

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**DELPHI CORPORATION, J.T.
BATTENBURG, III, ALAN
DAWES, PAUL FREE, JOHN
BLAHNIK, MILAN BELANS,
CATHERINE ROZANSKI,
JUDITH KUDLA, B.N.
BAHADUR, ATUL PASRICHA,
LAURA MARION, STUART
DOYLE, and KEVIN CURRY,**

Defendants.

**Case No. 2:06-cv-14891
DML-SDP**

**Honorable David M. Lawson
Mag. Judge Steven D. Pepe**

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR
APPROVAL OF DISTRIBUTION PLAN FOR THE FAIR FUND**

MOTION

Plaintiff Securities and Exchange Commission ("SEC") respectfully moves this Court to issue an order approving the proposed distribution plan ("Distribution Plan" or "Plan") for distributing the Fair Fund under this Court's jurisdiction (the "Distribution Fund" or "Fund") to an identified group of investors who were harmed by the Defendants' violations of the federal securities laws. Pursuant to the proposed Distribution Plan, the SEC would distribute the Fair

Fund of approximately \$1.26 million, plus any interest or earnings thereon and less Administrative Costs, to investors, or their lawful successors, identified by the SEC through a review and analysis of filings on SEC Form 13F, who may have suffered a loss from purchasing or acquiring shares of the common stock of Delphi Corporation between January 1, 2001, and March 21, 2005, at prices inflated by violations alleged in the SEC's Complaint. The SEC's motion is brought pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [15 U.S.C. § 7246(a)].

Pursuant to Local Rule 7.1, the SEC sought concurrence from Thomas W. Cranmer, Esquire, court-appointed *amicus curiae*, as well as Robert M. Stern, Esquire, attorney of record for Dawes, and Gregory Bruch, Esquire, attorney of record for Bahadur. Mr. Cranmer and Mr. Bruch consented to this motion. Mr. Stern was unable to obtain his client's consent at the time of filing. The SEC has not sought concurrence from attorneys of record for each of the other Defendants because they have not participated in these post-judgment proceedings which relate solely to the disposition of funds deposited by Dawes and Bahadur.

TABLE OF AUTHORITIES

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**BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF DISTRIBUTION PLAN FOR
THE FAIR FUND**

STATEMENT OF ISSUE PRESENTED

Whether, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [15 U.S.C. § 7246(a)], this Court should enter an order approving the proposed plan for distribution of the Fair Fund?

Plaintiff respectfully submits that the answer to this question should be in the affirmative.

I. BACKGROUND

On October 30, 2006, the SEC filed a Complaint against Delphi Corporation (“Delphi”) and thirteen individuals (collectively, the “Defendants”) alleging that, between 2000 and 2004, the Defendants, directly and indirectly, engaged in a pattern of fraudulent conduct that resulted in Delphi materially misstating its financial condition and operating results in filings made with the SEC, offering documents, press releases, and in other documents and statements disseminated to investors.¹ Dkt. 1 at 2. According to the Complaint, by their conduct, the Defendants violated the antifraud, reporting, and recordkeeping provisions of the federal securities laws. Dkt.1 at 6-11.

Delphi and six individuals, including Alan Dawes (“Dawes”), Delphi’s former Chief Financial Officer, and B.N. Bahadur (“Bahadur”), the founder and owner of an affiliated entity, settled with the SEC simultaneously with the filing of the Complaint. Dkt. 2, 3, 4, 5, 6, 7, and 8. Without admitting or denying the SEC’s allegations, Dawes consented to the entry of a final judgment ordering him to pay disgorgement of \$253,000 plus prejudgment interest of \$134,000, and a civil penalty of \$300,000 (the “Dawes Final Judgment”). Dkt. 10 at 5. Similarly, Bahadur consented to the entry of a final judgment ordering him to pay disgorgement of \$350,000 plus prejudgment interest of \$139,257 and a civil penalty of \$80,000 (the “Bahadur Final Judgment”). Dkt. 11 at 1. The Dawes Final Judgment and the Bahadur Final Judgment each provided that the ordered funds would be held pending further order of the Court and permitted the SEC, subject to Court approval, to propose a plan to distribute the funds collected pursuant to these judgments. Dkt. 10 at 5; Dkt. 11 at 2. In accordance with the judgments entered against them, Dawes and Bahadur paid a total of \$1,256,257 to the Court Registry Investment System (“CRIS”), where the

¹ On August 4, 2009, the Court entered a *Stipulation of Voluntary Dismissal Against Defendant Scot McDonald Only* dismissing all claims of the SEC against Scot McDonald. Dkt.115.

funds have remained in an interest-bearing account. Dkt. 397 at 1-2, PageID.22870-71. The SEC's litigation against the Defendants is complete and the only issue remaining in this case is the disposition of the funds subject to this Court's jurisdiction.²

The SEC initially determined that distributing the funds collected from Dawes and Bahadur to harmed investors would not be feasible because of the numerosity of these investors and other factors. Accordingly, on July 7, 2022, the SEC filed a turnover motion seeking the transfer of the funds held in the Court's registry to the SEC for remission to the U.S. Treasury. Dkt. 397, PageID.22870. However, following the Court's appointment of an *amicus curiae* and upon conducting further analysis, the SEC concluded that while a distribution to all of the investors harmed by the Defendants' violations would be infeasible, a distribution of funds to a limited number of previously identified investors may be feasible. Accordingly, on April 14, 2023, the SEC filed a motion to withdraw its original turnover motion. Dkt. 402, PageID.22887. In support of this motion, the SEC submitted the declaration of Dr. Thomas A. Dunn, an economist in the SEC's Division of Economic and Risk Assessment, describing the outlines of a potential distribution. In his declaration, Dr. Dunn explained that the SEC could distribute funds to approximately 236 institutional investors, whose harm had been quantified in a previously-filed expert witness report and whose holdings in Delphi common stock accounted for approximately 82 percent of outstanding shares during the relevant period.³ Dkt 402-1,

² The Court entered Final Judgments against twelve Defendants that included an order of monetary relief. Eight of the Final Judgments directed the Defendants to pay funds to the SEC and the SEC to "remit the funds paid pursuant to this paragraph to the United States Treasury." Dkt. 12 at 3; Dkt. 13 at 2; Dkt. 14 at 2; Dkt. 15 at 2; Dkt. 236 at 6; Dkt. 282 at 6-7; Dkt. 378 at 7, PageID.20372; Dkt. 380 at 3, PageID.20381. In addition, two Final Judgements direct that payments be made to the SEC but do not specify the disposition of these funds and make no reference to a distribution. Dkt. 111; Dkt. 271. Only the Dawes Final Judgment and the Bahadur Final Judgment order that funds be paid to the Court's registry and held pending further order of the Court. These judgments permit the SEC to motion the Court to propose a distribution plan for the funds collected pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002. Dkt. 10 at 5 and Dkt. 11 at 2.

³ Of the 82 percent of outstanding shares held by the institutional investors during the relevant period, the SEC's expert witness, Dr. Canjels, was not able to determine harm for institutional investors that held five percent of the

PageID.22894; *see also*, Dkt. 342-1 (Expert Witness Report of Eugene Canjels, Ph.D.).

On April 20, 2023, the Court entered an order granting, in part, and denying, in part, the SEC's motion. Dkt. 403, PageID.22902. In its order, the Court held the original motion to turn over funds in abeyance, suspended the briefing schedule of the *amicus curiae*, and ordered the parties to appear for a status conference. *Id.* The SEC staff conferred with the *amicus curiae* on June 22, 2023, and he agreed to the SEC's proposal to seek approval of the preliminary steps in the distribution process. The *amicus curiae* consented to the SEC motion filed on July 7, 2023, in which the SEC petitioned the Court to establish a Fair Fund, appoint a Tax Administrator and Distribution Agent, permit the retention of a third-party to assist with the administration of the distribution, transfer the funds held in the Court registry to the SEC for distribution, and set a date by which the SEC would file a proposed distribution plan. Dkt. 409, PageID.22913.

On August 1, 2023, the Court entered an Order granting, in part, and denying, in part, the relief requested by the SEC in its July 7, 2023, motion. Dkt. 413, PageID.22934. The Court established a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("SOX Section 308(a)") to permit the SEC to add the civil penalties plus disgorgement and prejudgment interest collected from the Defendants and held in the Court's registry to a fund established for the benefit of the victims of the Defendants' violations. The Court also appointed the Tax Administrator and Distribution Agent proposed by the SEC; denied the SEC's request to transfer funds held in the Court's registry to the U.S. Treasury; and ordered the SEC to file a proposed Distribution Plan and submit a copy of the Plan to *amicus curiae* on or before August 8, 2023.

Id.

outstanding Delphi shares at year-end 2004. This means that any potential distribution, of the type the SEC has determined to be feasible, would potentially return funds to harmed investors that represented 77 percent of the outstanding shares during the relevant period. Dkt. 402-1 at 4.

Accordingly, the SEC proposes the appended Distribution Plan to distribute the Fair Fund comprised of approximate \$1.26 million in disgorgement, prejudgment interest, and penalties plus any accrued interest thereon presently held in the Court’s registry to a class of identified investors harmed by the Defendants’ violations of the federal securities laws.⁴

II. ARGUMENT

A. The Proposed Distribution Plan is for the Benefit of Harmed Investors.

The Proposed Distribution Plan provides for the distribution of funds for the benefit of investors who were harmed by the Defendants’ violations as permitted by this Court’s orders and SOX Section 308(a). The Dawes and Bahadur Final Judgments permit the SEC, by motion, to propose a plan to distribute the funds collected from each of the Defendants for the benefit of investors. Dkt. 10 at 5; Dkt. 11 at 2. Both judgments grant the SEC authority to propose a distribution plan directing that the funds be distributed pursuant to SOX Section 308(a). Dkt. 10 at 5; Dkt. 11 at 2. This provision allows the SEC to use civil penalties for the “relief of victims” and to add to or combine civil penalties with a disgorgement fund or any other fund for the “benefit of the victims of such violation.” 15 U.S.C. § 7246(a). Consistent with the Dawes and Bahadur Final Judgments, the SEC petitioned this Court to establish a Fair Fund for the monies paid by Dawes and Bahadur that are being held in the Court’s registry. Dkt. 409, PageID.22913. The Court granted the SEC’s request and issued an order establishing the Fair Fund on August 1, 2023, and ordering the SEC to propose a plan for the distribution of the Fair Fund. Dkt. 413, PageID.22934. The SEC presents the proposed plan to distribute the Fair Fund to investors who held the majority of Delphi’s common stock during the relevant time period. The distribution

⁴ The Distribution Plan is appended to this Motion as Exhibit A.

plan is designed to effectuate the purpose of SOX Section 308(a) of benefiting investors who were harmed by the Defendants' violations and complies with this Court's orders.

B. The Distribution Plan is Fair and Reasonable and Should be Approved.

The SEC's principal goal in fashioning a distribution plan is to identify a methodology that would allocate the available funds fairly and reasonably and in proportion to the harm that investors suffered as a result of the Defendants' violations of the federal securities laws. The proposed Distribution Plan provides for an equitable and cost-efficient distribution to the majority of harmed investors in light of the size of the Fair Fund, the magnitude of investor harm, and the costs of locating and distributing funds to all investors harmed by the Defendants' violations.

1. The applicable standard of review is whether a distribution plan is fair and reasonable.

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. The Court enjoys broad equitable discretion in fashioning a plan of distribution. *See SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir.2001) (affirming distribution plan because it was "a logical way to divide the money") (internal quotation marks omitted) (approval of distribution plan reviewed for abuse of discretion); *United States v. Durham*, 86 F.3d 70, 73 (5th Cir.1996) (same). However, Courts have generally given the SEC discretion to design and determine the parameters of the distribution plan. As the Second Circuit has explained, "[t]his kind of line-drawing – which inevitably leaves out some potential claimants – is . . . appropriately left to the experience and expertise of the SEC in the first instance." *SEC v. Wang*, 944 F.2d 80, 83-84, 88

(2d Cir. 1991); *see also SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989).

In determining whether to approve a proposed distribution plan, the Court’s review should focus on whether the plan is fair and reasonable. *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 670 (6th Cir. 2001) (quoting *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (“[T]he district court determined . . . that a pro rata distribution would provide a fair and equitable remedy.”)); *Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (citing *Wang*, 944 F.2d at 85 (“Unless 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.”)); *see also SEC v. CR Intrinsic Investors, LLC*, 164 F. Supp. 3d 433, 435 (S.D.N.Y. 2016) (the standard of review for a proposed Fair Fund distribution plan is whether the fund distribution plan “fairly and reasonably distribute[s] the limited Fair Fund proceeds among the potential claimants” (citing *Worldcom*, 467 F.3d at 85)).

For the reasons articulated below, the SEC submits that its proposed distribution plan for the Fair Fund constitutes a fair and reasonable allocation of the funds available for distribution and should be approved.

2. The Distribution Plan will compensate investors who held the majority of Delphi’s common stock during the relevant period.

The SEC has identified the majority of the largest shareholders of Delphi common stock who suffered economic harm by purchasing or acquiring Delphi common stock at inflated prices. In connection with the litigation of this matter, an SEC economist identified 236 institutional investors whose holdings in Delphi common stock accounted for approximately 82 percent of the Company’s outstanding shares during the relevant period of January 2001 through March 2005.

Dkt. 402-1 at 3, PageID 22896. Using an event study analysis, the SEC economist determined that Delphi's stock price was inflated by 15.8% or \$1.04 per share due to the Defendants' conduct. Dkt. 342-1 at 8 (Expert Witness Report of Eugene Canjels, Ph.D.); Dkt. 402-1 at 3, PageID 22896 (Declaration of Thomas A, Dunn, Ph.D.) Applying this measure of artificial inflation, the SEC economist calculated that 96 institutional investors lost at least \$178,714,790 on shares of Delphi common stock purchased during the inflation period and held through the dates on which Delphi issued corrective disclosures in March 2005.⁵ Dkt. 342-1 at 11 (Expert Witness Report of Eugene Canjels, Ph.D.); *Id.* at 3-4. The economic harm suffered by these investors ranged from more than \$63 million to less than \$95. Dkt. 342-1 at 27-34 (Exhibit 8, Expert Witness Report of Eugene Canjels, Ph.D.). Given the magnitude of the harm caused by the Defendants' violations and the wide range of losses among investors, a *pro rata* distribution of the available funds will provide a fair and reasonable allocation of the Fair Fund and ensures that a majority of the investors harmed by the Defendants' violations will be compensated for a portion of their losses.

3. Retail investors will benefit from the distribution.

Although the proposed Plan does not provide for direct compensation of retail and other investors, many of these investors will still benefit from the distribution. The institutional investors identified by the SEC as potential claimants to the Fair Fund are investment advisers, banks, broker-dealers, and pension funds registered with the SEC as investment managers. In

⁵ As described in Dr. Dunn's declaration, these institutional investors reported their holdings on Form 13F, *Information Required of Institutional Investment Managers Pursuant to Section 13(f) of the Securities Exchange Act of 1934 and Rules Thereunder*, during the inflation period. As required by Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") 15 U.S.C. §78m(f), any SEC-registered investment adviser who exercises investment discretion over at least \$100 million in "Section 13(f) securities" must periodically file Form 13F with the SEC reflecting their holdings. 17 C.F.R. § 240.13f-1. This requirement was designed "to create a central depository of historical and current data about the investment activities of institutional investment managers" to assist investors and regulators.

www.investor.gov/introduction-investing/investing-basics/glossary/form-13f-reports-filed-institutional-investment

their roles as investment managers, these institutions regularly make investments for their own accounts as well as on behalf of their individual and entity clients, shareholders, and other beneficiaries. If the losses incurred by the investment managers are attributable to investments made on behalf of their current or former clients, shareholders, or others to whom they may have a legal, fiduciary, other duty, the Plan requires the investment managers to reallocate any distribution payments that they receive to the beneficial owners. In this way, retail investors will benefit from the distribution and recoup a portion of their losses.

4. The distribution will supplement the prior recovery of investor losses.

In addition, although the Fair Fund is relatively small compared to the economic harm suffered by investors, the proposed distribution will supplement recoveries that institutional and retail investors received through settlements of private securities litigation. Starting in 2005, numerous securities, derivative, and ERISA claims were filed against Delphi, its officers, directors, underwriters, and auditors alleging a range of violations stemming from its multi-year fraud.⁶ Many of the factual allegations in these suits mirrored those made in the SEC Complaint and there was substantial overlap in the named defendants and the claims of economic harm.

⁶ Southern District of New York: *In re Delphi Corp. Securities Litigation*, C.A. No. 1:05-2637; *Thomas Morrison v. Delphi Corp., et al.*, C.A. No. 1:05-2656; *Robert Hillman v. Delphi Corp., et al.*, C.A. No. 1:05-2732; *Vanessa Jones v. Delphi Corp., et al.*, C.A. No. 1:05-3323; *Ira Gaines v. Delphi Corp., et al.*, C.A. No. 1:05-3439; *Frank J. Fosbre, Jr., etc. v. J.T. Battenberg, III, et al.*, C.A. No. 1:05-3490; *Policemen's Annuity & Benefit Fund of Chicago v. Delphi Corp., et al.*, C.A. No. 1:05-4476.

Eastern District of Michigan: *Mary M. Brewer, et al. v. Delphi Corp., et al.*, C.A. No. 2:05-70882; *Steven Kramer, et al. v. Delphi Corp., et al.*, C.A. No. 2:05-70940; *Steven Willis, et al. v. Delphi Corp., et al.*, C.A. No. 2:05-71030; *Neal C. Folck v. Delphi Corp., et al.*, C.A. No. 2:05-71200; *Michael Polito, et al. v. Delphi Corp., et al.*, C.A. No. 2:05-71249; *Chris Glinka v. Delphi Corp., et al.*, C.A. No. 2:05-71291; *Kimberly Chase-Orr v. Delphi Corp., et al.*, C.A. No. 2:05-71339; *Clemie Hunter v. Delphi Corp., et al.*, C.A. No. 2:05-71396; *Edward Hammer v. Delphi Corp., et al.*, C.A. No. 2:05-71397; *Thomas A. Reilly, Jr. v. Delphi Corp., et al.*, C.A. No. 2:05-71398; *Greg Bartell v. Delphi Corp., et al.*, C.A. No. 2:05-71437; *Thomas Kessler, et al. v. Delphi Corp., et al.*, C.A. No. 2:05-71508; *Larry A. Williams v. Delphi Corp., et al.*, C.A. No. 2:05-71620; *Daniel Lazor v. Delphi Corp., et al.*, C.A. No. 2:05-71897; *Carolyn Hanners v. Delphi Corp., et al.*, C.A. No. 2:05-72198; *Shawn Dangerfield, etc. v. J.T. Battenberg, III, et al.*, C.A. No. 2:05-72550.

Southern District of Florida: *Sidney Bernstein v. Delphi Trust I, et al.*, C.A. No. 9:05-80307.

Notably, Dawes was a Defendant in the majority of the private lawsuits and BBK Limited, Bahadur's company, was a Third-Party Defendant in certain of the suits.⁷ Consolidated in the Eastern District of Michigan, the Defendants eventually entered into settlement agreements that resolved the private securities litigation and resulted in the distribution of funds to harmed investors who purchased or acquired shares of Delphi's common stock between March 2000 and March 2005 – virtually the same period for which the proposed distribution plan will provide recovery.⁸ In July 2010, Judge Gerald Rosen issued an Order Approving Distribution Plan for the Net Settlement Funds in the consolidated Delphi Securities Litigation, consisting of \$101,216,508 relating to a joint settlement with Delphi, its officers and directors, including Dawes, and certain of its underwriters, as well as, \$38,250,000 from a separate settlement with Delphi's former auditor, Deloitte & Touche.⁹ The Claims Administrator of the Net Settlement Funds conducted two *pro rata* distributions of more than \$91,000,000 to authorized claimants.¹⁰ While this distribution did not compensate investors for the full amount of their economic harm, it allowed them to recoup a portion of their losses. The distribution proposed by the SEC will supplement investors' recovery, providing additional relief to victims of the Defendants' violations.

⁷ On February 1, 2008, the lead plaintiff in the Delphi Securities Litigation filed a notice of voluntary dismissal under Fed. R. Civ.P. 41(a)(1) against BBK Limited, Setech, Inc., and JPMorgan Chase & Co. These were the only remaining defendants following the settlement with Delphi, its officers, directors, underwriters, and auditor. 2:05-md-01725, Dkt. 336.

⁸ Order and Final Judgment, , In re Delphi Corp. Sec., Derivative & "ERISA" Litig., Nos. 1725, 05-md-1725, 06-10026, 2007 U.S. Dist. LEXIS 10408 (E.D. Mich. Feb. 15, 2007), Dkt. 477 at 9.

⁹ Order Approving Distribution Plan for the Settlement of Funds, In re Delphi Corp. Sec., Derivative & "ERISA" Litig., Nos. 1725, 05-md-1725, 06-10026, 2007 U.S. Dist. LEXIS 10408 (E.D. Mich. Feb. 15, 2007), Dkt. 495.

¹⁰ Affidavit of Stephen J. Cirami in Support of Lead Plaintiffs' Motion for A Final Distribution Order, In re Delphi Corp. Sec., Derivative & "ERISA" Litig., Nos. 1725, 05-md-1725, 06-10026, 2007 U.S. Dist. LEXIS 10408 (E.D. Mich. Feb. 15, 2007), Dkt. 520 at 2, PageID17411.

5. **The proposed distribution methodology is a reasonable alternative to a claims process.**

Further, distribution to all of the investors harmed by the Defendant's conduct would be infeasible. The administrative costs associated with conducting a notice-and-claims process to identify and notify potentially tens of thousands of harmed investors, process their claims, gather supporting documents, calculate each investor's loss, and distribute funds would be expensive and time-consuming given the age of the conduct and the volume of potential claimants to the Fair Fund. Such a process would necessitate that the SEC seek the appointment of a claims administration firm to act as the distribution agent, significantly increasing the administration costs to the Fair Fund. The SEC does not have the internal resources to manage a distribution of this magnitude. In addition, the Fair Fund would incur substantial printing, publication, and postage costs associated with preparing and mailing notices and distribution payments. These expenses would consume a large percentage of the Fair Fund or even exceed the Fair Fund, leaving virtually nothing available for distribution. Even if the SEC was able to limit the costs of administration and the response rate was low, the Fair Fund would be distributed on a *pro rata* basis and the amount distributed to individual investors would be miniscule given the size of the Fair Fund.¹¹ The proposed plan of distributing funds to a limited number of investors who account for the majority of the shares outstanding during the relevant period is a reasonable alternative to a claims process and will provide the greatest benefit to harmed investors.

For the preceding reasons, the Plan is able to allocate the available funds fairly and

¹¹ The Claims Administrator in the private securities litigation reported that the Recognized Claims for purchases of Delphi common stock and certain notes was \$847,206,805.13. Affidavit of Stephen J. Cirami in Support of Lead Plaintiffs' Distribution Plan for the Net Settlement Funds, In re Delphi Corp. Sec., Derivative & "ERISA" Litig., Nos. 1725, 05-md-1725, 06-10026, 2007 U.S. Dist. LEXIS 10408 (E.D. Mich. Feb. 15, 2007), Dkt. 497 at 35, PageID 17294.

reasonably, in a manner proportional to the economic harm sustained by investors.

C. The Distribution Plan Provides for an Orderly Distribution of the Fair Fund.

In accordance with the Plan of Allocation, the Fair Fund will compensate certain 13F filers for their losses incurred on shares of Delphi purchased or acquired between January 1, 2001, and March 21, 2005, at inflated prices due to the Defendants' violations. Based upon records obtained by the SEC during its investigation and litigation, including an analysis of 13F filings made during the relevant period, the SEC has identified institutional investors who may have suffered a loss and may be eligible to recover from the Fair Fund ("Preliminary Claimants"). Working with the Third-Party, the Distribution Agent will gather contact information for Preliminary Claimants and provide each of them with a Plan Notice that will include a statement characterizing the distribution; a link to the approved Plan posted on the SEC's website and instructions for requesting a copy of the Plan; specification of any information needed from the Preliminary Claimant to prevent him, her, or it from being deemed an Unresponsive Preliminary Claimant; a description of the tax information reporting and other related tax matters; the procedure for the distribution as set forth in the Plan; and the name and contact information for the Distribution Agent as a resource for additional information or to contact with questions regarding the distribution. If a Preliminary Claimant fails to respond to the Plan Notice within the period specified in the Plan, the Distribution Agent may deem such claimant ineligible to participate in the distribution.

After the Distribution Agent has collected sufficient supporting documentation and information from all responsive Preliminary Claimants, the Distribution Agent will calculate each Preliminary Claimant's Recognized Loss. The Recognized Loss will be the product of the Preliminary Claimant's net holdings of the common stock of Delphi during the Relevant Period

and \$1.04, the inflation per share due to the Defendant's misconduct calculated by the SEC's economists. The Distribution Agent will inform the Preliminary Claimants of their calculated Recognized Loss amounts and provide an opportunity for the claimants to dispute these calculations. Following the dispute period, the Distribution Agent will send a final determination notice to each Preliminary Claimant identifying their status as an eligible or unresponsive claimant as well as the Distribution Agent's final determination of their Recognized Loss amount. If the Preliminary Claimant is not an Excluded Party and their Recognized Loss equals or exceeds the minimum distribution amount of \$10.00, the claimant will be eligible for a distribution payment.

Before calculating each claimant's distribution payment, the Distribution Agent, in conjunction with the Tax Administrator, will establish a reserve to pay Administrative Costs. The remainder of the Fair Fund ("Net Available Fair Fund") will be used to make distribution payments to eligible investors. Because the amount of total Recognized Losses suffered by the Preliminary Claimants exceeds the Net Available Fair Fund, each eligible claimant will receive a distribution payment equal to the claimant's *pro rata* share of the Net Available Fair Fund.

After calculating the distribution payments of all eligible claimants according to the Plan, the Distribution Agent will compile a Payee List consisting of the name, address, calculated Recognized Loss, calculated distribution payment, and the amount to be withheld from the distribution payment for taxes, if applicable. The Distribution Agent will submit the Payee List to the Court for review and petition the Court for an order to disburse funds from the Net Available Fair Fund for distribution in accordance with the Plan. Once the Court issues the disbursement order, the Distribution Agent will direct that the total amount of the payments reflected on the Payee List be transferred to the escrow account maintained by the Third-Party at

a financial institution not unacceptable to the SEC staff. The Third-Party will then distribute the disbursed funds, by check or wire, according to the Payee List. As appropriate, the Third- Party will transmit a communication concerning any tax withholdings with the distribution payment. Each distribution payment made by check will bear a stale date of 180 days.

If a distribution payment is returned as undeliverable before the stale date, the Third-Party shall use its best efforts to locate the payee. Additionally, the Distribution Agent will direct the Third-Party to reissue checks or electronic payments to payees upon the receipt of a valid, written request from the Payee prior to the initial stale date of 180 days. The Third-Party will maintain information about uncashed checks and any returned items due to non-delivery, insufficient addresses, and/or other deficiencies and provide this information to the Distribution Agent. The Third-Party will also research and reconciling errors and provide an accounting for all distribution payments to the Distribution Agent. The amount of all uncashed and undelivered payments will continue to be held in the Fair Fund pending further order of this Court.

D. The Court Will Determine the Disposition of Residual Funds.

Upon completion of the distribution, the SEC will file a motion with this Court to approve the final accounting, including a recommendation as to the final disposition of the Residual, consistent with Sections 21(d)(3),(5), and (7) of the Exchange Act¹² and *Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020) (holding that disgorged funds must be returned to harmed investors, at least where feasible). If distribution of the Residual to investors is infeasible, the SEC Staff may recommend that the remaining monies be transferred to the general fund of the

¹² 15 U.S.C. §§ 78u(d)(3), (5), and (7). Section 21(d)(7) was added to the Exchange Act by Section 6501(a) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, enacted January 1, 2021. The relevant provisions of this Act apply “to any action or proceeding that is pending on, or commenced on or after, the date of” the NDAA’s enactment. Section 6501(b).

U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.¹³ In moving this Court to approve the final accounting, the SEC staff will also seek an Order discharging the Distribution Agent and terminating the Fair Fund.

III. CONCLUSION

For the reasons stated above, the SEC respectfully requests that this Court grant the SEC's Motion, issue the Proposed Order, and grant such other relief as the Court deems just and proper.

Dated: August 8, 2023

Respectfully submitted,

 /S/
Christine E. Neal

¹³ Proposed Plan ¶¶ 60-3. Section 21F(g)(3) of the Exchange Act, 15 U.S. C. § 78u-6(g)(3).

CERTIFICATE OF SERVICE

I certify that on August 8, 2023, a copy of the foregoing motion to withdraw was served upon all counsel of record via the Court's electronic filing system.

/s/ _____
Christine E. Neal
Counsel for Plaintiff