UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMODITY FUTURES TRADING COMMISSION, Plaintiff v. U.S. INVESTMENT CO. LTD., et al. Defendants, and EDMUND EUGENE FLEMING and NANCY GREEN FLEMING, Relief Defendants.	)	C.A. No. 81-01070-MLW

MEMORANDUM AND ORDER

WOLF, D.J. December 30, 2003

On June 27, 2003 the court issued several orders in the above-captioned case. The "Consent Order to Resolve All Outstanding Proceedings" decided, among other things, the Commodity Futures Trading Commissions's ("CFTC") Motion to Hold Fleming in Contempt. It, in effect, approved a settlement of the claims of the United States Investment Company's ("USIC") receivership against its former receiver, Edmund Fleming. The court also entered a "Distribution Plan Order and Order Setting Objection Date" (the "Distribution Order").

The Distribution Order set forth a plan for the pro rata distribution of the assets of the USIC receivership to USIC's former investors. Paragraph three of the Distribution Order required all objections to the distribution plan to "be served on

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the Commission . . . as well as filed with the Court" by August 26, 2003. The court did not receive any objections by that date.

However, on September 3, 2003, the CFTC filed the Declaration of Karin N. Roth in Support of Commission's Response to Objections to the Distribution Plan (the "Roth Declaration"). The Roth Declaration described several written comments it received from former investors and highlighted two as potential objections.

Former investor Terry Allen wrote, "I am not happy with the settlement that was determined and do object to the distr. plan." Former investor Heinrich Medicus wrote that as "I must have been one of the last victims, if not the last one . . . . I would assume that my case justifies further relief beyond the approximately $327."

On September 15, 2003, the court issued an Order reviewing the history of this case and stating that, despite the fact that Allen and Medicus did not file their objections with the District Court as required by the Distribution Order,[1] the court would rule on their objections. The court scheduled a hearing to consider the objections to the fairness of the settlement for November 7, 2003, at 10:00 a.m. The court ordered that copies of its September 15, 2003 Order be sent to Allen and Medicus and that they, by October 24, 2003, "inform the court in writing whether or not they

[1]On July 8, 2003, the CFTC sent copies of the Distribution Order to Allen, Medicus and the other former investors with a cover letter explaining the distribution process. See Roth Decl. ¶4.

intend[ed] to attend the November 7, 2003 hearing."

Allen did not respond. Accordingly, as stated in the September 15, 2003 Order,"the court [assumed] he [did] not wish to participate in that hearing."

Medicus did respond. The court received a two page letter from him dated October 12, 2003, as well as a copy of a April 24, 1981 statement from a Merrill Lynch account indicating that Medicus wrote a check for $25,000 to USIC on April 8, 1981 and, as a result, his account was debited $25,000 on April 15, 1981. Medicus' letter stated, in part, that he would not attend the scheduled hearing.

As neither objecting investor planned to attend the hearing, the court cancelled it, and is ruling on the objections based on the letters sent by Allen and Medicus to the CFTC and the letter Medicus sent to the court. Although their complaints are understandable, they do not persuade the court that the CFTC's distribution plan should be rejected or revised.

In essence, the letters express eminently reasonable frustration. Allen, Medicus, and other investors in USIC were victimized twice. First, they were evidently defrauded by USIC. Then, as demonstrated by the Successor Receiver appointed by this court, they were victimized by Fleming. More specifically, as described in the April 10, 2000 Memorandum and Order, Fleming intentionally and wilfully violated his fiduciary duty to the USIC receivership, prompting this court to order him to repay the receivership $912,592.

Efforts to collect pursuant to that Order were delayed while Fleming was tried, convicted, and confined for violating an order of this court restraining the use of his assets during the Successor Receiver's investigation. The CFTC, which had absented itself for many years after recommending Fleming's appointment as Receiver, re-entered this case as the plaintiff, and made energetic and exhaustive efforts to discover assets and to collect from Fleming.

However, in civil contempt proceedings initiated by the CFTC, Fleming demonstrated that he was unable to repay anything approximating $912,592. As described in the June 27, 2003 Order, the civil contempt proceedings could not be utilized to punish Fleming for his demonstrated inability to obey the Order to repay that amount. See In re Power Recovery Sys., Inc., 950 F.2d 798, 802 (1st Cir. 1991). As explained in that Order, the hearings on the motion to hold Fleming in civil contempt also established that the payment to the receivership of all of Fleming's assets plus the $130,418 contributed by his wife provided a reasonable resolution of the contempt proceedings in the regrettable, but real, present circumstances.

This Distribution Order provides all investors with a pro rata share of the assets in the CFTC receivership. Medicus may well have been one of USIC's last investors, but this does not provide a persuasive reason to treat him more favorably than any other investor. Moreover, as the CFTC records regarding USIC were lost when its New York City office at the World Trade Center was destroyed on September 11, 2001, the CFTC correctly contends that "it [is] virtually impossible to determine the investment of each Former Investor." Roth Decl. ¶9. Therefore, a pro rata distribution plan is necessary as well as appropriate.

While the court fully understands the frustration expressed by Medicus and Allen, and undoubtedly shared by the other victims of USIC and Fleming, the Distribution Plan represents the most and best that can be done to end the sad chapter in the annals of the law that this case represents.

Accordingly, it is hereby ORDERED that:

1. All objections to the Distribution Plan are DENIED.

2. The CFTC shall implement the Distribution Plan in accordance with court's June 27, 2003 Distribution Plan Order and Order Setting Objection Date.

3. The CFTC shall send copies of this Order to Terry Allen and Heinrich Medicus.

UNITED STATES DISTRICT JUDGE