UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, ANGELO A. ALLECA, SUMMIT WEALTH MANAGEMENT, INC., SUMMIT INVESTMENT FUND, LP, ASSET CLASS DIVERSIFICATION FUND, LP, and PRIVATE CREDIT OPPORTUNITIES FUND, LLC, Defendants.	)	CIVIL ACTION FILE NO. 1:12-CV-3261-WSD

<u>RECEIVER'S OPPOSITION TO THE MEYERS GROUP, INC.'S MOTION TO VACATE ORDER APPROVING PLAN OF DISTRIBUTION AND OBJECTION TO RECEIVER'S PLAN OF DISTRIBUTION</u>

COMES NOW Robert D. Terry, the Court-appointed Receiver for Defendants Summit Wealth Management, Inc. ("Summit"), Summit Investment Fund, LP ("SIF"), Asset Class Diversification Fund, LP ("ACDF") and Private Credit Opportunities Fund, LLC ("PCOF")("collectively the "Summit Funds" and with Summit, SIF, and ACDF, collectively the "Receivership Entities"), and hereby files his Objection to The Meyers Group, Inc.'s Motion To Vacate Order Approving Plan of Distribution and Objection to Receiver's Plan of Distribution [Doc. No. 138] ("Motion to Vacate") and shows the Court the following:

1. Summary

- The Court's Order and Opinion [Doc. No. 131] approves a fair and equitable distribution, and there is no reason to further delay distributions to claimants unaffected by any of The Meyer's Group, Inc.'s ("TMG") various objections. This includes, at a minimum, investor claimants, to whom payments should be ordered immediately;
- The Meyers Group, Inc. ("TMG"), a non-investor claimant, seeks to vacate a fair and equitable distribution plan so that it can receive a distribution more favorable than that of both the investor claimants as well as the other non-investor claimants;
- The extraordinary relief of vacating the Court's Order and Opinion approving the Receiver's Motion to Approve Plan of Distribution [Doc. No. 120] ("Motion to Approve Plan") is not warranted under Fed. R. Civ. P. 60(b)(6); and
- TMG has again not shown any reason why the Receivership Estate should be split into two separate funds for the purposes of a distribution, other than

that to do so would be more favorable to TMG.[1]

2. Vacating the Order Is Neither Warranted Nor Appropriate

TMG argues that the Order and Opinion approving the Plan of Distribution should be vacated because it has not had the opportunity to be heard in a "meaningful time and a meaningful manner." This is simply not the case.

The Court required the Receiver to propose his modified plan and gave TMG an opportunity to object to the plan, which TMG has done. TMG will therefore have been heard. TMG has, through its response to the Receiver's Motion to Modify as well as TMG's three (3) other motions filed with the Court, certainly had every opportunity to set forth its arguments, and it still does not satisfy the burden to have either the plan changed or to dispute the change in the value of its claim. A motion to vacate under FRCP 60(b)(6) should only be granted in extraordinary circumstances, and TMG has not satisfied that burden. Albert v.

[1] The arguments made by TMG on this issue are with some minor exceptions the same arguments raised in TMG's Opposition to Motion to Modify Plan of Distribution [Doc. No. 137] ("Opposition to Modify Plan"), which were previously addressed by the Receiver it his Reply to the Meyers Group, Inc.'s Opposition to the Receiver's Motion to Modify the Distribution Plan's Proposed Distribution to Claimants 470 and 485 [Doc. No. 137]("Reply to Objection to Modify") and the Receiver's Motion to Approve Plan. Because TMG's arguments are duplicative, the Receiver incorporates its previous response as well as the arguments set forth its Motion to Approve Plan and recognizes that the arguments contained herein are duplicative of those already made.

Ameris Bank, 517 Fed.Appx. 900, 905-06 (11th Cir. 2013)(A movant seeking relief under Rule 60(b)(6) must show "that the circumstances are sufficiently extraordinary to warrant relief.") *citing Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir.2006); *S.E.C. v. Pension Fund of America L.C.*, 379 Fed.Appx. 832, 835 (11th Cir. 2010)(Relief under Rule 60(b)(6)'s catch-all provision "is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an 'extreme' or 'unexpected' hardship will result.") *citing Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir.1984).[2]

3. Summit and the Funds were Inextricably Linked and Commingled. The Receivership Distribution Should Not Be Separated Into a Summit "Creditor" Fund and a Summit "Investor" Fund

As it did in its Opposition to Modify Plan, TMG again asserts that the assets of the Receivership should be divided into two distinct pools, and that assets belonging to or recovered on behalf of Summit should only be used to pay creditors of Summit, while claimants who were investors in the Summit Funds should only be able to recover assets distinctly belonging to each said fund.

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[2] The Receiver also reiterates it position that an affidavit was not necessary and points not only to the approved plan in SEC v. Detroit Memorial Partners, LLC, No. 1:13-cv-1817-WSD but also the plans in SEC v. Torchia, et al., No. 1:15-cv-3904-WSD and SEC v. Coadum Advisors, Inc. et al., No. 1:08-cv-00011-ODE that were approved without any affidavit.

As the Receiver indicated in its Reply to Objection to Modify, TMG's objection is misguided. First, as recognized by TMG, every investor who invested in one or more of the Summit Funds is also a creditor of Summit, since it was Summit that sponsored and recommended the investments. Each instance of an investment in a Summit Fund was the consequence of a recommendation by Angelo Alleca or another Summit employee acting within his or her authority as a Summit employee, thus giving rise to the liability of Summit under various legal theories.

Second, the bulk of the Receivership Estate consists of assets that were specifically earmarked to pay harmed investors, rather than lenders like TMG. Specifically, the Receiver recovered approximately $1.5 million in proceeds of a disputed Errors and Omissions insurance policy insuring Summit (and its employees who were investment advisers) against claims asserted by customers of Summit. That policy defined "Insured Persons" to include Summit plus "any … Employee of an Investment Adviser... solely in his or her capacity as such." The policy provides for reimbursement of defense costs and indemnification of liability for certain defined claims arising from covered errors in the rendering of professional advisory services by Insured Persons. Therefore, the policy proceeds were payable to the customers of Summit and of Summit's employed investment advisers who claim to have been injured by negligence or other errors in making investment recommendations. Clearly, therefore, investor claimants are entitled to participate in distributions of those proceeds.

Finally, even if the investor claimants did not possess claims directly against Summit, combining the assets of Summit and the Summit Funds should be permitted. *See SEC v. Founding Partners Capital Management*, 2014 WL 2993780, *6 (M.D Fla. 2009) (courts may authorize the treatment of various receivership entities as one substantively pooled estate for the purpose of distribution, upon good cause shown), *citing SEC v. One Equity Corp.*, 2:08–CV–667, 2011 WL 1002702, *1 (S.D. Ohio Mar.16, 2011) (permitting pooling of six receivership entities upon good cause shown).

According to *SEC v. Founding Partners*:

> Under the "good cause" test for pooling, courts have examined a number of different factors, including whether: (1) a unified scheme to defraud existed among the receivership entities; (2) the investors across the various receivership entities are similarly situated; and (3) funds were commingled among the receivership entities. *See SEC v. Amerifirst Funding*, 2008 WL 919546 at *4 (pooling receivership entities because they were all involved in a unified scheme to defraud investors, even where there was no commingling of funds); [*CFTC v.*] *Walsh*, 712 F.3d at 749 [(2nd Cir. 2013)] (upholding district court's finding that investors are similarly situated for purposes of a pro rata distribution plan when they are similarly situated in relationship to the fraud, in relationship to the losses, in relationship to the fraudsters, and in relationship to the nature of their investments); *CFTC v. Eustace*,

> No. 05–2973, 2008 WL 471574, *3 (E.D. Penn. Feb. 19, 2008) (approving pooling of assets and *pro rata* distribution in light of evidence of joint marketing of receivership entities and commingling of funds).

2014 WL 2993780 at *6. In this case, combining the assets of all of the Receivership Entities is the most fair and equitable result. *SEC v. Sunwest Management, Inc.*, 2009 WL 3245879, *8 (D. Or. 2009) ("A district court administering an equity receivership has the power to fashion any distribution plan that is fair and equitable"); citing *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *SEC v. Wang*, 944 F.2d 80, 84–85 (2d Cir. 1991); *see also SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 670–71 (6th Cir. 2001); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992).

As set forth in the Motion to Approve Plan, the Receivership funds were commingled and separating them was not practicable or justified. As noted in the Motion, "In the original Ponzi scheme case, *Cunningham v. Brown*, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924), the Supreme Court held that 'tracing' fictions should not be used to pursue individual recoveries when a fraud ensnares multiple victims whose funds are commingled. . . . Instead, the Court held that all innocent victims should share equally in the recovered funds because equity demands equal treatment." *SEC v. The Infinity Group*, 226 Fed. Appx. 217 at 218 (3rd Cir. 2007).

Further, TMG again fails to recognize that rather than treating creditors more favorably than investors, the Courts have clearly sometimes done the opposite by upholding plans that treat trade creditors in an inferior position as to that of investor claimants. *U.S. Commodity Futures Trading Comm'n v. Capitalstreet Fin., LLC*, No. 3:09cv387– RJC–DCK, 2010 WL 2572349, at *2 (W.D.N.C. June 18, 2010); *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, at *3 (W.D. Mich. 2007). Certainly, these cases indicate a trade creditor should not be placed, as TMG asserts, in a ***superior*** position to that of investor claimants.

4. Conclusion

For the foregoing reasons, the Receiver requests that TMG's Motion to Vacate be DENIED.

Respectfully submitted this 9th day of November, 2017.

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CERTIFICATE OF SERVICE

I certify that the foregoing was prepared with one of the font and point selections approved by the Court in LR 5.1B. I further certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of electronic filing to counsel of record.

This 9th day of November, 2017

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