

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
v.	:
	:
VIVENDI UNIVERSAL, S.A., JEAN-MARIE	:
MESSIER, and GUILLAUME HANNEZO,	:
	:
Defendants.	:
-----	x

Case No. 03-CV-10195-PKC (FM)
Referred to United States Magistrate
Judge Frank Maas

**APPLICATION FOR REPORT AND RECOMMENDATION AFFIRMING
DISTRIBUTION AGENT’S DETERMINATION OF CLAIMS**

Jeffrey B. Sklaroff, acting in his capacity as the Court-appointed Distribution Agent herein, respectfully submits this application for a Report and Recommendation upholding and affirming his determination regarding certain claims and in support thereof states as follows:

A. *Procedural Background*

1. The Securities and Exchange Commission (the “SEC”) commenced this action by filing a Complaint, dated December 23, 2003, alleging that Vivendi Universal, S.A. (“Vivendi”), together with its former Chief Executive Officer Jean-Marie Messier and its former Chief Financial Officer Guillaume Hannezo committed violations of the antifraud, books and records, internal controls and reporting provisions of the federal securities laws. Specifically, the SEC alleged that between approximately December 2000 and July 2002, the defendants, among other things, reported materially false and misleading information about Vivendi’s financial condition.
2. By Final Judgments of Permanent Injunction and Other Relief, entered on January 9, 2004, the defendants agreed to settle this action by, among other things, paying combined civil

penalties and disgorgement in the total amount of \$51,268,150.00 for distribution to injured investors.

3. By Order of United States District Court Judge P. Kevin Castel, dated June 7, 2005, on the motion of the SEC, I was appointed as Distribution Agent and charged with the responsibility to develop and implement a plan of distribution by which the money paid by the defendants to settle the action will be distributed to eligible claimants.

4. By motion dated November 8, 2006, I submitted a proposed Plan of Distribution to Judge Castel for approval and by Order dated December 14, 2006, the Court approved the Plan and authorized and empowered me to implement its terms. A copy of the Plan is annexed hereto as Exhibit A.

5. As of November 19, 2007, 143,731 claims packets were mailed to potentially eligible claimants and 37,870 claims were filed. Of the claims received, I rejected 20,657 as being defective in whole or part after having given the affected claimants the opportunity to cure any and all deficiencies. Claimants whose claims were disallowed were notified of this outcome by a Final Determination Notice.

6. Pursuant to ¶ 45 of the Plan, any claimant who was dissatisfied with my decision to reject its claim was permitted to file an appeal with the Court. Paragraph 46 of the Plan permits the District Court to refer such appeals to a United States Magistrate Judge. By Order dated August 22, 2007, Judge Castel referred all claimant appeals to this Court for a Report and Recommendation.

B. The Claims Review and Appeals Process

7. To date, 213 appeals have been filed by claimants seeking reconsideration of my denial of their claims. I have reviewed each of these appeals and have worked with The Garden

City Group (“GCG”), which was retained on my motion to serve as Claims Administrator in this case, to determine whether there was a basis, consistent with the terms of the Plan, to reconsider the denial of these claims. In addition, at my request, GCG contacted virtually every claimant that filed an appeal in an effort to resolve any deficiencies and/or to explain to the claimant the reason why the claim had been denied.

8. As a result of that process, numerous appeals were withdrawn by the claimants who had filed them. In many other instances, claimants were able to cure the deficiencies that caused the claims to be rejected in the first instance. However, even upon additional review and analysis, my decision to reject many other claims did not change. Although the reasons for this varied for each particular claim, there are six general categories for why I decided to reject a claim. These categories are as follows:

a. The claimant acquired its shares of Vivendi stock or ADSs/ADRs (together, “Vivendi Securities”) not by purchasing the securities on the open market, as required by the Plan, but instead as a result of corporate mergers.

b. The claimant did not have eligible purchases of Vivendi Securities as required by the Plan.

c. The claimant did not suffer a loss in its purchase and/or sale of Vivendi Securities as “loss” is defined in the Plan.

d. The claimant failed to provide the documentation required by the Plan to substantiate its claim.

e. The claimant filed duplicate claims.

f. Although labeled as an “appeal,” the claimant was actually seeking alternative relief such as permission to file a late claim.

9. Attached hereto as Exhibit B is a table listing all claimant appeals that were served on me in this case. The table identifies each appeal by name of claimant and claim number, and separately groups the claims under the various categories identified above. As set forth below, my decision on these claims should be upheld and the appeals should be denied or ruled on as otherwise indicated.

C. Appeals That Have Been Withdrawn

10. As set forth in Section A of Exhibit B, there are 18 claimants who, after consultation with GCG, have decided to withdraw their appeals. The reasons for these claimants' decisions are generally described in the column labeled "Disposition." Because these appeals have been withdrawn, there is nothing for the Court to determine at this time and they should be marked off the Court's docket.

D. Deficiencies Cured, Claims Allowed

11. Section B of Exhibit B lists 100 claims that were originally rejected for various deficiencies and from which an appeal was filed. After consultation with GCG, the claimants who filed these claims were able to cure the deficiencies and, as a result, I have determined to allow these claims. There is, therefore, no additional relief to be granted to these claimants and their appeals should likewise be marked off the Court's docket.

E. Shares Acquired By Merger Of "Old Vivendi," Seagram Company, Ltd. and CanalPlus, S.A.

12. Numerous holders of Vivendi Securities acquired their securities as a result of a corporate merger and not by purchasing the securities on the open market as required by the Plan. In addition, these claimants did not purchase ordinary shares (or ADSs/ADRs) of Vivendi Universal, S.A., the only securities permitted to participate in the Plan, but instead purchased

shares in predecessor entities. After consulting with the SEC, I made the decision to deny all such claims on the ground that they did not meet the criteria for eligible claims. The 26 claimants listed in Section C of Exhibit B have filed appeals seeking a review of my decision in this regard.

13. The facts surrounding these transactions are as follows. Vivendi Universal, S.A., the Vivendi entity that is the defendant in this action, was created by the three way merger of (Old) Vivendi with two other entities: The Seagram Company Ltd. ("Seagram") and CanalPlus, S.A. ("Canal+"). The proposed merger was originally announced in June 2000, subject to various conditions being satisfied prior to closing including antitrust and shareholder approval. All required approvals were obtained as of December 5, 2000 and the merger was declared effective as of Friday, December 8, 2000. Trading in Vivendi Universal securities commenced on Monday, December 11, 2000.

14. Because the Plan in this case defines the Settlement Period as running from December 1, 2000 through July 2, 2002, a number of investors who had purchased shares in Vivendi, Seagram or Canal+ during the period from December 1 through December 8, 2000 inquired as to whether they would be eligible to participate in the Plan. I determined that investors who had acquired their shares in Vivendi as a result of purchases in Old Vivendi, Seagram and/or Canal+ during the period from December 1 through December 8 would not be permitted to participate in the Plan and I directed GCG to communicate this fact to such investors.

15. I reached this decision for the following reasons. As stated in the SEC's complaint in this matter, the wrongful conduct at issue in this enforcement action was that of Vivendi Universal, S.A., and not its predecessor entities, Old Vivendi, Seagrams or Canal+.

Moreover, the Plan itself and all notice documents that were approved by Judge Castel state explicitly that to be an eligible claimant, an investor must have purchased Vivendi Universal securities. No mention is made of purchases in Vivendi Universal's predecessor entities and it was never intended that investors who purchased shares in those entities would be able to participate in the Fund. Indeed, based on the language of the Plan and its associated notice documents, brokers, banks and other nominee purchasers would not have provided names and addresses of their clients who purchased securities other than in Vivendi Universal.

16. For all these reasons, I determined that purchasers of "Old Vivendi," Seagram and/or Canal+ securities during the period from December 1 through December 8, 2000 were not eligible to participate in the Plan. All of the claimants identified in Section C of Exhibit B fall into this category and accordingly, their appeals from my denial of their claims should be denied.

*Liberty Media Corporation – Shares Acquired Through Private Corporate
Merger Transaction*

17. Among the merger claims listed in Section C of Exhibit B is the claim of Liberty Media Corporation ("Liberty Media") which filed a claim in the amount of \$1,830,066,042.00 based on its acquisition of 37,386,436 ordinary shares of Vivendi Universal stock pursuant to the terms of a certain Agreement and Plan of Merger and Exchange, dated December 16, 2001 (the "Merger Agreement"). The Merger Agreement was entered into by and among Vivendi and a related entity on the one hand, and Liberty Media and various related entities on the other. A copy of Liberty Media's claim and its supporting papers, including a copy of the Merger Agreement, is attached hereto as Exhibit C.

18. By letter dated July 27, 2007, I informed Liberty Media that its claim did not qualify as an Eligible Claim under the terms of the Distribution Plan and that I was therefore

rejecting the claim in its entirety. A copy of my July 27 letter is annexed hereto as Exhibit D. On August 17, 2007, Liberty Media filed an appeal of this decision, a copy of which is annexed hereto as Exhibit E.

19. My reasoning in rejecting Liberty Media's claim is as follows. It is the purpose and intent of the Plan to distribute the settlement fund to those investors who purchased Vivendi Securities during the Settlement Period on the open market and who were damaged by the conduct alleged by the SEC against Vivendi and the other defendants in this action. Liberty Media's acquisition of the Vivendi ordinary shares upon which its claim is based was not a purchase on the open market but was instead consideration provided to Liberty Media under the terms of its private Merger Agreement. Neither the Fair Funds provision of the Sarbanes Oxley Act (15 U.S.C. §7246(a)), nor the Plan in this case was intended to provide a distribution to claimants such as Liberty Media who acquired their shares under these circumstances.

20. There are unique and substantial differences between investors who purchased Vivendi Securities on the open market and sophisticated corporate investors like Liberty Media who acquired Vivendi Securities through complex merger transactions. For example, prior to executing and entering into the Merger Agreement, Liberty Media had either actual or constructive access to enormous volumes of financial information and due diligence material that the open market investor did not have. Moreover, Liberty Media required Vivendi to make numerous written representations and warranties as a condition to going forward with its investment including specific representations that Vivendi's financial statements "present fairly, in all material respects, the consolidated financial position of Vivendi and its subsidiaries..." Merger Agreement, §3.08, at 12-13. See also Merger Agreement, §§3.07, 3.11 and 3.12.

21. Unlike the open market investor, Liberty Media had the right to, and in fact did, commence an action against Vivendi to recover monetary damages for Vivendi's alleged violation of these and other representations, as well as numerous other alleged violations and breaches of the Merger Agreement. See Complaint, ¶¶8-42, 55-63, 68-73, 77-85, 86-95. These claims are unique to Liberty Media and are not available to market investors.

22. Moreover, in enacting the Fair Funds provision of the Sarbanes Oxley Act, it is clear that Congress intended distributions from settlement funds to benefit those investors who purchased on the open market and not those, like Liberty Media, who had the opportunity to conduct extensive due diligence guided by lawyers, accountants and other experts, advising them on all aspects of the company's financial condition prior to entering into the Merger Agreement. See generally 148 Cong. Rec. H5642 (daily ed. July 24, 2002), SAROX-LH 75 (Westlaw).¹

23. Finally, to the extent there is any ambiguity in the Plan or any of its related notice documents that only open market investors are permitted to share in the Fund, I would move before Judge Castel to amend the Plan to make this explicitly clear, as I am permitted to do pursuant to paragraph 52 of the Plan and pursuant to the Order of Judge Castel which approved the Plan.

¹ It also should be noted that the size of Liberty Media's claim, more than \$1.8 billion, will result in a loss amount of approximately \$500,000,000.00, as calculated under the terms of the Plan. Based on the total estimated number and amount of all claims filed to date, the Liberty Media claim by itself would consume approximately 20 percent of the entire Settlement Fund. See *SEC v. Certain Unknown Purchasers of Common Stock of Santa Fe International Corp.*, 817 F.2d 1018, 1021 (2d Cir. 1987)(affirming District Court's decision to exclude a claimant from participating in settlement fund where the size of the claim (\$1 million) "would result in substantial dilution of the \$5 million fund" and "[e]ach claimant's pro rata share of disgorged profits would be significantly reduced if [the claimant's] claims and others in his position were allowed," and noting that unlike other claimants, the rejected claimant was an experienced market professional who was able to employ sophisticated hedging strategies to reduce his loss exposure).

F. No Eligible Purchases

24. The Plan requires that claimants must have purchased Vivendi Securities on the open market during the period from December 1, 2000 through July 2, 2002. If investors did not purchase their shares during this time period, they do not qualify to participate in the Fund.

25. I rejected the 9 claims in Section D of Exhibit B because the claimants were not able to establish that they had purchases of Vivendi Securities during the time period required by the Plan. My decision to reject these claims should, therefore, be upheld on appeal.

G. Insufficient Documentation

26. The Plan and its associated notice documents, including the approved proof of claim form, require claimants to provide documentation to support their claims including copies of trading records, sales confirmations and similar documents to verify that they did in fact have qualifying purchases and sales of Vivendi Securities. I waived the documentation requirement for claimants with claims in the amount of \$2,000 or less, but documentation was required for all other claims.

27. The claims listed in Section E of Exhibit B titled "Undocumented Transactions" were denied because these claimants did not produce the required documentation. As with other claim deficiencies, each claimant was given additional opportunities to cure this defect but were unable to do so. Accordingly, I request that my determination in this regard be affirmed.

H. Duplicate Claims

28. The 4 claims listed in Section F of Exhibit B were denied because they were determined to be duplicate of earlier filed claims. There is no basis to set aside my determination in this regard and my decision to reject these later filed duplicate claims should be upheld.

I. Unsigned Claim Form; Ineligible Security

The single claim listed in Section G of Exhibit B was not signed by the claimant as required by the Plan and its associated documents. Despite GCG's efforts, the claimant has still not provided a required signature and my decision to reject this claim should, therefore, be upheld. The single claim listed in Section H of Exhibit B indicates that the claimant purchased securities in an entity named "Vivendi Universal Exchange Co" and not Vivendi Universal. Accordingly, the claimant did not purchase shares of any eligible security within the meaning of the Plan and my determination to reject this claim should likewise be affirmed.

J. No Loss

29. Under the terms of the Plan, only those investors who suffered a loss under the following formula are permitted to receive a distribution from the Fund:

Eligible Loss Amount

		Disposal Date		
		During the Settlement Period But Before 7/2/2002	7/2/2002	After 7/2/2002, or still held
Purchase Date	Before 12/1/2000	No Eligible Claim	No Eligible Claim	No Eligible Claim
	On or after 12/1/2000 and before 7/2/2002	No Eligible Claim	27.75% of purchase price, less 12.86% of sale price	27.75% of purchase price
	7/2/2002	—	12.86% of difference between purchase price and sale price	12.86% of purchase price
	7/3/2002 or later	—	—	No Eligible Claim

30. Accordingly, in order to participate in the Fund, an investor must have purchased Vivendi Securities on or after December 1, 2000 and either sold them on or after July 2, 2002, or must still hold them. If a claimant does not meet this criteria, or if the claimant otherwise achieved a gain on its purchase and sale of Vivendi Securities during the settlement period, there is no recognized loss and no basis to share in the Fund.

31. The claimants listed in Section I of Exhibit B under the heading "No Loss" did not have purchases and sales within the required time periods and thus did not have a recognized loss within the meaning of the Plan. These claimants were given additional opportunities to establish that they did have qualifying losses but were unable to do so. Accordingly, I request that my determination to deny these claims be upheld.

K. *Claimants Seeking Relief Other Than Appeals*

32. The 3 claims listed in Section J of Exhibit B were rejected because the claimants were not seeking review of my decision on their claims but instead were seeking some other form of relief such as permission to file a late claim or had other types of inquiries. Because these claims do not involve appeals, they can be marked off the Court's docket.

L. *Notice of this Proceedings To Be Posted on the www.Vivendisecsettlement.com Website*

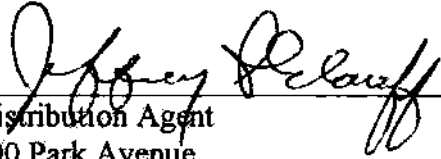
33. Paragraph 45 of the Plan states that the Distribution Agent is to give notice to appealing claimants of his written response to their appeals. Because of the time and cost involved in providing separate notice to each claimant who has filed an appeal, many of whom reside in a variety of foreign countries, I respectfully request that notice be provided only to the 95 remaining claimants whose claims have not either been allowed or withdrawn, and that I be permitted to send a copy this application together with the annexed exhibits by email to those claimants who have provided an email address. For those claimants who have not provided an

email address, I request that notice be deemed sufficient by mailing a copy of just the application together with a one page notice stating that all exhibits are available for inspection on the website that I have established in this case, www.vivendisecsettlement.com, and that such notice be deemed adequate under the circumstances.

WHEREFORE, I respectfully request that the Court issue a report and recommendation determining the appeals as requested herein and that the Court grant such other and further relief as it deems just.

Dated: New York, New York
February 13, 2008

JEFFREY B. SKLAROFF


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CERTIFICATE OF SERVICE


I hereby certify that the foregoing Application for Report and Recommendation Affirming Distribution Agent's Determination of Claims was served by email transmission this 13th day of February, 2008, on the following counsel:

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