UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants, CASE NO.: 8:09-cv-0087-T-26TBM

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.
_____/

THE RECEIVER'S OPPOSITION TO THE MOTION OF CLAIMANT ELENDOW LLC TO MODIFY ORDER DISALLOWING CLAIM (DOC. 980)

Burton W. Wiand, as Receiver (the "**Receiver**"), opposes the Motion Of Claimant Elendow LLC ("**Elendow**") To Modify Order Disallowing Claim (Doc. 980) (the "**Motion**"). Although the Motion contains pages of purported factual background with alleged misunderstandings, miscommunications, and failures by the Receiver, the pertinent facts are straightforward and uncontested:

- The Court set September 2, 2010, as the deadline to file a Proof of Claim form, but Elendow missed that deadline by almost a month.
- The Receiver then allowed Elendow the opportunity to explain in writing the reasons for missing the deadline, but it did not respond to the Receiver's letter – if at all (*see infra* Section II.A.) – for six months.
- After the Court denied Elendow's claim, Elendow never submitted an objection, and the deadline for objections expired on March 28, 2012.
- Instead, Elendow waited almost one year and filed its Motion seeking relief under Rule 60(b), which relief is only granted in extraordinary circumstances.

As explained below, Elendow's failure to comply with the procedures governing the claims process is attributable solely to its own inaction and lack of diligence, and its Motion falls far short of satisfying the threshold prerequisites for relief under Rule 60(b). Indeed, its Motion relies on correspondence it received from the Receiver and the Department of Justice as purportedly confusing and misleading, but virtually every claimant received substantively identical correspondence and none has requested similar relief. Granting the Motion would reward Elendow's lack of diligence at the expense of hundreds of other investors who complied with Orders and encourage other untimely claims.

BACKGROUND

The Court Barred Claims Filed After September 2, 2010

On April 20, 2010, the Receiver filed his Unopposed Motion To (1) Approve

Procedure To Administer Claims And Proof Of Claim Form, (2) Establish Deadline For Filing Proofs Of Claim, And (3) Permit Notice By Mail And Publication (the "**Claims Motion**"). *See* Doc. 390. The Claims Motion proposed *inter alia* parameters for the claims process, a proof of claim form (the "**Proof of Claim**"), and a notice letter to creditors (the "**Notice to Creditors**"). It also proposed a claim bar date (the "**Claim Bar Date**") and requested that "any claim received by the Receiver after the Claim Bar Date should be disallowed." *Id.* at 5. As the Claims Motion explained, "a Claim Bar Date will allow the Receiver to obtain certainty in a reasonably prompt fashion as to the total amount of potential claims against the Receivership Estate. Such certainty will facilitate a timely claims resolution and Distribution process." *Id.* In relevant part, the Notice to Creditors made two important, indisputably clear disclosures: (1) all claims, whether mature or not, had to be submitted by the Claim Bar Date, and (2) anyone who did not comply with that deadline would be forever barred and enjoined from asserting a claim. *See* Doc. 390-2 at 3, 5. On April 21, 2010, the Court granted the Claims Motion, approved the Notice to Creditors, and established a Claim Bar Date of **September 2, 2010**. *See* Doc. 391. Specifically, the Court confirmed that untimely claims "shall be forever barred and precluded." *Id.* ¶ 2.

Elendow's Proof Of Claim Was 27 Days Late

On June 4, 2010, the Receiver mailed the Notice to Creditors and Proof of Claim form to Elendow. *See* Declaration of Gianluca Morello (the "**Morello Decl.**"), Ex. A, which is being filed along with this opposition. He also included a cover letter that made clear that "[f]ailure to timely return a completed and signed Proof of Claim for an account will forever bar any claim related to that account." *Id.* at 2. Nevertheless, Elendow did not submit its

Proof of Claim until September 29, 2012 – 27 days after the Claim Bar Date and 115 days after the Receiver mailed the claims package.

The Receiver Received No Response To His Follow Up Letter; Elendow Claims It Responded 6 Months Later

On February 10, 2011, the Receiver sent Elendow a letter requesting an explanation for its untimely Proof of Claim (*see* Morello Decl., Ex. B), but as discussed below in Section II.A., the Receiver's records reflect neither Elendow nor anyone else ever responded to that letter (*see id.* ¶ 8). Elendow claims that it did respond, but even if that is true, its response was purportedly sent on August 11, 2011 – six months after the Receiver's letter requesting an explanation of Elendow's failure to comply with the Claims Bar Date. *See* Stillman Decl., Ex. 4 (Doc. 980-2). Although other investors filed untimely claims, they either included an explanation for the delay with their Proof of Claim or promptly responded to the Receiver's letter with extenuating circumstances. As such, the Receiver ultimately recommended those claims be allowed. *See* Doc. 675 at 21-22.

Elendow Never Objected To The Determination Of Its Claim

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 (the "**Determination Motion**"). *See* Doc. 675. The Receiver noted he received 504 total claims (*id.* at 10), which he divided into five proposed categories: (1) allowed; (2) allowed in part; (3) allowed in part but limited to specific collateral; (4) allowed but subrogated; and (5) denied. The Determination Motion and its exhibits are clear Elendow's claim was denied. Specifically, its claim (*i.e.*, Claim No. 458) was listed in Exhibit G to the

Determination Motion, which was entitled "**Investor Claims – Denied.**" *See* Doc. 675-7. The Receiver also addressed the denial of Claim No. 458 in the body of the Determination Motion:

> Fourteen Proof of Claim Forms were received after the Claim Bar Date. The Receiver sent a letter to each Investor Claimant who filed a late claim without providing an explanation for the late filing. The letter requested that any extenuating circumstances for the late filing be provided to the Receiver in writing and that failure to do so could result in denial of the claim. The Receiver received responses for each such claim except for one. (*See* Claim No. 458.)

Doc. 675 at 21-22 (emphasis added). That section was entitled "Investor Claim Which Should Be Denied Because It Was Filed After The Claim Bar Date And Investor Claimant Failed To Explain Reason For Late Submission." *Id.* As such, the Determination Motion was clear the Receiver recommended denial of Elendow's claim because it was untimely, and Elendow had not responded to the Receiver's request for an explanation.

In the interests of simplicity and conservation of Receivership resources, the Receiver assigned each claim an "**Allowed Amount**." *See id.* at 13 ("As detailed in Exhibits B through J, the Receiver has proposed an Allowed Amount for each claim." (footnote omitted; emphasis added)). A claim received an Allowed Amount of "None" if it was waived, consolidated with another claim, or denied. Indeed, Exhibits B through J each contain a column entitled "Allowed Amount," and at least 95 claims – all of which were denied, waived, or consolidated with another claim – were clearly assigned an Allowed Amount of "None." Among those claims with an Allowed Amount of "None," Elendow's claim was itemized in Exhibit G and denied in part for being untimely. *See* Doc. 675-7 at 7. The Receiver adopted this procedure to avoid the significant cost associated with creating

customized notice letters for each claim.

On December 9, 2011, the Receiver sent Elendow and all other claimants an identical letter (the "**Determination Letter**") informing them he had filed the Determination Motion and that they should consult it and its exhibits (available on the Receiver's website or in hardcopy from the Receiver) to learn the determination of claims:

> **My recommended determination of your claim is set forth in the Exhibits attached to the Motion and is addressed in the body of the Motion.** 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. The Allowed Amount, however, is not indicative of the amount you may ultimately receive. Rather, I have proposed that each investor claimant holding an allowed claim with a positive Allowed Amount ultimately receive a percentage of their Allowed Amount on a pro rata basis.

Stillman Decl., Ex. 5 at 1 (bold emphasis added); *see* Doc. 678 (notice of mailing letters to claimants, "informing them: (i) that the Motion was filed; (ii) that a copy of the Motion is available on the Receiver's website at www.nadelreceivership.com and, upon request, from the Receiver's office; and (iii) of their respective Claim Numbers"). Had Elendow or its counsel referenced the Determination Motion and its exhibits, as directed, they would have learned its claim was expressly denied.

The Determination Motion also set forth a procedure for objecting to the Receiver's claim determinations. Specifically, any claimant that did not agree with the Receiver's determination had to "serve the Receiver in accordance with the service requirements of Rule 5 of the Federal Rules of Civil Procedure with a written objection no later than twenty (20) days after the date of mailing of the Receiver's letter advising the [c]laimant of the Order on this [Determination] Motion." *Id.* at 81.

The Court granted the Determination Motion on March 3, 2012. *See* Doc. 776. In

doing so, it found "[t]he Receiver's determination of claims and claim priorities as set forth in the motion and in Exhibits B - J attached to the motion is fair and equitable and is approved." *See* Doc. 776 ¶ 3. The Court reiterated that "any and all further claims against … the Receivership estate are hereby barred and enjoined." *Id.* ¶ 8.

On March 8, 2012, the Receiver sent a letter to Elendow (and all other claimants) informing it the Court granted the Determination Motion and again directing it to that motion and its exhibits to view the determination of its claim (the letter also directed Elendow to the Receiver's website for a copy).

> The Court has approved my recommended determination of the above claim. This determination is set forth in the Exhibits attached to the Motion and is addressed in the body of the Motion. If you wish to dispute this claim's determination, its priority, or the plan of distribution, you **MUST** serve me with a written objection **no later than March 28, 2012.**

Morello Decl., Ex. D (underline added). Consequently, Elendow was required to object to the Receiver's determination by March 28, 2012. Elendow, however, never filed an objection. It thus waived its right to challenge the denial of its claim:

> **Failure to properly and timely serve an objection to the determination of your claim, its priority, or plan of distribution shall permanently waive your right to object to or contest the determination of your claim, its priority, and plan of distribution and your final claim amount shall be set as the Allowed Amount determined by me and approved by the Court as set forth in the Exhibits attached to the Motion.** (*Id.*)

In accordance with the procedures in the Determination Motion, claimants submitted 23 objections to the Receiver's determinations. The Receiver set aside reserves for those disputed claims as necessary and, on May 7, 2012, made a first distribution of $25 million to claimants with approved claims (*see* Docs. 825, 838). The Receiver made a second distribution of $22 million on November 20, 2012. *See* Docs. 945, 946. Because Elendow

did not object to the denial of its claim, the Receiver did not reserve for its $700,000 claim amount. As such, any award to Elendow now would necessarily reduce the funds available to make a third or final distribution to all of the other claimants who complied with the procedures governing the claims process.

ARGUMENT

I. BARRING LATE-FILED CLAIMS IS NECESSARY

It is axiomatic that any person or entity with a claim against a receivership estate must assert that claim in the court overseeing the receivership. *Riehle v. Margolies*, 279 U.S. 218, 224 (1929) ("Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him."); *see* Ralph E. Clark, *Clark on Receivers* § 646 at 1132 (3d ed. 1992). For efficiency, courts overseeing receiverships typically establish a claims process, require submission of claim forms, and set pertinent deadlines. *See Riehle*, 279 U.S. at 224 ("[I]n the receivership proof of the claim [must] be made in an orderly way, so that it may be established who the creditors are and the amounts due them."). To achieve finality, courts also set a claim bar date and disallow late-filed claims. *See S.E.C. v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) (entering bar date); *Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *cf. In re Best Products Co., Inc.*, 140 B.R. 353, 60 (Bankr. S.D.N.Y. 1992) ("Although persons with legitimate claims may be precluded from sharing in estate assets, strict enforcement of the bankruptcy bar date is no more unfair than application of a

statute of limitations to foreclose a tort claim."). Here, the Court established a claims process with specific deadlines; Elendow and all other potential creditors were appropriately notified of the process and deadlines; and Elendow failed to comply with the applicable procedures and deadlines. As such, its claim was properly denied.

II. ELENDOW HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO RELIEF UNDER RULE 60(b)(1)

Because Elendow's claim was properly denied, and it failed to object to the denial of its claim, it has no choice but to try seeking relief under Rule 60(b). Elendow first contends that it is entitled to relief under Rule 60(b)(1) because of "excusable neglect." As shown below, however, the facts governing this issue fall far short of constituting "excusable neglect." Relief under Rule 60(b) "is an extraordinary remedy and is granted only in exceptional circumstances." *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir.2006). In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), the Supreme Court articulated a four-pronged test for examining excusable neglect. *See Canfield v. Van Atta Buick/GMC Truck, Inc*., 127 F.3d 248, 249-50 (2d Cir.1997) (finding that while *Pioneer* involved Bankruptcy Code, the analysis was equally applicable to Fed. R. Civ. P. 60(b)). Courts must consider "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact upon judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. "The burden is upon the party moving to have the judgment set aside to plead and prove excusable neglect." *Pelican Production Corp. v. Marino*, 893 F.2d 1143 (10th Cir. 1990)). Here, Elendow has not satisfied its burden of establishing under the relevant factors it acted with excusable neglect.

A. Allowing Elendow's Untimely Claim Would Prejudice The Receivership And Other Investors Who Followed Mandated Procedures

Elendow argues allowing its untimely claim would not prejudice the Receivership because "the Receiver has acknowledged that allowing claims filed within 30 days of the Claims Bar Date caused no prejudice at all." *See* Mot. 13. That argument refers to the Receiver's recommendation in the Determination Motion that certain untimely claims be allowed because those claimants "provided extenuating circumstances for the delay which the Receiver believe[d], under the totality of the circumstances, reasonably justif[ied] allowing those late-filed claims." *See* Doc. 675 at 22. Elendow is wrong, however, for two reasons: (1) unlike the other relevant claimants, it failed to provide extenuating circumstances for its delay in filing a Proof of Claim – and even if it did so, as it contends, it only did so six months after requested by the Receiver; and (2) while there may have been no prejudice to allowing late-filed claims in December 2011 when the Receiver filed the Determination Motion, that is not true now (*i.e.*, 15 months later), as two significant distributions of Receivership assets have already been made.

First, Elendow relies on other late-filed claims to argue that claims filed within 30 days of the Claim Bar Date caused no prejudice. But Elendow ignores those claimants explained extenuating circumstances for the tardiness of the claims in prompt fashion. In contrast, the Receiver has no record that Elendow provided or attempted to provide extenuating circumstances for its delay in filing a Proof of Claim. Specifically, on February 10, 2011, the Receiver wrote all claimants who filed untimely claims "to allow [them] to submit an explanation in writing explaining the extenuating circumstances for [their] late filing." Morello Decl., Ex. B. The letter warned: "In the absence of a reasonable

explanation, it may be necessary to deny your claim." *Id.* All of the claimants who submitted late-filed claims provided extenuating circumstances in writing, except Elendow. *See* Doc. 675 at 21 ("The Receiver received responses for each such claim except for one. (*See* Claim No. 458.)").

Now, more than two years after the Receiver's February 2011 letter and for the first time, Elendow claims to have actually responded – through counsel – on August 11, 2011, to the Receiver's request for an explanation of extenuating circumstances. *See* Stillman Decl., Ex. 4. As an initial matter, the Receiver has no record of actually receiving that letter. The Receiver's February 2011 letter was sent under his name, and it explicitly directed inquiries to Jordan Maglich (one of the Receiver's attorneys). *Id.* Further, Elendow's counsel claims to have had communications with Gianluca Morello, Michael Lamont, and Maya Lockwood (other attorneys representing the Receiver). Yet, he purportedly and inexplicably sent Elendow's explanation letter to "Claims Dept." *See id.* ¶¶ 10-13. But even assuming *arguendo* the Receiver had received that letter, it still was not sent until six months after the Receiver requested additional information. As such, Elendow's August 11, 2011, letter did not excuse Elendow's delay for filing its claim; the letter merely compounded it and reflected additional lack of diligence. *See Robinson v. Wix Filtration Corp, LLC.*, 599 F.3d 403, 412 (4th Cir. 2010) ("A party that fails to act with diligence will be unable to establish that his conduct constituted excusable neglect.").

Second, there was no prejudice to allowing limited, late-filed claims in December 2011 when the Receiver filed the Determination Motion, but since then he has made two interim distributions, totaling $47 million. Because Elendow's claim was denied and it never

submitted an objection, the Receiver did not reserve for its $700,000 claim amount. Recognizing the prejudicial impact of its Motion, Elendow suggests this problem could be remedied by only allowing it "to receive future pro rata distributions rather than receiving all of the distributions to which it would otherwise have been entitled had its claim been allowed or this Motion filed before any distribution had been made." *See* Mot. at 14. But even that limited remedy is highly prejudicial because it would reduce the amount of money available in future distributions to those claimants and, more broadly, undermine the finality imposed by the Claim Bar Date and encourage other late-filed (or unfiled) claims. *See, e.g., In re New Cent. TRS Holdings, Inc.*, 465 B.R. 38, 51 (Bankr. D. Del. 2012) (finding prejudice and barring late-filed claim because "the Trust has already made two interim distributions" and "allowance of late-filed claims in this case unquestionably will open a floodgate to similar claims by other borrowers"); *In re US Airways, Inc.*, 2005 WL 3676186, *9 (E.D. Va. 2005) ("[A] a large and complicated reorganization case such as this would be subject to constant disruption—to the considerable prejudice of creditors who filed timely proofs of claim—if the court were to allow claims to be filed after the bar date except for the most compelling circumstances."); *In re Best Products*, 140 B.R. at 359-60 (finding prejudice where delay would "impact the assets available to … other creditors" and noting "it is generally improvident to grant permission to file late proofs of claim"). As such, Elendow has failed to demonstrate the relief it seeks would not prejudice this Receivership and consequently its Motion should be denied for this reason alone.

B. Elendow Failed To Comply With Multiple Deadlines, And Its Delays Were Significant And Within Its Control

In addition to prejudice, when granting extraordinary relief under Rule 60(b), courts

must consider "the length of the delay and its potential impact upon judicial proceedings, [and] the reason for the delay, including whether it was in the reasonable control of the movant." *Pioneer*, 507 U.S. at 395. Here, Elendow missed multiple deadlines by lengthy periods of time, and the delays were the result of its own conduct or inaction and consequently do not qualify as excusable neglect. *See In re Best Products*, 140 B.R. at 359 ("I can not overlook the fact that [claimants] themselves were the source of the delay in asserting their rights. Even ignorance of one's own claim does not constitute excusable neglect."); *In re S. Atlantic Fin. Corp*, 767 F.2d 814, 817-818 (11th Cir. 1985) (reviewing cases finding no excusable neglect where late filing resulted from (1) sending correspondence to wrong address, (2) relying on "misinformation from bankruptcy court clerk," (3) failing to obtain necessary records, and (4) a "misunderstanding" between a creditor and its lawyers).

First, Elendow failed to file its Proof of Claim by the Claim Bar Date. It was late by almost a month, and in total, 115 days elapsed between the date the Receiver mailed the claims package and the date Elendow's managing member, Eric Waldman ("**Mr. Waldman**") finally reviewed it. Mr. Waldman writes that "[a]t some time during summer of 2010, I apparently was mailed" the claims package, but he claims he did not review it until September 27, 2010, because he was trying to start a new business and traveling. *See* Waldman Decl. ¶ 10 (Doc. 980-1). Despite Mr. Waldman's vagueness about when he received the claims package, there is no evidence in the record that he did not receive it within a few days after it was mailed to him on June 4, 2010. As such, there is no record evidence contradicting the fact that Mr. Waldman had the claims package for over three

months before he saw it on September 27, 2010. *See id.* His reasons for not seeing it for over three months – attempting to start a business and traveling "most" but not all of each month – on their face are not excusable neglect. Second, in February 2011, the Receiver wrote Elendow asking it to explain its delay in writing and to provide any extenuating circumstances, but even according to its own account (which, as explained above in Section II.A., the Receiver cannot substantiate), Elendow did not respond to the Receiver's letter until August 2011 – *i.e.*, six months later. Third, Elendow never objected to the denial of its claim, and it did not file this Motion until almost a year after the deadline to object.

Elendow argues these delays are excusable because (1) it did not initially realize its claim had been denied because the Determination Letter was purportedly misleading; (2) it received a purportedly confusing letter from the Department of Justice; and (3) it was waiting to file this Motion until the Court resolved its entitlement to setoff through the Receiver's case against Dancing $, LLC ("**Dancing $**").[1] As explained below in Section III, the Determination Letter was not misleading, and it expressly directed all claimants to consult the Determination Motion and its exhibits, which clearly indicated Elendow's claim was denied and that it would not be entitled to receive any distributions. Elendow inexcusably failed to read the Determination Motion or its exhibits.[2] Further, the letter from the

[1] Mr. Waldman was the managing member of both Elendow and Dancing $. Dancing $ received false profits of $107,172.11 from the scheme and the Receiver successfully sued it to recover those funds. *See Wiand, as Receiver v. Dancing $*, Case No. 8:10-cv-92-T-17MAP (M.D. Fla.). Dancing $ argued its false profits should be setoff against Elendow's losses because the entities had overlapping members. As explained later in this response, that argument clearly lacked merit.

[2] To justify its late filings, Elendow relies on purported confusion as to whether it or its counsel received and was responsible for acting on the Receiver's correspondence (*see, e.g.*, Stillman Decl. ¶¶ 7, 8 & Ex. 3), but a "misunderstanding" between a claimant and "its own attorney" "does not constitute excusable neglect." *In re Horn Constr. & Maint., Inc.*, 32 B.R. 87, 89 (Bankr. S.D. Ala. 1983). Further, as also discussed below in Section II.C., Elendow claims the Receiver should have directed correspondence to its counsel or otherwise

Department of Justice is a classic red herring, because as a matter of law Elendow's purported confusion cannot constitute excusable neglect. *See In re Oakton Beach & Tennis Club Real Estate Ltd. P'ship*, 9 B.R. 201, 205 (Bankr. E.D. Wisc. 1981) (holding counsel's reliance on misinformation from a bankruptcy court clerk regarding his duty to file a proof of claim did not amount to excusable neglect); *McDowell-Bonner v. District of Columbia*, 668 F. Supp.2d 124 (D.C. Cir. 2009) (noting "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect") (internal citation omitted); *Noah v. Bond Cold Storage*, 408 F.3d 1043 (8th Cir. 2005) ("Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect."). In any event, identical letters were sent by the Department of Justice to most if not all living investors who lost money in Arthur Nadel's Ponzi scheme, yet Elendow is the only instance in which an investor claimed "confusion."

Finally, Elendow's argument that it was waiting to file this Motion until the Court decided its right to setoff in the *Dancing $* litigation simply makes no sense. The Receiver sued Dancing $ to recover $107,172.11 in "false profits" (*see supra* fn. 1), but Elendow submitted a late claim for $700,000. Thus, even if the Court permitted setoff in *Dancing $*, Elendow would still have had a claim for $592,827.89.[3] Unless it was willing to waive that amount, it would have had to file this Motion regardless of the outcome in *Dancing $*. And

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contacted its counsel when it failed to meet the Court's deadlines, but the Proof of Claim form directed claimants to "[p]rovide **one** mailing address where you … authorize receipt of all future communications relating to this claim," and Elendow listed Mr. Waldman's address in Bozeman, Montana. *See* Morello Decl. ¶ 9. As such, the Receiver properly sent all correspondence to that address. *See id.*, Exs. B, C & D.

[3] There was never a basis to setoff Dancing $'s false profits with Elendow's losses because they are separate entities and setoff requires mutuality of debts. *See, e.g., Scholes v. Ames*, 850 F. Supp. 707, 713 (N.D. Ill. 1994); *In re McKay*, 420 B.R. 871, 877 (Bankr. M.D. Fla. 2009).

in any event, this Court issued a Report and Recommendation ("**R&R**") on November 29, 2012, denying setoff (*see Dancing $* Doc. 121), and it was clear from the cases cited in the R&R and in footnote 3 here that denial of setoff would not be overturned by the District Judge. Despite this, Elendow nevertheless waited to the second-to-last day possible to seek relief under Rule 60(b) from the Court's Order granting the Determination Motion.

C. Elendow's Claim Should Be Denied On The Merits

Elendow also argues the merits of its claim support reconsideration, but the merits are not a relevant factor under the Supreme Court's *Pioneer* decision. *See* 507 U.S. at 395.[4] As such, they have no impact on the Motion as a matter of law. In any event, Elendow's arguments merely rehash procedural objections made elsewhere in the Motion. For example, Elendow contends only its claim was denied as untimely (*see* Mot. at 16), but it ignores that, unlike other claimants with late-filed claims, it either (1) never responded to the Receiver's letter regarding extenuating circumstances or (2) at best for Elendow, responded six months after the Receiver requested an explanation (*see supra* II.A.). Elendow argues this is no reason to have denied its claim because the Receiver "obviously knew how to reach Elendow – [the Receiver's counsel] need only have picked up the telephone and called Mr. Stillman or sent an email" (*see* Mot. at 17). Of course, this ignores the burden of perfecting Elendow's claim does not fall on the Receiver or his counsel. Indeed, the Receiver processed more than 500 claims while simultaneously litigating dozens of "clawback" and other lawsuits, including a successful one against Mr. Waldman's other entity, Dancing $, and working on numerous other efforts on behalf of the Receivership estate. This complexity and scope of

responsibilities held by a receiver are precisely why claims processes are established with specific procedures and deadlines to which claimants are required to strictly adhere. It is not the Receiver's responsibility to babysit claimants – especially those represented by counsel – to preemptively ensure they act in accordance with all applicable procedures and deadlines and read and follow all pertinent correspondence. *In re New Cent. TRS Holdings*, 465 B.R. at 52 ("Permitting this late filing would create a dangerous precedent for other creditors who have sat on their rights without any other reasonable justification.") (quotation omitted).

Elendow's only argument regarding the actual merits of its untimely claim is that the Receiver must treat Elendow and Dancing $ as separate entities, and he cannot rely on Dancing $'s receipt of false profits (or its frivolous litigation strategy) to deny Elendow's claim. As an initial matter, the claims process is governed by equity and this Court may consider Mr. Waldman's conduct through Dancing $ on the one hand and Elendow on the other. *See S.E.C. v. Elliot*, 953 F. 2d 1560, 1566 (11th Cir. 1992) (court has "broad powers and wide discretion" to assure equitable distributions); *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 176 (S.D.N.Y. 2009) (noting "when funds are limited, hard choices must be made"). But in any event, Elendow never objected to the Receiver's determination of its claim; as such, any argument regarding the merits of that determination is expressly waived. Morello Decl., Ex. D ("Failure to properly and timely serve an objection to the determination of your claim … shall permanently waive your right to object to or contest the determination of your claim…"). As previously noted, the merits are not a factor for consideration under Rule

[4] Instead, the only other pertinent factor is good faith. *See id.* One of Elendow's arguments in its Motion – that the Receiver engaged in misconduct by adopting a strategy to "lull" claimants into abandoning their claims (*see infra* Section III) – is so baseless it calls Elendow's good faith into question.

60(b) and consequently cannot help Elendow.

III. ELENDOW IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(3)

In a transparent attempt to excuse its inattention and inaction, Elendow next argues the Receiver committed misconduct by employing a "strategy" "intended to lull those claimants holding a denied claim not to oppose the treatment of their claim." Mot. at 18. Specifically, Elendow argues the Determination Letter was "misleading and fail[ed] to give proper notice" that its claim was denied because it purportedly informed Elendow it had an "Allowed Claim." *Id.* This argument fails for four independent reasons. First, the Determination Letter did not inform Elendow that it had an "Allowed Claim." *See* Stillman Decl., Ex. 5. Instead, it explicitly referred Elendow to the Determination Motion and its exhibits to learn the Receiver's determination of the claim:

> My recommended determination of your claim is set forth in the Exhibits attached to the Motion and is addressed in the body of the Motion. 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. The Allowed Amount, however, is not indicative of the amount you may ultimately receive. Rather, I have proposed that each investor claimant holding an allowed claim with a positive Allowed Amount ultimately receive a percentage of their Allowed Amount on a pro rata basis.

Id. at 1. Elendow's claim was addressed in an exhibit entitled "**Investor Claims – Denied**," and it was also discussed in a section of the Determination Motion devoted to its denial. *See* Doc. 675 at 21-22. Elendow's misquotation of the Determination Letter is either particularly careless or deliberately misleading. Aside from directing Elendow to the Determination Motion and its exhibits to learn the determination of its claim, the Determination Letter informed Elendow that (1) the Receiver assigned claims an Allowed Amount, (2) Elendow should refer to "the Exhibits attached to the Motion" to determine that amount, and (3) only

claimants with a "positive" Allowed Amount would ultimately be entitled to recovery. *Id.; see also id.* at 2 (noting only claimants holding "an allowed claim with a positive Allowed Amount" will recover). As noted above at page 4, all claims, including those that were denied, waived, or consolidated with other claims were assigned an Allowed Amount. For the denied, waived, or consolidated claims, that amount was "none," and it was clearly indicated in the Determination Motion and pertinent exhibits. That Elendow purportedly did not realize its claim had been denied and "none" of its claim amount had been allowed because it and its counsel ignored the Receiver's express direction to consult the Determination Motion and its exhibits does not render the Determination Letter misleading.

Second, the Receiver sent a substantively identical Determination Letter to all claimants because it would have been unnecessarily expensive and time-consuming to create more than 500 individualized letters. As explained in the Background Section above, claims were divided into five general categories, and the reasons for an individual claim's assignment to a particular category were varied. For example, the Receiver assigned at least 95 claims an Allowed Amount of "None." A claim received an Allowed Amount of "None" if it was waived, consolidated with another claim, or denied. Exhibit G contained all "Denied" claims, including Elendow's, and large sections of the Determination Motion were devoted to explaining the legal basis for the denials. As such, referring investors to the Determination Motion and its exhibits was designed to conserve Receivership resources and eliminate the need for unnecessary and complex paperwork. The Receiver even offered to provide a copy of the Determination Motion if a claimant was unable to access it on the Receiver's website. *See id.* at 1.

Third, the Determination Letter did not, in fact, "lull" claimants into abandoning their claims. For example, claimants timely submitted 23 objections to the Receiver's determinations in accordance with the procedures set forth in the Determination Motion. This is *prima facie* evidence the Determination Letter was sufficient to provide reasonable notice and was not misleading. *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) (requiring "notice reasonably calculated, under all the circumstances, to … afford [parties] an opportunity to present their objections."). Indeed, only Elendow has complained that the Determination Letter was misleading. Because Elendow was represented by counsel and even unrepresented claimants managed to file timely objections, Elendow's failure to submit an objection is attributable solely to its and its counsel's inattention and lack of diligence. *Cf. In re Oakton Beach & Tennis Club,* 9 B.R. at 205 (holding claimant "was represented by an attorney who should have independently determined whether or not his client needed to file a proof of claim" or here, an objection).

Fourth, the Court approved the Receiver's proposed procedures. For example, in the body of the Determination Motion, the Receiver clearly stated each claim was assigned an Allowed Amount. *See id.* at 13 ("As detailed in Exhibits B through J, the Receiver has proposed an Allowed Amount for each claim." (footnote omitted; emphasis added)). Indeed, Exhibits B through J (including Exhibit G "**Investor Claims – Denied**") each contained a column entitled "Allowed Amount," and at least 95 claims were transparently assigned an Allowed Amount of "None." In granting the Determination Motion, the Court found "[t]he Receiver's determination of claims and claim priorities as set forth in the motion and in Exhibits B - J attached to the motion is fair and equitable and is approved." *See* Doc. 776

¶ 3; *see also* Doc. 678 (notice of mailing letters to claimants). In short, the Receiver did not engage in any misconduct (much less misconduct sufficient to warrant Rule 60(b)(3) relief), as his actions were approved by this Court and they purportedly mislead no one but Elendow. Because this argument is nothing more than a fabrication designed to excuse Elendow's complete lack of diligence, this ground for the Motion also should be denied.

IV. ELENDOW IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(6)

Finally, Elendow argues it is entitled to relief under Rule 60(b)(6). But even it recognizes "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." *See* Mot. at 19. For the reasons discussed above, the Motion does not present extraordinary circumstances: it merely seeks relief for Elendow's inexcusable lack of diligence and attention. More broadly, the Motion merely seeks reconsideration of the unchallenged denial of Elendow's untimely claim. Such motions are ordinary, and as explained above, to achieve finality, discourage the filing of additional late claims, and promote orderly administration, courts routinely deny them. *Princeton Econ.*, 2008 WL 7826694 at *4 (establishing bar date); *Callahan*, 415 F.3d at 117-18 (dismissing objection for lack of standing asserted by parties that failed to file timely claim); *In re S. Atlantic Fin. Corp*, 767 F.2d at 819 (affirming bankruptcy court's denial of claim field 18 days after bar date); *In re New Cent. TRS Holdings*, 465 B.R. at 52 (disallowing and expunging late-filed claim); *In re US Airways*, 2005 WL 3676186 at *9 (denying motion to file late claim); *In re Oakton Beach & Tennis Club*, 9 B.R. at 205 (same).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 18, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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