

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 AND  
MEMORANDUM OF LAW IN SUPPORT OF AN ORDER TO TURN OVER FUNDS ON  
DEPOSIT WITH THE COMMISSION TO THE DISTRIBUTION AGENT AND AUTHORIZE  
PAYMENT OF THE DISTRIBUTION AGENT'S FEES

MOTION

Plaintiff, the United States Securities and Exchange Commission (the "Commission" or "SEC"), respectfully requests that the Court enter an Order (i) directing the Commission to issue a check to the distribution agent, Epiq Systems (hereafter "Distribution Agent"), to transfer the funds held by the Commission under the case name designation "*SEC v. AgFeed Distribution Fund*" ("Distribution Fund" or "Fund") totaling approximately \$5,624,494.05, (ii) directing the Distribution Agent to deposit these funds pursuant to Paragraph 3.28 of the Distribution Plan,

and (iii) directing the Distribution Agent to disburse these funds to Eligible Claimants in accordance with the terms of the Distribution Plan, (iv) directing the Distribution Agent to pay its outstanding fees and expenses from the Distribution Fund; and (v) authorizing the Distribution Agent to pay all future tax obligations, fees, and expenses of the Tax Administrator and/or Distribution Agent from the Distribution Fund, upon written request to and written approval by Commission staff, without further order from the Court.

#### MEMORANDUM OF LAW

#### I. 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 (Dkt. #110).

On September 28, 2016, the Commission filed a motion to approve a distribution plan, which detailed the distribution plan (the “Plan”). On October 18, 2016, the Court issued an order that approved the Plan (Dkt. #160).

On March 24, 2017, the court entered a final judgment against K. Ivan Gothner (“Gothner”). Gothner was ordered to pay a total of \$75,000.00 in penalties to the Commission pursuant to a 364 day payment plan. The Commission was ordered to hold all funds, together with interest and income earned thereon, pending further order of the Court. Also on March 24, 2017, the court entered a final judgment against Edward J. Pazdro (“Pazdro”). Pazdro was ordered to pay a total of \$30,000.00 in penalties to the Commission pursuant to a 364 day payment plan. The Commission was ordered to hold all funds, together with interest and income earned thereon, pending further order of the Court.

In total, the Defendants were ordered to pay \$5,605,000. As of February 27, 2018, the Distribution Fund balance was \$5,624,494.05. The Distribution Fund is comprised of approximately \$5,624,494.05, plus any interest and minus any tax obligations and fees and expenses of the distribution agent and tax administrator. The funds are currently being held by the Commission.

The Plan was 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. Each Eligible Claimant will receive a *pro rata* share of the *SEC v. AgFeed Distribution Fund* available for distribution. The distribution methodology allocated the Distribution Fund amongst 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

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

the payment received in the Class Action.<sup>2</sup>

## II. DISBURSEMENT OF DISTRIBUTION FUND

Pursuant to the Plan, the Distribution Agent has prepared and submitted to the Commission staff a list of Eligible Claimants and total Eligible Loss amounts for each (the “Final Payee List”).<sup>3</sup> There are 4,239 Eligible Claimants on the Final Payee List with total Net Eligible Losses of \$19,508,873.78. The Distribution Agent has also submitted the Declaration of Alex Villanova (“Declaration,” attached as Exhibit 1) in support of this Motion, which provides a detailed explanation of the procedures that the Distribution Agent used to develop the list of Eligible Claimants. Distribution checks shall be issued to those four thousand three hundred seventy nine (4,239) harmed investors for which the SEC provided Eligible Loss amounts assuming their payment calculates above the Minimum Distribution Amount of \$10.00 as provided in the Plan. Each Eligible Claimant will receive a *pro rata* share of the *SEC v. AgFeed Distribution Fund* available for distribution. The Final Payee List and the Declaration has been reviewed by the undersigned Commission Counsel, who has no objections, and thus now moves the Court to transfer funds to Epiq for distribution pursuant to the Plan.

Epiq is now in a position to distribute checks to Eligible Claimants as defined in the Plan. In order to do so, subject to the Court’s approval of this motion, and pursuant to Paragraph 3.28 of the Plan, Epiq will establish an escrow account in the name of “*SEC v. AgFeed Distribution Fund*” and bearing the Employer Identification Number of the Qualified Settlement Fund, as custodian for the distributees of the Distribution Fund. Epiq will also establish a separate deposit account titled “*SEC v. AgFeed Distribution Fund*” as set forth above for the for the purpose of

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

<sup>3</sup> The Final Payee List contains the names and addresses of the payees. Attached as Exhibit 2 is a copy of the Final Payee List, but the names and addresses of the payees have been removed. At the Court's request, the Commission will file an unredacted copy of Exhibit 2 under seal.

funding checks to be distributed to investors by Epiq pursuant to the Plan. Accordingly, the Commission respectfully requests that the Court order the funds in the Distribution Fund be transferred, \$5,624,494.05 minus Court Fees, for distribution to Eligible Claimants pursuant to the Plan.

**Payment of Outstanding Fees and Expenses of the Distribution Agent**

The Distribution Agent has submitted invoices totaling \$461,389.91 for outstanding fees and expenses. See Exhibit 3. This amount represents the costs incurred by the Distribution Agent from October 1, 2015 through December 31, 2017 as reflected on Invoices 90179033, 90179572, 90183301, 90187141, 90191428, 90195442, 90199611, 90203153, 90206623, 90210369, 90214690, 90218653, and 90222642. Commission staff has reviewed the invoice and believes it is reasonable for the work performed and in accordance with the Court's Order dated October 6, 2015. Therefore, the Commission respectfully requests that the Court direct the Distribution Agent be paid its outstanding fees and expenses from the Distribution Fund.

**Payment of Future Taxes, Fees and Expenses**

To expedite the administration and the subsequent termination of the Distribution Fund, the Commission requests that Distribution Agent be authorized to pay future obligations, fees and expenses of the Tax Administrator and/or the Distribution Agent from the Distribution Fund, upon written request to and written approval by Commission staff, without further order from the Court.

**WHEREFORE**, for all the foregoing reasons, the Commission respectfully requests that this Court enter the proposed Order and grant such other relief as it deems just and proper.

Dated: March 7, 2018

Respectfully submitted,

s/ Keshia W. Ellis

Keshia W. Ellis

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, a copy of the foregoing Plaintiff Securities and Exchange Commission's Motion and Memorandum of Law in Support of an Order to Turn Over Funds on Deposit with the Commission to the Distribution Agent and its accompanying proposed Order were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system, which will send notification to all counsel of record listed below. Parties may access this filing through the Court's system.

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