

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 4:12-cv-00080-CEJ
BURTON DOUGLAS MORRISS, et al.,)	
)	
Defendants, and)	
)	
MORRISS HOLDINGS, LLC,)	
)	
Relief Defendant.)	
)	

MEMORANDUM IN RESPONSE TO COURT’S ORDER DATED FEBRUARY 12, 2013 (DKT. NO. 228) REGARDING THE RECEIVER’S MOTION TO ESTABLISH CLAIMS BAR DATE, APPROVE MANNER AND FORM OF NOTICE OF CLAIMS BAR DATE AND APPROVE PROCESS FOR SUBMITTING CLAIMS

Receiver Claire M. Schenk, in her capacity as receiver (“Receiver”) for Acartha Group, LLC, Acartha Technology Partners, L.P., MIC VII, LLC, and Gryphon Investments III, LLC (collectively, the “Receivership Entities”) submits this Memorandum in Response to the Court’s Order Dated February 12, 2013 (Dkt. No. 228) regarding the Receiver’s *Motion to Establish Claims Bar Date, Approve Manner and Form of Notice of Claims Bar Date and Approve Process for Submitting Claims* (the “Motion”) (Dkt. No. 214; filed Dec. 3, 2012), and respectfully requests that the Court enter an Order, substantially in the form of the Proposed Order filed simultaneously herewith as Exhibit A, (i) establishing a claims bar date for the filing of claims against the Receivership Entities and the Receivership estate, (ii) approving the manner and form of notice of the claims bar date, (iii) approving the proof of claim form and procedures for submitting proofs of claim and (iv) approving the process for determining validity and allowance of claims, as set forth herein and in the Proposed Order. In support of this request, the Receiver relies on all the reasons set forth in the Receiver’s Memorandum of Law (Dkt. No. 215; filed Dec. 3, 2012) and further states as follows:

I. Preliminary Statement

The Receiver filed the Motion on December 3, 2012. On February 12, 2013, the Court entered its Order seeking additional information regarding some of the specific elements of the Receiver's proposal for procedures to govern the claims notice and submission process in this receivership proceeding. The Receiver has taken into account the Court's comments and concerns. As a result, the Receiver has prepared an amended Proposed Order and related Exhibits (which are attached hereto).

Attached hereto are the following documents:

- Exhibit A Amended Proposed Order
- Exhibit A-1 Redline to Original Proposed Order
- Exhibit B Amended Bar Date Notice
- Exhibit B-1 Redline to Original Bar Date Notice
- Exhibit C Amended Proof of Claim Form
- Exhibit C-1 Redline to Original Proof of Claim Form
- Exhibit D Amended Bar Date Publication Notice
- Exhibit D-1 Redline to Original Bar Date Publication Notice
- Exhibit E Form Notice of Deficiency
- Exhibit F Form Notice of Determination

These documents reflect the changes and additions that the Receiver has made to her proposed claims notice and submission procedures. These changes and additions are discussed more fully below.

II. Responses to the Court's Comments and Concerns

- 1. The receiver proposes a claims bar date that is 60 days from the date the order approving the claims process is entered. There is no explanation as to why this period was selected and the Court cannot make a determination as to whether 60 days is an adequate period of time for claimants to comply.**

Under the circumstances presented in this Receivership, a sixty (60) day time period allows the Receiver adequate time to deliver notices to potential Claimants and for potential Claimants to prepare

and submit their Proof of Claim Forms to the Receiver. The Court appointed the Receiver over one year ago, on January 17, 2012. Since that time, the Receiver has endeavored to give constructive and actual notice of the receivership to known and potential Claimants through various forms. *See* Receivership Reports (Dkt. Nos. 51-1, 134-1, 189-1). A press release was issued, a public website was established and actual notice of the Receivership was provided to known potential Claimants. The Receiver has created, maintained and updated a master list of interested and affected individuals and entities with which the Receiver has had these communications. Thus, the Receiver believes that the majority of potential Claimants already have knowledge of the Receivership and that the Receiver is well positioned to promptly deliver electronic notice of the claims bar date order upon receipt.

Moreover, a sixty (60) day time period has been deemed acceptable and is generally within the range allowed to potential Claimants in other matters. *See S.E.C. v. Forte*, 2:09-cv-00063-PD, 2012 WL 1719145 (E.D. Pa. May 16, 2012) (overruling objections and granting receivers request to establish a 60-day time period for claims bar date); *Order Setting a Claims Bar Date, Establishing Claims Resolution Procedures, and Approving Distribution Methodology*, No. 09-cv-0064-PD, ECF 123 (E.D. Pa. May 16, 2012); *S.E.C. v. Young et al.*, No. 2:09-cv-01634, ECF 172 (E.D. Pa. May 14, 2010) (establishing a 60-day claims bar period); *S.E.C. v. Judah et al.*, No. 5:09-cv-87-C, ECF 183 (N.D. Texas March 8, 2010) (establishing 16-day claims bar period for investor victim claims and 47-day claims bar period for non-investor claims). *See also S.E.C. v. Cook*, No. 09-cv-3333 MJD/FLN, ECF 556 (D. Minn. Nov. 1, 2011) (establishing claims bar time period of 74 days); *S.E.C. v. Sun Empire, LLC et al.*, No. 8:09-cv-00399-DOC-RNB, ECF 357 (C.D. Cal. August 17, 2011) (establishing claims bar period of 76 days); *S.E.C. v. Sunwest Management, Inc. et al.*, No. 09-cv-6056-HO, ECF Dkt. No. 941 (D. Oregon November 3, 2009) (establishing claims bar period of 73 days); *S.E.C. v. Stanford*, 3:09-cv-0298-N (N.D. Texas May 4, 2012) (establishing claims bar time period of 120 days). In sum, a sixty (60) day time period is appropriate under the circumstances presented in this Receivership and in light of existing authority.

- 2. The proposal requires that proof of claim forms be received by the receiver by 5:00 p.m. on the bar date to be considered timely. Given that a sender has no control over the delivery of mail, it is typically the postmark that determines whether a deadline has been met. It may be that actual receipt is more appropriate in this case but, again, there is no information from which the Court can make that determination.**

The Receiver has amended the Proposed Order and the Notices to provide that (i) the official postmark on the envelope of the Proof of Claim Form will control the timeliness of all Proof of Claim Forms sent by mail, (ii) the date and time of actual delivery will control the timeliness of all Proof of Claim Forms that are hand-delivered or sent by courier to the Receiver, and (iii) the time stamp given to the email by the Claimant's email provider (adjusted to prevailing Central Time, as necessary) will control the timeliness of all Proof of Claim Forms transmitted by electronic mail. The Receiver also amended the proposed Bar Date to encompass the whole twenty-four hours of the Bar Date, up to 11:59 p.m. prevailing Central Time on the Bar Date. The Receiver believes that these amendments address the Court's concerns regarding a Claimant's inability to control the delivery of regular mail, while recognizing that a Claimant does have control over the hand delivery, courier delivery and email transmission of Proof of Claim Forms.

- 3. The notice does not indicate whether the receiver will notify claimants that a claim has been received nor does it specify the method by which a claimant can inquire whether a claim is received.**

The Proposed Order and Proposed Bar Date Notice now provide a process by which Claimants may request confirmation of receipt of their Proof of Claim Forms. *See* Exhibit A, ¶ 6(e); Exhibit B. These amended documents indicate that unless Claimants follow this process, the Receiver will not notify a Claimant that the Receiver has received such Claimant's Proof of Claim Form. *See* Exhibit A, ¶ 6(e).

4. **The notice allows a claimant to submit separate proof of claim forms against more than one of the receivership entities if the claimant believes that he has a claim against more than one entity or if the claimant is unsure about the entity against which he has a claim. It is unclear whether a claimant who invested in more than one receivership entity must submit a separate claim form for each entity or may submit one form that addresses all claims.**

The Proposed Claims Bar Date Order and Proposed Bar Date Notices now clarify that Claimants do not need to file a separate Proof of Claim Form for each Receivership Entity against which the Claimant may have a Claim, but must indicate on the Proof of Claim Form each such Receivership Entity to which the Claim relates and the Claim amount(s) attributable to each such Receivership Entity. *See* Exhibit A ¶ 6(f); Exhibit B, No. 7; Exhibit D.

5. **The notice states that the receiver may request additional information and conduct interviews with claimants. *Id.* at ¶8. It is unclear whether the receiver retains the discretion to disallow a claim based on lack of information without first giving the claimant the opportunity to supplement the claim.**

The Receiver has amended the proposed claims procedures to provide for a process where the Receiver may request additional information from Claimants, through issuance of a Notice of Deficiency, in substantially the form attached hereto as Exhibit E. The Receiver will provide the Claimant with the Notice of Deficiency, if one is required, on or before the date that is sixty (60) days after the Bar Date. The Claimant will have sixty (60) days from the date of issuance of the Notice of Deficiency to provide the information requested in the Notice of Deficiency. If the Claimant fails to provide the information requested in the Notice of Deficiency, the Receiver may disallow the Claim. *See* Exhibit A ¶ 6(j).

6. **The notice is silent with respect to whether the receiver will notify claimants of her determination on their claims and whether there is a process for challenging the determination.**

The Receiver has amended the proposed claims procedures to provide for notification to Claimants of the Receiver's claim determinations and a process by which a Claimant may challenge the Receiver's determination of its Claim. *See* Exhibit A ¶¶ 6(l) through 6(q). Under the procedure, the Receiver will provide each Claimant who submits a Proof of Claim Form with a written Notice of Determination, in substantially the form attached hereto as Exhibit F. The Receiver will provide the Notice of Determination: (i) for all Proof of Claim Forms for which the Receiver does not issue a Notice

of Deficiency, on or before sixty (60) days after the Bar Date; and (ii) for all Proof of Claim Forms for which the Receiver issues a Notice of Deficiency, by the later of (a) the date that is sixty (60) days after the date the Receiver issued the Notice of Deficiency to the Claimant or (b) the date that is sixty (60) days after the date the Receiver receives the Claimant's response to the Notice of Deficiency. If the Receiver disallows the Claim, the Notice of Determination will state that the Claim is disallowed, either in whole or in part, and set forth the Receiver's reasons for disallowing the Claim.

If a Claimant objects to the Receiver's determination of a Claim, paragraphs 6(m) through 6(q) outline the procedure for challenging the Receiver's claim determination. The first part of the procedure requires the Claimant to file a written objection with the Receiver within thirty (30) days of the date of the Receiver's Notice of Determination. If the Claimant and the Receiver cannot resolve the Claimant's objection within ninety (90) days of the date of the Notice of Determination, the Claimant can file a written objection to the Notice of Determination with the Court. The Claimant has thirty (30) days from the expiration of the ninety (90) day resolution period, or one hundred and twenty (120) days from the date of the Notice of Determination, to file its written objection with the Court.¹ The Receiver then has thirty (30) days to file her response to the Claimant's objection. Following the filing of the Receiver's response, or if the Receiver fails to file a response, the expiration of the Receiver's response period, the Court shall consider and rule on the Claimant's objection. This process is almost identical to the process implemented in *Securities & Exchange Comm'n v. Stanford Int'l Bank, Ltd. et al.*, Case No. 3:09-cv-00298-N (N.D. Texas), which process was modeled after the processes implemented in *In re MF Global, Inc.*, Case No. 11-2790 (MG) SIPA (Bankr. S.D.N.Y.), and *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC*, No. 08-01789-BRL (Bankr. S.D.N.Y.).

¹ The proposed procedures provide that the Claimant must file its written objection no earlier than ninety (90) days of the date of the Receiver's Notice of Determination and no later than one hundred and twenty (120) days of the date of the Receiver's Notice of Determination.

III. Other Matters

During her review of the proposed claims procedures in response to the Court's Order, the Receiver identified two other areas in the proposed claims papers that would benefit from additional explanation and/or clarification. First, the Receiver has amended the Bar Date Notice (Exhibit B) to include language clarifying that the process for submitting Proof of Claim Forms and obtaining the Receiver's determination on submitted Claims does not guarantee a Claimant a distribution from the Receivership Estates or establish a Claimant's priority for distribution purposes. The Receiver anticipates presenting the Court with a proposed order of distribution at a later date, provided that there are Receivership assets to distribute to Claimants.

Second, the Receiver has amended the Bar Date Notice (Exhibit B) and the Bar Date Publication Notice (Exhibit D) to include language clarifying that potential Claimants should file Proof of Claim Forms for Claims against the four Receivership Entities and no other entities, including but not limited to the various special purpose vehicle entities established by the Receivership Entities prior to the creation of this Receivership.

IV. Conclusion

The Receiver respectfully requests that the Court grant the relief sought in the Motion, as amended by this Supplemental Memorandum, and that the Court:

- (A) enter the Claims Bar Date Order, substantially in the form attached hereto as **Exhibit A**,
 - (i) establishing 11:59 p.m. prevailing Central Time on the date that is sixty (60) days after entry of the Claims Bar Date Order as the deadline by which all Claimants must submit completed and signed proofs of claim evidencing their Claims against one or more of the Receivership Entities;
 - (ii) approving the form and manner of the Notices thereof, which Notices are attached hereto as **Exhibit B** and **Exhibit D**; and
 - (iii) approving the Proof of Claim Form, attached hereto as **Exhibit C**, and the proposed Claims Procedures for submitting proofs of claim, as set forth in the Claims Bar Date Order;
 - (iv) approving the proposed Notice of Deficiency form, attached hereto as **Exhibit E**;

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that on March 1, 2013, I served the foregoing document by First Class U.S. Mail on:

Morriss Holdings, LLC
7820 Maryland Ave.
St. Louis, Missouri 63105

/s/ Kathleen E. Kraft