Securities and Exchange Commission v. Nadel et al Doc. 980

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.
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BURTON W. WIAND, as Receiver for Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd., Victory IRA Fund, LTD, and Scoop Real Estate, L.P.,

Plaintiff,

v. Related Case No. 8:10-cv-092-17MAP

DANCING $, LLC.,

Defendant.
______________________________________/

MOTION OF CLAIMANT ELENDOW LLC TO MODIFY ORDER DISALLOWING CLAIM

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Claimant Elendow, LLC, by and through undersigned counsel, respectfully requests that the Court reconsider that portion of it's March 2, 2012 Order disallowing Elendow's late-filed claim (Docket No. 776) and enter a new order allowing Elendow to participate in distributions to victims of Nadel's schemes.

INTRODUCTION

Movant Elendow, LLC is a victim of Nadel's various schemes, who lost $719,000 in investments in Valhalla Investment Partners, LP and in Scoop Real Estate, LP. The amount of the claim is undisputed, and it is undisputed that the money lost by Elendow was used to fund Nadel's schemes. However, Elendow's claim was denied by this Court based on the Receiver's unopposed recommendation.

As set forth more fully below, the Receiver's recommendation was unopposed by Elendow because the Receiver indicated in his letter to Elendow on December 9, 2011 that it's claim was allowed in the amount set forth in the Receiver's Motion. Only if Elendow had actually looked up the motion would it have seen that the amount of the allowed claim was zero. Thus, Elendow had no notice that in reality its claim was denied. Only shortly before a mediation in another case with the Receiver in October 2012 in *Wiand v. Dancing $, LLC*, Case No. 10-0092, did Elendow learn that it's claim had been denied, not allowed, and that a distribution had already been made to those who had allowed claims.

This Court recently entered a judgment against Dancing $, LLC on January 23, 2013, which denied any offset from Elendow's losses against Dancing $'s $107,000 gain (the majority of Elendow's losses were incurred by the members of Dancing $, who reinvested the $107,000 and an additional $619,000 back into the funds). Since the Court has now determined that

Elendow and Dancing $ must be treated separately, the chief reason for denying Elendow's claim, *i.e.*, that its members profited from the scheme through Dancing $, the disallowance of Elendow's claim should be reconsidered.

STATEMENT OF FACTS

A. Background of Elendow.

Dancing $, LLC was a Montana limited liability company that was formed to facilitate investment into the BLMIS (Madoff) funds, and to a significantly smaller degree, Vallaha Investment Partners, L.P. and Scoop Real Estate, L.P. (Valhalla and Scoop are referred to herein as the "Funds"). Mr. Waldman had little investment experience, and Dancing $ consisted entirely of family and friends of Mr. Waldman. Waldman Decl., ¶ 2. Dancing $ had 136 small investors. *Id.* In an odd twist of fate, BLMIS informed Dancing $ that Dancing $ failed to comply with certain "underwriting standards" and therefore was required to liquidate its BLMIS holdings in 2007. To correct this problem, Eric Waldman, the managing member of Dancing $ and a significant investor in Dancing $, liquidated Dancing $'s holdings in BLMIS and the Funds and made distributions to the members of Dancing $ in accordance with the percentage of membership interests held. Waldman Decl., ¶ 2. Dancing $ received what the Receiver contended in *Wiand v. Dancing $, LLC*, 10-cv-0092 were $107,172.11 in total alleged false profits received from the Funds.

In December 2007, Mr. Waldman formed another Montana LLC, Elendow LLC, in order to reinvest in both BLMIS and in the Funds. Waldmand Decl., ¶ 3. Of the 136 members of Dancing $ that had invested in the Funds, holders of 86.78% of the membership interests in Dancing $ (53 members) used their distributions from Valhalla and Scoop to purchase

membership interests in Elendow, a total of $92,956.94 of the $107,172.11 in total alleged false profits received from Valhalla and Scoop. The balance of the alleged false profits of $14,164.17 was distributed to the remaining 83 members of Dancing $. Waldman Decl., ¶ 4.

Those members from Dancing $ that invested the distributions from the Funds into Elendow accounted for 88.55% of the membership interests in Elendow. Through Elendow, those members originally in Dancing $ invested a total of $619,843.11 back into the funds, and lost the entirety of the investment.[1] The Receiver does not dispute that Elendow's loss was $700,000. Motion to Approve Claims, Exhibit G [DE 675-7].

B. The Receiver's Notice That the Dancing $ and Elendow Claims Were Related.

On or about December 11, 2009, Dancing $ received a letter from the Receiver dated December 4, 2009, stating that Dancing $ had received $107,172.11 in "false profits" from the funds and demanded that it be repaid. Shortly thereafter, in December 2009, Mr. Stillman, counsel for Dancing $, spoke and emailed with Michael Lamont, counsel for the Receiver, and among other things, explained that through Elendow, the members of Dancing $ were "net losers," rather then net winners, and gave Mr. Lamont the specific amounts. Stillman Decl., ¶ 2. On February 9, 2010, Mr. Stillman agreed to have his client provide detailed spreadsheets for Mr. Lamont, showing the members of Dancing $, their percentage of the alleged distribution, the dollar amount of the alleged "false profits" that their percentage ownership in Dancing $ represented, their percentage in Elendow, and the actual dollar amount of each Dancing $

[1] For example, Mr. Waldman's case is typical. He is in his 60's, and after receiving $5,712 in alleged "false profits" into his IRA from Dancing $'s redemption of its limited partnership interests in Valhalla and Scoop, he personally lost over $40,000 from his IRA in the Funds through Elendow. Waldman Decl., ¶ 7.

member's investment. *Id.* A copy of Mr. Stillman's email correspondence linking Dancing $ and Elendow on February 9 and February 12, 2010 are attached to the Stillman Declaration as Exhibit 1. Those spreadsheets were provided by Dancing $ to Mr. Lamont in late February 2010 and are attached to the Stillman Decl. as Exhibit 2; Waldman Decl., ¶ 9.

After the complaint was filed, this court issued an order dated February 10, 2010 directing that no responses be filed at that time pending mediation, which was forwarded to Mr. Stillman by the Receiver's counsel. The next action taken in the case was when the Receiver contacted Mr. Stillman via email on July 27, 2010 regarding the need to mediate the case. Stillman Dec., ¶ 5. Thus, the Receiver clearly believed that Mr. Stillman was representing Dancing $, even though he had not yet filed an appearance in the case.

At some time during the summer of 2010, Mr. Waldman apparently received a notice from the Receiver regarding the need to file a Proof of Claim with the Receiver regarding Elendow prior to September 2, 2010. However, because Mr. Waldman was traveling out of the country, he did not actually see the notice from the Receiver until on or about September 27, 2010. Waldman Decl., ¶ 10. A copy of Mr. Waldman's email to Mr. Stillman on September 27, 2010 indicating that he just discovered the Claim form is attached to the Stillman Decl. as Exhibit 3. Mr. Waldman filed it immediately. *Id.* It is undisputed by the Receiver that he received the Claim from Elendow on September 29, 2010. *See* Receiver's Motion to Approve Treatment of Claims, Exhibit G. [DE 675-7].

On February 2, 2011, Mr. Stillman received a January 21, 2011 Motion for Entry of Clerk's Default in *Wiand v. Dancing $, LLC*. Stillman Decl., ¶ 9. He then obtained local counsel and appeared for Dancing $ in the action on February 11, 2011. After its Motion to

Dismiss was denied, Dancing $ filed an Answer, asserting as an affirmative defense that Dancing $ was in reality a "net loser," given that 86% of it's members had not only reinvested their distributions back into the Funds though Elendow, but lost substantially more. *See* Answer, *Wiand v. Dancing $*, Case. No. 10-cv-0092. [DE 63]

He also was informed by Mr. Waldman in or about April 2011 that the Receiver requested further information on the Elendow claim, specifically asking why Elendow's claim was received 27 days late.[2] Stillman Decl., ¶ 10. On or about July 8, 2011, Mr. Stillman spoke with Gianluca Morello, another of the Receiver's attorneys, regarding scheduling issues in *Wiand v. Dancing $*. Stillman Decl., ¶ 11. During that conversation, Mr. Stillman mentioned the letter that Mr. Waldman had received regarding the Elendow claim. *Id.* Mr. Morello gave Mr. Stillman the name and telephone number of the attorney handling the claims issues for the Receiver at that time, Maya Lockwood, and Mr. Stillman contacted her regarding the Elendow claim. Stillman Decl., ¶ 11.

In that conversation, Mr. Stillman explained that Mr. Waldman had been out of the country and had wrongly thought that Mr. Stillman was being noticed on matters pertaining to Elendow. Stillman Decl., ¶ 12. Ms. Lockwood stated that there were no plans at that point to make any distribution and there had not yet been a decision regarding the treatment of late claims. *Id.* Mr. Stillman then wrote a letter to the Receiver's law firm, "Attn: Claims Dept." setting forth the reason for the late filing. A copy of the letter is attached to the Stillman Decl. as

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[2] The letter was apparently dated February 10, 2011, but Mr. Stillman was not aware of the letter until informed by his client later. Stillman Decl., ¶ 10. The apparent reason is that Mr. Waldman's elderly mother passed away earlier that month and he was in San Diego during that time.

Exhibit 4.

Mr. Stillman received nothing further from the Receiver's counsel regarding Elendow, although the Receiver requested discovery from Dancing $ concerning Dancing $'s affirmative defenses, to which Supplemental Answers were served on April 10, 2012. Stillman Decl., ¶ 14.

C. The Receiver's Notice of Treatment of Claims.

On December 7, 2011, the Receiver filed his "Unopposed Motion To (1) Approve Determination And Priority Of Claims, (2) Pool Receivership Assets And Liabilities, (3) Approve Plan Of Distribution, And (4) Establish Objection Procedure, ("Motion to Approve Claims").[3] [D.E. 675] On December 9, 2011, the Receiver mailed letters to the claimants. [DE 678]. In particular, the letter sent to Elendow assigned Elendow Claim Number 458, and stated that:

> My recommended determination of your claim will include an Allowed Amount. The Allowed Amount is the amount to which I have determined the relevant claim is entitled.

A copy of the December 9, 2011 Letter is attached to the Stillman Decl. as Exhibit 5. Nothing indicated to Mr. Waldman that his claim was anything but allowed. Waldman Decl., ¶ 15. Therefore, there was nothing contained in the letter that would indicate to Mr. Waldman that he needed to review a "motion." *Id.* In fact, on January 26, 2012, Mr. Waldman received a letter from the Department of Justice, informing him that Elendow was entitled to $350,000 as restitution. Waldman Decl., ¶ 16. A copy of the DOJ Letter is attached to the Stillman Decl. as Exhibit 6. Coupled with the assignment of a claim number by the Receiver, and the reference to

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[3] Mr. Stillman only received ECF notices in *Wiand v. Dancing $, LLC*, not in the main Receivership case and therefore was completely unaware of the Motion. Stillman Decl., ¶ 8.

the fact that Elendow was entitled to an "Allowed Amount," Mr. Waldman reasonably believed that the amount represented the allowed claim for Elendow. Waldman Decl., ¶ 16. He therefore never asked Mr. Stillman about the issue. *Id.*

In early October 2012, Mr. Stillman was discussing settlement of the *Dancing $* litigation with Mr. Lamont as there was a mediation scheduled for October 19, 2012. During that conversation, Mr. Stillman casually asked Mr. Lamont about whether there would be distributions from the Receiver, since that would have an effect on Dancing $'s settlement proposal. Stillman Decl, ¶15. For the first time, and despite Mr. Lamont specifically knowing that Dancing $ and Elendow were interrelated, Mr. Lamont informed him that a distribution had been made, and that Elendow's claim had been *denied*, not allowed. Stillman Decl., ¶ 15.

D. The Receiver's Denial Of Elendow's Claim.

Shortly before the mediation, and after discovering that Elendow's claim had been denied, Mr. Waldman provided Mr. Stillman with the letters that he had received, and Mr. Stillman reviewed the Receiver's Motion, which listed Elendow's claim as "allowed" in the amount of "none" in Exhibit G of the Motion, buried more than 100 pages back in the four part document. [DE 675-7] In other words, the Receiver's December 9, 2011 Letter to Elendow was seriously misleading to a reasonable reader in stating that the claim was an "Allowed" claim, but neglecting to say that the amount of the "allowed claim" was zero.[4]

The Receiver gave three reasons for denying Elendow's claim, listed in the section of the Motion entitled "**E. Denied Claims**." First, although not disputing that Elendow had suffered a

[4] In the Receiver's Motion to Approve Determination And Priority of Claims, etc., the Receiver drops all clever pretense and lists Elendow's claim in the Motion as "denied," not "allowed." *See* pp. 21-22.

$700,000 loss, the Receiver said that the claim was received 27 days after the September 2, 2011 claims deadline. Motion to Approve Claims, pp. 21-22. However, the Received *fourteen* claims after the September 2, 2011 date, and recommended that all late claims *other than Elendow's* be allowed, despite being received as late as October 6, 2011. *Id.* As the Receiver acknowledged, "This conclusion is heavily based on the fact that (i) because those claims were filed so close in time to the Claim Bar Date (they were received by October 6, 2010, which is slightly more than one month after the Claim Bar Date), there is no prejudice in accepting them at this time . . ." *Id.* If there was no prejudice in accepting claims received after Elendow's, there is clearly no prejudice in accepting Elendow's undisputed claim.

Although acknowledging that there was no prejudice in allowing thirteen other victims' claims, the Receiver also stated that "the Claimants made an effort to provide extenuating circumstances for their late filings." Motion to Approve Claims, p. 22. This was erroneous, because Elendow *had* made an effort to explain the reason for its tardy claim and had no notice that its efforts were not registered.

Finally, and perhaps most indicative of the Receiver's underlying hostility to Elendow's claim, the Receiver stated:

> Receiver has learned the owners of this Claimant, along with other individuals, previously invested in Hedge Funds through another Limited Liability Company. That previous investment received False Profits. Because the Receiver was not provided any details about who invested in the Hedge Funds through both Limited Liability Companies and how much those persons or entities invested in and received from the Hedge Funds, the Receiver cannot determine each such person or entity's losses or False Profits.

Motion to Approve Claims, pp. 21-22. However, in granting summary judgment on the Receiver's claim against Dancing $, this Court rejected Dancing $'s affirmative defense that it

was entitled to offset it's receipt of $107,000 in alleged false profits by the Elendow losses of $700,000. Report and Recommendation to Grant Summary Judgment, *Wiand v. Dancing $, LLC*, Case no. 10-0092, pp. 28-29 [DE 121] ("Elendow's debt claim is not Dancing $'s claim, notwithstanding their overlapping memberships."), adopted without change by this Court on January 23, 2013 [DE 129]. This Court also recognized in denying the Receiver's claim for prejudgment interest that in losing all of the "false profits" and substantially more, "Simply put, Dancing $ members (despite the LLC's legal fiction), have suffered enough." *Id.* at p. 31.

The Receiver's reasons were merely punitive. The Receiver allowed claims received more than a week later than Elendow's claim. As set forth above, Mr. Stillman responded for Elendow months earlier explaining that Mr. Waldman had been out of the country and had thought that Mr. Stillman was receiving copies of Elendow correspondence, since the Receiver unquestionably knew that Mr. Stillman was Elendow's counsel as well as Dancing $. Stillman Decl., ¶¶ 12-13.

The Receiver's statement concerning the overlapping members of Dancing $ and Elendow is either false or seriously misleading for two reasons. First, the Receiver repeatedly contended, and this Court ultimately found, that despite overlapping members, each entity had to be treated as a separate entity. Report and Recommendation Granting Summary Judgment, *Wiand v. Dancing $, LLC*, 10-cv-0092, p. 28. Thus, any argument that there should be offsets between Dancing $ and Elendow sufficient to deny Elendow's legitimate claim has been firmly disposed of by this Court on January 23, 2013. Second, the Receiver knew as of March 2010 exactly how many of Dancing $'s members had invested their "false profits" back into the Funds through Elendow, and knew that those members accounted for $619,000 of Elendow's $700,000

loss as a result of the spreadsheets that had been produced to Mr. Lamont at that time.

Accordingly, at the mediation, Dancing $ proposed that the Elendow claim be allowed, and the Dancing $ "false profits" be deducted from the amount of the allowed claim. Although settlement was discussed further, the mediation was unsuccessful. However, at that time, the Receiver's motion for summary judgment was pending. In opposition to the motion, Dancing $ also argued that it was entitled to a set-off or recoupment of the Elendow claim against the alleged "false profits" received by Dancing $ because of the interrelated members. Report and Recommendation Granting Summary Judgment, pp.28-29. Dancing $'s affirmative defense based on the Elendow claim was ultimately resolved by this Court on January 23, 2013, and therefore this motion was prepared.

ARGUMENT

I.

THE EQUITABLE POWERS OF THIS COURT

In equity receiverships resulting from SEC enforcement actions, district courts have very broad powers and wide discretion to fashion remedies and determine to whom and how the assets of the Receivership Estate will be distributed. *See SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership. This discretion derives from the inherent powers of an equity court to fashion relief"); *see also SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). When it comes to fashioning a claims process and related distribution plan, "[n]o specific distribution scheme is mandated so long as the distribution is 'fair and equitable.'" *SEC v. P.B. Ventures*, Civ. A. No. 90-5322, 1991 U.S. Dist. LEXIS 17901, 1991 WL 269982, at 2 (E.D. Pa.

Dec. 11, 1991). Similarly, in deciding what claims should be recognized and in what amounts, "the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike." *SEC v. Credit Bancorp. Ltd.,* No. 99 Civ. 11395-RSW, 2000 U.S. Dist. LEXIS 17171, 2000 WL 1752979, at 13 (S.D.N.Y. Nov. 29, 2000). Since any one group of investors in a ponzi-type scheme generally occupies the same legal position as other investors, equity should not permit one group a preference over another, because "equality is equity." *See Elliot*, 953 F.2d at 1570.

II.

THIS COURT MAY MODIFY IT'S MARCH 2, 2012 ORDER WITHIN AT LEAST ONE YEAR

Although this Court has inherently equitable jurisdiction over the claims process, Fed. R. Civ. P. 60(b) likely applies. Rule 60(b) allows this Court to set aside or modify an order or judgment pursuant to, for purposes germane here, subsections (1) mistake, inadvertence, surprise, or excusable neglect; (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; or (6) any other reason that justifies relief. A motion for relief under Rule 60(b) must be filed within a reasonable time but within one year. Since the Order that Elendow is seeking to modify was entered on March 2, 2012, this motion is timely pursuant to Rule 60(c). Moreover, it is filed within a reasonable time because (a) Elendow only learned that it's claim was in reality denied in October 2012, and this Court only finally ruled that Dancing $ and Elendow must be treated as totally separate claims on January 23, 2013. Given the fact that the main rationale for denying Elendow's claim was that the Receiver could not discern how many of the members of Dancing $ (which had received

alleged "false profits") were also members of Elendow, the fact that this court decided that both entities must be treated separately is enough to reconsider Elendow's claim.

A. The Order Disallowing Elendow's Claim Should Be Set Aside Pursuant to Rule 60(b)(1)

Whether excusable neglect can be found turns on a consideration of all factors applied by the court in an exercise of its sound judicial discretion. To determine if there was excusable neglect, the court considers the following factors: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *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)(late-filed bankruptcy claim). Of primary importance is the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration. *See Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (holding that the nonmovant was not prejudiced by the movant's six-day delay). "For purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* 507 U.S. at 395. The Court concluded that whether a party's neglect of a deadline may be excused is an equitable decision turning on "all relevant circumstances surrounding the party's omission." *Id.*

1. **No Prejudice.**

There is no prejudice whatsoever to the Receiver if Elendow's claim is allowed. First, the Receiver has acknowledged that allowing claims filed within 30 days of the Claims Bar Date caused no prejudice at all. Moreover, allowing Elendow's claim would not effect any other allowed claims in a legally cognizable way, given that Elendow clearly lost $700,000 that went

to fund the "false profits" received by others. Moreover, allowing all or even a portion of Elendow's claim simply means that Elendow gets to share in any distributions. Thus, allowing the claim – even at this time – has no impact on judicial proceedings at all. To the extent that there is any prejudice from the late allowance of the claim, a suitable remedy can easily be fashioned, such as only allowing Elendow to receive future pro rata distributions rather than receiving all of the distributions to which it would otherwise have been entitled had it's claim been allowed or this Motion filed before any distribution had been made.

2. **Reason For The Delay.**

As fully set forth above, the delay in challenging the Receiver's Motion was at most negligent. It is obvious, for example, that delay did not give Elendow any advantage whatsoever. Moreover, a reasonable person receiving a letter from the Receiver assigning a claim number, and stating that the person has an "allowed claim," is certainly *not* notice that the "allowed claim" is in reality a "denied claim." As set forth below, that may not rise to "misrepresentation," but it is at least seriously misleading to the reasonable person.[5] Thus, it is completely understandable that Elendow took no further action on it's claim, given that it was "allowed." Coupled with the letter from the Department of Justice giving Elendow a claim value of $350,000 received less than two months after the Receiver's letter, it was reasonable for a lay person like Mr. Waldman to not have any reason to review the Receiver's Motion.[6] *See*

[5] Black's Law Dictionary (7th Ed. 1999), defines "misleading" as "calculated to be misunderstood." It is difficult to characterize the Receiver's letter calling Elendow's claim an "Allowed Claim," while in the Motion filed with this Court, calling it a denied claim, as anything but misleading.

[6] There is no contention that Elendow acted in anything but good faith, and in fact, asserted in it's objection to the Report and Recommendation that it intended to file this Motion

McVicker v Donnelly, 95 F.R.D. 353 (E.D. Pa 1982,) (Excusable neglect may be established by showing of confusion resulting from proximity and subject-matter similarity of two proceedings).

Moreover, the vast majority of the delay is the direct result of not even discovering that the claim had actually been denied. When that fact was finally discovered, there was a mediation in place where Dancing $'s offer was to allow Elendow's claim, offset by Dancing $'s false profits – a fair and equitable result for all parties. That was rejected. In November 2012, Dancing $ raised as a defense to the Receiver's Motion for Summary Judgment that the Elendow claim and the Dancing $ "false profits" should be offset. *See* Report and Recommendation, p. 28-29. [DE 121] The magistrate recommended that the affirmative defense be denied, as Elendow's losses and Dancing $'s gains had to be treated separately – something directly contrary to the Receiver's contention in his Motion to Approve Claims. The magistrate's recommendation was timely objected-to by both the Receiver and Dancing $, and only became final on January 23, 2013, when this Court overruled all objections. [DE 129] Thus, given the final order affirming that Elendow's losses and Dancing $'s gains had to be treated separately that repudiated the core reason for denying the Elendow claim, Elendow acted reasonably in bringing this motion when that decision was final.

3. **The Underlying Merits Of Elendow's Claim Support Reconsideration.**

As the Supreme Court acknowledged in *Pioneer* and followed by the Eleventh Circuit in *Cheney*, the underlying principle is equity. Here, equity mandates that Elendow's claim be

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for Reconsideration. Thus, the Receiver was on notice in November 2012 that this motion would be filed.

deemed allowed. First, it is undisputed that Elendow is a true victim of the Ponzi scheme and lost $719,000.

Second, it is undisputed that Elendow's claim was filed only 16 days late. The Receiver has allowed claims received significantly after Elendow's – in fact, of the fourteen late claims received *after* the Claims Date and even later than Elendow's, Elendow was the only late claim denied -- so the mere late filing is clearly neither prejudicial nor excessive. The Receiver admitted in his Motion to Approve Claims that there was no prejudice in allowing claims received within 30 days of the Claims Bar Date.

Moreover, the claim was only filed 27 days late because Mr. Waldman was out of the country. In addition, because Mr. Waldman had so clearly linked Dancing $'s claim with that of Elendow directly to Mr. Lamont, the Receiver's counsel, Mr. Waldman reasonably but mistakenly thought that Dancing $'s counsel was receiving notices in connection with Elendow. That alone has sufficed to establish excusable neglect. *See Ticketron, Div. of Control Data Corp. v Record Museum, Inc.* 92 F.R.D. 6 (E.D.Pa 1981) (defendant's failure to plead is excusable where he turned complaint over to council representing corporate codefendant and assumed that corporate counsel would represent him).

The other two rationales put forth in the Receiver's Motion are also pretextual. First, the Receiver posits that he never received any response from Elendow regarding the reason for the late claim. That excuse in and of itself is no reason to deny Elendow's claim. However, not only did Mr. Stillman speak with Maya Lockwood, who was supposedly an attorney handling the claims processing for the Receiver, regarding the Elendow claim, but he wrote a letter to the Claims Department again setting forth the reason for the late claim. In addition, the Receiver's

counsel clearly knew the relationship between Elendow and Dancing $. As shown by the correspondence between Dancing $'s counsel, Mr. Lamont and Mr. Waldman, the Receiver clearly knew how to reach Dancing $. In fact, at the same time that the Motion was pending, Mr. Stillman was repeatedly in contact with the Receiver's counsel concerning Dancing $, and no one ever said a word about the Elendow claim to him. The receiver obviously knew how to reach Elendow – Mr. Lamont need only have picked up the telephone and called Mr. Stillman or sent an email.

Finally, the Receiver's contention that Elendow's claim should be denied because many of the members of Elendow were also members of Dancing $ and had received false profits was rejected by this Court. As strenuously argued by the Receiver in *Wiand v. Dancing $*, both Elendow and Dancing $ were separate entities and had to be treated as separate entities. Report And Recommendation Granting Summary Judgment, *Wiand v. Dancing $, LLC*, 10-cv-0092, p. 29. [D.E. 121]. Thus, the Receiver cannot on the one hand, advocate denying Elendow's claim because of the overlapping members with Dancing $, while in *Wiand v. Dancing $, LLC*, argue that the two entities had to be treated as separate unrelated entities. It is a paradigm case of judicial estoppel. In short, it is only Elendow, a legitimate victim of the Ponzi scheme that suffers any prejudice at all and equity dictates that it share in the distributions to the victims.

B. Relief Pursuant to Rule 60(b)(3).

In order to obtain relief under Fed. R. Civ. P. 60(b)(3), the movant must prove that: (1) the party maintained a meritorious claim at trial; and (2) because of the fraud, misrepresentation or misconduct of the adverse party; (3) the party was prevented from fully and fairly presenting its case at trial. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995). Rule 60(b)(3) applies to

both intentional and unintentional misrepresentation. *Id.* "Misconduct" does not require showing of nefarious intent or purpose as prerequisite to redress. *MMAR Group, Inc. v Dow Jones & Co.* 187 F.R.D. 282 (S.D. Tex 1999). Relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." *Bros. Inc. v. W. E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied*, 383 U.S. 936, 86 S. Ct. 1065, 15 L. Ed. 2d 852 (1966).

On December 7, 2011, the Receiver filed his Motion to Approve Claims listing Elendow's claim as denied. Yet the Receiver's December 9, 2011 Letter – the one designed to notify claimants of the Receiver's action regarding the claimant – states that it is an "allowed claim." Although Elendow hesitates to say that the Receiver's conduct in connection with the Elendow claim was "fraudulent," a fair review of the Receiver's December 9, 2011 Letter compared to his statements concerning the Elendow claim certainly appear at a minimum to be misleading and fail to give proper notice. A reasonable lay person receiving a letter saying that that person has an Allowed Claim indicates just that – an allowed claim. Directing a claimant to a long legal document on a website for further information buried on page 22 is not calculated to inform a claimant with an "allowed claim" that the claim is actually listed in the Motion as a "denied claim." Fairness dictated that the Receiver's letter more accurately state that the claim was denied, not allowed in the amount of $0. Since that would have been not only simple but accurate, a strong inference can be drawn that the Receiver intended to lull those claimants holding a denied claim not to oppose the treatment of their claim – a strategy that clearly worked here. Had Elendow known that its claim was actually denied, it would have taken immediate steps to object to the Motion.

Moreover, the Receiver's representations in the Motion to Approve Claims that he did not know the extent of overlap in membership between Elendow and Dancing $ were actually false. That information had been provided to the Receiver in March 2010, two years before the entry of the Order approving the Receiver's Motion, and at a minimum, the Receiver's counsel knew how to contact Mr. Stillman and was in regular contact with Mr. Stillman while telling the Court that Elendow had failed to respond.

C. Relief Pursuant to Rule 60(b)(6)

Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case." *Cashner v. Freedom Stores*, 98 F.3d 572, 579 (10th Cir. 1996). However, a district court may grant a Rule 60(b)(6) motion only in extraordinary circumstances not covered by subsections (1)-(5) and only when necessary to accomplish justice. *Id.* To the extent that this Court does not believe that Elendow is entitled to relief pursuant to subsections (1) or (3), Elendow requests that the Court consider relief under this Court's equitable powers "to do justice in a particular case." Here, it is the epitome of *in*equity to allow the Receiver to treat Elendow and Dancing $ as separate entities or ignore their separate existence when convenient for his goals.

In this case, there is no question that Elendow is a victim of Nadel's schemes. Regardless of whether members received $107,000 in false profits through Dancing $, those members lost an additional approximately $600,000 above and beyond those "false profits," even if the Court were to disregard the corporate existence.

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GOOD FAITH CERTIFICATION

In accordance with Local Rule 3.01(g), Philip Stillman certifies that he has conferred with opposing counsel, Michael Lamont, and that opposing counsel objects to the relief sought by this motion.

WHEREFORE, for the foregoing reasons, Elendow respectfully requests that this Court reconsider its order disallowing Elendow's claim.

Respectfully submitted,

Dated: March 1, 2013

By:__________________________________

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[7] Mr. Stillman is admitted *pro hac vice* in related case *Wiand v. Dancing $, LLC* and is also counsel for Elendow.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted, this 1st day of March, 2013.

/s/ *Philip H. Stillman*

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SERVICE LIST

Burton W. Wiand, et al. v. Dancing $, LLC
Case No.: 8:10-cv-092-17MAP
United States District Court/Middle District of Florida

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