

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF NORTH CAROLINA
 CHARLOTTE DIVISION

FILED
 CHARLOTTE, NC
 2005 FEB -4 PM 2

IN RE: ALL FUNDS ON DEPOSIT IN)
 ACCOUNT NUMBER 000669829075 in)
 THE BANK OF MM ACMC BANQUE DE)
 COMMERCE, INC., AT NATIONSBANK,)
 N.A., CONSISTING OF \$18,756,420.97,)
 MORE OR LESS.)

C.A. NO. 3:98mc96-K

 GEORGE AND DOLORES ROLLAR,)
 Plaintiffs,)

C.A. NO. 3:01CV205-K ✓
 ORDER

v.)

UNITED STATES OF AMERICA, et al.,)
 Defendants,)

(CASES CONSOLIDATED)

RICHARD VASQUEZ,)
 Intervener.)

THIS MATTER is before the Court with consent of the parties on the Receiver's Second Motion to Disallow Filed Claims and Potential Claims (doc. 139).

I. Factual and Procedural Background

In December 1998, the Federal Bureau of Investigation ("FBI") seized over \$18 million from account number 000669829075 in the name of MM ACMC Banque de Commerce at NationsBank, N.A. (now Bank of America, N.A.). The funds ("Seized Funds") were seized as probable proceeds of mail and wire fraud. The government alleged that the Seized Funds constituted proceeds of a fraudulent "Ponzi" scheme perpetrated by Frederick Gilliland ("Gilliland"), August Wilhelm Christian Mohr ("Mohr") and others. George and Dolores Rollar lost over \$12 million in the scheme. The Rollars filed the instant lawsuit seeking the return of their lost investment from the Seized Funds. Richard Vasquez, who lost over \$900,000.00 to the scheme, intervened in the action.

170

On October 11, 2001, the Court granted the parties' request to appoint a receiver in these proceedings. On October 29, 2001 the Court issued an Order appointing Michael J. Quilling to serve as the Receiver.

The Receiver's primary assignment in this case is to identify the sources of deposits into the following four separate accounts controlled by Fred Gilliland: (1) the NationsBank Account; (2) the Bank of Butterfield Account; (3) the Allied Dunbar Account No. 1; and (4) the Allied Dunbar Account No. 2. On February 21, 2002, the Receiver filed his Unopposed Motion to Establish Claim Procedures and to Approve Claim Form (doc.46) which was granted by Order dated February 25, 2002 (doc. 47) . The Order specifically provided that claimants would have 60 days from the date the claim form was sent to them to complete and return the form. Since that time, the Receiver has processed hundreds of claims. Some of the claimants who were located by the Receiver did not return the claim forms. In some cases, the Receiver was unable to locate the source of the funds. The Receiver now moves this Court to disallow several potential claims and to disallow several filed claims.

At the request of the Receiver, an evidentiary hearing was held in this matter on January 26, 2005. All parties and claimants were notified of the hearing and advised of their right to be present. Present at the hearing were the Receiver, Mike Quilling; Assistant United States Attorney Bill Brafford; Rodney Alexander, counsel for the Rollars; and Meagan Watkins, counsel for Richard Vasquez. Christopher Steward, counsel for claimant John Valentine, and Christopher Boyden, counsel for claimant ITC, attended by telephone. Milo Segner, the accountant for the Receiver, was present to offer testimony, if needed, regarding the financial documents he prepared for this case.

The Receiver presented the following documentary evidence without objection:

- Consent Order

- Order Appointing Receiver
- Receiver’s Unopposed Motion to Establish Claim Procedures and to Approve Claim Form
- Order Granting Receiver’s Unopposed Motion to Establish Claim Procedures and to Approve Claim Form
- Receiver’s Second Motion to Disallow Filed Claims and Potential Claims
- Notice of Hearing
- Certificate of Mailing
- Order setting hearing
- Schematic diagrams/charts of the four bank accounts covered by the receivership
- Selected pages of the bank account statements relating to the potential claims/filed claims at issue
- Spreadsheets of each of the four bank accounts covered by the receivership
- Relevant portions of each claim form file which are the subject of the Second Motion
- Prior pleadings/order relating to the claims filed
- Appellate Court opinion relating to criminal conviction of claimant Mohr.

The parties and claimants were given an opportunity to present evidence and argument regarding the allowance of the claims at issue.

II. Relevant Authority

“[The] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors.” *S.E.C. v. Hardy*, 803

F.2d 1034, 1038 (9th Cir. 1986) (citing *SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n. 9 (9th Cir. 1986); *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1368 (9th Cir. 1978)). The court is afforded broad deference in determining the case-specific procedures to be utilized for an orderly and efficient estate administration. *See, e.g., Commodity Futures Trading Com'n v. Topworth Intern., Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) (citing *S.E.C. v. Hardy*, 803 F.2d 1034, 1037-38 (9th Cir. 1986)). The procedures should be fashioned around the three general functions of a receivership: (1) marshalling of the assets subject to the receivership, (2) liquidating the assets for the benefit of the creditors and investors, and (3) remitting payment to the creditors and investors from the proceeds of the liquidation. *See, e.g., CFTC v. Chilcott Portfolio Mgmt., Inc.*, 725 F.2d 584, 586 (10th Cir. 1984) (discussing the appointment of a receiver to marshal assets, set up claim procedures, and eventually distribute any assets to the creditors and investors); *United States v. Vanguard Inv. Co., Inc.*, 694 F.Supp. 1219, 1228-29 (M.D.N.C. 1988) (discussing need to appoint receiver to perform the same under the direction of the court).

The procedures to be employed for the third function necessarily require the court to approve a procedure for the allowance, disallowance, and subordination of claims asserted in the receivership proceedings. *See id.*; *Transit Cas. Co. v. Selective Ins. Co. of Southeast*, 137 F.3d 540, 543 (8th Cir. 1998) (discussing claims allowed and disallowed by receiver during claims process); *Fishgold v. OnBank & Trust Co.*, 43 F.Supp. 2d 346, 348 (W.D.N.Y. 1999)(discussing resulting increase in trust corpus available to other creditors upon the disallowance of creditor's claim). Such a procedure is required to ensure, *inter alia*, not only that claims asserted in a receivership proceeding will only be paid after a review of the claim's validity of amount and enforceability, but also to bring finality to the administration of the estate. *See, e.g., S.E.C. v. Hardy*, 803 F.2d 1034, 1039-40 (9th Cir. 1986)

(affirming trial court's enforcement of deadline to file claims as reasonable balance of creditors' rights and need for expeditious administration of a receivership proceeding).

Like other aspects of a receivership proceeding, the court is afforded wide discretion in fashioning the procedures to be employed for the allowance, disallowance, and subordination of claims. *See id.* at 1037-39. The court is even afforded discretion to employ summary procedures for this process, as opposed to plenary proceedings under the Federal Rules, so long as claimants, at a minimum, have fair notice and a reasonable opportunity to respond. *See McFarland v. Winnebago South, Inc.*, 863 F.Supp. 1025, 1034 (W.D. Mo. 1994) (citing *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984)). Such procedures are not merely acceptable to the courts. Instead, they actually further the goal of providing an efficient resolution of the allowance, disallowance, and subordination of claims and likewise reduce litigation costs to the receivership. *See id.* at 1039.

Here, all of the notice and procedural safeguards discussed in the cases above have been met. A claim form, approved by the Court, was sent to all investors and reasonable time to complete and return the form was provided. The instant motion and hearing provide the claimants an opportunity to be heard regarding the merits of each claim in an efficient manner.

III. Analysis

At the outset, the Receiver noted that the following claims challenged by his motion were resolved prior to the hearing and would *not* need consideration by this Court: the Roof-Ellenburg claim and the Maxine Gregory claim. As to Ms. Gregory's claim, it was resolved by settlement. The Receiver filed a written motion to approve the settlement agreement with Ms. Gregory. Further, the Oval Insurance Services and the John Valentine claims were continued to a later hearing by consent of the parties and order of this Court. Lastly, it became evident to this Court during the hearing that

more information is needed to determine whether ITC's claims should be allowed. Accordingly, the ITC claims are continued to the next hearing date. The remaining claims at issue are either potential claims or filed claims which are challenged by the Receiver as objectionable. They are addressed seriatim.

Potential Claims

Based upon the Receiver's efforts to date, the Receiver moved to disallow the following *potential* claims:

(1) Motorola ECU West

A person or entity sent \$10,000.00 to the Bank of Butterfield account from an account at the Motorola Employee Credit Union West. Despite diligent efforts, the Receiver has not been able to determine anything about the identity of the account holder, nor has the Receiver been contacted by anyone claiming to have sent the funds. After reviewing the evidence presented, this Court finds that the Receiver has done all that can reasonably be expected under the circumstances to identify and locate the potential claimant. Accordingly, this potential claim should be disallowed.

(2) Fox MJ and Fox JL

Fox MJ and Fox JL refer to two deposits sent to the Allied Dunbar Account No. 2 of \$40,000.00 and \$60,000.00, respectively. The Account spreadsheet refers to the deposits as "Richard Fox- Michael Johnson" and "Richard Fox- Jeff Lindsey" (*see* Receiver's Ex. 10). The Receiver has presented evidence that Richard Fox does not claim these funds and that Johnson and Lindsey are aggregators who were running a fraudulent financial scheme, suggesting that these funds originally belonged to victims of Johnson and Lindsey. No one has asserted a claim for these funds. Despite diligent efforts, the Receiver has not been able to determine anything about the ownership of the funds, nor to identify or locate the depositors. Fred Gilliland has told the Receiver he knows

nothing about the entity. After reviewing the evidence presented, this Court finds that the Receiver has done all that can reasonably be expected under the circumstances to identify and locate the potential claimants. Accordingly, these potential claims should be disallowed.

(3) Henwood Investments

This entity initially deposited funds into another account at NationsBank controlled by August Wilhelm Christian Mohr (“Mohr”) (#000650552254). In order to open the account at issue in these proceedings, Mohr caused \$1,000.00 to be transferred from the other account. Despite diligent effort, the Receiver has been unable to locate Henwood Investments. After reviewing the evidence presented, this Court finds that the Receiver has done all that can reasonably be expected under the circumstances to identify and locate the potential claimant. Accordingly, this potential claim should be disallowed.¹

Objectionable Claims

During the course of reviewing claims, the Receiver has determined that several claims are objectionable. For the reasons set forth below, the following filed claims should be disallowed.

(1) JIBO Ltd. - Claim of \$175,000.00

This claim is submitted on behalf of the entity by its Court-appointed liquidator. The funds invested were sent to an account in the Turks & Caicos in the name of a lawyer working with Fred Gilliland at a date *after* the account in this case was seized. Therefore, the funds could not have been deposited in the account in this case. In addition, JIBO Ltd. received a payment from the Bank of Butterfield in the amount of \$840,000.00 and thus, on a net basis, JIBO Ltd. was overpaid. As the evidence is insufficient to support this claim, it is disallowed.

¹Mohr has filed a claim for the funds (*see* Claim No. 5 of MM ACMC Banque de Commerce, Inc. (“BDC”), *supra*).

The remaining objectionable claims are all Mohr-related claims.

(2) Mohr Claims

These claims were all filed by Mohr on behalf of two Mohr-controlled entities, M.M. APMC Banque de Commerce (“BDC”) and M.M. APMC Fiduciary & Nominees, B.A. (“F & N”). Mohr used these two entities to perpetrate the fraud at issue here.

Mohr was convicted in Norway and sentenced to six years imprisonment for, *inter alia*, obtaining the Seized Funds at issue through “investor fraud” and “complicity in gross fraud.” (*See* Receiver’s Ex. 28). Despite this conviction, Mohr filed a Motion for Return of Property seeking to have the Seized Funds returned to him. This Court denied the motion because Mohr had no legally cognizable interest in the funds as they constitute the proceeds of a fraudulent scheme perpetrated by Mohr and the Mohr-controlled entity BDC. Undaunted, Mohr has filed several claims with the Receiver - again seeking to recover these funds based upon various theories. Despite notice², neither Mohr nor his counsel appeared at the hearing to respond to the Receiver’s objections about his claims, nor did they file any pleadings to support their claims.

Under North Carolina law, contracts that are induced by fraud are void and “no title passes under such an instrument-it is void-and no right may be acquired thereunder even by innocent third parties.” *United States v. Real Property Located at 5201 Woodlake Drive*, 895 F.Supp. 791, 797 (M.D.N.C. 1995), citing *Furst & Thomas v. Merritt*, 190 N.C. 397, 130 S.E. 40, 43 (1925). It is axiomatic that contracts which are founded upon or grow out of transactions which are illegal cannot and will not be enforced. *See, i.e., Blythe v. Lovinggood*, 1841 WL 782 (N.C. 1841); *Seminole Phosphate Co. v. Johnson*, 124 S.E. 859 (N.C. 1924); *Lamm v. Crumpler*, 65 S.E. 2d. 336 (N.C.

²In addition to the ample notice sent to all parties and claimants, the Receiver telephoned Mohr’s attorney several times about the instant motion and evidentiary hearing. The calls were not returned.

1951). Every claim asserted by Mohr arises out of the illegal contracts between Mohr and Gilliland and thus, no cognizable interest in the funds could support the claims.

In that this is a federal equity receivership, equitable principles apply. It is black letter law that a party which has unclean hands due to its own inequitable conduct will be barred from receiving equitable relief. *Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.* 202 F.3d 223, 228 (4th Cir. 2000). *See also, In re Technical Land, Inc.*, 172 B.R. 429, 434 (Bankr. D. Colo. 1994) (discussing that equitable principals apply in federal equity receivership proceedings).

For the reasons discussed below, none of the Mohr-related claims are supported by the evidence. Even if they were, Mohr's unclean hands bar him from receiving equitable relief from this Court.

- **M.M. APMC Banque de Commerce, Inc. - \$180,649.00 (Claim #4)**

This claim is for the interest earned on investor funds deposited in the seized account. It has been the rule since the mid-1700's that the "interest follows principal." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165, 118 S. Ct. 1925 (1998). North Carolina follows this rule. *McMillan v. Robeson County*, 262 N.C. 413, 417, 137 S.E. 2d. 105, 108 (1964) (the earnings on the fund were a mere incident of ownership of the fund itself). As noted above, this Court has already found that Mohr has no claim to the bulk of the funds. Applying relevant caselaw, he has no claim to the interest on the funds. Neither the evidence nor equitable principles support this claim. It is disallowed.

- **M.M. APMC Banque de Commerce, Inc. - \$16,451,841.00 (Claim #1)**

This claim purports to reflect a "settlement" between the Mohr-controlled entities, BDC and F & N, whereby F & N settled BDC's claim to the funds in the seized account which is the subject of these proceedings. Having been denied a claim to the funds directly, Mohr argues that F & N (one

of his shell entities) had a right to over \$16 million of the seized funds. Mohr claims that BDC (his other shell entity) “settled” F & N’s claim and thus is owed the \$16 million that would have gone to F & N. This Court has already ruled that BDC has no claim to the funds in the first instance. It cannot create an interest in the funds by playing a shell game with F & N. Moreover, as a Mohr-controlled entity that helped perpetrate the fraud at issue, F & N would have no claim to the funds for the same reasons that BDC has no claim. Neither the evidence nor equitable principles support this claim. It is disallowed.

- **M.M. APMC Banque de Commerce, Inc. - \$1,849,897.00 (Claim #7)**
- **M.M. APMC Fiduciary & Nominees, B.A. - \$0 (Claim #8)**

These two claims are for the purported “costs” of the settlement discussed above. Because the settlement is a fiction that does not give rise to an interest in the funds, any costs related to the settlement cannot support a claim. Neither the evidence nor equitable principles support these claims. They are disallowed.

- **M.M. APMC Fiduciary & Nominees, B.A. - \$0 (Claim #2)**
- **M.M. APMC Fiduciary & Nominees, B.A. - \$0 (Claim #3)**

These claims both state that they are for \$0. They were filed to make it appear as if other claims filed by BDC were legitimate. Neither the evidence nor equitable principles support these claims. They are disallowed.

- **M.M. APMC Banque de Commerce, Inc. - \$1,000.00 (Claim #5)**

This claim is for the initial account opening deposit which BDC (acting through Mohr) transferred from another account under its control. The funds transferred did not belong to BDC . They can be traced to Henwood Investments, an entity the Receiver has not been able to locate as discussed above. Neither the evidence nor equitable principles support this claim. It is disallowed.

- **M.M. APMC Banque de Commerce, Inc. - \$380,000.00 (Claim #6)**

This claim is for fees which BDC contends it earned for leasing T-bills to International Trade & Capital, Inc. ("ITC"). At the hearing, ITC, through its attorney, averred that it did not receive any T-bills. BDC presented no evidence to support this claim. Moreover, the Receiver presented evidence that T-bills cannot, in fact, be leased and that entities purporting to lease T-bills are running a financial scam. Even if T-bills could be leased, the Receiver presented evidence that BDC never owned \$3 million of T-bills to lease to ITC. Neither the evidence nor equitable principles support this claim. It is disallowed.

IV. Conclusion

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Receiver's Second Motion to Disallow Filed Claims and Potential Claims (doc. 139) is **GRANTED**, consistent with the discussion above.

IT IS SO ORDERED, this 4th day of February, 2005.



DAVID C. KEESLER
UNITED STATES MAGISTRATE JUDGE