

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CASE NO: 8:09-cv-87-T-26TBM

ARTHUR NADEL; SCOOP CAPITAL, LLC;
and SCOOP MANAGEMENT, INC.,

Defendants,

SCOOP REAL ESTATE, L.P.;
VALHALLA INVESTMENT PARTNERS, L.P.;
VALHALLA MANAGEMENT, INC.;
VICTORY IRA FUND, LTD.; VICTORY FUND, LTD.;
VIKING IRA FUND, LLC; VIKING FUND, LLC;
and VIKING MANAGEMENT, LLC,

Relief Defendants.

ORDER

Before the Court is the Motion of Claimant Elendow LLC to Modify Order Disallowing Claim with exhibits attached (Dkt. 980) and the Receiver's Opposition with support. (Dkts. 990 & 991). After careful consideration of the submissions and the entire file, the Court concludes that the motion should be denied.

BACKGROUND

In this receivership spanning over four years, the Receiver instituted a claims process within the second year and published notice on June 4, 2010,¹ resulting in more

¹ See docket 991 at para. 3 (Declaration of Gianluca Morello, attorney for Receiver) & Exh. A (Claims package including (1) Letter from Receiver to "Elendow Fund, LLC c/o Eric

than 500 proof of claim forms being submitted.² While the vast majority of these proof of claim forms were filed by the claims bar date of September 2, 2010,³ the Receiver did receive some late-filed proofs of claim.⁴ This motion involves one of the claimants, Elendow Fund, LLC (Elendow),⁵ which filed a late proof of claim after the claims bar date of September 2, 2010.

Elendow missed the claims bar date by twenty-seven days, filing it with the Receiver on September 29, 2010.⁶ The Receiver then wrote a letter to Elendow in February 2011, along with the other late-filing claimants, requesting an explanation for its tardiness, failing which would result in denial of the claim.⁷ The Receiver did not receive

Waldman, (2) Notice of Claims Bar Date, and (3) Blank Proof of Claim Form for “Elendow Fund, LLC c/o Eric Waldman” in Bozeman, Montana with Exhibit A attached showing a net investment amount of \$700,000.00). The body of the June 4, 2010, letter provides that “[t]he identification of a positive Net Investment Amount on the exhibit to the enclosed Proof of Claim Form does not mean that particular account has a valid claim or that you will receive the amount or a percentage of the amount identified.”

² See docket 950 at p. 4.

³ See docket 391 (Court’s Order dated April 21, 2010, setting claim bar date of 120 days from entry of order or 90 days from mailing proof of claim form to claimants, whichever is later). September 2, 2010, is ninety days from June 4, 2010, the date the Receiver mailed the claims package.

⁴ See docket 675 at p. 21 (“Fourteen Proof of Claim Forms were received after the Claim Bar Date.”).

⁵ Elendow was created in December 2007 for some of the larger Dancing \$, LLC account holders and a few new members. Dancing \$, LLC, a Montana LLC, was made up of Eric Waldman and his family members and friends. See docket 980-1 at paras. 2 & 3.

⁶ See docket 991 at para. 4 & Exh. B (Letter dated February 10, 2011, from Receiver to Elendow inviting an explanation in writing for the late-filed claim).

⁷ See id.

a response from Elendow.⁸ Elendow, through its California attorney Mr. Stillman, claims to have mailed a letter dated August 11, 2011, to the Receiver.⁹ Notably, this letter was written six months after the Receiver's request for the circumstances underlying the tardiness and almost one year after the claims bar date. The Receiver claims to never have received it.¹⁰ The two reasons given for Elendow's late-filing were that Mr. Eric Waldman, the manager of Elendow, was "out of the country when the claim was supposed to have been filed" and because Mr. Stillman had "regular contact with [the Receiver's] firm in connection with [a] related case,¹¹ [Waldman] assumed that [Stillman] was receiving all notices and was responsible for any filings that were necessary."¹² Waldman's email to Stillman dated September 27, 2010, and Waldman's declaration confirm that he did not see the proof of claim materials from the Receiver until he returned home.¹³

⁸ See docket 675 at 21 ("The Receiver received responses for each claim except for one. (See Claim No. 458.)).

⁹ See docket 980-2, Exh. 4. The letter is directed to "Claims Dept." as opposed to Attorney Jordan Maglich as specified in the Receiver's February 2011 letter. The February 2011 letter was sent to Elendow "c/o Eric Waldman" in Bozeman, Montana.

¹⁰ See docket 991 at para. 7 (The Receiver and his counsel have searched their files but have no record of having received the August 11, 2011, letter Philip Stillman, counsel for Elendow, purportedly sent to "Claims Dept.").

¹¹ The related case is Wiand v. Dancing \$, LLC, No. 8:10-cv-92-T-17MAP.

¹² See docket 980-2, Exh. 4.

¹³ See docket 980-2, Exh. 3 and docket 980-1 at paras. 10 & 11.

As the case progressed, on December 9, 2011, the Receiver wrote to Elendow notifying Elendow that the Receiver had just filed a motion to approve the determination and priority of claims, identifying the claim number for Elendow as 458 and explaining that objections to the Receiver's determination of the claim must be made twenty days after the court rules on the motion.¹⁴ The letter further explained that the allowed amount for Claim 458 appeared in an exhibit to the motion, and if the allowed amount was positive, then a percentage of that amount would be received on a pro rata basis.¹⁵ The exhibit to the motion showed the total claim amount for Elendow (Claim 458) as \$700,000.00, and the amount allowed as none.¹⁶ Waldman admits that he did not look up

¹⁴ See docket 991-3.

¹⁵ The motion, which was filed on December 7, 2011, sought the approval of the determination and priority of claims, the pooling of receivership assets and liabilities, the approval of a plan of distribution, and the establishment of an objection procedure. See docket 675.

¹⁶ See docket 675-7, Exh. G titled "Investor Claims—Denied Class 4"). The recommended claim determination provides as follows:

This claim was received 27 days after the Claim Bar Date. The Receiver sent the Claimant a letter requesting a written explanation of any extenuating circumstances for the late filing. The Claimant did not submit any such written explanation or otherwise provide the Receiver with any extenuating circumstances. Further, the Receiver was informed the owners of this Claimant, along with other individuals, previously invested in Hedge Funds through another Limited Liability Company [Dancing \$, LLC]. That previous investment received False Profits. Because the Receiver has not been provided sufficient details about how much money persons and entities invested in and received from the Hedge Funds through both the Claimant and the other pertinent Limited Liability Company, the Receiver cannot determine each such person or entity's losses or False Profits. For these reasons, this claim should be denied.

the motion or the exhibit to ascertain whether there was a positive allowed amount recorded in the exhibit beside Claim 458.¹⁷ Had he looked at the motion he would have seen that Claim 458 was recommended by the Receiver to be denied.

The Court granted the motion to approve the determination and priority of claims on March 3, 2012.¹⁸ The order approved the determination of claims as fair and equitable and stated once again that “any and all further claims against . . . the Receivership estate are hereby barred and enjoined.”¹⁹ The Receiver mailed letters to all claimants on March 8, 2012, including Elendow, inviting any objections to the claims, their priority, and plan of distribution as determined by the order.²⁰ The deadline for objections was March 28, 2012. Elendow did not serve any written objection on the Receiver. Elendow, instead, waited until the related “clawback” case of Wiand v. Dancing \$, LLC, No. 8:10-cv-92-T-17MAP, was decided by another district judge in this District²¹ to file the motion for reconsideration before this District Court in the receivership case. While the Receiver set aside reserves based on the timely-received objections lodged in response to the order approving the determination and priority of claims, two distributions have been made and

¹⁷ See docket 980 at 2 (“Only if Elendow had actually looked up the motion would it have seen that the amount of the allowed claim was zero.”).

¹⁸ See docket 776.

¹⁹ See docket 776 at paras. 3 & 8.

²⁰ See docket 991, Exh. D.

²¹ In that case, the Court found that Dancing \$, LLC received “false profits” amounting to \$107,172.11, which was the amount received from the Nadel ponzi scheme in excess of the amounts invested. See docket 128 at 4 in Case No. 8:10-cv-92-T-17MAP.

awarding a claim to Elendow now would necessarily reduce the funds available for future distributions to all other claimants who timely complied.

ANALYSIS

Elendow takes issue with the fact that all of the late-filed claims, other than its own, were ultimately accepted as timely. It claims that it responded to the Receiver's February 2011 letter seeking an explanation for the lateness of the claim, and that its reasons for responding past the bar date are valid. Elendow further asserts that it was confused by the letter sent in December 2011 referring to an "allowed claim" while at the same time referring the reader to a motion that listed the claim as denied. It also claims that, contrary to the Receiver's assertion that Elendow had not provided the details of the prior investment and receipt of false profits on the part of Dancing \$, LLC and Elendow, Elendow had provided this information as early as March 2010. The significance of the make-up of the investors in Dancing \$, LLC and Elendow, according to Elendow, is that the Receiver relied on its lack of knowledge of the details of the investors to refuse to offset the "false profits" received by Dancing \$, LLC against the losses suffered by Elendow and to deny the claim.²² Elendow argues that it is unfair for the Receiver to treat Dancing \$, LLC and Elendow as separate entities for the purposes of offset, but as one entity for purposes of denying Elendow's claim. Relying on Federal Rule of Civil Procedure 60(b)(1), (b)(3), and (b)(6), Elendow urges this Court to reconsider its order of

²² See docket 980-1 at para. 18.

March 2, 2012, disallowing Elendow's claim and to award Elendow its claim of \$700,000.00 so that it may receive future distributions by the Receiver.

Rule 60(b)(1)

As a preface to discussing Rule 60 for relief from judgment, the Court emphasizes the importance of establishing a fixed claims process procedure in a receivership case, such as this one, under the board authority bestowed in establishing claims procedures. See S.E.C. v. Elliott, 953 F. 2d 1560, 1566 (11th Cir. 1992) (stating that district court has broad powers and wide discretion to determine relief in equity receivership); U.S. v. Capital Across Amer., L.P., 369 F. App'x 674, 680 (6th Cir. 2010) (unpublished opinion) (opining that it would not have been abuse of receivership court's discretion to deny claim based on failure to comply with established claims procedures). Rule 60(b)(1) permits relief from an order based on excusable neglect. Excusable neglect is determined from the following four factors: (1) the danger of prejudice to the receivership, in this case; (2) the length of delay and its potential impact on the judicial proceedings; (3) the reasons for the delay; and (4) the good faith of the movant. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L. Ed. 2d 74 (1993).²³

Permitting Elendow's untimely claim to stand at this late date in the receivership would highly prejudice the receivership. At this point in the receivership, two

²³ Although the Pioneer case involved the Bankruptcy Code, the four factors have been applied to excusable neglect under Rule 60(b)(1). See Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F. 3d 248, 249-50 (2d Cir. 1997).

distributions have been made and the Receiver did not reserve the \$700,000 claim amount for Elendow. The Receiver allowed only those late-filed claims in which the claimants provided reasons for missing the claims bar date of September 2, 2010, and the filings were within a reasonably short period of time afterwards, such as thirty days. Although Elendow filed a proof of claim by September 29, 2010, it never provided the reasons for its late-filed proof of claim, consistent with the claims process. Even assuming Elendow sent the letter of explanation to the Receiver in August 2011,²⁴ almost one year after it filed its proof of claim and six months after the Receiver requested an explanation, the reasons given for the delay are weak—that Waldman was traveling out of town and out of the country and that the Receiver should not punish Elendow for not sending materials identifying the crossover investors of Elendow and Dancing \$, LLC to the correct contact. Elendow certainly never followed up with the Receiver concerning whether the reasons given were satisfactory, and a perusal of the motion for determination would have revealed that the claim was recommended to be denied.

Even as late as March 2012, after the Receiver had notified Elendow in December 2011 that it was requesting an order of determination of claims and their priority and after the Receiver had notified Elendow in early March 2012 that objections must be served within twenty days, Elendow never responded. To the extent Elendow asserts its confusion surrounding the December 2011 letter as to whether Claim 458 was allowed in a positive allowed amount, which is an amount above zero, Elendow was remiss in not

²⁴ The Court is aware that the Receiver contends that it never received this correspondence from Elendow.

locating the Receiver's motion referenced in the letter to confirm whether Claim 458 was allowed or denied. If Elendow had desired to know the Receiver's recommended determination of Claim 458, he easily could have located the motion filed in the public records and available on the Receiver's website. Again in March 2012, Elendow could have submitted written objections to the determination of Claim 458 and its priority. Based on the first three factors under Pioneer, the Court finds no excusable neglect.

Rule 60(b)(3)

Rule 60(b)(3) permits relief if the Receiver, in this case, obtained the order because of fraud, misrepresentation or other misconduct, and the movant was prevented from fully and fairly presenting its case. See Cox Nuclear Pharmacy, Inc. v. CTI, Inc., 478 F. 3d 1303, 1314 (11th Cir. 2007); Frederick v. Kirby Tankships, Inc., 205 F. 2d 1277, 1287 (11th Cir. 2000). According to Elendow, the alleged misconduct on the part of the Receiver consists of his description of the claims in his December 2011 letter regarding the determination of claims and their priority. By using the term "allowed amount," Elendow argues, the Receiver lulled the claimants whose claims were waived or denied into inaction erroneously believing their claims were allowed.

Elendow's characterization of the letter is incorrect. The letter plainly tells the claimants to refer to the motion for determination to discover the allowed amount of the claim. The motion lists 95 claims with an allowed amount of none, hardly a means of keeping the claims determinations secret and inducing the claimants to abandon their claims. In fact, 23 objections to claims determinations were served on the Receiver.

There is no evidence to suggest that the Receiver engaged in any misconduct in obtaining the order approving the determination and priority of claims, and consequently, relief based on Rule 60(b)(3) is denied.

Rule 60(b)(6)

Rule 60(b)(6) is a catch-all provision and “is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances.” Daniels v. Sodexo, Inc., 2013 WL 1150130, at *1 (11th Cir. 2013) (unpublished opinion) (citing Griffin v. Swim-Tech Corp., 722 F. 2d 677, 680 (11th Cir. 1984)). Giving Elendow the benefit of the doubt by assuming Elendow responded to the Receiver’s February 2011 letter, it is undisputed that it was not sent until six months later in August 2011, which was almost one year after the claims bar date. Elendow not only filed a late proof of claim without timely explanation but also failed to object to the priority of claims in March 2012. This case does not present any exceptional circumstances other than an extremely late attempt to challenge the denial of Elendow’s claim without a persuasive reason. Consequently, the motion in all respects is denied.

It is therefore **ORDERED AND ADJUDGED** that the Motion of Claimant Elendow LLC to Modify Order Disallowing Claim (Dkt. 980) is **DENIED**.

DONE AND ORDERED at Tampa, Florida, on April 12, 2013.

s/Richard A. Lazzara

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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