

**UNITED STATES DISTRICT COURT DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

|                               |   |   |
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| SECURITIES AND EXCHANGE       | ) |   |
| COMMISSION,                   | ) | <b>Civil Action No.:07-cv-00919-DCN</b> |
| Plaintiff,                    | ) |   |
|                               | ) |   |
| v.                            | ) |   |
|                               | ) |   |
| ALBERT E. PARISH, JR., PARISH | ) |   |
| ECONOMICS, LLC, and           | ) |   |
| SUMMERVILLE HARD ASSETS, LLC, | ) |   |
| Defendants.                   | ) |   |
|                               | ) |   |
|                               | ) |   |
|                               | ) |   |

**TO: TO MERLE R. ARNOLD, III, ATTORNEY FOR THE RECEIVER:**

**OBJECTION TO RECEIVER'S MOTION TO APPROVE  
SETTLEMENT AND FOR RELATED INJUNCTIVE RELIEF**

This Objection is submitted on behalf of L.G. Elrod, Mary Elrod, Tommie Williams, Amy Williams and Jerry R. Williams, (hereinafter "Objectors") by and through their undersigned counsel, in response to Receiver, S. Gregory Hays' (hereinafter "Receiver") Motion to Approve Settlement and For Related Injunctive Relief filed pursuant to 28 U.S.C. 1447.

**INTRODUCTION**

The proposed Settlement is a disguised attempt by the Receiver to resolve claims that are those of certain investors not of the Receiver Estate. The Receiver Estate has no claim or cause of action against Charleston Southern University. The Receiver lacks standing to bring a claim on behalf of the investors. Moreover, the Receiver's proposed settlement is detrimental to those investors that have claims against CSU, versus those investors that do not.

### ORDER APPOINTING RECEIVER

This Court's Order appointing the Receiver provides in pertinent part:

Defendants Parish, Parish Economics, and Summerville Assets and their assets, are collectively referred to herein as 'the Receiver Estate.'...

To receive and collect any and all sums of money due or owing to Defendants Parish, Parish Economics and Summerville Assets whether the same are now due or shall hereafter become due and payable, and is authorized to incur such expenses and make such disbursements as are necessary and proper for the collection, preservation, maintenance, administration and operation of the Receiver Estate...

To the broadest extent allowed under applicable law, the Receiver, in his sole discretion, is authorized to file and prosecute any civil action or other proceeding that could be filed by a receiver, generally, or by any defendant subject to this Receivership...

### ARGUMENT

#### A. The Receiver Estate has no claim against Charleston Southern University

In 1935 the United States Supreme Court recognized that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *McCandless v. Furlaud*, 296 U.S. 140, 148, 56 S.Ct. 41, 80 L. Ed. 121 (1935). The progeny of *McCandless* have recognized the general rule that a receiver acquires no greater rights and powers to sue than the person or entity whose property is in the receivership. *See Javitch V. First Union Sec., Inc.*, 315 F.3d 619, 625(6<sup>TH</sup> Cir. 2003) ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.") (citations omitted).

The Receiver asserts that the Receiver Estate has claims against CSU as other investors do for negligence supervision, negligent misrepresentation and violation of §35-1-59(g)(10) and (2). Nothing could be less plausible.

The Receiver only has claims that the Receiver Estate, Al Parish, Parish Economics and Summerville Assets have. None of these entities placed investments with the Receiver Estate as the third party investors did. None of these entities have been damaged by the acts or omissions of Al Parish. Al Parish cannot argue that due to CSU's negligent supervision of him, he suffered damage. Al Parish cannot claim CSU made negligent misrepresentations to him thereby causing him damage. The receiver may only assert claims that could have been asserted by these entities. These entities have no claims against CSU.<sup>1</sup>

**B. The equitable powers of this court cannot be extended to permit the Receiver to resolve claims that in reality are third party claims in favor of certain investors for which the Receiver has not authority or standing to assert or compromise.**

The reality of the proposed settlement is not a resolution of claims in favor of the Receiver Estate but rather a resolution of investors third party claims. The Receiver lacks standing to institute action on behalf of investors or to resolve investors third party claims. *See*, 13 Moore's Federal Practice § 66.08[1][b] (3d ed. 2005).

In *Javitch v. First Union Sec., Inc.*, 315 F. 3d 619 (6<sup>th</sup> Cir. 2003) the court emphasized that "although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors." 315 F.3d at 627 (citing *Jarrett v. Kassel*, 972 F.2d 1415, 1426 (6th Cir. 1992)). In *Jarrett*, for a limited time in the early 1980's, the plaintiffs purchased contracts for the future delivery of coal from an organization named National Coal Exchange ("NCE"). 972 F.2d at 1417. The plaintiffs alleged that NCE sold the future contracts without having the means of acquiring the coal necessary to fulfill contractual obligations. *Id.* In 1981, the Commodity Futures Trading Commission ("CFTC") filed suit against NCE, alleging violations of the Commodity Exchange Act. *Id.* The

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<sup>1</sup> Objectors incorporate herein all arguments made on behalf of Objector Steven L. Smith in his Memorandum in Opposition to Proposed Settlement of Claims by reference herein.

district court appointed a receiver for NCE and the other companies that were involved in the scheme. *Id.* at 1418. The Receiver sought and obtained permission from the court to file suit on behalf of NCE's customers against the officers of NCE and another entity for conspiracy to defraud NCE's customers. *Id.*

The court held that the receiver "did not have general authority to take legal action on behalf of NCE's customers." *Jarrett*, 972 F.2d at 1426 (citation omitted). They noted that while the receiver is charged with the limited authority to protect the investors interests in the receivership property, the receiver nevertheless does not have the authority to represent the interests of the investors. *Id.* Accordingly, the receiver only had the authority to sue on behalf of the receivership itself, "but had no authority to bring a cause of action on behalf of the individual customers." *Id.* (emphasis added) (A proposition is replete in federal appellate case law. *See, e.g., Goodman v. F.C.C.*, 182 F.3d 987, 991 (D.C. Cir. 1999); *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997); *Miller v. Harding*, No. 00-1245, 2000 WL 1792990, at \*2 (1st Cir. Dec. 5, 2000).

Similarly, in *Scholes v. Schroeder*, 744 F. Supp. 1419, 1420-23 (N.D. Ill. 1990), an appointed receiver attempted to raise claims "framed in terms of alleged fraud on the investors." The court precluded the receiver from pursuing the claims reiterating the principle cited in *Jarrett*, that "[f]raud on *investors* that damages those *investors* is for those *investors* to pursue-not the receiver. By contrast, fraud on the *receivership entity* that operates to *its* damage is for the *receiver* to pursue." *Id.* at 1422. The court further noted that a district court's authority with respect to appointing a receiver is limited by Article III constraints. *Id.* at 1421. Accordingly, the district court was not empowered to authorize the receiver to bring suit on behalf of the investors. *Id.* More succinctly, the court held that to the extent that the orders appointing the receiver purported to confer power on him

to sue directly on behalf of investors, those orders exceeded the judiciary's power and would not be enforced. *Id.* at 1423.

The limitation on the district court's authority to authorize a receiver to act is supported by other precedent. In *Marwil v. Farah*, No. 1:03-CV-0482-DFH, 2003 WL 23095657, at 7 (S.D. Ind. Dec. 11, 2003), the court held that an appointed receiver lacked standing to represent injured investors directly. *Id.* at 1. The court reasoned that notwithstanding the language of the receivership court order that enabled the receiver "to assert Causes of Action on behalf of Noteholders" and ordered him "to ensure that the Investors are made whole with respect to the funds they invested with [CEG]," *id.* at 3, 5, the court lacked the authority to transfer property-including causes of action from the investors to the receiver, *id.* at 5. The court emphasized that to hold otherwise would extend a district court's jurisdiction beyond the confines of Article III. *See id.* at 5-6. *See Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24-25 (1st Cir. 1990) (holding that although the district court empowered the receiver "to prevent irreparable loss, damage and injury to commodity customers and clients," the receiver lacked standing to sue for claims belonging to investors, such as violations of the Commodity Exchange Act); *B.E.L.T., Inc. v. Lacrad Intern. Corp.*, No. 01 C 4296, 2002 WL 1905389, at \*1-2 (N.D. Ill. Aug. 19, 2002) (holding that the receiver for a corporation had no standing to sue for, inter alia, receipt of funds fraudulently obtained, fraud, and unjust enrichment even though he was appointed "on behalf of all the creditors," because those were claims of the creditors, not of the corporation); *Scholes v. Tomlinson*, Nos. 90 C 1350/6615/7201, 89 C 8407, 1991 WL 152062, at \*2 (N.D. Ill. July 29, 1991) (modifying the order appointing the receiver such as "to omit any other language in the order which purports to confer authority upon the Receiver to institute actions belonging to the investors, clients, or account holders of the receivership entities" in light of the rule set forth in *Scholes*).

In *Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230 (7th Cir. 2003) a case dealing with a Ponzi scheme, the Seventh Circuit stated "we believe the district court was probably correct in concluding that [the receiver] had no standing to pursue the Ponzi sales claims...Any claim relating to the fraudulent sales rightfully belongs to the wronged investors." *Id.* at 234. Such is the same here.

Again the subject proposed resolution of claims by the Receiver are not claims of the Receiver Estate. The Receiver as much concedes it is resolving the claims of investors by its statement "*it provides for an orderly and effectively way to administer the monies paid by CSU for the benefit of all investors...The reality is that the settlement with the Receiver is the best and, quite likely, the only way for all investors to benefit from a recovery against CSU*" (Receiver Motion to Approve, p. 17)(emphasis added). Indeed any claims that exist are the claims of investors against an independent third party. In a rather surreptitious way the Receiver is attempting to effect the rights of the investors for which he has no authority or standing to do. Stated differently, the Receiver is attempting to expand his authority outside of the confines of authority granted to this court by Article III. The claims against CSU lie in favor of the investors and are only for the investors to pursue in their discretion. The Receiver has no authority to resolve the claims of third parties therefore the settlement cannot be approved nor can the Receiver be permitted to interference with investors independent causes of action.

**C. The proposed resolution is antagonistic to the interests of certain investors.**

In support of its position the Receiver implies that all investors have a claim against CSU. He claims all investors will then suggest the funds be distributed in an equitable manner to all investors. The funds cannot be distributed in an equitable manner to all investors since all investors do not have a claim against CSU.

The interests of certain investors are antagonistic to the interests of other claims. Contrary to the position of the Receiver, not all investors have claims against CSU. The possible claims against CSU by investors are fact specific. The investors with claims are those investors that conducted business with Parish on CSU facilities. Investors that conducted business with Parish completely outside the confines of CSU property do not have a claim against CSU. Furthermore, due to the distinction amongst claims and competing interest, the claims cannot be brought in a representative capacity (i.e. class action). Thus, the proposed resolution by the Receiver is inequitable to those investors that do have claims and have the right to pursue those claims individually.<sup>2</sup>

**D. The Receiver's reliance on the All Writs Act is misplaced.**

The Receiver cites to general authority relating to the application of the All Writs Act claiming this court can enjoin the action of investors in their pursuit of claims against third parties since such actions will frustrate the implication of this Court's Order appointing the Receiver. There is nothing that the actions of investors could do in the pursuit of their claims against third parties that would frustrate this Court's Order of receivership.

As noted above federal precedent establishes that this Court cannot extend its jurisdiction permitting the Receiver to assert claims on behalf of investors that belong to investors. "The All Writs Act only authorizes such orders in aid of the court's jurisdiction. (28 U.S.C. §16519A). It does not authorize the court to assume jurisdiction over claims not otherwise before the court." *TBG, Inc. v. Bendis*, 36 F. 3d 916 (10<sup>th</sup> Cir. 1994).

The Order of Receivership defines the Receiver Estate and only takes jurisdiction over the Receiver Estate. The Receiver's requested relief is outside the confines of the Receivership Order

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<sup>2</sup> What the Receiver is promoting is a mandatory class action of which investors cannot opt out. Rule 23, FRCP does not favor such a result.

and does not involve receivership property. Thus, this Court's equitable powers cannot be extended to preclude investors from pursuing third party claims which are not part of the Receivership Estate and have no affect on the Receiver Estate's rights.

**E. The Anti-Injunction Act does apply.**

The Receiver is not asking this Court to act within its jurisdictional limits; but rather, to extend the jurisdiction granted to it. Thus, for the same reasons set forth above describing how this court lacks jurisdiction over the third party claims of investors, the Anti-Injunction action precludes this Court from enjoining the pending state court actions.

**CONCLUSION**

WHEREFORE, for all of the foregoing reasons, the Objectors respectfully request that this Court deny the relief sought by the Receiver.

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February 20, 2008  
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