

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

AGFEED INDUSTRIES, INC., et al.,

Defendants.

NO. 3:14-CV-00663-WDC-BDH  
JUDGE CRENSHAW  
MAGISTRATE JUDGE HOLMES

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

**MOTION**

Plaintiff Securities and Exchange Commission (the "Commission" or "SEC") moves the Court to approve the Commission's proposed plan to distribute funds paid by defendant AgFeed Industries, Inc., et al ("AgFeed" or "Defendant") and any future funds to be paid by Defendant to harmed investors (the "Distribution Plan") submitted herewith.

## **MEMORANDUM OF LAW**

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

The Commission filed a settled enforcement action against AgFeed Industries, Inc. (“Defendant”) on October 6, 2014. As required by Section V of the Final Judgment, Defendant was liable for disgorgement of \$18,000,000, which represented profits gained as a result of the conduct alleged in the Complaint. The Final Judgment ordered Defendant to pay (i) \$12,500,000 pro-rata to holders of Class 5B equity interests, as defined in Defendant’s July 22, 2014 Second Amended Chapter 11 Plan of liquidation Supported by the Official Committee of Equity Security Holders in In re AgFeed, Inc., Chapter 11 case No. 13-11762 (BLS)(Bankr. D. Del.) (the “Bankruptcy Case”), and (ii) \$5,500,000.00 to the Commission pursuant to a confirmed Chapter 11 Plan of liquidation in the Bankruptcy Case. In accordance with the Final Judgment, Defendant paid a total of \$5,500,000.00 to the Commission on or about November 26, 2014. The funds were deposited into an SEC-designated account with the United States Treasury.

On October 6, 2015, the Court entered an Order appointing Epiq Systems (“Epiq”) as Distribution Agent charged with facilitating the development of a distribution plan for the fund and to administer the plan. The AgFeed Distribution Fund (“Distribution Fund”) is comprised of the \$5,500,000.00, plus any interest and minus any tax obligations and fees and expenses of the fund administrator and tax administrator. The funds are currently being held by the Commission.

### **II. LEGAL STANDARD FOR REVIEW**

#### **a. The Court May Give Significant Deference to the SEC’s Distribution Plan.**

Nearly every plan to distribute funds obtained in SEC enforcement actions requires choices to be made regarding the allocation of funds among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, courts give the

Commission significant discretion to design and set the parameters of a distribution plan. *See SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165 (2d Cir. 1989). The court’s review of a distribution plan focuses on whether the plan is fair and reasonable. *SEC v Fishbach*, 133 F.3d 170, 175 (2nd Cir. 1997); *See Official Comm. Of Unsec. Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006). (“[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), citing *Wang*, 944 F.2d at 85. For the reasons articulated below, the Commission believes that the proposed distribution plan (“AgFeed Distribution Plan”) for the Distribution Fund constitutes a fair and reasonable allocation of the limited funds available and should be approved.

**b. The Commission’s Proposed Distribution Plan Provides a Fair and Reasonable Allocation of the Distribution Fund.**

The Commission’s principal goal in fashioning a distribution plan is to identify a methodology that would allocate the available funds fairly and reasonably, in a manner proportional to the injury that investors suffered as a result of the actions of the Defendant.

In its Complaint, the Commission alleged that AgFeed reported fictitious revenues from its China operations from 2008 through June 30, 2011 in order to meet financial targets and prop up the stock price. The fraud caused AgFeed’s publicly-reported revenues to be inflated by approximately \$239 million during that period. On an annual basis, the fraud caused overstated revenue ranging from approximately 71% to 103%.

The AgFeed Distribution Plan is designed to compensate purchasers of shares of AgFeed

common stock during the Recovery Period,<sup>1</sup> or holders stock as of the last day of the Recovery Period because they were harmed by AgFeed's materially misstated revenues, which caused AgFeed's share prices to be artificially inflated. The proposed distribution methodology allocates the Distribution Fund amongst Eligible Claimants. An Eligible Claimant's total Eligible Loss Amount, as determined in accordance with the Plan of Allocation contained in Exhibit B to the AgFeed Distribution Plan, will be used to determine the amount of their distribution payment. Should the total amount of the total Eligible Loss Amount of all Eligible Claimants exceed the Net Distribution Fund, the Distribution Agent will distribute funds to the Eligible Claimants based on a *pro rata* distribution formula. The Distribution Agent shall determine each Eligible Claimant's pro rata share based upon each Eligible Claimant's total Eligible Loss Amount divided by the aggregate total Eligible Loss Amount of all Eligible Claimants. In no event will an Eligible Claimant receive a Distribution Payment totaling more than his, her or its calculated harm, after taking into account the payment received in the Class Action.<sup>2</sup>

### **III. CONCLUSION**

The Commission believes that the proposed Distribution Plan for the Distribution Fund should be approved as fair and reasonable. The proposed plan directs the Distribution Funds' proceeds to investors who were harmed by the improper conduct alleged in the Commission's underlying lawsuit. The plan reasonably and fairly allocates its funds in accordance with each Eligible Claimant's Eligible Loss Amount.

Copies of the proposed AgFeed Distribution Plan and accompanying Plan of Allocation are attached to this motion as Exhibit A and Exhibit B, respectively.

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<sup>1</sup> Capitalized terms have the meaning assigned in the Distribution Plan.

<sup>2</sup> *Blitz v. AgFeed Industries, Inc.*, No. 11-cv-0992, (M. D. Tenn. Oct. 18, 2011)

Dated: September 28, 2016

Respectfully submitted,

s/ Keshia W. Ellis

Keshia W. Ellis

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