

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

1:18-CV-08480

Plaintiff,

- against -

SEAWORLD ENTERTAINMENT AND JAMES ATCHISON,

ECF CASE

Defendants.

SECURITIES AND EXCHANGE COMMISSION,

1:18-CV-08482

Plaintiff,

- against-

FREDERICK D. JACOBS,

ECF CASE

Defendant.

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF MOTION,
MOTION, AND MEMORANDUM IN SUPPORT OF ORDER FOR APPROVAL OF
PROPOSED DISTRIBUTION PLAN**

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying Motion, Memorandum, and Proposed Order, and all other papers and proceedings herein, Plaintiff Securities and Exchange Commission will move this Court, the Honorable Colleen McMahon, for an Order Approving the Proposed Distribution Plan.

MOTION

Plaintiff Securities and Exchange Commission (the "SEC" or "Commission")

respectfully moves this Court for an Order approving a plan to distribute more than \$5 million to compensate harmed investors in connection with false or misleading statements or omissions by Defendants in connection with the negative impact of the documentary film *Blackfish* on SeaWorld common stock during the period from December 20, 2013 and August 12, 2014, inclusive. A proposed order granting this Motion, and appending the Distribution Plan, is included as Exhibit A. For the reasons set forth below, the Commission respectfully submits that its Motion should be granted in its entirety.

MEMORANDUM OF LAW

I. BACKGROUND

On September 18, 2018, the SEC filed a complaint (the “Complaint”) (Dkt. No. 1) against SeaWorld Entertainment, Inc. (“SeaWorld”), and SeaWorld’s former Chief Executive Officer, James Atchison (“Atchison”). The Complaint alleged that Defendants made untrue and misleading statements or omissions in SEC filings, earnings releases and calls, and other statements to the press regarding the documentary film *Blackfish*’s impact on the company’s reputation and business (i.e., “*Blackfish* effect”). *Blackfish* criticized SeaWorld’s treatment of its orcas (killer whales). The film was released in theaters in July 2013, and received significant media attention that escalated as the film became more widely distributed. Between approximately December 20, 2013, and August 13, 2014 (the “Relevant Period”), in connection with the offer and sale of SeaWorld’s common stock (the “Security”), Defendants engaged in a course of business that—by failing to disclose the *Blackfish* effect to investors— they should have known would operate as a fraud or deceit upon the purchasers of SeaWorld stock. According to the Complaint, from January through March 2014, Atchison sold SeaWorld stock pursuant to a Rule 10b5-1 trading plan he had entered into prior to the Relevant Period.

SeaWorld's stock price was inflated as a result of Atchison's false and misleading conduct, allowing him to avoid losses of approximately \$730,860 on his sales. On August 13, 2014, SeaWorld, for the first time, acknowledged that its declining attendance was, among other factors, partially caused by negative publicity connected to *Blackfish*. SeaWorld's stock price fell approximately 33% causing a loss of approximately \$830 million in shareholder value.

On the same day, the SEC filed an additional Complaint, against SeaWorld's former Vice President of Communications, Fred Jacobs ("Jacobs" and/or "Defendant"), (Dkt. No. 1). The SEC alleged that Jacobs, on January 13, 2014, just prior to selling his SeaWorld stock, made an untrue statement of material fact and/or omitted material facts from his statement. By selling his stock, Jacobs avoided losses of approximately \$84,885 on his sales.

On October 4, 2018, SeaWorld, Atchinson, and Jacobs (collectively "Defendants"), without admitting or denying the allegations, consented to the entry of final judgments ("Final Judgment(s)"). The Court ordered SeaWorld to pay a civil penalty of \$4,000,000 (Dkt. No. 11); Atchison to pay disgorgement of \$730,860 plus prejudgment interest thereon of \$119,323 and a civil penalty of \$150,000 (Dkt. No. 10) and; Jacobs to pay disgorgement of \$84,885 plus prejudgment interest thereon in the amount of \$14,270 (Dkt. No. 8). On December 4, 2020, the Court entered an Order consolidating the two civil actions for the purpose of distributing the funds paid by Defendants to harmed investors and established a Fair Fund. (Dkt. No. 15).

The SEC collected a total of \$5,099,338.00 from the Defendants pursuant to the Final Judgments. The Fair Fund consists of the funds collected from the Defendants plus accrued interest and deposited in an interest-bearing account at the U.S. Treasury's Bureau of Fiscal Service ("BFS"). As of March 23, 2023, the total Fair Fund has a balance of \$5,314,037.15.

On December 15, 2020, the Court also appointed Miller Kaplan Arase LLP ("Miller

Kaplan”) as the tax administrator (“Tax Administrator”) and JND Legal Administration as the distribution agent (“Distribution Agent”) of the Fair Fund; and authorized the SEC staff to pay the tax obligations and administrative fees and expenses from the Fair Fund without further Court Order (Dkt. No. 18).

II. ARGUMENT

A. The Applicable Standard

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. *See SEC v. Wang*, 944 F.2d 80, 83-84 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989). Courts have historically deferred to the Commission regarding whether and how to distribute disgorgement and prejudgment interest. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). The Court’s review of a proposed distribution plan should focus on whether the plan is fair and reasonable. *See Off. Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (citing *Wang*, 944 F.2d at 85 (“[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.”)). For the reasons stated below, the Commission submits that the Plan for the Fair Fund constitutes a fair and reasonable allocation of the funds available for distribution, and should be approved.

B. The Commission’s Plan Provides a Fair and Reasonable Allocation of the Fair Fund

The Commission's principal goal in fashioning a distribution plan for the Fair Fund is to identify a methodology that would allocate the available funds fairly and reasonably in a manner proportional to the harm that investors suffered as a result of the Defendants' actions detailed in the Complaint.

The Plan seeks to compensate investors who were harmed, by the Defendants' conduct alleged in the Complaint, in connection with misleading statements and/or omissions they made in SEC filings, earnings releases and calls, and other statements to the press regarding the impact of the documentary film, *Blackfish* on SeaWorld's reputation and business. According to the Plan, the Fair Fund will compensate investors on their losses on SeaWorld common stock purchased or acquired between December 20, 2013 and August 12, 2014 due to the misconduct of the Defendants.

The Plan provides that the Distribution Agent, subject to review by the Commission staff, will: (1) identify the investors who are eligible to be compensated, (2) calculate each eligible claimant's Recognized Loss per Share correlating to the harm from the Defendant's misconduct; (3) compile a Payee List identifying the distribution amounts to be paid to each eligible claimant; and (4) distribute the Fair Fund according to the Payee List. The Plan thereby allocates the available funds fairly and reasonably, in a manner proportional to the economic harm sustained by investors.

C. The Court Should Approve the Distribution Plan

The Commission seeks approval of its proposed Distribution Plan for the Fair Fund. The Distribution Plan provides for a distribution to injured investors who were harmed by the Defendants' misconduct. Commission staff plans to distribute the Fair Fund, less any taxes and fees to the tax administrator and any other administrative expenses, on a *pro rata* basis to

Eligible Claimants. A copy of the proposed Distribution Plan is attached as Exhibit A.

D. Disposition of Remaining Funds after Distribution

Upon completion of the final distribution, the SEC staff will file a motion with this Court to approve the final accounting, including a recommendation as to the final disposition of the Residual,¹ consistent with Sections 21(d)(3), (5), and (7)² of the Exchange Act and *Liu v. SEC*, 140 S. Ct. 1936 (2020). If distribution of the Residual to investors is infeasible, the SEC staff may recommend that the monies be transferred to the general fund of the U.S. Treasury subject to Section 21F(g)(3) of the Exchange Act.³ In moving this Court to approve the final accounting, the SEC staff will also seek from the Court an Order that discharges the Distribution Agent and terminates the Fair Fund.

CONCLUSION

For 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: **May 15, 2023**

Respectfully Submitted,

/s/ _____
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¹ All capitalized terms used herein but not defined shall have the same meanings ascribed to them in the Plan.

² 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 National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, enacted January 1, 2021. The relevant provisions of the NDAA apply “to any action or proceeding that is pending on, or commenced on or after, the date of” the NDAA’s enactment. NDAA, Section 6501(b).

³ Proposed Plan ¶¶ . Section 21F(g)(3) of the Exchange Act, 15 U.S. C. § 78u-6(g)(3), provides, in relevant part, that any monetary

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Attachment: EXHIBIT A – Distribution Plan

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023 a copy of the foregoing Plaintiff Securities and Exchange Commission's Motion and Memorandum of Law for Approval of Proposed Distribution Plan and its accompanying Proposed Order were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties on the electronic filing receipt. Parties may access this filing through the Court's system.