UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. ALBERT E. PARISH, JR., PARISH ECONOMICS, LLC and SUMMERVILLE HARD ASSETS, LLC, Defendants.	)	CASE NO. 2:07-cv-00919-DCN

MEMORANDUM OF INVESTOR STEVEN L. SMITH
IN OPPOSITION TO
PROPOSED SETTLEMENT OF CLAIMS

The instant matter is before the Court on the proposal of the Receiver, S. Gregory Hays, to enter into a purported settlement agreement with Charleston Southern University. Steven L. Smith ("Objecting Investor"), plaintiff in Case No. 07-CP-08-809, *Smith v. Charleston Southern University* (Berkeley County, South Carolina), has asserted claims against Charleston Southern that may be affected by the settlement proposed by the Receiver, and hereby objects to the proposal, both in its entirety and insofar as it requests that this Court enjoin the continuation of the pending action filed by Smith, as well as at least one action filed by another investor similarly situated. Smith believes the Receiver lacks standing to settle with CSU, that neither the All Writs Act nor the Anti-Injunction Act are sufficiently broad to encompass the acts the Receiver wishes this Court to take, and that the proposal made by the Receiver is not in the best interests of the Investors.

I. STANDING

The statement of facts as set out by the Receiver is, in the opinion of the Objecting Investor, essentially accurate, and to the extent that there may be disagreements regarding some points made, those disagreements are irrelevant to the instant argument. The Objecting Investor does, however, take exception to the opening conclusion drawn by the Receiver, in which the Receiver states that he believes that he could assert claims against CSU. This conclusion is unsupported by any of the facts presented by the Receiver, and is equally unsupported in law.

The factual summary contained in the Memorandum explains at some length why it is that at least some of the Investors would have claims against CSU. Depending on the outcome of certain factual disputes, and the interplay of certain relationships within CSU itself, it is possible that CSU would have claims against Parish, or, by extension, against the estate managed by the Receiver. Significantly lacking is any factual or legal basis for the assertion that Parish, or the estate, would have claims against CSU.

The powers of the Receiver arise entirely from those granted to him by the Order of this Court. That Order, entered April 12, 2007, gave the Receiver the authority to act in the place of Defendants Albert Parish and the various Parish entities, including granting the Receiver the power to manage all aspects of the Receiver Estate, its finances, property, and its rights against third parties. As the Receiver notes in his Memorandum, the Court also granted the Receiver the right to "settle, compromise or adjust any pending or future action or proceeding as may be advisable or proper for the protection of the Receiver Estate." This language stops well short of granting the Receiver standing to pursue the claims of third parties against persons in possession of property not belonging to the Estate.

Pursuant to this language, the Receiver has complete authority to settle any actions brought by or against the Estate. The Receiver is given the power to marshal all assets that would or should have belonged to the Estate, and to recover from any third parties monies traceable to investor funds, from persons or entities from whom any of the Receivership entities made purchases or with whom they might have invested. The Receiver clearly has standing to recover any assets, from any source or any location, to the extent that those assets were purchased with investor funds or on behalf of investors. The Order also grants the Receiver the power to prosecute, in the name of the Estate, any causes of action that might have accrued to the Estate, and to do so for the benefit of the Investors. The initial difficulty with the proposal made by the Receiver in this instance is that he is attempting to settle an action that neither he nor the Estate could have brought and, in so doing, is simultaneously seeking to bar those in whose favor such an action might accrue from being able to proceed.

It is black-letter law that standing to bring a lawsuit is threshold inquiry. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to have standing, a plaintiff must meet three criteria:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -the injury has to be fairly traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Jones, 136 F.3d 342, 347 (4th Cir. 1998)(*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)). Notwithstanding the Receiver's conclusion that he and the Estate have viable causes of action against CSU, it is literally impossible to see what those might have been, and what injury CSU might have caused to Parish or any of the Parish entities. CSU might

reasonably allege that it has suffered an injury at the hands of Parish; the reverse is simply not the case.

Although the Receiver lays out the facts surrounding Parish's involvement with and employment by CSU, and explains in some detail the basis for the Investor lawsuits against CSU, there is no causal connection between the facts and any supposed cause of action on behalf of Parish. This is likely because, no matter how the facts are viewed, there is no conceivable basis for any action by or on behalf of the wrongdoer against the entity that enable him to commit the wrongs.

The overwhelming number of cases discussing the rights of receivers, generally, to settle claims of or filed on behalf of an estate are bankruptcy proceedings, and, in fact, the Receiver herein employs bankruptcy language throughout his Motion. These cases make it clear that even though a bankruptcy receiver is granted broad powers in the management of the affairs of the bankruptcy estate, those powers "do not extend to ordering a private party to release its personal claims against another private party." *In re Derivium Capital, LLC*, 2007 Bankr. LEXIS 3760, *20 (D.S.C. 2007).

Derivium Capital involved a complex set of stock purchases and transfers, made by a financial services firm established by three individuals. As a part of the services offered, the firm would accept stock pledges from its clients, and use those pledges as collateral for loans of up to 90% of the value of the stock. The clients were unaware that the company was immediately selling the pledged stocks and using the proceeds for a variety of purposes, including payment of operating expenses and the making of new loans. By the time of the bankruptcy filing, there were a number of lawsuits involving various combinations of investors, creditors, owners, and other third parties pending.

The bankruptcy trustee proposed a settlement that would have encompassed not only all of the claims of all parties against Derivium Capital and its owners, but several of the claims of different investors against entities not parties to the bankruptcy. Consideration for the proposed settlement would have been a lump-sum payment, of less value than the potential claims but of substantial value nonetheless, made to the bankruptcy estate and thus divisible among all investors. Relying on the broad powers of the Bankruptcy Court granted by 11 U.S.C. § 105 – and employing language identical to that of the Receiver herein – the trustee contended that such a settlement was appropriate and necessary to enforce the court's orders, and that it would provide for an orderly and effective way to manage assets of the estate.

The Bankruptcy Court held that the claims of creditors are not those of the estate, and that the trustee lacked the requisite standing to bring an action on behalf of creditors, as any recovery sought by creditors would be their property and not the property of the estate represented by the trustee. *See, also, Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 434 (1972); *Fisher v. Apostolou*, 155 F.3d 876, 879 (7th Cir. 1997). The Court went on to add that if the trustee lacked standing to bring the claims, it "would necessarily follow that a trustee would lack authority to settle…" *Id.* at *21.

Although the Receiver herein is not a bankruptcy trustee, the analysis is identical, and the Receiver does not have powers broader than those of a trustee. Like a bankruptcy trustee, a receiver in equity "has standing for all claims that would belong to the entity in receivership…, but no standing to represent the creditors and investors in their individual claims" *Miller v. Harding*, 248 F.3d 1127 (1st Cir. 2000). The Receiver's unsupported conclusions aside, there are no viable claims of any nature by or on behalf of the Estate against CSU, and the Receiver consequently does not have the requisite standing either to pursue any actions against that entity

or to enter into any settlements with it. The Receiver certainly does not have standing to seek to prohibit third parties who happen to be creditors of the Receivership Estate from pursuing their own independent causes of action against a third party.

The Receiver essentially glosses over the issue of standing entirely. The Motion goes from the known fact that Objecting Investor and at least one other party have filed lawsuits against CSU as a direct result of CSU's involvement with Parish directly to the conclusion that any claims of investors against CSU are property of the Receivership Estates. The Receiver additionally states that among the Receiver's duties is the analysis and administration of the claims of investors and creditors, a statement that appears to be used to show that investor claims against CSU are encompassed in the duties granted by the original Receivership Orders. This is simply incorrect.

The Receiver's duties are spelled out in the Receivership Orders, and in great detail. The Receiver has all of the rights to management and administration of the Receivership Estates that would normally vest in the owner of the Estate. These rights include the right to collect any sums owed to Parish or his entities and to take any actions that could be taken by Parish. All assets belonging to the Receivership Estates are frozen. Most importantly, the Receivership Orders prohibit the filing of any lawsuit seeking independent recovery from the Estates. All parties are prohibited from interfering with the assets of the Estates. Although it is not spelled out, it is obviously implicit in the Orders that the purpose of the Receivership is to collect the assets of the Estates in order that the maximum recovery may be obtained by the investors, as a group.

Equally obviously, distribution to the investors includes investigation into the claims of the individual investors themselves. The Receiver promptly, upon appointment, began to solicit

claims from investors in order that he might best determine the total owed by the Receivership Estates, and best determine the amount to be distributed to each investor following the payment of Estate expenses. That investigation into claims specifically against the Receivership Estates is among the Receiver's duties is not in question. That does not translate into the right to investigate the claims of any of those investors against any other party.

As noted above, it is difficult to imagine how the Receiver, standing in the stead of the Parish entities, could state a claim against Charleston Southern. As summarized by the Receiver, all of the potential claims against CSU involve CSU's acts and statements about Parish to third parties. None of them constitute claims grounded in any actions against Parish, or which could have injured him or his business. The Receiver's authority does not extend to the point at which the Receiver is entitled to assert, let alone to settle, the claims of third parties against an entity not included in the Receivership Estate, in order to obtain funds not payable to the Estates.

II. ANTI-INJUNCTION ACT

The arguments regarding the Anti-Injunction Act, 28 U.S.C. § 2283, are essentially mooted by a conclusion that the Receiver lacks standing to enter into any settlement of claims against CSU. However, should this Court find that there are, in fact, possible claims of the Receivership Estate capable of being brought against Charleston Southern, and that it is in the interest of the Receivership Estate that such claims be settled, the Receiver's request to enjoin the pending state court actions should still be denied. The Act itself is a complete prohibition on the Receiver's proposed settlement, which is not only not within the scope of the Receiver's authority but is far too broad.[1]

The Anti-Injunction Act is intended to be a complete prohibition on the entry of an injunction on state court proceedings unless the matter falls within one of the three specific enumerated exceptions. *Studdert v. Scanlon*, 468 F. Supp. 381 (D. Mont. 1979). Those exceptions are where 1) the injunction is expressly authorized by Congress; 2) it is necessary to aid in the court's jurisdiction; or 3) required in order to enable the court to protect or effectuate its judgment. The exceptions are narrowly construed, *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied* 485 U.S. 993 (1988), and doubts are to be resolved in favor of permitting the state action to proceed. *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). The Act does not provide an exception that would permit this Court to enjoin the action brought by Objecting Investor herein.

Objecting Investor does not dispute that there would likely be a strong argument in favor of the Receiver's request for the issuance of an injunction were the Receiver correct in his initial

[1] The overbreadth of the Receiver's Motion is made clear by the fact that he seeks a bar on possible future law suits not only by or on behalf of investors and creditors of the Parish entities, but those that might be filed "by donors to or benefactors of CSU," a group totally outside the ambit of the instant action, and completely unrelated to Parish or any of his business entities.

assertion that any monies received through litigation against Charleston Southern could accrue to the benefit of the Receivership Estate. The difficulty with the Receiver's position, however, is that, once again, the Receiver lacks standing to pursue any cause of action against CSU. The entry of an injunction against further state court proceedings would not aid this Court's jurisdiction or protect any judgment rendered in the course of this action; the assets sought in the state court matters would never be a part of the Receivership Estates but for the existence of some proposed agreement between the Receiver and CSU.

It is difficult to discuss the application of the Anti-Injunction Act, or the All-Writs Act, in the context of this matter, as it is impossible to move past the jurisdiction issue to arrive to a point where such discussion is worthwhile. Before the Court can consider whether or not an injunction might be appropriate, there must be a resolution of the threshold inquiry: whether the property sought to be protected is within the scope of the Court's earlier orders, or in its jurisdiction in the first instance, so as to be protectable. The Receiver's Motion makes complete sense if, and only if, the Court accepts the basic assumption made at the very outset: that the Receiver has standing to pursue actions against Charleston Southern.

Even if this Court were to determine that somehow the monies that might be recovered as a result of third-party actions against an entity against which the Receivership Estates have no cause of action would accrue to the benefit of the Estates, the entry of an injunction would not be appropriate in this case. As noted, the Supreme Court has indicated that the Anti-Injunction Act is to be read to limit, rather than expand, the powers of the federal courts, and that the Act "does not qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). This Court has long recognized that the Anti-Injunction Act is

> more than a mere statement of "a principle of comity"; it represents "a binding rule on the power of the federal courts," a rule which may not be ignored, even though the State "proceedings" sought to be stayed 'interfere with a protected federal right * * *, even when the interference is unmistakably clear" and "regardless of whether the federal court itself has jurisdiction over the controversy." It is "not to be whittled away by judicial improvisation" nor are its exceptions to be "enlarged by loose statutory construction."

Hartsville Theatres, Inc. v. Fox, 324 F. Supp. 258, 261 (D.S.C. 1971)(*quoting Atlantic C.L.R. Co. v. Engineers*, 398 U.S. at 294; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 514 (1955)).

The vast majority of the situations in which the courts have found the imposition of an injunction to prohibit concurrent state proceedings to be appropriate have arisen under either the bankruptcy laws, or in cases in which the so-called "relitigation" exception applied. *See, e.g., Atlantic Coastline, supra*. There is substantial authority for the proposition that a federal court may enjoin a state proceeding that interferes with the disposition of property held in a bankruptcy estate, or property intended to be disbursed by such an estate, as a part of its inherent authority under 11 U.S.C. § 105. The relitigation exception is strictly limited to those cases in which the federal court has actually heard and disposed of an identical cause of action on the merits. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Bryan v. BellSouth Communs., Inc.*, 492 F.3d 231 (4th Cir. 2007). Even within these areas, the Supreme Court has noted that the mere fact that an injunction may issue does not mandate it, and the district court must still determine whether it is required. *Id.; see also Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995)(holding that federal preemption of ERISA law does not require enjoining state action brought under ERISA statutes).

Clearly, there is no basis for the issuance of an injunction in the instant action pursuant to either statutory authority, as which there is none, or upon any claim that the matters raised by

Objecting Investor have been previously litigated. Although the Receiver's Motion is less than entirely clear upon this point, it appears that the injunction is sought pursuant to the second of the three exceptions to the Anti-Injunction Act, and that the Receiver's position is that an injunction is necessary in order for this Court to retain jurisdiction over the Receivership Estates. Such is not the case.

As Objecting Investor noted above, the Receiver lacks standing to pursue the claims he has filed against CSU because neither those claims nor the proceeds of any action upon them would accrue to the benefit of the Receivership Estate. Whether Objecting Investor is successful or not has no effect on the assets or the administration of the Estates; recovery in the state court proceeding by Objecting Investor would not diminish the value of the property properly in the Estate, since there is no property belonging to CSU that is in the Receivership. The Receiver seeks to have this Court enjoin prosecution of an action filed by a third party and against a different third party, seeking to recover monies that are not now and were never part of the Receivership Estates. Although it is certainly true that any money coming into the hands of the Receiver has an effect on the administration of those Estates, that is not the equivalent of saying that any monies obtained by persons who happened to have been Parish investors is by definition Estate property.

Equitable distribution of the funds in the Receivership Estates presupposes the existence of funds properly in those Estates. The Receiver has the ability to marshal all assets that were or should have been Parish property, or that were purchased through the use of Parish's own money, regardless of the source of that money. Included among the necessary powers of the Receiver, and already the subject of an Order of this Court, is the ability to enjoin investors from attempting to individually sue Parish or any of his business for their own individualized losses.

There is no question but that such piece-mealing of the litigation would impede the Receiver's – and the Court's – ability to administer the Receivership property in an orderly, cohesive manner.

The same cannot be said for the litigation the Receiver wishes to enjoin through the present Motion. The Receiver is not looking to halt litigation against any portion of the Estate. Rather, the Receiver is attempting to draw into those Estates monies that would not be included but for the existence of the proposed settlement, not because there might be questions as to liability, but because the Estates have no claim to them in the first instance.

The Anti-Injunction Act is specifically intended to restrain the federal courts from interference with state court litigation unless and until it is clearly demonstrated that such interference is statutorily permissible and independently necessary. *See, e.g., Lamb Enterprises, Inc. v. Kiroff*, 399 F. Supp. 409 (N.D. Ohio 1975), *rev'd on other grounds*, 549 F.2d 1052 (6th Cir.), *cert denied* 431 U.S. 968 (1977). As the actual administration of the Receivership Estates is utterly unaffected by the separate state court action brought by Objecting Investor, the assets of the Receivership Estates are untouched regardless of the outcome of that action, and there is no statutory basis for the issuance of an injunction, the Receiver's Motion should be denied.

III. ALL WRITS ACT

The Receiver further contends that this Court has the power pursuant to 28 U.S.C. § 1651, the All Writs Act, to bar further litigation against CSU in the event of a settlement between the Receivership Estates and Charleston Southern. As an introductory matter, of course, and as with all other aspects of the Receiver's Motion, the issue of standing must first be overcome. Even if it is, however, the Receiver misapplies the Act in this case.

As the Receiver states, the All Writs Act is intended to give the federal courts the ability to issue commands, including injunctions and "bar orders," when those are "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). This language is identical to that contained in the second exception to the Anti-Injunction Act, and is interpreted in the same manner. *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002). The language has been strictly interpreted to permit for the issuance of a writ entering a bar order in cases in which the subject matter of both the federal action and the state proceeding are the same *res* over which the federal court has already determined it has jurisdiction, *see Corley v Entergy Tech. Holding Co.*, 297 F Supp 2d 915 (E.D. Tex. 2003), or where the issue before the state tribunal has already been litigated in the federal courts. *Farmers Bank v. Kittay (In re March, 988 F.2d 498, 500* (4th Cir.), *cert. denied* 510 U.S. 864 (1993). The instant action presents neither scenario.

The most common situation in which the issuance of a bar order has been approved involves situations in which the federal court has already addressed the issues sought to be relitigated in the state system. The federal courts have historically retained the power to issue injunctions "to effectuate their own decrees…[and] in order to avoid the relitigation of questions once settled between the parties." *Root v.* Woolworth, 150 U.S. 401, 511-12 (1893). There can be no

question but that there is nothing contained in the Receiver's Motion regarding matters that have already been litigated in this Court, and there is no final judgment being collaterally attacked in the state courts. The relitigation exception contained in the Anti-Injunction Act, and incorporated into the All Writs Act, is inapplicable.

It is also undisputed that the action before this Court is an *in rem* proceeding in that it deals with the property of the Receivership Estates. This Court has already issued Orders granting the Receiver the authority to collect and distribute those assets, to seek out such assets wherever they might be found, and to manage them in the manner deemed most appropriate for the benefit of creditors and the Estates themselves. In addition, the Receivership Orders already prohibit the filing of any actions that would seek to attach any of those assets, or to interfere in any way with the Receiver's authority. Any such filings would, obviously, also interfere with this Court's continuing jurisdiction over and oversight of the *res* involved in the case.

The Receiver is, however, not asking for the issuance of a writ to be used to manage or supervise the property in the Estates. He is seeking to have this Court prohibit a third party from pursuing his own, and purely personal, action, against property that is not before the Court in the first instance, and which is not properly part of the Receivership Estates themselves. The All Writs Act does not confer the power to enjoin a completely independent state court action involving different parties, purely on the grounds that one of the parties to the state court case believes it may be to its benefit to pay one creditor rather than another.

The few cases in which neither the relitigation exception nor the requirement of an *in rem* proceeding have been found applicable are matters involving complex, multi-district, or class action cases. Although not strictly within the language of the Act, the federal courts have generally held that they retain the inherent power to enjoin state court actions when those actions

would tend to interfere with the federal court's orderly handling of "massive" litigation. *Newby v. Enron Corp.*, 338 F.3d 467, 474 (5th Cir. 2003); *see also Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993) (Federal district court presiding over class action asbestos litigation could properly enjoin absent members of the plaintiff class from prosecuting separate action in state court or other forum. Plaintiffs in state suit were seeking to challenge the propriety of the federal class.); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) (Federal court may enjoin state court plaintiffs from pursuing claims in state court that are substantially similar to federal antitrust claims settled by final judgment in large federal class action. The district court maintained continuing jurisdiction over the case to resolve disputes over the terms of the judgment.).

The instant action simply does not fall into this class. Although the losses suffered by the Parish investors are large, and there are a substantial number of such investors, this is not a class action, there have been no final orders entered, and permitting Objecting Investor to proceed with his claims against Charleston Southern University would in no manner interfere with this Court's ability to oversee, supervise, and manage the Receivership Estates in an orderly fashion.

Finally, although the Receiver notes that CSU will not enter into the settlement unless this Court enters an order protecting it from the possibility of any other litigation arising out of the Parish situation, neither the existence of a proposed settlement, nor the overall policy in favor of settlements, provides this Court with the authority to enter a bar order unless such authority is found in the statutory scheme. As the Court of Appeals for the Tenth Circuit noted, "[a]lthough federal policy generally encourages settlement, that policy does not override statutory rights. Courts may not extinguish such rights in order to facilitate settlement unless the statute authorizes them to do so." *TBG, Inc.. v. Bendis*, 36 f.3d 916, 924 (10th Cir. 1994).

The All Writs Act does not give the federal courts powers more expansive than those addressed by the Anti-Injunction Act. Neither Act confers the ability to enjoin state court actions which have been brought by parties not before the court against parties not before the court, merely on the grounds that the Estate in Receivership wishes to make some financial arrangement, or that the outside defendant believes such an arrangement would be advantageous to it. The Acts, taken together, confer upon the federal courts the fullest ability to enforce their judgments, to protect the integrity of their decisions, and to manage the property before them. The Receiver is seeking to enjoin actions far outside the scope of those encompassed in the All Writs Act, and the Act is inapplicable to this case.

IV. THE SETTLEMENT PROPOSAL UNDULY PREJUDICES SOME INVESTORS

As a final issue, even if this Court determines that Receiver has standing to pursue a settlement with Charleston Southern University, the proposal advanced by the Receiver relies upon certain inaccurate factual predicates. Specifically, although there is no question but that all investors are identically situated with respect to Parish and the Parish entities, they are not identically situated with respect to CSU.

Attached hereto is the Affidavit of Steven L. Smith, Objecting Investor for the purposes of the instant Objection and Plaintiff in Case No. 07-CP-08-809, *Smith v. Charleston Southern University*, currently pending in the Court of Common Pleas of Berkeley County. Objecting Investor was introduced to Albert Parish under the auspices of Charleston Southern University, met with Parish exclusively at his offices located on the campus of the Charleston Southern University, and relied upon the reports of Parish's financial acumen provided to him by Charleston Southern University in making his decision to invest in one of the Parish investment pools. The nature and extent of Objecting Investor's relationship with Charleston Southern forms the basis for the lawsuit filed against CSU.

At the same time, and as attested to in the Affidavit, Objecting Investor is aware, both through personal knowledge and upon information and belief, that large numbers of the Parish Investors had no dealings whatever with CSU. A number of the investors – including, at least according to the articles in the Post & Courier – are located out-of-state, and may not have met with Parish face-to-face at all. Many more dealt with Parish at the offices of one or the other of the affiliated entities, or elsewhere. Many of the investors were introduced to Parish by friends, neighbors, or through various media sources and seminars.

The Receiver identifies as the basis for potential claims against CSU several specific grounds, including negligent supervision, negligent misrepresentation, and control person liability. Objecting Investor has made no claims for control person liability. However, there may be additional grounds as well. One common element of these bases for liability is a presumption of some relationship between the plaintiff and CSU, not merely between the plaintiff and Parish.

The Receiver cites Section 317 of the Restatement of Torts Second as the standard for negligent supervision. As this section makes clear, and as it is used in *Davis v. United States Steel Corp*., 779 F.2d 209 (4th Cir. 1985), there are two essential elements to a finding of employer liability for the acts of an employee acting outside the scope of his employment: first, the employer must have both knowledge of the employee's misdeeds and the ability to control them, and second – and more germane to the issue at hand – the acts complained of must occur on the premises of the employer. There is no liability under Section 317 for wrongful acts of the employee undertaken other than upon the premises owned or operated by the employer.

As far as Objecting Investor, who met with Parish exclusively on the grounds of CSU, there is at a minimum a cause of action under this theory. Those of the investors who never set foot on the CSU campus, or whose dealings with Parish were entirely conducted elsewhere, would never be able to state a claim for negligent supervision under this theory. Two separate and distinct groups of investors exist in this regard.

Any claim of negligent misrepresentation requires a showing that a statement was made, upon which the speaker intended the listener to rely. *See, e.g., Redwend L.P. v. Edwards*, 354 S.C. 459; 581 S.E.2d 496 (Ct. App. 2003). Again, Objecting Investor has stated that his introduction to Parish was through CSU, and that he relied upon the statements made by CSU

regarding Parish's talents, skills, knowledge, and honesty in making the decision to invest. Those of the investors who were introduced to Parish by other means, or who never had any contact with anyone at CSU, cannot state a claim for negligent misrepresentation against Charleston Southern, as there were no representations made in the first instance.

Objecting Investor makes no representations regarding the effect of S.C. Code § 35-1-509 on this or any other potential investor action against CSU. As noted, this is not among the claims raised by Objecting Investor. It is certainly possible that all investors may have equal rights against CSU pursuant to this section of the South Carolina Code, just as it is possible that any cause of action stated thereunder would be subsumed by the SEC action itself.[2] As it has not been raised, however, its inclusion as a potential cause of action that would militate in favor of approval of the Receiver's settlement proposal is immaterial.

Even without standing on his own to pursue claims against Charleston Southern, the Receiver's argument might have some merit if it were true that any monies received from CSU would, or should, go in equal shares to all Parish investors. The claims against CSU are, however, predicated upon more than the mere fact of inclusion in a Parish investment pool. A fundamental prerequisite of any such claims is some degree of involvement by the investor with CSU itself, and only those investors who can demonstrate the existence of this relationship, and their own personal reliance upon CSU in making their decisions to invest, have claims.

In fact, the two cases mentioned in the Receiver's Motion – *Smith* and *Elrod v. Charleston Southern University*, pending in Charleston County – are not the only actions that have been filed as a result of the Parish situation. They are, however, the only two that name Charleston Southern University as a defendant. Other investors, who did not have dealings with the

[2] It is worth noting, however, that even this cause of action accrues exclusively to the benefit of investors, and does not give any of the Receivership Estates – or, by extension – the Receiver, any rights against CSU. It does not confer any standing upon the Receiver to pursue any claims against Charleston Southern.

university, but only with Parish and/or his various business ventures, have not named CSU at all. Only a portion of the investors have claims, and only a portion of the investors would have any rights of recovery against the university.

That being the case, it would be inequitable to the investors who do have personal claims against CSU were any recovery from the institution to be shared out equally among all investors. Furthermore, this does not create a situation in which, as the Receiver states, there would be "competing claimants" to a pool of funds in the Receivership Estate to which all investors have equal rights. This is a separate and distinct pool, independent of any claims against the Parish entities, and to which only some of the investors might be entitled.

Objecting Investor would respectfully submit that the proposed Settlement, even if one the Receiver has standing to pursue, and the accompanying injunctions sought by the Receiver, even if permissible under the Anti-Injunction Act, would operate as an injustice on its merits. It would act to distribute a relatively small sum of money among a large number of persons who are not otherwise entitled to bring the cause of action upon which the settlement is based. It would furthermore require that whatever monies are received in settlement of the purely personal claims of Objecting Investor and others possibly similarly situated be used to pay the expenses of the Receivership itself, although the Receivership Estates are not and could not be parties to any action from which these funds would flow.

V. THE PROPOSED SETTLEMENT AMOUNT IS INSUFFICIENT

Not only does the proposed settlement fail to take into consideration the substantial differences between various classes of Parish investors, the numbers presented by the Receiver on behalf of Charleston Southern University do not appear to match the most recent financial disclosures available to Objecting Investor. The Receiver asserts that the proposed settlement contribution of $160,000 represents 10% of CSU's total liquid assets. Objecting Investor would request, at a minimum, some reconciliation of this figure with the numbers shown on CSU's Tax Year 2005 Form 990, attached hereto as Exhibit B.

For instance, the 990 shows total investments, including corporate stocks and bonds, having a value of roughly $15 million as of the close of the year. Other investments reflected in Form 990 include savings accounts and certificates of deposit totaling nearly $3 million, and the assignment of a value of roughly $9.4 million in a limited liability company. CSU claims to have $2.3 million on deposit with the South Carolina Foundation of Independent Colleges and its Trustees, and an additional $833,000 held by the South Carolina Baptist Foundation. Although Objecting Investor recognizes that land, buildings, and equipment are not liquid assets, CSU shows the book value of this property – after accumulated depreciation – as being in excess of $32 million, with a basis of almost $60 million.

Objecting Investor recognizes that CSU likely lost money on the failed Parish investments, as did he and numerous others. Objecting Investor further recognizes that it is impossible to determine solely from the face of the Form 990 precisely what assets CSU has or the liquidity of those assets. Finally, Objecting Investor recognizes the value to the community of ensuring that Charleston Southern University is able to continue to operate. At the same time, the action filed against CSU is predicated upon the wrongdoing of the institution with regard to activities that are

not part of its educational purpose, and it is the position of Objecting Investor that CSU bears separate liability for its part in the Parish scheme, for which CSU should attempt to make those injured by its actions whole. Conclusory statements regarding the value of the assets of the institution, unsupported by any calculations and frankly belied by the institutions most recent tax filings, are insufficient as a basis for determining that the value of the proposed settlement is adequate.

As noted above, Objecting Investor believes that the Receiver lacks standing to pursue this settlement proposal, and that there is no applicable exception to the Anti-Injunction Act that would grant this Court the statutory ability to enjoin separate actions against Charleston Southern University. Should this Court determine, however, that the proposal is, in general terms, appropriate, Objecting Investor would respectfully request that this Court require a full financial disclosure from and examination of the institution prior to making any determination that the amount offered is proper.

CONCLUSION

Some, although not all, of the Parish investors might have claims against Charleston Southern University. The Receivership Estates themselves do not. Since the Receiver can do no more than could the Estates themselves, the Receiver lacks the requisite standing to settle the claims filed against Charleston Southern.

Even if such standing existed, the Anti-Injunction Act does not contain an exception sufficiently broad to permit for the issuance of an injunction to bar on-going state actions filed by third parties against different third parties. The damages sought by those of the investors, including Objecting Investor herein, are not part of the Receivership Estate, are not under the jurisdiction of this Court, and represent a purely personal cause of action unrelated to the administration of the Receivership.

Even if this Court finds that the Receiver has standing and that an injunction may issue, the settlement itself is inequitable, as not all of the investors in the Parish pools are similarly situated with respect to Charleston Southern University. The proposal does not take into account the personal nature of the claims against CSU, and the proposal should be denied on its merits.

Finally, and at a minimum, should this Court determine that the settlement proposal advanced by the Receiver is appropriate and in the best interests of the Investors who might have personal claims against Charleston Southern, as opposed to the class of investors who have claims against the Parish entities only, the Court should nonetheless require additional financial information from Charleston Southern prior to approving the proposal as it has been presented. Conclusory statements by the Receiver, on behalf of the settling party, that the settlement amount reflects a certain percentage of the liquid assets available to that party should not be sufficient to

enable this Court to conclude that CSU is incapable of making further restitution to injured investors.

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