

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

HENRY FORD f/k/a
CLEOTHUS LEFTY JACKSON and
FALLCATCHER, INC.,

Defendants.

Case No. 19-cv-2214 (PD)

ECF Case

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS
UNCONTESTED MOTION TO ESTABLISH A FAIR FUND, APPOINT
A TAX ADMINISTRATOR, AND AUTHORIZE PAYMENT OF
FUTURE TAX-RELATED FEES, EXPENSES, AND OBLIGATIONS**

Plaintiff Securities and Exchange Commission (the “SEC” or “Commission”) respectfully submits this Memorandum of Law in support of its Uncontested Motion to Establish a Fair Fund, Appoint a Tax Administrator, and Authorize Payment of Future Tax-Related Fees, Expenses and Obligations (“Motion”).¹ For the reasons set forth below, the Commission respectfully submits that its motion should be granted in its entirety.

I. BACKGROUND

1. On May 22, 2019, the Commission filed a Complaint against Henry Ford f/k/a Cleothus Lefty Jackson (“Ford”) and Fallcatcher, Inc. (“Fallcatcher”) (collectively the “Defendants”) for selling shares of Fallcatcher’s common stock to investors based on material misrepresentations about the interest in Fallcatcher’s technology by large insurers and state governments. The Complaint alleged that between approximately August and September 2018, Ford

¹ As set forth in the Local Civil Rule 7.1(b) Certification attached to the Motion, Defendants consent to this motion.

and Fallcatcher engaged in the fraudulent offer and sale of Fallcatcher's common stock to about sixty-one (61) investors, defrauding them of approximately \$5 million. Fallcatcher, a privately-held start-up company, founded by Ford who was also the company's chief information officer, purported to create, market, and sell biometric devices and software to track patients receiving treatment for opioid and other drug addictions in order to prevent medical billing fraud on insurers and government agencies.

2. In presentations which he used to promote and sell Fallcatcher stock to potential investors, Ford falsely claimed that well-known insurers and state governments had expressed interest in Fallcatcher's technology. Ford showed investors a copy of a letter of interest (the "Letter") - purportedly addressed to Ford from a large well-known insurance company (the "Insurer") - on a large screen, telling investors, "This is why we are here." The Letter claimed to express the Insurer's interest in initiating a pilot program using Fallcatcher's technology. In his presentation, Ford claimed that Fallcatcher had offers not only from the Insurer but also from at least one other major insurance company and five states' health agencies to begin pilot programs with Fallcatcher's technology. In reality, Ford knew that the Letter was fabricated and that neither the Insurer nor any other insurer or state health agency had expressed any interest in using Fallcatcher's purported technology for a pilot program or in otherwise doing business with Fallcatcher.

3. On February 26, 2020, the Court entered an Order² approving Consent Judgments against Ford³ and Fallcatcher⁴ (the "Consent Judgments"), ordering: Ford to pay \$1,091,643.66 (disgorgement of \$539,140.58, prejudgment interest of \$13,362.50 and a civil penalty of \$539,140.58); and Fallcatcher to pay disgorgement of \$2,295,320.87. The judgments required the Defendants to pay the monies ordered to the SEC. To date, the Commission has received

² Dkt Nos. 40 and 41.

³ Dkt No. 38-1

⁴ Dkt No. 38-2.

disgorgement funds totaling \$2,267,805.27 from financial institutions and other third-parties that were holding those funds when this case was filed. Fallcatcher has been credited with \$2,263,696.11 and Ford has been credited with \$4,109.16. The Defendants owe a combined balance of \$1,119,156.26 (Fallcatcher \$31,624.76, and Ford \$1,087,534.50).

4. On July 14, 2020, in a related proceeding the Commission issued a settled Order (the “Administrative Proceeding”) against Abetterfinacialplan.com, LLC, d/b/a A Better Financial Plan (“ABF”) and Dean J. Vagnozzi (“Vagnozzi”)⁵ (collectively, the “Respondents”). In the Order, the Commission found that the Respondents raised over \$4.9 million for Fallcatcher from August through September 2018 from their advisory clients in violation of the federal securities laws. These funds accounted for the entirety of Fallcatcher’s September 2018 capital raise. The Fallcatcher-related conduct and the investors who were harmed as a result of that conduct in the Commission’s Order are identical to the conduct and harmed investors in SEC v. Ford, et al. For their efforts, Ford and Fallcatcher paid the Respondents a flat fee and four million shares of Fallcatcher for finding investors. As a result of the fraudulent conduct described in the Order, the Commission: (a) ordered the Respondents to pay a total of \$599,429.33 (consisting of disgorgement, prejudgment interest and penalties); (b) created a Fair Fund so that the disgorgement, prejudgment interest and penalties collected could be distributed to the victims of the Respondent’s fraud; and (c) ordered that funds paid by the Respondents be combined with the funds paid by the defendants in SEC v. Ford, et al., 19-cv-2214 (E.D. Pa). To date, the Respondents have not paid any of the amounts ordered pursuant to the Commission’s Order.

II. ESTABLISHMENT OF A FAIR FUND

5. The Consent Judgments provide that that funds paid “may be added or combined with funds paid in any related district court or administrative proceeding brought by or instituted by the

⁵ Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Exchange Act Rel. No. 89318 (July 14, 2020).

Commission for distribution to affected investors”, that the Commission will propose a plan to distribute the funds collected subject to the Court’s approval, and that the fund “shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002.”

6. All funds collected are held in an interest-bearing account at the Bureau of Fiscal Services of the United States Treasury Department (the “BFS”). The Fund consist of the \$2,267,805.27 collected from the Defendants together with interest earned on the monies invested. Any additional amounts paid by the Defendants in this matter, or by the Respondents pursuant to the Commission’s Order, will be added to the Fair Fund.

7. The Commission now moves the Court to establish a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, so that the funds collected plus accrued interest and earnings can be distributed to harmed investors. Section 308(a) of the Sarbanes-Oxley Act provides in relevant part:

If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

See 15 U.S.C. § 7246(a).

8. The Commission brought this action under the securities laws, and the Court and the Commission have separately ordered payment of disgorgement, prejudgment interest and penalties, of which Defendants Fallcatcher and Ford have paid a total of \$2,267,805.27. Accordingly, the requirements of Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, have been satisfied, and the Court should establish a Fair Fund to facilitate ultimate distribution of the funds to investors harmed by the Defendants’ conduct.

9. The creation of a Fair Fund is a precursor to creating a plan of distribution for Court approval in order to distribute the Fair Fund to investors harmed by the Defendant’s fraudulent

conduct which violated the securities laws. The SEC intends to develop a distribution plan (“Plan”), which will involve applying to the Court for the appointment of a distribution agent to assist with the development and administration of such a Plan, which will then be submitted to the Court for approval.

III. APPOINTMENT OF A TAX ADMINISTRATOR

10. The Fair Fund is a Qualified Settlement Fund (“QSF”) under section 468B(g) of the Internal Revenue Code (“IRC”), 26 U.S.C. § 468B(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5. A Tax Administrator, on behalf of the Fair Fund, should be appointed and authorized to take all necessary steps to enable the Fair Fund to obtain and maintain the status of a taxable QSF, including the filing of all required elections and statements contemplated by those provisions. The Tax Administrator will cause the Fair Fund to pay taxes in a manner consistent with treatment of the Fair Fund as a QSF. The reasonable costs, fees, and other expenses incurred in the performance of the Tax Administrator’s duties would be paid by the Fair Fund in accordance with the agreement between the SEC and the Tax Administrator.

11. The Commission recommends the appointment of Miller Kaplan, which is experienced in the taxation of QFSs and has agreed to reasonable fees for its services. In summary, the current agreement with Miller Kaplan provides for compensation for services and expenses as follows:

SERVICE	FIXED FEE
Income tax returns, including items a-f (below).	\$1,600
Income tax returns, including items a-f (below), for funds with assets of \$120,000 or less or that are open and closed within the same year.	\$700

Fixed fee tax compliance services include:⁶

- a. Obtain a federal tax identification number for the QSF.

⁶ These fixed fees include all copying expenses, and any internal expenses of the Tax Administrator in performing these services such as facsimile fees and telephone charges. Expenses that are not included are postage, expedited delivery fees

- b. Prepare and file federal and state income tax returns, as required.
- c. Where required, calculate quarterly estimated tax payments and provide information to the SEC so that payments may be made timely.
- d. Make arrangements with the SEC or its agents to pay tax liability.
- e. Calculate and recommend retention of a reserve for penalties and interest to be assessed as a result of any late filing of tax returns and late payment of taxes.
- f. Determine and comply with tax reporting obligations of the QSF relating to distributions or payments to vendors, if applicable.

Miller Kaplan has served as a tax administrator on numerous QSF's established by the Commission. The Commission staff respectfully requests that the Court appoint Miller Kaplan as Tax Administrator to execute all income tax reporting requirements, including the preparation and filing of tax returns, with respect to the Fair Fund under this Court's jurisdiction.

By the proposed Order, Miller Kaplan will satisfy the administrative requirements imposed by the QSF regulations, including but not limited to the fixed services set forth above and satisfying any information, reporting, or withholding requirements imposed on distributions from the Fair Fund, such as by the Foreign Account Tax Compliance Act. At the completion of the distribution, it will work with the Court-appointed distribution agent to prepare a final report and final accounting for filing with the Court. If appointed, Miller Kaplan may be removed *sua sponte* by the Court or upon motion of the SEC and replaced with a successor and, in the event it decides to resign as distribution agent, it must first give written notice to the Court and to the SEC's counsel of such intention, and the resignation, if permitted, will not be effective until the Court appoints a successor.

IV. THE COURT SHOULD AUTHORIZE THE SEC STAFF TO DIRECT PAYMENT OF TAX OBLIGATIONS AND ADMINISTRATIVE FEES AND EXPENSES WITHOUT FURTHER COURT ORDER.

In order to ensure timely payments of tax obligations and the fees and expenses of the Tax

(such as Federal Express), and other extraordinary costs, such as extended telephone conferences and reports. Additional tax compliance services and services for the administration of the QSF would be provided at the Commission's request and billed at the Tax Administrator's current rates discounted by 20%.

