

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE, :
COMMISSION, :

Plaintiff, :
-against- :

VIVENDI UNIVERSAL, S.A., JEAN-MARIE :
MESSIER, and GUILLAME HANNEZO, :

Defendants. :
-----X

**REPORT AND
RECOMMENDATION
TO THE HONORABLE
P. KEVIN CASTEL**

03 Civ. 10195 (PKC)(FM)

FRANK MAAS, United States Magistrate Judge.

I. Introduction

The Securities and Exchange Commission (“Commission”) commenced this action against defendants Vivendi Universal, S.A., Jean-Marie Messier, and Guillaume Hannezo (collectively “Vivendi”) alleging various violations of the United States securities laws. After the parties settled the case, a Distribution Agent (“Agent”) was appointed to disburse the settlement fund (“Fund”) to eligible claimants. Pursuant to a court-approved distribution plan (“Plan”), the Agent has denied certain claims. The Agent now seeks to have the denial of these claims affirmed. (See Docket No. 52). For the reasons stated below, I conclude that the Agent exercised his authority properly. I therefore recommend that the Agent’s application be granted.

II. Background

On December 18, 2003, the Commission filed a complaint against Vivendi alleging that the company, along with its Chief Executive Officer and Chief Financial Officer, had violated the securities laws by reporting materially false and misleading information about its financial condition. (Docket No. 1). By final judgment entered on January 12, 2004, Vivendi agreed, inter alia, to pay \$51,268,150 in disgorgement and penalties. (Docket Nos. 5-7).

On June 7, 2005, Your Honor granted the Commission's motion to appoint Jeffrey Sklaroff, Esq., of Greenberg Traurig LLP, as the Agent to administer the settlement funds. (Docket No. 13). Thereafter, the Agent filed his proposed Plan, and Your Honor directed that anyone wishing to object to it do so in writing by December 6, 2006. (Docket No. 30). It appears that no such objections were received. Consequently, the Plan was approved on December 14, 2006. (Docket No. 33).

The claims administrator ("Administrator") retained by the Agent mailed claims packets to potentially eligible individuals and received 37,870 claims. (Agent's Application for Report & Rec. Affirming his Determination of Claims ("App.") ¶ 5). After giving the claimants an opportunity to cure any deficiencies, the Agent rejected 20,657 of the claims. (Id.).

Paragraph 45 of the Plan permits any claimant who objects to the Agent's denial of a claim to file an appeal with the Court. (Id. ¶ 6). The Plan further provides that

any appeals may be referred to a magistrate judge for a “final determination” and that such determination “shall be final for all purposes” without a claimant having the right to bring any “further proceedings or appeals related to the same.” (Id. Ex. A ¶ 46).

Although this language suggests that the parties intended to consent to my jurisdiction for all purposes related to the appeals in the event of a referral, the Agent’s present application is for a report and recommendation. (See Docket No. 52). Accordingly, I have treated Your Honor’s referral, dated August 22, 2007, (Docket No. 39), as the referral of a nondispositive matter pursuant to 28 U.S.C. § 636(b).

III. Discussion

Section 27 of the Securities Exchange Act has long afforded a federal court discretion with respect to the distribution of disgorged funds. See SEC v. Certain Unknown Purchasers of the Common Stock of & Call Options for the Common Stock of Santa Fe Int’l Corp., 817 F.2d 1018, 1020 (2d Cir. 1987) (citing 15 U.S.C. § 78aa). More recently, Congress enacted the Fair Funds for Investors provision of the Sarbanes-Oxley Act, which permits defrauded investors to receive compensation not only from disgorged funds, but from civil penalties paid by violators of the United States securities laws as well. See 15 U.S.C. § 7246(a); Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82 (2d Cir. 2006). “Thus, as with disgorged profits, the [Commission] may now, if it chooses, use civil penalties . . . to compensate injured investors.” World Com, Inc., 467 F.3d at 82.

As in the past, the Commission's determination regarding the distribution of funds paid by a securities law violator is subject to review under a "fair and reasonable standard." Id. at 82-84. The Second Circuit also has cautioned that courts should defer to the Commission's experience in distributing settlement funds and realize that every plan will "inevitably leave[] out some potential claimants." Id. at 82-83 (citing SEC v. Wang, 944 F.2d 80, 88 (2d Cir. 1991)).

In this case, Your Honor approved the Plan, "and nothing submitted by the [appealing claimants] supports a change in that determination." In re Auction Houses Antitrust Litig., No. 00 Civ. 0648 (LAK)(RLE), 2004 WL 3670993, at *3 (S.D.N.Y. Nov. 17, 2004). Accordingly, to the extent that the Agent's claims denials comport with the terms of the Plan, they must be upheld. Because I find that the Agent's rejections were proper under the Plan, I recommend that the Agent's application to affirm his determinations be granted. The various categories of appeals are considered below.

A. Purchases Outside Settlement Period

Nine appeals were rejected because the claimants did not purchase their Vivendi shares within the relevant time period. (App. ¶¶ 24-25 & Ex. B, Chart D). The Plan defines the "Settlement Period" as December 1, 2000, to July 2, 2002. (Id. Ex. A ¶ 22). Therefore, as the Distribution Plan Notice ("Notice") confirms, to be entitled to share in the Fund, a claimant must have purchased an Eligible Security¹ during that

¹ "Eligible Securities" are defined under the Plan as American Depository Receipts or Shares registered with the Commission and issued by Vivendi, and any common stock or ordinary shares issued by Vivendi. (App. Ex. A ¶ 16).

period. (Id. Ex. A ¶ 15 & Appx. 1, Ex. A at 2, Ex. D). Most of the claims rejected on this basis were denied because the claimants purchased Vivendi shares before the start of the settlement period. (See id. Ex. B, Chart D). In any event, it appears undisputed that each of these claimants' purchases occurred outside the Settlement Period. The denials of their claims therefore should be upheld. See Goldsmith v. Tech. Solutions Co., No. 92 C 4374, 1995 WL 17009594, at *6 (N.D. Ill. Oct. 10, 1995) (calculating recognized losses as those resulting from purchases made only during the class period "comports with the well-accepted out-of-pocket damage measure used in [securities fraud actions]") (citing In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744 (S.D.N.Y. 1985)).

B. No Recognized Loss

The Agent rejected an additional thirty-seven appeals of claimants who did not suffer a loss. (App. ¶¶ 29-31 & Ex. B, Chart I). In that regard, the Plan states that "[n]o distribution shall be made to a Potentially Eligible Claimant who had a gain from overall transactions in the Eligible Securities during the Settlement Period." (Id. Ex. A ¶ 30). Additionally, the Notice sent to each claimant specified that claimants "must have incurred an aggregate net loss from all transactions in Vivendi securities for which either the purchase or the sale (or both) occurred during the Settlement Period." (Id. Ex. A, Ex. A at 2). Therefore, to the extent that claimants realized a gain by trading their shares of Vivendi stock during the Settlement Period, the Agent's denials of these claims should be upheld. See In re Aetna Inc., No. Civ. A. MDL 1219, 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2001) ("[I]t is fair that claimants who reaped a profit on their sales . . . during the

Class Period receive no share of the settlement since they suffered no loss from any alleged misrepresentations.”). Similarly, claimants who could not demonstrate a loss arising from a purchase or sale within the Settlement Period were properly rejected.

The Agent’s determinations with respect to these claimants consequently should be affirmed.

C. Merger-Related Appeals

The claims of Liberty Media Corporation (“Liberty Media”), along with those of twenty-five other claimants, were rejected because the Vivendi shares at issue were acquired pursuant to a merger agreement, rather than through open market transactions. (See App. ¶¶ 12-23 & Ex. B, Chart C). These claimants have appealed the Agent’s denial, arguing that the Plan does not expressly require that shares be purchased on the open market. Liberty Media further argues that such a requirement would be unfair because it sustained as great a loss as it would have if it had acquired Vivendi shares on the open market. (See Docket No. 38 (Mot. to Appeal the Distribution Agent’s Denial of Liberty Media Corp.’s Claim to the Settlement Fund (“Liberty Mem.”), at 2)). Neither of these alleged bases for reversing the Agent’s determination withstands scrutiny.

The Notice plainly states that “[o]nly those persons who purchased Vivendi securities, which are defined as ordinary shares or American Depositary Receipts or American Depositary Shares,” are “eligible to share in the distribution of the Fund.” (App. Ex. A, Ex. A at 3) (emphasis added). Moreover, as noted above, the Plan defines

an “Eligible Security” as one “registered with” the Commission and “issued by Vivendi.” (Id. Ex. A ¶ 16). Applying this language, the Agent determined that eligible claimants must demonstrate that they purchased Vivendi shares, not shares of the predecessor entities that combined to form Vivendi, or shares acquired by way of merger into Vivendi. (Id. ¶ 15).

The Agent’s interpretation of the Plan clearly is reasonable because neither the Plan nor its accompanying documents make any mention of Vivendi’s predecessor entities. Furthermore, even if this aspect of the Plan were to be considered ambiguous, the Agent has indicated that he is prepared to seek any necessary modification of this language, as is his right under the Plan. (See id. ¶ 23 & Ex. A ¶¶ 32, 52). Thus, in light of the reasonableness of the Agent’s interpretation and his discretion to seek a further modification excluding claimants who did not acquire their shares through open market purchases, the denial of the claims of such claimants should be upheld.

On August 17, 2007, Liberty Media submitted a motion of its own, in which it advanced several further arguments as to why it should receive a portion of the Fund. (See Docket No. 37; Liberty Mem.). Liberty Media previously had instituted its own action against Vivendi on March 28, 2003, seeking damages and equitable relief for breach of contract, fraud, unjust enrichment, and securities fraud based on the same allegedly misleading statements at issue in this case. (See Liberty Media Corp. v. Vivendi Universal, 03 Civ. 2175 (RJH)(HBP), Docket No. 1 (Compl.)). In its complaint in that action, Liberty Media alleged that Vivendi improperly induced it to enter into a

merger agreement by concealing material facts about Vivendi's liquidity crisis. (*Id.* ¶ 1). Since this separate lawsuit remains active, denying Liberty Media's claim to a portion of the Fund will not necessarily leave it without a means of redress.

In its papers, Liberty Media argues that this is an improper consideration because the Plan expressly provides that "acceptance of a distribution by an Eligible Claimant shall not affect an Eligible Claimant's rights and claims as against any party . . . including, without limitation, Vivendi, [and] Vivendi's past or present directors, officers, advisors and agents." (Liberty Mem. at 3-4 (citing App. Ex. A ¶ 51); see also App. Ex. A, Ex. A at 3 ("[P]articipation in the distribution of the Fund will not constitute a release or waiver by potentially eligible claimants of any rights or claims they may have against any person, including . . . Vivendi and Vivendi's past and present directors, officers, advisors and agents.")). Thus, in Liberty Media's view, the fact that it has instituted a separate suit against Vivendi should not preclude it from recovering against the Fund. (Liberty Mem. at 3). In making this argument, Liberty Media overlooks several critical considerations.

First, Liberty Media's merger discussions with Vivendi gave it access to volumes of information that other investors did not have. Indeed, five months passed between the day the parties signed the merger agreement on December 16, 2001, and the day it actually closed on May 7, 2002. (*Id.* Ex. A at 1-2). Both during and before that time, Liberty Media undoubtedly engaged in a due diligence review and negotiated modifications of its deal. (See, e.g., *id.* at 2 (stating that the parties amended the initial merger agreement for "structural" reasons)). Having had access to extensive information

about Vivendi as part of this process, Liberty Media simply cannot be compared to other investors.

Second, if the Court were to accept Liberty Media's claim, there would be a significant diminution of the Fund for all other claimants. As a result of its merger agreement with Vivendi, Liberty Media received 37,386,436 Vivendi shares. (See *id.* Ex. A(1)-(4)). After the fraud was exposed, Liberty Media sold those Vivendi shares, incurring a loss of approximately \$1.8 billion. (*Id.* at 2 n.2; App. ¶ 17). A claim of that size would result in a loss amount of approximately \$500 million, thereby consuming roughly twenty percent of the Fund. (App. at 8 n.1). Although Liberty Media obviously has suffered a very substantial loss, an award of that magnitude to a sophisticated claimant which had opportunities not available to other investors is unwarranted. See Santa Fe Int'l Corp., 817 F.2d at 1021 ("Unnecessary dilution of the [fund is] to be avoided," especially that which results from trading by "an experienced market professional"); SEC v. Worldcom, Inc., No. 02 Civ. 4963 (JSR), 2004 WL 1621185, at *2 (S.D.N.Y. July 20, 2004) ("When funds are limited, hard choices must be made.").

Finally, even if Liberty Media's claim had some facial appeal, a court confronted with the need to engage in line drawing in these circumstances should not base its determination on technical legal matters, but, rather, should aim at striking an equitable balance. See World Com, Inc., 467 F.3d at 81 ("[I]t remains within the court's discretion to determine how and to whom the [disgorgement] money will be distributed.") (internal quotation marks and citation omitted). Here, given the substantial discretion

accorded to the Commission and Agent, Liberty Media's sophistication, the pendency of its other lawsuit, and the effect that its claim would have on the claims of other smaller investors, Liberty Media's claim should be denied.

D. Undocumented Appeals

Fifteen claims were rejected because they lacked sufficient documentation. (App. ¶¶ 26-27 & Ex. B, Chart E). The Plan mandates that "[a]ny claim asserted . . . shall provide adequate documentary evidence to substantiate the claim, including all documentary evidence which the Distribution Agent deems necessary or appropriate, including . . . account statements and trade confirmations." (Id. Ex. A ¶ 27). Although the Agent waived such documentation for claims of \$2,000 or less, (id. ¶ 26), fifteen claimants with claims over \$2,000 did not provide adequate support for their claims. For this reason, their claims should be denied.

E. Duplicate Claims

The Agent found that four claims were duplicates of claims that previously had been filed and approved. (Id. ¶ 28 & Ex. B, Chart F). Obviously, no claimant is entitled to a double recovery. The Agent's determination regarding these claims therefore should be affirmed.

F. Other Miscellaneous Claims

1. Unsigned Claim

One claim was rejected for failure to provide a signature. (Id. ¶ I & Ex. B, Chart G). The Plan and its accompanying documents require each claim to be signed. (Id. Ex. A ¶ 28). Although efforts were made to help the claimant cure this deficiency, he still has not signed the claim form. (Id. ¶ I). The rejection of the claim therefore should be upheld.

2. Ineligible Security

One claimant submitted a form stating that he purchased securities in a company called “Vivendi Universal Exchange Co.” (Id. ¶ I & Ex. B, Chart H). This is not the same entity as Vivendi. Therefore, the Agent’s denial of this claim should be affirmed.

3. Non-Appeals

The Agent also rejected the claims submitted by three individuals who were not, in fact, appealing the denials of their claims. (Id. ¶ 32 & Ex. B, Chart J). Instead, they were simply making inquiries. (See, e.g., id. Ex. B, Chart J). Because these requests do not constitute appeals, their rejection was proper and should be upheld.

4. Withdrawn Appeals

Eighteen claimants withdrew their appeals for various reasons. (Id. ¶ 10 & Ex. B, Chart A). Their appeals consequently do not need to be addressed, and the Agent’s denials of their claims should be upheld.

5. Claims Allowed after Cure

Finally, after consulting with the Agent and Administrator, one hundred claimants who filed appeals were able to cure the defects that initially caused their claims to be rejected. (Id. ¶ 11 & Ex. B, Chart B). Inasmuch as these claims have been allowed, there is no need to consider them further.

IV. Conclusion

For the foregoing reasons, the Agent's application to affirm his claims determinations, (Docket No. 52), should be granted. Additionally, Liberty Media's motion, (Docket No. 38), should be denied.

V. Notice of Procedure for Filing of Objections to this Report and Recommendation

The parties and persons who filed appeals are hereby directed that if they have objections to this Report and Recommendation, they must, within ten days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable P. Kevin Castel and to the chambers of the undersigned, at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any

requests for an extension of time for filing objections must be directed to Judge Castel.

The failure to file timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Thomas v. Arn, 474 U.S. 140, 147-48 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992).

Dated: New York, New York
March 24, 2008



FRANK MAAS
United States Magistrate Judge

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