UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| Securities and Exchange Commission,<br><br>Plaintiff,<br><br>v.<br><br>Albert E. Parish, Jr., Parish Economics, LLC and Summerville Hard Assets, LLC,<br><br>Defendants. | Civil Action No.: 2:07-cv-00919-DCN<br><br>**OBJECTION TO PROPOSED SETTLEMENT OF CLAIMS AGAINST CHARLESTON SOUTHERN UNIVERSITY BY LOUIS MANCUSO, RICHARD BROWN and RYAN BROWN** |

## INTRODUCTION

Louis Mancuso, Richard Brown and Ryan Brown, by and through their undersigned counsel, hereby make and file this objection to the proposed settlement of claims with Charleston Southern University. Louis Mancuso, Richard Brown and Ryan Brown all lost money in the fraudulent investment scheme perpetuated by Defendants. Each has also submitted a claim with the Receiver. Apparently, as a result of submitting these claims, the Receiver forwarded a Notice of Motion via regular mail advising that the Receiver had entered into a proposed settlement and compromise agreement with Charleston Southern University and informing these Claimants that if they objected to the proposed settlement that each must file a written objection with the Court no later than February 20, 2008. The notice further advises that the Claimants' rights may be affected by the settlement, but does not state how and requires that the Claimants appear before the Court at 2:00 p.m. on February 25, 2008. A copy of the Notice and Motion is attached hereto as Exhibit A. Mancuso received a copy of this Motion on February 11, 2008.

## SUMMARY OF GROUNDS FOR OBJECTION

Mancuso, Richard Brown and Ryan Brown object to the proposed settlement on the grounds that the Receiver lacks standing to settle claims with Charleston Southern University

and that the imposition of an order barring any investor claims against Charleston Southern exceeds the authority of the Receiver, the jurisdiction of this Court, and entering such an order will amount to an abuse of discretion. Barring all future claims against Charleston Southern will also violate these Claimants as well as every other investor's right to a jury trial as guaranteed by the Seventh Amendment as well as his right to Due Process. These Claimants object to the procedure by which such investor claims are being extinguished. Particularly, the record fails to establish that the Receiver has issued notice in a manner and means designed to reach all persons potentially affected by this Court's bar order. The content of the notice is also deficient. The notice fails to inform each investor of what amount of money they are likely to receive from the proposed settlement or the procedure by which the settlement money is to be allocated. The notice also fails to specifically state that the investors' claims against Charleston Southern will be barred if the Court approves the settlement. Lastly, the Receiver has provided the investors with less two weeks notice prior to the deadline to file an objection (Mancuso received notice less than 10 days prior to the deadline) This is an insufficient amount of time to allow all affected investors to fully evaluate the proposed settlement and consult with counsel if necessary in order to make a meaningful decision regarding whether to object to same.

## ARGUMENT

### I. The Receiver Lacks Standing to Settle the Investors' Claims Charleston Southern University

An equity receiver may sue only to redress injuries to the entity in receivership. Caplin v. Marine Midland Grace Trust Company of New York, 406 U.S. 416, 434 (1972)(bankruptcy trustee for entity which issued bonds does not have standing to sue an bond trustee on behalf of bond holders and any claim against trustee by the debtor company would be barred by the doctrine of *in pari delicto*); Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995)(like a trustee

in bankruptcy or for that matter a plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093 (2d Cir. 1995)(bankruptcy trustee lacked standing to bring claims predicated on misleading private placement memoranda to investors because those claims belong to the investors and trustee lacks standing to bring malpractice claims against accounting firm because debtors had participated in accounting firm in defrauding investors.); E.F. Hutton & Co. v. Hadley, 901 F.2d 979, 984 (11th Cir. 1990)(claims arising out of Ponzi scheme belonged only to the defrauded investors and the bankruptcy trustee lacks standing to sue); Lank v. New York Stock Exchange, 584 F.2d 61, 67 (2d Cir. 1977)(a receiver stands in the shoes of the corporation and can only assert those claims which the corporation could have asserted).

Recently, the Court appointed Receiver in this action, Hayes was also the court appointed receiver in a matter pending in the Northern District of Georgia where he brought suit against sales agents to recover commissions and bonuses paid for the sale of unregistered securities by the seller for whom he had been appointed receiver. Hayes v. Adam, 512 F.Supp.2d 1330 (N.D. Ga. 2007). The Court determined that the Receiver had standing to sue to recover commissions paid by the entity in receivership. The District Court explained, "Although it is clear that the receiver cannot bring claims directly on behalf of third parties, such as investors, those parties may nonetheless indirectly benefit from the receiver's actions as creditors of the receivership." Scholes v. Lehmann, 56 F.3d at 753; SEC v. Cook, 2001 W.L. 256172 (M.D. Tex. March 8, 2001). Unlike the Adams decision and this Court's previous Order affirming the Settlement with Defendant Parish's wife, Ms. Yoder, the Receiver is not seeking to collect payments made to Charleston Southern University or assets acquired from Parish or Parish Economics by

Charleston Southern University. Charleston Southern is not alleged to be holding any assets of Parish. Rather, Charleston Southern invested and lost over $5 million with Parish.

Here, the Receiver is merely seeking to compromise claims that are owned directly by the individual investors and do not rest with any receivership entity. In the Receiver's Motion in Support of Settlement Approval at p. 13, the Receiver identifies the following causes of action that would most likely be successful under South Carolina Law:

1. Negligent supervision of Parish as a CSU employee;

2. Negligent misrepresentation as a result of the public embrace and affirmation of Parish;

3. Control personal liability in connection with Parish's investment scheme while an employee of CSU.

The Receiver then states that "similar claims have already been asserted in two complaints filed against CSU on behalf of investors and those cases are presently pending in State Court."

As is clearly evident, these claims are not claims of either Parish Economics or Summerville Hard Assets, the two receivership entities. Moreover, even if the receivership entities had a claim against Charleston Southern, any such claim would be barred the doctrine of *in pari delicto*, which is recognized under South Carolina law. See Myatt v. RHVT Financial Corp., 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006)(action brought by corporation's receiver against bank alleging breach of fiduciary duty, constructive fraud and related causes of action and seeking damages arising out of bank's actions regarding corporation's accounts was barred by doctrine of *in pari delicto* where president of both corporations used the corporations to perpetrate a fraud on investors, apparent sole purpose for corporation's existence was to

perpetuate investment scheme and receiver did not make any claim against bank for fraudulent conveyance).

The claims sought to be compromised by the Receiver in this settlement are clearly investor claims. Charleston Southern is attempting to obtain immunity from its civil litigation exposure by entering into this collusive settlement agreement with the Receiver who does not have standing to bring or compromise such claims. The Receiver has therefore exceeded his authority in attempting to bring and settle such claims.

## II. This Court does not have Authority to Issue a Bar Order Enjoining Investor Claims Under the Proposed Settlement Agreement Between the Receiver and Charleston Southern University.

This Court does not have authority to enter a bar order enjoining investors from suing Charleston Southern for state law or federal securities law claims. The Receiver relies upon the All Writs Act to support his request for a bar order. However, the All Writs Act does not provide such authority in this case.

In TBG, Inc. v. Bendis, 36 F.3d 916 (10th Cir. 1994), the Court of Appeals rejected a class settlement of federal securities claims that included an order barring non-settling defendants' contribution claims against the settling defendants. The Court rejected the settling parties' argument that the All Writs Act granted authority to issue such bar orders of contribution claims. The Court explained as follows:

> "We agree with the concurrence, the Ninth Circuit and most other courts that have decided the issue that the Rule 10(b)-5 contribution right entitles a defendant to recover the amount of damages attributable to another party's fault … therefore, if a court or jury properly decides the settling defendants share of the fault and somehow credits that amount to the non-settling defendants, the All Writs Act probably would authorize an order barring future contribution claims because they would necessarily relitigate that issue. However, the finding in which a credit is based precludes relitigation, not the credit itself. If there were only a credit and no

> finding of relative fault, a non-settling defendant would be free to file a subsequent contribution action to recover the difference between the credit awarded and the amount he claims is attributable to the settling defendants fault."

The Court then concluded that a court's power under the All Writs Act is limited to issuance of bar orders that enjoin relitigation of issues already decided by the lower court. The Court further relied upon an 1893 U.S. Supreme Court decision Root v. Woolworth, 150 U.S. 401, 411-412 (1893), wherein the court described the power "to effectuate their own decrees by injunctions … in order to avoid the relitigation of questions once settled between these same parties."

Here, the Receiver and Charleston Southern are seeking a bar order to enjoin all pending and future investors' claims against Charleston Southern. These investors are not parties to this action and have not been made parties to the action. In the class action context, all class members who are bound by the settlement are made parties to the case through notice provisions and providing to class members with an opportunity to opt out. The Supreme Court has held that in the class action settlements of mass tort claims, courts cannot impose mandatory class action settlements that prohibit a putative class member's right to opt out and proceed in an individual action. *See Ortiz v. Fibre Board Corp.*, 527 U.S. 815 (1999). Yet this is exactly what the Receiver and Charleston Southern request that this Court do.

The Fourth Circuit authority relied upon by the Receiver is inopposite. In *Miller v. Brooks,* 315 F.3d 417 (4th Cir. 2003) a court issued an order under the All Writs Act enjoining the enforcement of arbitration award obtained by a party in the District Court proceeding when the Court had accepted continuing jurisdiction over a significant legal issue that was presented in the arbitration proceeding. The Receiver also relies upon *Klay v. United Health Group, Inc.,* 376 F.3d 1092 (11th Cir. 2004). However, in that case, the Court of Appeals reversed the issuance of

an injunction under the All Writs Act as an abuse of discretion. The lower court has enjoined certain parties before it from arbitrating claims that had previously been ruled to be non-arbitrable was an abuse of discretion.

The Receiver relies upon *In Re: Consolidated Welfare Fund ERISA Litigation*, 798 F.Supp. 125 (S.D. NY 1992) in support of its position that a bar order is appropriate to support the Charleston Southern settlement. The *ERISA* litigation involved an action brought by the United States Department of Labor against the Consolidated Welfare Fund of New York alleging that the Welfare Fund violated ERISA. The District Court had appointed a receiver for the fund. The Panel on Multidistrict Litigation consolidated 14 separate federal actions brought against the fund before a single District Court. The District Court then issued a stay of all federal cases. The District Court thereafter, upon request of the Department of Labor, extended the stay to all state actions against the fund. The Court relied upon the authority of the All Writs Act to issue such an order. The differences between the *ERISA* litigation and the Court's order under the All Writs Act and the Receiver's request for bar order in this instance is patent. The District Court's order in the Erisa litigation is akin to this Court's prior order enjoining all litigation against the receivership entities. Such an order was appropriate under the All Writs Act to preserve the jurisdiction of the Court and to provide the Receiver an opportunity to develop a liquidation plan. No such justifications exist for the Receiver's request in this instance to simply provide Charleston Southern complete immunity from investor litigation by paying a ransom to the Receiver.

## III. The Notice Procedure Employed By The Receiver Is Inadequate

The notice procedure employed by the receiver fails to provide these Claimants and all other investors with sufficient information from reach each can make an informed decision regarding whether the proposed settlement is fair. Particularly, the notice fails to describe the manner in which the settlement proceeds are to be divided and the amount of money if any each investor can expect to receive from the settlement. Further, the notice was not sent in sufficient time for the Claimants and other investors to evaluate the fairness of the settlement as to each of them prior to the date for making objections. Most importantly, the notice does not explicitly state that the claimants will forever lose their right to sue Charleston Southern if the settlement is approved. Rather the notice simply states that the rights of the claimant "*may* be affected by the Court's ruling."

In addition, there is insufficient information in the record from which this Court can determine whether the manner in which notice was provided meet with requirements of Due Process.[1] Specifically, was notice mailed to all persons who invested in any of the Parish unregistered securities, or just those persons who have filed a claim to date?[2] What effort, if any, was made to reach those investors who have yet to file a claim? Before this Court can obtain jurisdiction over any person who is to be bound by the bar order contemplated by the settlement, basic Due Process requires notice and an opportunity to be heard. *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). There is nothing filed in support of the Receiver's motion even describing the methods by which notice is being provided to potentially affected persons and entities.

[1] Mancuso and Richard Brown raise these procedural due process issues on behalf of those investors who are putative class members in separate actions filed by them in this Court. *Mancuso v. Battery Wealth et. al. Co.* No: 2:07-CV-952-DCN; *Brown et. al. v. Charles Schwab & Co. Inc.* 2:07-3852-DCN.

[2] Counsel is unaware of any order of this Court setting a bar date by which claims must be filed in order to be considered.

**CONCLUSION**

For the reasons stated herein, Claimants request that the Court deny the Motion to Approve Settlement and for such other and further relief as the Court deems just and proper.

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