

EXHIBIT E

SECURITIES AND EXCHANGE COMMISSION,

Civ. No. 03-CV-10195 (PKC)

Plaintiff,

v.

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

Defendants.

**MOTION TO APPEAL THE DISTRIBUTION AGENT'S DENIAL
OF LIBERTY MEDIA CORPORATION'S CLAIM TO THE SETTLEMENT FUND**

Pursuant to Paragraph 45 of the Distribution Plan, Liberty Media Corporation ("Liberty Media") hereby files this notice of appeal of the Distribution Agent's denial of Liberty Media's claim to the Vivendi SEC Settlement Fund.

Liberty Media, on behalf of itself and its wholly-owned subsidiaries as they existed during the Settlement Period, timely submitted its Proof of Claim with supporting documentation to the Distribution Agent on June 12, 2007. Ex. A. The Distribution Agent notified Liberty Media on July 27, 2007 that Liberty Media did not qualify as an Eligible Claimant under the Distribution Plan. Ex. B. According to the Distribution Agent, Liberty Media's claim was rejected for two principal reasons: (1) because Liberty Media "acquired its Vivendi shares as part of a corporate acquisition and Merger Agreement and not on the open market," and (2) because Liberty Media has "an alternative remedy arising from its claim that Vivendi breached the terms of that Agreement." *Id.* The Distribution Agent also stated in a footnote that "the size of [the] Claim, \$1,830,066,042, based on Liberty Media's acquisition of 37,386,436 Vivendi ordinary

shares pursuant to the Merger Agreement, would result in a Loss Amount of approximately \$500,000,000 as calculated under the terms of the Plan,” and “[b]ased on the total estimated amount of all claims filed to date, the Liberty Claim by itself would consume approximately 20 percent of the entire Fund.” *Id.* at n. 2. None of these given reasons disqualifies Liberty Media as an Eligible Claimant to the Fund.

As set forth more fully in Liberty Media’s Proof of Claim and cover letter to the Distribution Agent, Liberty Media contracted to purchase Vivendi shares on December 16, 2001 via a Merger Agreement with Vivendi. *See* Ex. A. The transaction ultimately closed on May 7, 2002, the same day that Liberty Media received the Vivendi shares. *Id.* The fact that Liberty Media purchased those shares via a contractual arrangement as opposed to an “open market” stock transaction in no way diminishes Liberty Media’s status as a “victim” of Vivendi’s fraud under the Fair Funds provision of the Sarbanes-Oxley Act. *See* Section 308(a) of the Sarbanes-Oxley Act of 2002 (“[T]he amount of such civil penalty [paid by a violator of the securities laws] shall . . . be added to and become part of the disgorgement fund for the benefit of the victims of such violation.”). Like any other purchaser of Vivendi shares during the Settlement Period, Liberty Media had no knowledge of the ongoing fraud that Vivendi was perpetuating on the market. Like other market investors, Liberty Media relied on the accuracy of Vivendi’s public filings when making its decision to invest in Vivendi shares. Neither the Fair Funds provision nor the Distribution Plan arbitrarily limits “victims” deserving of Fair Funds compensation to those investors who purchased shares in the open market instead of through a contract with the company, and the Distribution Agent did not seek to amend the Distribution Plan to include such a requirement.¹

¹ Notably, counsel to Liberty Media wrote a letter to the SEC on March 7, 2005 requesting that Liberty Media be considered for participation in any Fair Fund distribution based on “its acquisition of over \$1.8

In addition, the Distribution Plan does not exclude as Eligible Claimants other entities who purchased shares directly from the company, such as employees not involved in the fraud who exercised stock options. The U.S. Bankruptcy Court for the Southern District of New York has noted that employees holding stock options—options obtained directly from the company rather than on the open market—may be eligible to participate in a SEC settlement fund. *See In re Enron Corp.*, 341. B.R. 141, 151 and 169 n. 25 (S.D.N.Y. 2006) (“While it is true that the Claimants did not purchase the stock options on the open market, they nonetheless exchanged value for the options The Fair Funds provision of section 308(a) of Sarbanes-Oxley, codified at 15 U.S.C. §7256(a), allows the SEC to distribute any civil penalties it obtains in an enforcement action for violation of the ‘securities laws,’ . . . to the victims of that securities violation. In effect then, under section 308(a) defrauded securityholders such as the Claimants might be able to obtain a recovery for the debtor’s securities laws violations.”).

The fact that Liberty Media has an ongoing lawsuit against Vivendi should not disqualify Liberty Media as an Eligible Claimant to the Fund. First, the possibility of obtaining an “alternative remedy” through a lawsuit against Vivendi is available to every potential claimant to the Fund through the pending class action. *See In re Vivendi Universal, S.A. Securities Litigation*, Civ. No. 02 Civ. 5571 (RJH).² Second, the Distribution Plan itself contemplates that an alternative remedy may be available to potential claimants. Paragraph 51 of the Plan states: “The submission of the Proof of Claim Form and the receipt and acceptance of a distribution by

billion in Vivendi securities pursuant to agreements entered into in December 2001.” Ex. C. The SEC responded on March 21, 2005 that the SEC “may submit a proposed distribution plan to the District Court” and that “[i]nvestors who believe they may be eligible to participate in the distribution plan need not do anything at this time.” Ex. D. The Proposed Distribution Plan that was filed with this Court in November 2006 and ultimately approved by the Court in December 2006 does not contain any “open market” limitations on potential claimants.

² See SEC Notice at <http://www.sec.gov/divisions/enforce/claims/vivendi.htm> (“Please be aware that investors who join a class action against any of the defendants may still be able to participate in the SEC’s plan.”).

an Eligible Claimant shall not affect an Eligible Claimant's rights and claims as against any party (other than the Distribution Agent and his agents), including, without limitation, Vivendi, Vivendi's past or present directors, officers, advisors and agents, Messier and Hannezo."³ It should also be noted that Liberty Media's breach of contract claims against Vivendi are largely based on representations and warranties in the Merger Agreement regarding the accuracy of Vivendi's public filings during the relevant time period. See Liberty Media's Complaint, attached hereto as Ex. E.

Finally, the Distribution Agent states in the denial letter that the size of Liberty Media's claim "would result in a Loss Amount of approximately \$500,000,000 as calculated under the terms of the Plan" and that "[b]ased on the total estimated amount of all claims filed to date, the Liberty Claim by itself would consume approximately 20 percent of the entire Fund." Ex. B at n. 2. The fact that Liberty Media suffered such an enormous loss (as calculated by the Distribution Agent) because of Vivendi's fraud further justifies Liberty Media's claim to the Fund. The Second Circuit case cited by the Distribution Agent, *SEC v. Certain Unknown Purchasers of Common Stock of Santa Fe International Corp.*, 817 F.2d 1018 (2d Cir. 1987), does not suggest otherwise. In that case, the court upheld the exclusion of a claimant from participating in a


³ The Consents to Final Judgment signed by Vivendi, Mr. Messier, and Mr. Hannezo in the SEC Action also contemplate separate lawsuits by investors; each states the following: "To preserve the deterrent effect of the civil penalty, Defendant agrees that [it/he] shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this action that is proportionately attributable to the civil penalty paid by Defendant ('Penalty Offset'). If the court in any Related Investor Action grants such an offset or reduction, Defendant agrees that it shall, within 30 days after entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this action. For purposes of this paragraph, a 'Related Investor Action' means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action." Thus, if Liberty Media obtains a recovery through its lawsuit against Vivendi, and such recovery is offset by Liberty Media's recovery under the Vivendi SEC Settlement Fund, Defendants would be required to reimburse the amount of that offset to the United States Treasury or to a Fair Fund.

disgorgement fund because that claimant did not sustain any out-of-pocket losses, as was specifically required under the distribution plan. *Santa Fe*, 817 F.2d at 1020-21. While the Distribution Plan in this case also 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,” Liberty Media did in fact suffer a tremendous loss on its purchase of Vivendi securities. As shown in Liberty Media’s complaint, Liberty Media’s out-of-pocket losses are well in excess of the Loss Amount attributable to Liberty Media under the Distribution Plan. See Ex. E at Paragraph 54. It would thus be inequitable to prevent Liberty Media from recovering under the Distribution Plan solely because it suffered greater losses than the average investor. Notably, the distribution plan approved by the district court and affirmed by the Second Circuit in *Santa Fe* reflected the district court’s belief that “the most grievously injured claimants should receive the greatest share of the fund.” *Id*; see also *Official Committee of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006) (“We noted [in *Santa Fe*] that ‘the equities clearly support[ed]’ the district court’s decision to approve the plan, which reflected the district court’s finding that ‘the most grievously injured claimants should receive the greatest share of the fund.’”) (citing *Santa Fe*).

Therefore, Liberty Media respectfully requests that this Court find Liberty Media to be an Eligible Claimant to the Vivendi SEC Settlement Fund and order the Distribution Agent to distribute to Liberty Media its fair share of the Settlement Fund pursuant to the Distribution Plan.

Dated: August 17, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below a true and correct copy of the
aforementioned document, MOTION TO APPEAL THE DISTRIBUTION AGENT'S DENIAL
OF LIBERTY MEDIA CORPORATION'S CLAIM TO THE SETTLEMENT FUND was
served by hand delivery upon:

Jeffrey Sklaroff, Esq.
Greenberg Traurig
MetLife Building
200 Park Avenue
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Dated: August 23, 2007


Margaret Dooley Nolan