

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-81080-CIV-MIDDLEBROOKS/JOHNSON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

MERCER CAPITAL, INC., et al.,

Defendants.

**RECEIVER'S MOTION TO DEEM ALL CLAIMS
NOT FILED BY CLAIMS BAR DATE BARRED**

Court-Appointed Receiver, Daniel S. Newman ("Receiver") hereby files this Motion To Deem All Claims Not Filed By Claims Bar Date Barred. In support of this Motion, the Receiver states:

PROCEDURAL HISTORY

On June 30, 2010, this Court entered an Order granting the Receiver's Motion to Approve Second Distribution to Approved Claimants [DE 161]. Since the filing of that motion, 3 investors who failed to file a Proof of Claim now seek to participate in the Court-approved distribution process. None of these investors filed a Proof of Claim form by the September 29, 2008 Claims Bar Date or at any time thereafter. The Receiver respectfully submits that investors or creditors that did not submit a Proof of Claim on a timely basis should not be permitted to participate in the claims process. Accordingly, the Receiver requests that this Court enter an Order affirming that claims not submitted by the Claims Bar Date are barred.

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BACKGROUND

On June 23, 2008, this Court entered an Order [DE 129] granting the Receiver's Motion for Authorization to Distribute Proofs of Claim and Establish Claims Bar Date (the "Receiver's Motion"). Pursuant to the Court's Order, the Receiver mailed Proof of Claim forms to all known investors and creditors of the Mercer and Tri-State Receivership entities. The Receiver also publicized notice of the pendency of the Receivership proceedings, including the claims process, for two days over a two week period in *USA Today*, a national newspaper publication. The Receiver's Motion specifically asked the Court to find that notice by publication constituted sufficient notice to discharge the Receiver and the Receivership entities from its obligations, if any, to investors and creditors who may have had knowledge of the pendency of the Receivership Proceeding. *See* Mot. at 4. The Receiver also posted a copy of the Proof of Claim form on the Receiver's website so that investors and creditors could download a copy and submit to the Receiver's office.

Pursuant to the Court's Order, all Proofs of Claim were to be completed and returned to the Receiver's office no later than September 29, 2008 (the "Claims Bar Date"). Notably, the Claims Bar Date was prominently featured on the first page of each Proof of Claim form, as well as in the letter from the Receiver that accompanied each form that was mailed to investors and creditors.

MEMORANDUM

Three investors of the Receivership entities', including Vincent Albanese, Barbara J. Piedmont and Nadira Fauder have expressed their desire to participate in the claims process nearly two years after the expiration of the Claims Bar Date. Surprisingly, each of these investors denies having received a copy of the Proof of Claim form, despite them having

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received prior mailed correspondence from the Receiver during the pendency of the Receivership. The Receiver objects to their request to participate in the claims process on the grounds that their claims are untimely as none of these investors' claims were filed prior to (or even after) the Claims Bar Date.

Claims bar dates are routinely used in receiverships and bankruptcies and are necessary to provide finality and enable the Receiver to identify the interests of the claimants. *See In re PT-1 Commc'n, Inc.*, 403 B. R. 250, 259 (E.D.N.Y. 2009) (noting that claims bar date allows parties to identify claimants and amounts of claims in bankruptcy action); *In re Hooker Inv., Inc.*, 937 F. 2d 833, 840 (2d Cir. 1991) (“[E]stablishing the identities and interests of the participants so that claims-allowance process may begin is an essential function served by a bar order.”). Without a claims bar date, the Receiver could never identify the universe of claimants with any certainty and, consequently, could not calculate the amounts owed to customers. Indeed, a pro rata plan of the type approved by this Court in the instant case required the implementation of a bar date since a pro rata share could not be determined until the final number of investors and creditors was identified. Consequently, the Receiver opposes any new and untimely requests by investors or creditors, who did not submit a Proof of Claim, and who now wish to participate in the claims process.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that this Court enter an Order affirming that any claims not submitted by the Claims Bar Date are barred, and for such other and further relief as this Court deems just and proper.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 4, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel or parties of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ David B. Rosenberg
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