

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT FLORIDA
TAMPA DIVISION

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Case No. 8:09-cv-00910-VMC-JSS

Plaintiff,

v.

WELLCARE HEALTH PLANS, INC., et al.

Defendants.

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION
AND MEMORANDUM OF LAW FOR AN ORDER APPROVING
A DISTRIBUTION PLAN FOR THE FAIR FUND**

MOTION

Plaintiff, United States Securities and Exchange Commission (the "Commission"), moves the Court for an order approving a plan to distribute more than \$32 million to compensate injured WellCare Health Plans, Inc. ("WellCare") common stock investors for their losses ("Distribution Plan"). A proposed order granting this Motion, and appending the Distribution Plan, is included as Exhibit 1.

MEMORANDUM OF LAW

Plaintiff United States Securities and Exchange Commission ("SEC" or the "Commission") respectfully submits this Memorandum of Law in support of the Commission's motion requesting from the Court an order approving the Commission's proposed plan to distribute more than \$32 million to injured investors who purchased WellCare Health Plans, Inc.

(“WellCare”) common stock during the relevant period identified in the proposed plan of distribution (“Distribution Plan”).

I. BACKGROUND

On May 18, 2009, the Commission filed a settled civil injunctive action against WellCare Health Plans, Inc. (“WellCare”). From at least November 2003 to October 2007, WellCare fraudulently retained over \$40 million it was required to return to Florida state agencies under programs that provided mental health services to Medicaid recipients and healthcare services to uninsured children. As a result, WellCare materially overstated its publicly reported net income and diluted earnings per share in periodic filings made with the Commission. Without admitting or denying the allegations in the Commission’s complaint, WellCare consented to the entry of a final judgment¹ for violations of the antifraud provisions of the federal securities laws² and the reporting provisions, recording keeping, and internal control provisions of the Exchange Act.³ WellCare also consented to pay \$1 in disgorgement and a \$10,000,000 civil penalty. WellCare paid the disgorgement of \$1 and penalty of \$10,000,000 in four installment payments concluding on May 5, 2010 to the Court Registry.

On August 13, 2019, the Court entered an Order creating a Fair Fund, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 [15 U.S.C. § 7246(a)], as amended by the Dodd-Frank Act of 2010 [15 U.S.C. § 7246] (“Sarbanes-Oxley Act”), for the entire amount paid by WellCare, plus accrued interest, minus expenses incurred in establishing or maintaining the fund (the “Fair Fund”) and appointed Miller Kaplan Arase LLP as the Tax Administrator for the Fair Fund.⁴ On

¹ Dkt. No. 4.

² Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder; and Section 17(a) of the Securities Act of 1933 (“Securities Act”).

³ Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder; and Section 13(b)(2)(A) and 13(b)(2)(B) of the Securities Act.

⁴ Dkt. No. 18.

December 9, 2019, the Court appointed Kurtzman Carson Consultants, LLC (“KCC”) to serve as Distribution Agent of the Fair Fund.⁵

In a related matter, on April 17, 2017, the Court entered final judgments against Todd Farha (“Farha”), former Chief Executive Officer of WellCare, Paul Behrens (“Behrens”), former Chief Financial Officer of WellCare, and Thaddeus Bereday (“Bereday” and together with Wellcare, Farha, and Behrens, the “Defendants”).⁶ Farha and Behrens were charged with violating the antifraud provisions of the federal securities laws,⁷ the reporting provisions, recording keeping and internal control provisions of the Exchange Act⁸ and Section 304(a) of the Sarbanes-Oxley Act; and with aiding and abetting WellCare’s violations of the antifraud provisions of the federal securities laws⁹ and the reporting provisions, recording keeping, and internal control provisions of the Exchange Act.¹⁰ Farha and Behrens each consented to the entry of final judgments, which were ordered by the Court. Per the final judgments, the Court ordered Behrens to pay \$4,500,000, comprised of \$3,500,000 in disgorgement and \$1,000,000 in civil penalties to the Commission.¹¹ The Court ordered Farha to pay \$12,500,000, comprised of \$11,500,000 in disgorgement and \$1,000,000 in civil penalties to the Commission.¹² On August 3, 2017 and October 2, 2017, the Court issued orders of satisfaction of monetary provisions of order and judgment, confirming that Farha and Behrens paid \$12,500,000 and \$4,500,000 respectively to the Commission.

⁵ Dkt. No. 21.

⁶ *SEC v. Farha*, 8:12-cv-00047 (M.D. Fla. 2012).

⁷ Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and Section 17(a) of the Securities Act.

⁸ Section 13(b)(5) of the Exchange Act and Rules 12b-20, 13b2-1, 13b2-2, and 13a-14 thereunder.

⁹ See supra note 2.

¹⁰ See supra note 3.

¹¹ *Farha*, Dkt. No. 30.

¹² *Farha*, Dkt. No. 29.

On September 28, 2017, Bereday, who served as the General Counsel of WellCare during the relevant period, consented to the entry of a final judgment. Bereday was charged with violating the antifraud provisions of the federal securities laws,¹³ the reporting provisions, recording keeping and internal control provisions of the Exchange Act,¹⁴ and Section 304(a) of Sarbanes-Oxley Act; and aiding and abetting WellCare's violations of the antifraud provisions of the federal securities laws¹⁵ and the reporting provisions, recording keeping and internal control provisions of the Exchange Act.¹⁶ On May 1, 2018, the Court ordered Bereday to pay disgorgement of \$3,500,000 and a civil penalty of \$1,000,000.¹⁷ On or about May 15, 2018, Bereday paid \$4,500,000 to the Commission.

On June 5, 2020 the Court ordered the Commission to transfer the money paid by Farha, Behrens, and Bereday, together with the interest earned thereon, totaling approximately \$22,428,079.57, to the Fair Fund established in *Wellcare* for distribution to harmed investors.¹⁸ The combined balance of the Fair Fund as of April 5, 2021, is \$32,053,529.66.

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. As the Court of Appeals in the Second Circuit has explained, “[t]his kind of

¹³ Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; Section 17(a) of the Securities Act.

¹⁴ Section 13(b)(5) of the Exchange Act and Rules 13b2-1, 13b2-2, and 13a-14 thereunder.

¹⁵ See supra note 2.

¹⁶ See supra note 3.

¹⁷ *Farha*, Dkt. No. 39.

¹⁸ *Farha*, Dkt. No. 45.

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 *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989).

The Court’s review of a Fair Fund distribution plan focuses on whether the plan is fair and reasonable. See *Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (“[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”), citing *Wang*, 944 F.2d at 85.

For the reasons articulated below, the Commission submits that the distribution 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 Proposed Distribution Plan Provides
A Fair and Reasonable Allocation of the Fair Fund**

The Plan of Allocation is designed to compensate Eligible Investors based on their losses on shares of the WellCare common stock purchased during the Relevant Period due to the misconduct of the Respondents. The Distribution Plan will compensate WellCare common stock holders who purchased shares during the period beginning August 11, 2004, and continuing until 10:59 a.m. Eastern Standard Time on October 24, 2007 (“Relevant Period”) and sold or retained shares during periods delineated in the Plan of Allocation. The methodology contained in the Distribution Plan proposes to use ten (10) separate periods to calculate investor losses based on the average closing price of WellCare common stock during the Relevant Period.

The first-in, first-out (“FIFO”) methodology will be used for computation of Recognized Losses per share for Eligible Claimants who made multiple transactions in eligible securities

during the Relevant Period. Should the total Eligible Loss Amounts (the sum of the Recognized Loss Per Share) for all Eligible Claimants exceed the Net Available Fair Fund, the Distribution Agent will distribute funds to the Eligible Claimants based upon a *pro rata* distribution formula. A *de minimis* of \$10.00 will be imposed and if an Eligible Claimant's Distribution Payment is less than \$10.00, the Eligible Claimant will not be included in the calculation and the funds will be distributed to other Eligible Claimants with Distribution Payments greater than the Minimum Distribution Amount.

With respect to purchases or sales of WellCare common stock through the exercise of an option, the purchase/sale date is the exercise date of the call and the assignment date of the put, and the purchase/sale price is the price of the call at the time of exercise and the put at the time of assignment. Otherwise, transactions during the Relevant Period that are pursuant to, or in connection with, a swap, an option or other derivative will not be eligible for a recovery.

If the Net Available Fair Fund has funds in excess of that necessary to pay all Eligible Claimants Distribution Payments equal to their Recognized Losses, the Distribution Agent, in consultation with the SEC staff, may award Reasonable Interest.

C. Disposition of Remaining Funds

If, after the distribution is complete, all tax obligations of the Fair Fund have been satisfied, and funds remain in the Fair Fund, the Commission staff, in consultation with the Distribution Agent, will return to the Court with a recommended approach regarding the proposed disposition of the remaining funds.

WHEREFORE, the Commission respectfully requests that this Court enter an order approving a Distribution Plan for the Fair Fund, and such other relief that the Court deems just and proper.

Dated: April 28, 2021

Respectfully submitted,

/s/ Susan S. Pecaro

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