Keshia W. Ellis (Michigan Bar # P65146)
(elliskw@sec.gov)
Senior Counsel

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, DC 20549-5631
Telephone: (202) 551-4406
Facsimile: (202) 772-9363

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. DIAMOND FOODS, INC. Defendant.	Case No. 3:14-cv-00123-WHA **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR AN ORDER TO APPROVE THE DISTRIBUTION PLAN**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR AN ORDER TO APPROVE THE DISTRIBUTION PLAN

NOTICE

PLEASE TAKE NOTICE, that based upon the accompanying Motion, Memorandum, and Proposed Order, and all other papers and proceedings herein, Plaintiff United States Securities and Exchange Commission (the "Commission" or the "SEC") will move this Court, at a date and time to be determined by the Court, before the Honorable William H. Alsup, at the United States Courthouse for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, for an order to approve the Distribution Plan.

MOTION

Plaintiff, the SEC, respectfully requests that the Court enter an Order to approve the Distribution Plan. The SEC has submitted a proposed Order to the Court contemporaneously with the filing of this Motion.

I. Background

On January 9, 2014, the Commission filed separate actions against Diamond Foods, Inc. ("Diamond"), a snack food company, and its former CEO, Michael Mendes ("Mendes"), and its former CFO, Steven Neil ("Neil"), for their roles in an accounting scheme to falsify walnut costs in order to boost earnings and meet estimates by stock analysts for fiscal quarters in 2010 and 2011.

Collectively, Diamond, Mendes, and Neil were ordered to and have paid a total of $5,250,000.00 in penalties (the "Distribution Fund").

On October 18, 2016, the Court appointed Damasco & Associates LLP as the Tax Administrator to fulfill the tax obligations of the Distribution Fund.

On November 4, 2016, the Court created a Fair Fund for the $5,250,000.00 paid by Diamond, Mendes, and Neil to be distributed to harmed investors and appointed Kurtzman Carson Consultants as the Distribution Agent to oversee the distribution of the Fair Fund.

II. The Court Should Approve the Distribution Plan

The Commission seeks approval of its proposed Distribution Plan for the funds already collected from Diamond, Mendes, and Neil. The Distribution Plan provides for a distribution to certain individuals (the “Eligible Recipients”) who were harmed by Diamond’s, Mendes’, and Neil’s roles in an accounting scheme to falsify walnut costs in order to boost earnings and meet estimates by stock analysts for fiscal quarters in 2010 and 2011. Diamond, Mendes, and Neil were ordered, and have paid, a total of 5,250,000.00 in penalties to the Commission. The Distribution Plan, subject to Court approval, contemplates that $5,250,000.00, plus any interest, minus any tax obligations and fees and expenses of the tax administrator and distribution agent, will be distributed to Eligible Recipients on a *pro rata* basis for the harm created by Diamond’s, Mendes’, and Neil’s conduct. Commission staff also plans to distribute any future funds received, plus interest, less any taxes and fees to the tax administrator and any other administrative expenses, on a *pro rata* basis to Eligible Recipients as those future funds are received on an annual basis under the compromise payment plan.

III. The Proposed Plan of Distribution

The Commission proposes the following methodology (see Exhibit 1) to determine the distribution of the corpus of the Fair Fund and any future payments received into the Fair Fund pursuant to the Defendant's payment plan:

(Step 1) Determine each Eligible Recipient's loss ("Eligible Loss Amount") and use it to calculate the Recognized Claim Amount. Calculate total losses suffered by all harmed Eligible Recipients by adding up each Eligible Recipient's Recognized Claim Amount ("Total Recognized Claim Amount");

(Step 2) Divide each Eligible Recipient's Loss by the Total Recognized Claim Amount. This fractional result represents the Eligible Recipient's proportion of losses to the pool of total losses ("Eligible Recipient's Proportional Loss"); and

(Step 3) Multiply each Eligible Recipient's Proportional Loss by the Fair Fund, plus interest, less any reserve for taxes and fees of the tax administrator and any other administrative expenses ("Net Fair Fund"). The resulting figure represents the amount of the Net Fair Fund to be distributed to that Eligible Recipient ("Eligible Recipient's *Pro Rata* Share").

IV. Argument

Generally, courts have broad discretion to approve plans to distribute funds collected in SEC enforcement actions. *SEC v. Wang*, 944 F.2d 80, 84 (2d Cir. 1991). In evaluating a proposed distribution plan, a court should "decide whether, in the aggregate, the plan is equitable and reasonable." *Id.* "Unless the consent decree specifically provides otherwise, once the District Court satisfies itself that the distribution of proceeds in a proposed Securities and Exchange Commission disgorgement plan is fair and reasonable, its review is at an end." *Id.* at 85.

As the amount of money lost by Eligible Recipients is significantly more than the amount of funds that were collected for disbursement, the payments to investors will be calculated on a *pro rata* basis as described in the proposed methodology above. Any future payments paid pursuant to the

Final Judgment will be added to the Fair Fund. The Commission believes that the proposed Distribution Plan for the Fair Fund should be approved as equitable and reasonable.

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

Dated: November 30, 2018

Respectfully submitted,

s/ Keshia W. Ellis
Keshia W. Ellis
Trial Counsel
Office of Distributions
U.S. Securities and Exchange Commission
100 F. Street, N.E., SP III
Washington, DC 20549-5876
(202) 551-4406 – Telephone
(202) 772-9335 – Facsimile
elliskw@sec.gov
Michigan Bar #P65146
Attorney for Plaintiff