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

Securities and Exchange Commission,

Plaintiff,

vs.

Albert E. Parish, Jr.; Parish Economics, LLC; and Summerville Hard Assets, LLC,

Defendants.

C/A No. 2:07-CV-00919-DCN

ORDER and OPINION

This matter is before the court on the receiver's motion to approve the settlement agreement and for related injunctive relief in connection with Legare & Bailey, LLC ("Legare & Bailey"), Daniel O. Legare ("Legare"), J. Mark Bailey ("Bailey"), Gloria S. Legare, Melissa C. Legare, and Christina F. Bailey (collectively, the "Settling Parties"). In the course of his investigation of the facts and circumstances related to the fraudulent investment scheme that is the subject of this SEC enforcement action, the receiver determined that he, as well as the investors who lost money as a result of the investment scheme, have potential claims against the Settling Parties. The receiver began negotiations with the Settling Parties regarding resolution of the receiver's claims, and, as a result of those efforts, the receiver and the Settling Parties have reached a written settlement agreement. That agreement, in addition to providing a substantial monetary settlement to the receiver, also includes a waiver of the Settling Parties' entitlement to payment from the receivership estate. The receiver has agreed to release any claims arising from the scheme that the receivership entities may have against the Settling

Parties. The settlement is conditioned upon this court's entry of a "bar order," which would enjoin the filing of any suit or further prosecution of any previously-filed suit against the Settling Parties relating to Parish's investment scheme. For the reasons set forth below, the court grants the motion, approves the settlement agreement, and issues the bar order.

I. BACKGROUND

1. This enforcement action was filed on April 5, 2007, by the Securities Exchange Commission against Albert E. Parish ("Parish") and Parish Economics, LLC ("Parish Economics"), and Summerville Hard Assets, LLC ("SHA"). The SEC alleged that Parish operated a fraudulent investment scheme in violation of securities laws through Parish Economics and SHA.

2. Pursuant to temporary and preliminary orders dated April 5 and 12, 2007, this court appointed S. Gregory Hays as receiver for the defendants authorizing him to, among other things, pursue all claims which may be brought by receivership entities and settle any of those claims as may be advisable or proper in the administration of the receivership estate.

3. The receiver and the professionals working with him have conducted an extensive investigation of the fraudulent investment scheme conducted by Parish. As more fully set forth in the receiver's interim reports filed with this court, the scheme involved "investment pools" – the Hedged Income Pool, the Stock Pool, the Commodity Futures Pool, and the Hard Asset Pool – which were operated and maintained by Parish Economics and SHA and purportedly managed by Parish. Investors were provided with

periodic reports indicating that each of these pools was yielding high returns and consistently out-performing traditional investments and the market.

4. Parish and Parish Economics expressly represented to investors that, in operating the investment pools, Parish used a confidential, proprietary "mathematical model" developed by him as a part of his research as an economist.

5. Parish Economics was originally formed on December 31, 1996. At the time of its formation, Parish expected that investors would become members of Parish Economics. Parish Economics operated as a partnership for federal income tax purposes from 1998 through 2004, and filed partnership returns for each of those years that included K-1's for investors indicating that they were "Limited Partners" or "other LLC Members." Parish Economics did not file a tax return for 2005 or 2006, but did issue K-1's to investors.

6. Over time, approximately 630 individuals invested in excess of $100 million in the investment pools.

7. On October 5, 2007, Parish entered a guilty plea to two counts of mail fraud and one count of making false statement to an agency of the federal government.

8. As part of his investigation, the receiver and his counsel determined the following with respect to the relationship between Parish and Legare & Bailey and its two principals, Legare and Bailey:

a. From 1997 to 2004, Parish employed Legare & Bailey to prepare income tax returns for Parish Economics. There were significant issues associated with the income tax returns that allegedly should have alerted Legare and Bailey to

Parish's fraudulent activity. In sum, Legare & Bailey received information and representations from Parish that should have raised "red flags" about whether Parish Economics was actually engaged in legitimate investment activities. Rather than looking into issues raised by these "red flags" or insisting upon documentation to verify the accuracy of the information provided by Parish and Parish Economics, Legare & Bailey simply relied upon schedules and other information prepared by Parish.

b. In connection with the preparation of the tax returns for Parish Economics, Legare & Bailey produced a K-1 for each investor. As with the tax returns, Legare & Bailey relied exclusively on Parish's schedules and spreadsheets in preparing the K-1's.

c. In 2003, Parish provided Legare with several years of individual income tax returns, which revealed that Parish's annual income was approximately $76,000. Legare was or should have been familiar with Parish's extravagant lifestyle and knew or should have known that this stated income was far below the amount that would be necessary to support Parish's lifestyle. After receiving unsatisfactory explanations from Parish about the source of his wealth, Legare did not insist upon seeing independent information supporting or verifying Parish's explanations or confirming that investors' money was being properly handled and invested in accordance with the representations made by Parish.

d. Legare was aware that Parish was engaging in like-kind exchanges in one of his "investment pools," the "hard asset pool" pool. Nevertheless, he neither

requested nor reviewed any independent, verifiable information or data regarding these exchanges.

e. Legare was privy to communications between Parish and his attorney in 2004 in which Parish's attorney raised various concerns about the way in which Parish was conducting the business of Parish Economics. Legare did nothing to assure himself that Parish Economics was being run properly.

f. Some of the Settling Parties were investors in one or more of Parish's "investment pools." The receiver contends that, over a number of years, some of those Settling Parties made substantial withdrawals of their investment and ultimately withdrew more than the principal amount of their investment. At least one of these withdrawals was made shortly before this suit was filed.

g. The Settling Parties do not admit that any of the Receiver's factual allegations are true and, in fact, vigorously deny that the Receiver's allegations and conclusions are correct. Significantly, in the context of a settlement, there are no known facts that in any way indicate that any of the Settling Parties were knowingly complicit in the perpetration of Parish's fraudulent investment scheme.

9. Based on his findings, the receiver and his counsel concluded that, as receiver for Parish Economics and SHA, he could assert viable claims against the Settling Parties under South Carolina law. The receiver also concluded that the Settling Parties would likely assert numerous defenses in response to any lawsuit filed by the receiver. In anticipation of filing a lawsuit, the receiver made a settlement demand on the Settling Parties.

10. Even though the Settling Parties deny that any liability to the receiver (or any other claimant), they engaged in settlement negotiations with the receiver, which resulted in the execution of the Settlement Agreement. A copy of the operative agreement, i.e., Settlement Agreement and Mutual Release dated July 15, 2008, is attached to this Order as Exhibit "A" and incorporated herein by reference.

11. Under the circumstances of this case, the terms of the Settlement Agreement are fair and reasonable. In particular:

a. Legare & Bailey has a single $1 million insurance policy that would be available to respond to the types of claims that could be asserted based upon the facts set forth above.

b. A very large percentage (92.5%) of Legare & Bailey's insurance policy is being committed to this settlement. It is very unlikely that Legare & Bailey or its insurer would ever be willing or able to pay significantly more from the policy to resolve numerous potential claims by agreement.

c. The receiver is the only prospective plaintiff that can use the Settling Parties' waiver of claims as "cash" for the benefit of all victims.

d. Once the cost of litigation is taken into account, it is very unlikely that future recovery would net more to victims than the proposed settlement. The cash value of the proposed settlement is $952,000, with $925,000 paid by Legare & Bailey's insurance policy and $27,000 paid by or on behalf of Gloria S. Legare, Melissa C. Legare, and Christina F. Bailey. This $952,000 settlement will inure to the benefit of all aggrieved investors. The court is satisfied that it is highly unlikely

that any other plaintiff or group of plaintiffs could obtain a more favorable financial settlement that could benefit <u>all</u> aggrieved investors.

12. On April 5, 2007, David T. Pearlman ("objecting investor") filed suit in the Charleston County Court of Common Pleas, naming as defendants Parish, Parish Economics, Yolanda Yoder, Wayne Cassaday, and Battery Wealth Management, Inc. Battery Wealth is a financial advising company, of which Legare and Bailey were founding members. The objecting investor claims in his lawsuit that Battery Wealth was reckless, negligent, and breached numerous duties it owed to objecting investor.

13. The objecting investor's claims against any of the Settling Parties are not meaningfully different from the claims that could be asserted by Parish's other aggrieved investors. If the proposed settlement is not approved, it is reasonable to assume that other victims will file suits against the Settling Parties, thereby creating a "race to the courthouse," which is not in the best interest of any victim or other creditor. Moreover, because the settlement proceeds can be administered through the receivership and distributed to all aggrieved investors and other creditors, the result will be far more fair and efficient than having victims compete for recoveries through the prosecution of multiple lawsuits against the Settling Parties. This process will also eliminate the concomitant costs and attorneys' fees that will have to be incurred by the Settling Parties in defending multiple cases.

14. The settlement proposed by the receiver and his counsel guarantees that a substantial recovery will be divided pro rata among all aggrieved investors and at the same time avoids the risks and costs of protracted litigation.

II. DISCUSSION

A. The Receiver's Standing to Assert Claims

The receiver can act only with respect to the assets (including choses in action) of the receivership estate. See Receivership Order at §§ VI, VII. The receiver has no power to assert claims on behalf of aggrieved investors or other creditors of the receivership entities. The objecting investor argues that the receivership estate possesses no causes of action against the Settling Parties and, therefore, the claims the receiver is attempting to settle belong to aggrieved investors or other creditors. However, the receivership estate can assert many potential claims against the Settling Parties that are distinct and separate from claims owned by aggrieved investors and creditors.

The receiver has various causes of action under South Carolina law against the Settling Parties, including professional negligence/malpractice, negligent misrepresentation, unjust enrichment/constructive trust/fraudulent conveyance, and action to set aside conveyances. The receiver has identified various defenses the Settling Parties could assert, including arguments that they did not know (and in the exercise of reasonable care should not have known) that Parish was conducting a fraudulent investment scheme, that Parish intentionally deceived them, that investors relied on Parish, not the Settling Parties, in making their investment decisions, and that they were never engaged to audit, review, or otherwise attest to the accuracy and completeness of the financial records. Although the Settling Parties possess defenses, those defenses do not negate the receiver's standing to assert those claims. Moreover, the receiver and the Settling Parties have properly valued the estate's claims, accounting for defenses, in

reaching this settlement.

The objecting investor argues that the receiver has no standing to assert claims because of the doctrine of *in pari delicto*. "The doctrine of in pari delicto is '[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.'" Myatt v. RHBT Fin. Corp., 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006) (quoting Black's Law Dictionary 794 (7th ed. 1999)). In Myatt, the South Carolina Court of Appeals squarely considered the operation of *in pari delicto* on claims brought by a receiver on behalf of receivership entities that were used to carry on a Ponzi scheme against defendants who assisted in the execution of that scheme. The receiver asserted multiple claims, including breach of fiduciary duty, negligence, and negligent supervision, on behalf of the receivership entities' against a bank that had a business relationship with the orchestrator of the Ponzi scheme. Id. at 393-94, 635 S.E.2d at 546-47. The trial court granted summary judgment to the defendants, concluding that *in pari delicto* barred all of the receiver's claims. See id. The court of appeals agreed, holding "that, in the absence of a fraudulent conveyance case, the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud." Id. at 397, 635 S.E.2d at 548.

The Myatt court expressly relied on a pair of Seventh Circuit decisions that considered the effect of *in pari delicto* in actions brought by a receiver on behalf of receivership entities against co-conspirators in the fraud. In Scholes v. Lehman, Michael Douglas orchestrated a Ponzi scheme using various limited partnerships and corporations he controlled. 56 F.3d 750, 752 (7th Cir. 1995). The federal government brought

criminal charges against Douglas, and he was sentenced to a term of imprisonment on those charges. Id. The SEC also brought a civil enforcement action against Douglas and three of his corporations. The federal district court appointed a receiver for Douglas and the corporations. Id. In an attempt to recover assets of the scheme, the receiver brought fraudulent conveyance claims against Douglas's ex-wife, one of the investors in the scheme, and five religious corporations. Id. at 753. The district court granted summary judgment for the receiver on the fraudulent conveyance claims. Id.

The Seventh Circuit first considered whether the receiver had standing to bring the fraudulent conveyance suit. Id. The court quickly rejected the receiver's argument that he had power to bring claims on behalf of the victims of the Ponzi scheme. Rather, the court reasoned that he only had the power to pursue claims on behalf of the individual and entities that were subject to the receivership. Id. The court further concluded that the receivership entities did in fact have claims against the defendants for fraudulent conveyance because they, as separate legal entities from the orchestrator of the scheme, were harmed by the wrongful transfers. See id. at 754. More importantly for purposes of this case, the Seventh Circuit held the defense of *in pari delicto* did not bar the claims because Douglas–the fraudulent scheme's orchestrator–was not part of the suit. Id. The Seventh Circuit explained:

> [T]he wrongdoer must not be allowed to profit from his wrong by recovering property that he had parted with in order to thwart his creditors. That reason falls out now that Douglas has been ousted from control of and beneficial interest in the corporations. The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies. Freed from his spell they became entitled to return of the moneys—for the benefit not of Douglas but of innocent investors—that Douglas had made the corporations divert to unauthorized purposes. . . . Put

> different, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated.

Id. Thus, the Seventh Circuit concluded the receiver's suit was proper and proceeded to address the remaining issues in the appeal, eventually reversing the district court in part on other grounds. Id. at 763.

The Seventh Circuit revisited Scholes in Knauer v. Jonathan Roberts Financial Group, 348 F.3d 230 (7th Cir. 2003). In an SEC enforcement action, Knauer was appointed as receiver over two entities, Heartland and JMS Investment Group, that were involved in executing a Ponzi scheme. Heartland and JMS were formed by Kenneth R. Payne, who was assisted by Daniel Danker, both of whom were registered representatives of five broker-dealers (the defendants) who the receiver sued on behalf of Heartland and JMS. Id. at 231-32. The receiver asserted various claims against the defendants, including control person liability under the federal securities laws and vicarious liability because Payne and Danker were their agents. Id. at 232. The district court granted the defendants' motion to dismiss, concluding the receiver had no standing to assert claims on behalf of investors and that *in pari delicto* barred the claims the receiver asserted on behalf of the receivership entities. Id. at 233.

The Seventh Circuit affirmed. In doing so, the court distinguished Scholes because the receiver in that case had brought fraudulent conveyance claims:

> This case . . . presents a different equitable alignment [than Scholes]. The key difference, for purposes of equity, between fraudulent conveyance cases such as Scholes and the instant case is the identities of the defendants. The receiver here is not seeking to recover the diverted funds from beneficiaries of the diversions (e.g., the recipients of Douglas's transfers in Scholes). Rather, this is a claim for tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to claim for their

> occurrence. In the equitable balancing before us, we find Scholes less pertinent than the general . . . rule that the receiver stands precisely in the shoes of the corporations for which he has been appointed.

Id. at 263. Because the Seventh Circuit concluded that the receivership entities' fault for the wrong was at least equal to the parties they were suing, *in pari delicto* prevented their suit to recover damages incurred as a result of the Ponzi scheme. Id. at 267.

The receiver has standing to assert any claims held by the receivership entities against the Settling Parties, including claims for professional negligence/malpractice, negligent misrepresentation, unjust enrichment/constructive trust/fraudulent conveyance, and action to set aside conveyance. If the receiver brought those claims against the Settling Parties, they would certainly raise *in pari delicto* as a defense. Under Myatt, *in pari delicto* may bar the receiver's non-fraudulent conveyance claims. However, the receivership entities (and, consequently, the receiver) possess valid fraudulent conveyance claims that are included as part of the settlement agreement. Parish has been removed from control over Parish Economics and Summerville Hard Assets. Thus, under the South Carolina Court of Appeals' decision in Myatt and the Seventh Circuit's decision in Scholes, the receiver can bring claims on the entities' behalf for fraudulent conveyance without implicating *in pari delicto*.

B. The Court's Power to Enter a Bar Order

Before determining whether the settlement, in conjunction with a bar order, is in the best interest of the receivership entities and their creditors, it is first necessary to determine whether the court has the power to issue a bar order enjoining new or existing litigation. The All Writs Act authorizes federal courts to "issue all writs necessary and

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. This includes the authority "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." In re Am. Honda Motor Co., Inc., Dealerships Relations Litig., 315 F.3d 417, 437-38 (4th Cir. 2003) (internal quotations omitted) (quoting Penn. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40 (1985)).

A "district court has within its equity power the authority to appoint receivers and to administer receiverships." Gilchrist v. Gen. Electric Capital Corp., 262 F.3d 295, 302 (4th Cir. 2001) (citing Fed. R. Civ. P. 66). Moreover, a "district court has within its equity power the authority to protect its jurisdiction over a receivership estate through the All Writs Act, 28 U.S.C. § 1651, and through its injunctive powers, consistent with Federal Rule of Civil Procedure 65. Of course, the exercise of this authority is always subject to other limitations, statutory and constitutional, which limit the jurisdiction of federal courts." Id. By appointing a receiver in this matter, the court created a receivership estate over which it has *in rem* jurisdiction. Id. That jurisdiction extends to all assets of the estate, including choses in action. See id. Accordingly, this court has the power under the All Writs Act to issue injunctions in order to protect the estate's choses in action against the Settling Parties (including any settlement reached in connection with those claims).

The power conferred by the All Writs Act extends beyond merely issuing injunctions that are necessary to carrying out the district court's jurisdiction. Application

of the All Writs Act is "not limited to those situations where it is 'necessary' to issue the writ or order in the sense that the court could not otherwise physically discharge its . . . duties." United States v. N.Y. Tel. Co., 434 U.S. 159, 173 (1977). Rather, a district court may issue an injunction when "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it." Adams v. United States, 317 U.S. 269, 273 (1942). Finally, the court has the power to extend the injunction to third-parties who are not parties to the action nor were involved in the wrongdoing: "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice and encompasses even those who have not taken any affirmative action to hinder justice." N.Y. Tel., 434 U.S. at 174 (internal citations omitted).

Having concluded that the court possesses the power to issue the bar order, the propriety of issuing such an order is discussed below as part of considering the sufficiency and fairness of the agreement as a whole.

C. Sufficiency and Fairness of the Agreement

The primary purpose of an equitable receivership is the marshaling of the estate's assets for the benefit of all the aggrieved investors and other creditors of the receivership entities. See SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986) ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors.") In administering the receivership, the district court has "broad discretion" to take actions it deems appropriate to effectuate the

purpose of the receivership. See United States v. Vanguard Inv. Co., 6 F.3d 222, 226-27 (4th Cir. 1993).

The proposed settlement is consistent with and furthers the purposes of the receivership. The settlement proceeds, which total $952,000, will ultimately be part of the distribution to the victims of Parish's fraudulent investment scheme. While the settlement will not fully restore the victims and other creditors, its proceeds represent a considerable addition to the amount that will be distributed by the receiver. The receiver has appropriately determined the settlement value of his claims against the Settling Parties and, by reaching this agreement at this early date, will save the receivership from the expenses of protracted litigation.

This settlement is also a fair and efficient means of distributing compensation that may be owed by the Settling Parties to all of the receivership entities' creditors, especially victims. The fairness of this solution is clear in light of the alternative. Victims could bring individual suits against the Settling Parties, which would require expensive and protracted litigation. If litigation were pursued, victims would face an uncertain outcome and perhaps, years later, could recover nothing. The amount of resources it would take for tens if not hundreds of victims to individually pursue claims against the Settling Parties demonstrates the economic irrationality of individual litigation relative to the receivership process. Given the costs and duration of litigation, many victims would choose not to pursue claims against the Settling Parties, leaving them with only part of the recovery to which they would otherwise be entitled. The receiver has been able to negotiate a fair, global settlement with the Settling Parties that

assures that all victims will realize relatively timely compensation. Failing to approve this settlement would result in a drawn-out, inefficient, and chaotic administration of justice, assuming justice in those circumstances could be achieved at all.

If victims choose to pursue individual litigation, there will certainly be a "free for all" competition to obtain recovery against the Settling Parties. That "race to the courthouse" will likely result in disparate outcomes, which would be inapposite to the goals of this receivership and would likely impair the receiver's and, ultimately, this court's ability to fairly administer the receivership estate for the benefit of all victims. To preserve the court's equitable powers, particularly the power to establish a fair and efficient scheme for administering the estate and distributing its assets to the aggrieved investors, it is necessary to enter the bar order. Thus, the court finds it appropriate and necessary to enjoin the further filing of claims and/or continued prosecution of claims pending against the Settling Parties that relate to or arise from the investment schemes that are the subject of this action.

The court recognizes that the Anti-Injunction Act generally prohibits this court from enjoining the prosecution of pending state-court actions. See 28 U.S.C. § 2283. Although the Act does not apply to suits have that not yet been filed, at least one investor has already filed suit against the Settling Parties or related entities. There is a clear exception to the Act, however, when the injunctive relief is necessary in aid of the district court's jurisdiction. See id. Because the entry of the bar order is necessary to preserve and aid this court's jurisdiction over the receivership estate, the court finds that the Anti-Injunction Act does not prohibit an injunction against pending investor suits.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED**:

1. The settlement between the receiver and the Settling Parties, as specifically provided for in the Settlement Agreement and Mutual Release dated July 15, 2008, is hereby approved and the parties are directed to perform in accordance with its terms.

2. Any and all persons or entities, including those who purchased investments from Parish or any of the other receivership entities, are hereby enjoined from the filing and/or continued prosecution of any claims or causes of action, including, but not limited to, claims by investors in and creditors of defendants against Legare & Bailey, LLC, Daniel O. Legare, Gloria S. Legare, Melissa C. Legare, J. Mark Bailey, Christina F. Bailey, their heirs, successors, agents or assigns arising out of or in any way connected with: (a) the investment-related activities of Parish, Parish Economics and/or Summerville Hard Assets or any affiliated "investment pool"; (b) professional services rendered by Legare & Bailey, LLC, Daniel O. Legare, and/or J. Mark Bailey; and/or (c) any investment made by any person or entity in the investment pools that are the subject of this enforcement action.

3. Nothing in this order is intended to nor should be construed to release, limit or otherwise modify any right, claim or defense that the receiver or any individual investor (including individuals employed by or affiliated with the Settling Parties) might have with respect to individual claims filed with the receiver to recover their or their family's individual investment losses as a part of the receivership claims administration

process. Any party, attorney or other person who acts in a manner contradictory to this order shall subject to such remedies for contempt as the court may deem appropriate. This court shall retain exclusive jurisdiction over the parties with respect to any disputes related to the interpretation and performance of the settlement agreement.

4. Nothing in the settlement agreement or this order shall operate to in any way release, waive or limit the receiver's rights, if any, to pursue claims against other third parties.

5. This court finds that there is no just reason for delay for an entry of a final judgment as to the approval of the settlement and bar order and directs the entry of judgment pursuant to Fed. R. Civ. P. 54(b).

AND IT IS SO ORDERED.

DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

March 23, 2009
Charleston, South Carolina