge of the fraud is imputed to 100079 Canada. *Spear & Jackson Securities Litigation*, 399 F.Supp.2d at 1361; *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1340.

Furthermore, based on the factual findings in their dismissed private lawsuit, MacKay and 100079 Canada are collaterally estopped from arguing here that they did not have knowledge of the Valuation Fraud. *See SEC v. Michael Lauer, et al.*, 2008 WL 4372896 *14 (S.D. Fla. Sept. 24, 2008), *affirmed*, 478 Fed.Appx. 550, 555 (unpublished) (11th Cir. 2012) (after another court found that Lauer had manipulated a stock, he was estopped from disputing those facts). The 11th Circuit has articulated the following standard for issue preclusion:

> To claim the benefit of collateral estoppel the party relying on the doctrine must show that:
>
> > (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Pleming v. Universal–Rundle Corp., 142 F.3d 1354, 1359 (11th Cir.1998), cited with approval in *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000). In determining when an issue has been "actually litigated," the *Pleming* court cited with approval the Restatement of Judgments' formulation that "[w]hen an issue is properly raised, by the pleadings or otherwise, and is

submitted for determination, and is determined, the issue is actually litigated." Id. (quoting *Restatement (Second) of Judgments* § 27 cmt. d (1982)).

In this case, all of the elements for issue preclusion have been satisfied: (1) the issues decided in the *100079 Canada v. Stiefel Labs and Stiefel* litigation are identical to those being asserted herein (whether MacKay and 100079 Canada had knowledge of the fraud); (2) those issues were actually litigated in the *100079 Canada v. Stiefel Labs and Stiefel* litigation; (3) determination of those issues was essential to the court's detailed judgment in the *100079 Canada v. Stiefel Labs and Stiefel* litigation; (4) and 100079 Canada/MacKay had a full and fair opportunity to present their evidence on the issues. Therefore, this Court should find that 100079 Canada and MacKay are precluded from re-litigating the issue of whether they had knowledge of the fraud in this litigation.

Lastly, it is absurd to call them victims when they received *more than $177 million* from selling the remainder of MacKay's Stiefel Labs shares in July 2009.

For all of these reasons, the Court should deny the Objection of MacKay and 100079 Canada since they both had knowledge of the fraud.

4. The Court Should Reject the Objectors Remaining Arguments

The objectors also make a number of red herring arguments that the Court should reject. First, they incorrectly claim that they are being excluded from participating in the Fair Fund because it was found that the statute of limitations for 100079 Canada's private right of action against the Company had expired. Objection at 11-12. However, this is simply not the case. The definition of Excluded Shareholder in the Distribution Plan includes six categories, none of which involves excluding any shareholder based on the statute of limitations in a private right of action.

DE 240-1 at 3, ¶4.[16] Second, they claim the Court should not exclude them because other victims also received the August 9, 2007 email from Stiefel announcing the Blackstone's investment in the Company. Objection at 9. Again, no shareholder (including MacKay and 100079 Canada) is being excluded on this basis. This email did not disclose the valuation of the Company that Blackstone and other investment banks placed on the Company, which was substantially higher than valuation Bogush placed on the Company.[17] Finally, the Objectors claim that they can only be excluded if they had *actual* knowledge of the fraud. Objection at 10. However, neither MacKay nor 100079 Canada have provided any legal support for this standard. Regardless, as discussed extensively above (*see* above Section II.D.), the Commission has more than met this standard since they had *actual* knowledge of the underlying facts that form the basis of the Valuation Fraud.

C. Request for Oral Argument

The Objectors request oral argument. However, given that: nearly every issue they raise has already been decided against them in 100079 Canada's private litigation against the Company; MacKay and all Stiefel Labs' Board members (and entities they controlled) are being treated uniformly, so there is nothing arbitrary or capricious about the proposed Plan of Distribution; and the complete unfairness to ordinary victims to have MacKay or 100079 Canada (who both had knowledge of the fraud and have already received more than $177 million) take more than a third of the Fair Fund, the Commission respectfully states that oral argument is not needed and the Court

[16] The reasons they are being excluded, as discussed extensively above, is that MacKay was a Stiefel Labs' Board member, 100079 Canada was controlled by a Board member, and both had knowledge of the Valuation Fraud.

[17] As discussed extensively above, MacKay was aware of these higher valuations that form the basis of the Valuation Fraud while ordinary shareholders had no such knowledge.

should deny the Objection based on the pleadings.[18]

IV. Conclusion

For all of the reasons set forth in this Reply, the Court should deny the Amended Objection by MacKay and 100079 Canada (DE 267) and approve the Commission's Distribution Plan as set forth in DE 240-1.[19]

December 8, 2020

Respectfully submitted,

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

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

Co-Distribution Agents and 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 December 8, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Christopher E. Martin
Christopher E. Martin

[18] If the Court does grant oral argument, we request that due to the ongoing COVID-19 pandemic that the Court allow the parties to attend the oral argument by video.

[19] As we indicated in the motion to approve the Distribution Plan, once the Court has ruled on the objections, the Commission will submit a proposed order approving the Distribution Plan.

EXHIBIT
A

Plaintiff's Exhibit 151
Case No. 11-CV-24438-WJZ

Confidential

INFORMATION STATEMENT AND CONSENT SOLICITATION

STIEFEL®

STIEFEL LABORATORIES, INC.

April 20, 2009

CONFIDENTIAL

INFORMATION STATEMENT AND CONSENT SOLICITATION

Stiefel Laboratories, Inc.

This Information Statement and Consent Solicitation ("**Information Statement**") is being furnished to stockholders of Stiefel Laboratories, Inc., a Delaware corporation ("**Stiefel**"), to solicit the consent of Stiefel stockholders in favor of the proposed merger (the "**Merger**") of a subsidiary of SJ Galaxy Acquisition Corporation, a Delaware corporation ("**Parent**") and a wholly owned subsidiary of GlaxoSmithKline plc, a public limited company organized under the laws of England and Wales ("**GlaxoSmithKline**"), with and into Stiefel, pursuant to which Stiefel will become an indirect wholly-owned subsidiary of GlaxoSmithKline. The Agreement and Plan of Merger, dated as of April 20, 2009 (the "**Merger Agreement**"), by and among GlaxoSmithKline, Parent and Stiefel is attached to this Information Statement as Exhibit A. Capitalized terms not defined herein have the respective meanings ascribed to them in the Merger Agreement, except that in all cases references to the "Company" have been replaced with "Stiefel" and references to "Parent" have been replaced with "GSK" for clarity.

This Information Statement is being sent to Stiefel stockholders on or about April 20, 2009.

The proposed Merger is a complex transaction. You are strongly urged to read and consider carefully all of the information in this Information Statement, including the Exhibits hereto. ***You should also carefully consider the information under "Risk Factors" beginning on page 3 in this Information Statement.***

You should only consider and rely on the information contained in this Information Statement. You should not rely on any information or representations that are not in, or made part of, this Information Statement. You should not assume that the information in this Information Statement is accurate as of any date other than the date of this Information Statement. No persons have been authorized to give any information or to make any representations or statements (other than those contained in this Information Statement) regarding the Merger or the other matters discussed herein and, if given or made, any such representations or information provided must not be relied on as having been authorized or sanctioned by GSK or Stiefel or any other person.

This document is not an offer to sell to, or a solicitation of an offer to buy from, anyone in any state or other jurisdiction in which such offer or solicitation is not authorized, or to any person to whom it is unlawful to make such offer or solicitation.

The information contained in this Information Statement is not intended to be legal, tax or investment advice. You should consult your own counsel, accountants and investment advisors, respectively, as to legal, tax and other matters concerning the Merger.

The information contained in this Information Statement is highly confidential and is disclosed solely for your use in connection with consideration of the Merger and related matters. The information contained in this Information Statement, or any other information provided in connection herewith, is not to be relied or used for any other purpose or released to any other persons other than your legal, tax and accounting advisors, without the express prior written consent of Stiefel.

Requests for additional information should be directed to Matt Pattullo, Corporate Secretary of Stiefel, at (786) 999-7023.

INTERESTS OF CERTAIN PARTIES

In considering the recommendation of the board of directors of Stiefel with respect to the Merger, stockholders of Stiefel should be aware that some of the directors and officers of Stiefel have interests in the Merger that may be different from, or are in addition to, the interests of Stiefel stockholders generally. The board of directors of Stiefel was aware of the interests described below and considered them in approving the Merger and recommending that Stiefel stockholders eligible to vote approve and adopt the Merger Agreement and approve the Merger.

Capital Stock and Equity-Based Awards held by Directors and Officers of Stiefel

Stiefel's officers and directors own shares of Stiefel capital stock. Additionally, some of Stiefel's officers have been granted (i) restricted stock awards, which will fully vest upon the consummation of the Merger, and (ii) performance unit awards, which will vest fully and pay out in cash upon the consummation of the Merger.

The following table indicates the number of shares of Common Stock, and the number of shares of Common Stock underlying unvested equity awards granted pursuant to the Stiefel Laboratories, Inc. Long Term Incentive Plan, held by Stiefel's executive officers and directors as of April 20, 2009.

	Number of Shares of Class A Common Stock	Number of Shares of Class B Common Stock	Number of Shares of Class C Common Stock	Number of Shares of Series A Preferred Stock	Number of Shares of Class C Common Stock Underlying Restricted Stock Award Certificate (6)	Value of Performance Unit Awards Payable Upon Consummation of Merger (6)
Directors and Executive Officers						
Charles W. Stiefel (1)(5) *Chief Executive Officer and Chairman of the Board*	8.041566	2,195.777383	1,733.991998	--	15.18	$750,000
Todd R. Stiefel (2)(5) *Chief Strategy Officer and Director*	3.305904	2.727150	614.108535	--	4.83	$238,875
Brent D. Stiefel (3)(5) *Chief of Pharmaceutical Operations and Director*	2.160780	2.655217	603.981929	--	4.83	$238,875
William Humphries (5) *President and Director*	1.005907	0.053165	0.859095	--	4.83	$238,875
Richard J. MacKay (4) *President of Stiefel Canada, Inc. and Vice Chairman of the Board*	232.272795	--	2322.727205	--	--	--
Gabriel McGlynn *Senior Vice President, Eurasia, Commercial Operations and Director*	--	--	--	--	--	--
Michael T. Cornelius (5) *Chief Financial Officer*	1.234857	0.111682	3.685286	--	2.96	$146,250
Devin G. Buckley (5) *Senior Vice President and General Counsel*	1.538760	0.150213	7.120110	--	1.97	$97,500
Gavin Corcoran *Chief Scientific Officer*	--	--	--	--	2.96	$146,250
Non-Employee Directors						
Catherine M. Stiefel	113.597190	--	1,135.973125	--	--	--
Anjan Mukherjee (7)	--	--	--	8,930.460	--	--
Jeffrey S. Thompson (5)	1.875149	0.350424	12.364592	--	--	--

(1) Includes 100 shares of Class C held under the Brent D. Stiefel 2008 GRAT and 100 shares of Class C held under the Todd R. Stiefel 2008 GRAT
(2) Includes 100 shares of Class C held under the Todd R. Stiefel 2008 GRAT and 6.324563 shares of Class C held under the FTMA for Cole Gentry Stiefel.
(3) Includes 100 shares of Class C held under the Brent D. Stiefel 2008 GRAT
(4) Includes shared owned directly by 100079 Canada, Inc., of which Mr. MacKay is the controlling shareholder.
(5) Includes both vested and unvested shares held pursuant to the Stiefel Laboratories, Inc. Retirement Savings Plan
(6) Includes unvested shares held pursuant to the Stiefel Laboratories, Inc. Long Term Incentive Plan.
(7) Includes shares owned by Blackstone Healthcare Partners L.L.C.

Employment Agreements

Certain employees of Stiefel are party to an employment agreement with Stiefel. It is anticipated that each of these employees will continue to be employed by GSK or one of its subsidiaries after the Merger. As of the date of this Information Statement there have been no discussions between GSK and employees of Stiefel concerning new employment arrangements, but GSK and certain employees of Stiefel may negotiate and enter into new employment agreements on terms that may be materially different from those contained in their current employment agreements. Under the terms of the employees' current agreements, each such employee would be eligible to receive the following severance payments and benefits from GSK or one of its subsidiaries upon an "Involuntary Termination" (as such term is defined in the employment agreements) of such officer's employment by Stiefel following the Merger: (i) a lump-sum payment of any accrued but unpaid base salary and any earned and unpaid bonus; (ii) a lump-sum cash payment of the executive's remaining base salary for the remaining term of the "Employment Period" (as such term is defined in the employment agreements); (iii) a lump-sum payment equal to the executive's then current target annual bonus for the remaining term of the "Employment Period"; and (iv) payment of such executive's COBRA premiums so as to maintain health insurance coverage for the executive and his dependants for a period of 18 months following the date of termination.

Additionally, in the event that an excise tax is imposed by reason of Section 4999 of the Internal Revenue Code of 1986, as amended, on any of the payments or benefits received by the executive employees, the employees will be entitled to receive a gross-up payment so that the executive employees receive the same after-tax benefit as they would have received had no excise taxes been imposed.

The following table indicates the dollar values of the amounts that will be payable by GSK or one of its subsidiaries to Stiefel's executive officers under the executive employment agreements, as amended, in the event that GSK causes an "Involuntary Termination" of the executive officers on July 1, 2009. However, as noted above, such officers are expected to continue to be employed by GSK or its subsidiaries following the consummation of the Merger.

	Value of Potential Employment Agreement Severance Benefits	Value of COBRA Premiums	Value of Estimated 280G Gross-Up Payment	Total Potential Non-Equity Based Transaction Benefits
Charles W. Stiefel *Chairman and Chief Executive Officer*	$7,875,000	$26,100	$2,874,594	$10,775,694
Todd R. Stiefel *Chief Strategy Officer and Director*	$1,875,000	$26,100	$808,048	$2,709,148
Brent D. Stiefel *Chief of Pharmaceutical Operations and Director*	$1,725,000	$26,100	$809,553	$2,560,653
William Humphries *President and Director*	$3,750,000	$26,100	$1,793,553	$5,569,653
Michael T. Cornelius *Chief Financial Officer*	$1,365,000	$26,100	$564,651	$1,955,751
Devin G. Buckley *Senior Vice President and General Counsel*	$1,140,733	$26,100	$402,797	$1,569,630
Gavin Corcoran *Chief Scientific Officer*	$1,593,750	$26,100	$699,695	$2,319,545

rate under a treaty applies and the non-U.S. holder certifies its eligibility for such reduced rate. A non-U.S. Holder should consult with its tax advisor to determine the specific tax consequences to the holder of the installment method, including electing out of the installment method and the application of any imputed interest rules to the payments received after the taxable year in which the Merger occurs.

Backup Withholding Tax and Information Reporting for Non-U.S. Holders

In general, if you are a non-U.S. Holder you will not be subject to backup withholding and information reporting with respect to cash received in the Merger if you have provided the Paying Agent with an IRS Form W-8BEN (or a Form W-8ECI if your gain is effectively connected with the conduct of a U.S. trade or business). If a non-U.S. Holder's Stiefel shares are held through a foreign partnership or other flow-through entity, certain documentation requirements also apply to the partnership or other flow-through entity. Backup withholding is not an additional tax and any amounts withheld under the backup withholding rules may be refunded or credited against a non-U.S. Holder's U.S. federal income tax liability, if any, provided that you furnish the required information to the Internal Revenue Service in a timely manner.

THE FOREGOING DISCUSSION DOES NOT PURPORT TO BE A COMPLETE SUMMARY OF THE POTENTIAL TAX CONSEQUENCES OF THE MERGER. HOLDERS OF SHARES ARE STRONGLY URGED TO CONSULT THEIR TAX ADVISORS AS TO THE SPECIFIC TAX CONSEQUENCES TO THEM OF THE MERGER, INCLUDING THE APPLICABILITY AND EFFECT OF U.S. FEDERAL, STATE, LOCAL, FOREIGN AND OTHER TAX LAWS IN THEIR PARTICULAR CIRCUMSTANCES.