IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BILLY WAYNE McCLINTOCK, and DIANNE ALEXANDER, Defendants, MSC HOLDINGS USA, LLC; MCS HOLDINGS, INC.; and MSC GA HOLDINGS, LLC, Relief Defendants.	:	CIVIL ACTION NO. 1:12-CV-4028-SCJ

ORDER

This case arises out of a complaint filed by the Securities and Exchange Commission ("SEC") Defendants Diane Alexander and Billy Wayne McClintock, alleging that Defendants perpetrated a Ponzi-type scheme through Relief Defendants MSC Holdings USA, LLC; MCS Holdings, Inc.; and MSC GA Holdings, LLC ("the Receivership Entities"). See Doc. No. [1]. After having recovered some of the funds lost by "investors" in Defendants' scheme, the Receiver, Jason Nohr, filed a Motion for the Approval of a Plan of Distribution and First Interim Distribution (Doc.

No. [118]) and an Amended Motion (Doc. No. [132]) also pertaining to the plan of distribution and interim distribution.

On March 31, 2017, the Court ordered any claimant with objections to the distribution plan to make their objection within 30 days and gave the Receiver 14 days in which to respond to any objections. Doc. No. [141]. The Court received a variety of documents that it has construed as objections to the proposed distribution plan. Docs. No. [120], [125], [126], [127], [129], [130], [137], [138], [140], [144], [145], [146]. The Receiver has filed his response (Doc. No. [147]), and this matter is now ripe for review.

A. Objections of Huong Thu Nguyen and Vinh Thanh Nguyen

On September 27, 2013, the Receiver sent a letter to Huong Thu Nguyen and Vinh Thanh Nguyen ("the Nguyens") stating that the records in the possession of the Receiver indicated that the Nguyens "paid the Defendants $400,000." Doc. No. [120], p. 4. However, the claim amount submitted by the Nguyens—an amount that was allowed in full—was $100,000. Id. p. 2. The Nguyens now claim that "they did in fact give Dianne Alexander $400,000." Doc. No. [126], p. 1. In support of this position, they rely on the September 2013 letter from the Receiver and a handwritten note from signed by Defendant Alexander purporting that Vinh Thanh Nguyen paid "$300K cash" on December 13, 2011. Id. pp. 3, 9.

The reason for the discrepancy between the amount in the September 2013 letter and the claim amount ultimately approved is simple. As noted in the September 2013 letter, the Receiver was just beginning to undertake "efforts to verify payments, investments, and distributions to and from the Defendants." Id. p. 3. While the letter suggested that the Nguyens had paid $400,000, it expressly contemplated that the figure may be incorrect. Id. p. 4. The letter further stated that the Nguyens could submit supporting documentation as to the amount they paid, such as "copies of cancelled checks, deposit tickets, bank statements, and/or electronic transfer receipts," and stated that amounts "that are unsupported by documentation will not be considered by the Receiver." Id. Upon further investigation, the Receiver discovered that Defendant Alexander's personal records "were unreliable, inaccurate, and could not be corroborated by independent banking records." Doc. No. [147], p. 6. In his review of bank records and other independent sources, the Receiver "could not verify an net investment by the Nguyens that exceeded $100,000." Id.

Although the Nguyens repeatedly assert that they did in fact pay Defendant Alexander $400,000, the only evidence they submit in support of their position are the records of Defendant Alexander. See Doc. No. [126], pp. 1, 9; Doc. No. [146]. However, the Receiver's decision to rely on verifiable, independent records is a reasonable and equitable one. As of at least September 2013, the Nguyens were on

notice that amounts "that are unsupported by documentation will not be considered by the Receiver." Doc. No. [126], p. 4. The Nguyens were also informed of the kind of documentation the Receiver would rely on—verifiable banking records such as "copies of cancelled checks, deposit tickets, bank statements, and/or electronic transfer receipts." Id. These sources only showed that the Nguyens deposited $100,000, not the $400,000 that they now claim. Doc. No. [147], p. 6. Because the Nguyens have no independent proof that they gave Defendants $400,000, the $100,000 allowed claim amount in the proposed distribution plan is proper.

B. Objections of Thu Nguyen, Huong Bui, and Phy Nguyen

Like the Nguyens, claimants Thu Nguyen, Huong Bui, and Phy Nguyen ("the Bui/Nguyen claimants") were told in September 2013 that Defendant Alexander's records showed they paid $165,000, but the claim amount ultimately allowed was only $110,000. Doc. No. [127], pp. 19, 21. This $55,000 discrepancy is due to the Receiver's decision not to count the Bui/Nguyen claimants' alleged "second general performance agreement." See id. p. 1. As proof that they gave Defendants the $55,000 in consideration of the "second general performance agreement," the Bui/Nguyen claimants submit a handwritten note by Defendant Alexander indicating that she received $25,000 in cash, and a wire transfer request to send $30,000 to MSC GA Holding, LLC. Id. pp. 1, 7, 10.

The Receiver first notes that the records the Bui/Nguyen claimants now submit in support of their second general performance agreement were never previously submitted to the Receiver for consideration. Doc. No. [147], p. 7. Even considering the records, however, they are insufficient documentation. Again, handwritten notes by Defendant Alexander, standing alone, are cannot demonstrate that such funds were actually paid to the Receivership Entities. Moreover, while the Bui/Nguyen claimants submit the handwritten wire transfer requests for both a $110,000 transfer and a $30,000 transfer, they only submit a receipt proving the $110,000 transfer. See Doc. No. [127], pp. 3–9. The Receiver's independent review of the Receivership Entities' banking records shows the $110,000 wire transfer, but reveals no evidence of the alleged $30,000 transfer. Doc. No. [147], p. 7. Under the circumstances, the Court believes that the Receiver's decision to only credit the Bui/Nguyen claimants with the verifiable $110,000 transfer is equitable and just.

C. Objections of Kimberly and Michael Strickland

Rather than objecting to the amount of their allowed claim, Claimants Kimberly and Michael Strickland ("the Stricklands") object to the order in which they will be paid. Doc. No. [147], pp. 15–16. As a brief background, the distribution plan recognizes six classes of claimants. See Doc. No. [118], pp. 29–32. The first two classes are for tax claims and administrative expenses of the Receivership Entities. Id. p. 29.

Class 3 claimants are those investors who did not receive referral fees or "who timely repaid referral fees." Id. p. 30. Investors who failed to timely repay referral fees are subordinated into Class 4. Id. Class 5 is for claimants who submitted their claim forms after the deadline established by the Court, and Class 6 is for claimants who *both* failed to timely repay referral fees and submitted a late claim form. See id. p. 31. Each successive class is paid only after the proceeding classes have been paid.

The Stricklands are currently treated as Class 4 claimants because they did not timely repay their referral fees. Doc. No. [147], pp. 15–16. However, the Receiver suggests that the Court treat the Stricklands as Class 3 claimants because they repaid their referral fees after only a *de minimis* delay. Id. p. 16 n.4. In just over a week after receiving the complaint against them seeking to recover the referral fees, the Stricklands had repaid the fees in full. Id. The Receiver also notes the Stricklands' lack of legal counsel, lack of familiarity with the legal process, and personal and family hardships. Id. pp. 17–18. The Court is inclined to agree. When a company is placed in receivership, district courts have "broad powers and wide discretion" in deciding how to dispose of the company's assets to fashion equitable relief. S.E.C. v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992). The Court concludes, in its discretion, that it would be inequitable to treat the Stricklands as Class 4 claimants, since they repaid their referral fees after only a minor delay.

D. Objections of Stephen and Tonya Carr

Stephen and Tonya Carr ("the Carrs") also object to their treatment as Class 4 claimants, arguing that they should be treated as Class 3 claimants. Doc. No. [129], pp. 1–2. They concede that, like the Stricklands, they did not repay any money toward the referral fees they received until after the Receiver filed suit against them. See id. pp. 3–6. However, unlike the Stricklands, the Carrs did not repay their referral fees until after reaching an agreement with the Receiver at mediation on November 19, 2015 – well over a year after the deadline for repaying all referral fees. Id. pp. 5–6; see also Doc. No. [147-3], p. 2. Nevertheless, the Carrs argue that the settlement agreement they reached with the Receiver entitles them to treatment as Class 3 claimants regardless of the fact that they did not timely repay the referral fees. Doc. No. [129], pp. 6–8.

Specifically, the settlement agreement at issue provides that the Receiver will not argue that the Carrs' claim "should be prejudiced in any way as a result of their asserting defenses in [the case filed by the Receiver]." Doc. No. [129-1], p. 4, ¶4. The Carrs argue that the Receiver is punishing them for asserting their defenses by treating them as Class 4 claimants. Doc. No. [129], p. 6. However, the same paragraph of the settlement agreement also provides that the Receiver "makes no representation about . . . the relative priority of [the Carrs'] claim." Doc. No. [129-1], p. 4, ¶4. The

Receiver argues that this part of the provision demonstrates that the Carrs received no promise as to which class they would be assigned. Doc. No. [147], pp. 11–12. In support of his position that the Carrs are not being punished for asserting their defenses, the Receiver notes that the Carrs have been treated as Class 4 claimants just like the Stricklands, who also failed to timely repay the referral fees but did not assert any defenses. Id. p. 12 n.3.

The Court would be inclined to agree with the Receiver's position that the Carrs are not being punished for asserting their defenses and have been treated the same as any other claimant who failed to timely repay referral fees. However, the Receiver is arguing that the Stricklands should be treated as Class 3 claimants because they repaid the fees "after only a *de minimis* delay," while the Carrs should remain Class 4 because they took longer to repay their fees. See id. p. 12 n.3. The Carrs took longer to repay their fees than the Stricklands precisely because they asserted defenses in the litigation and only entered into an agreement with the Receiver at mediation on November 19, 2015. See Doc. No. [129], pp. 4–6. Thus, to keep them as Class 4 because they "took longer" to repay the fees is to prejudice them for asserting their defenses. Since the Stricklands are to be reclassified as Class 3 claimants, then the Carrs should be as well.

E. **Objections of Daphne Swilling, Cindy Jang, Nancy Cheek, Tom and Jamie Poeling, and George and Mary Cuvar**

Claimants Cindy Jang, Nancy Cheek, Tom and Jamie Poeling, and George and Mary Cuvar have been classified as Class 5 claimants because they did not timely submit their proof of claim form. See Doc. No. [147], pp. 18–20. Claimant Daphne Swilling is treated as a Class 6 claimant because in addition to failing to submit a timely proof of claim form she also failed to timely repay her referral fees. Id. p. 18. None of the arguments of these claimants demonstrate that the claimants should be given more favorable treatment.

Ms. Swilling did not pay her referral fees in a timely manner, and did not submit her proof of claim form until over six months after the deadline established by the Court. See id.; see also Docs. No. [112], [147-4]. She argues that her failure to respond in a timely fashion should be excused because the documents sent to her "might as well been written in Greek with dates connected with penalties." See Doc. No. [137], p. 2. While the Court certainly has sympathy for the difficulty faced by *pro se* litigants, even *pro se* litigants must comply with orders of the Court, procedural rules, and deadlines. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989) (holding that when a *pro se* litigant fails to comply with an order "he is and should

be subject to sanctions like any other litigant"). Thus, Ms. Swilling's argument does not excuse her non-compliance with the deadline established by the Court.

Likewise, Ms. Cheek's failure to submit a timely claim form is not excused by the fact that she "depended on a responsible person to advise [her]." See Doc. No. [140], p. 1; see also Mekdeci By & Through Mekdeci v. Merrell Nat. Labs., a Div. of Richardson-Merrell, Inc., 711 F.2d 1510, 1522–23 (11th Cir. 1983) (noting that a civil litigant does not "have a protected right to competent representation," and that the remedy for poor representation lies against the party providing the poor advice). Far from proving that she should receive more favorable treatment, Ms. Jang's objection definitively shows that she failed to submit the claim form in a timely fashion. See Doc. No. [138]; see also Doc. No. [112]. The argument of Tom and Jamie Poeling, that they did not submit their claim form in a timely fashion because they were concerned that "filing a claim would result in financial repercussions," does not excuse their failure to comply with the Court's order. See Doc. No. [144], p. 2.

George and Mary Cuvar have a much more persuasive argument for why they should receive more favorable treatment. Around the time the claim forms were due, Mr. Cuvar was suffering from failing health—undergoing two open heart surgeries. Doc. No. [145], p. 1. Mr. Cuvar ultimately passed away in March 2017. Doc. No. [145-1]. While the Court has great sympathy for the unfortunate circumstances,

Mr. Cuvar's poor health does not fully explain why Mrs. Cuvar—the person who actually submitted the claim form—waited until over six months after the deadline imposed by the Court to submit the claim form. Moreover, there is no indication that the Cuvars ever made the Receiver aware that they would be submitting their claim form late. See Doc. No. [145]. Simply put, the Court concludes that the Cuvars, like the other claimants above, are properly classified because they did not submit their claim forms in accordance with the Court's order.

F. **Objections of Don Q. Nguyen**

Finally, Don Nguyen objects that his claim amount of $100,000 has been disallowed entirely. See Doc. No. [130]. The only evidence he has in support of his assertion that he invested $100,000 is a copy of a "general performance agreement" that was in Defendant Alexander's records. See id. p. 3; see also Doc. No. [147-9], p. 6. According to the Receiver, Don Nguyen claims that he "met Alexander at some unidentified location between Ohio and Georgia and delivered [the $100,000] in cash to her." Doc. No. [147], pp. 20–21. However, the Receiver's review of the independent banking records reveals no deposit of this money into the accounts of the Receivership Entities. Id. p. 21. Because Don Nguyen provided no verifiable proof of the transaction, the Receiver properly disallowed his claim.

CONCLUSION

Accordingly, the Receiver's Motion for the Approval of a Plan of Distribution and First Interim Distribution (Doc. No. [118]) and an Amended Motion (Doc. No. [132]) are **GRANTED AS MODIFIED** by this Order. The Stricklands and Carrs are to be reclassified as Class 3 claimants, and the distribution plan is to be adjusted accordingly. The Stricklands' objection, construed by the Clerk as a motion to be reclassified (Doc. No. [125]), is **GRANTED**. All other objections to the distribution plan are **OVERRULED**, and the corresponding motions (Docs. No. [137], [140], [146]) are **DENIED**.

IT IS SO ORDERED, this 1st day of June, 2017.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE