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District of New Mexico

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Filer Information

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Comments: Memorandum Opinion on Lincoln National Life Insurance Corporation's Motion for Reconsideration and Motion 1) for Final Hearing on Objection to the Proof of Claim, 2) to Amend Order for Interim Distribution, and 3) to Compel the Trustee to Act to Recover Overpayments or, in the Alternative, to Distr

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
SANTA FE PRIVATE EQUITY FUND,
Debtor. No. 7-87-01188 SS

MEMORANDUM OPINION ON LINCOLN NATIONAL LIFE INSURANCE CORPORATION'S MOTION FOR RECONSIDERATION
-AND-
MOTION 1) FOR FINAL HEARING ON OBJECTION TO THE PROOF OF CLAIM, 2) TO AMEND ORDER FOR INTERIM DISTRIBUTION, AND 3) TO COMPEL THE TRUSTEE TO ACT TO RECOVER OVERPAYMENTS OR, IN THE ALTERNATIVE, TO DISTRIBUTE CAUSES OF ACTION TO LINCOLN

This matter came before the Court for final hearing on the Law Firm of Eastham, Johnson, Monnheimer & Jontz, P.C.'s ("Eastham's") Motion to Reconsider an Oral Ruling made by Judge Rose, the judge previously assigned to this case (the "Motion to Reconsider"). Judge Rose orally denied a motion by Lincoln National Life Insurance Corporation ("Lincoln National"/or "Lincoln") for 1) a final hearing on the objection to the proof of claim, 2) to amend order for interim distribution, and 3) to compel the Trustee to act to recover overpayments or, in the alternative, to distribute causes of action to Lincoln (Lincoln's "Motion for Final Hearing"). Lincoln National joined in the Motion to Reconsider[1]. The Trustee Robert N. Hilgendorf appeared. Alice Nystel Page appeared for Lincoln. Walter

[1]Arinco and the Trustee both raised the issue of the standing of Eastham, as former attorney for Lincoln National, to file the motion to reconsider. The Court finds that Lincoln National's joinder moots the standing issue.

Reardon appeared for creditor Arinco Computer Systems, Inc. ("Arinco"). Kenneth Harrigan and Wade Woodard appeared for interested party Eastham. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B).

Judge Rose retired after the last hearing he conducted on Lincoln's Motion for Final Hearing. At that last hearing, Judge Rose orally denied the motion; he subsequently entered Findings of Fact and Conclusions of Law, but no written order denying the motion. The matter is now before this Court on the motion to reconsider the oral ruling. Procedurally, therefore, we have a motion to reconsider the denial of what is basically another motion to reconsider a prior order that allowed an interim distribution.

On April 16, 1999, this Court entered its Certification pursuant to Bankruptcy Rule 9028, certifying familiarity with the record as required by Federal Rule of Civil Procedure 63. This Court then conducted an evidentiary hearing on Lincoln's Motion for Final Hearing in connection with the hearing on the Motion to Reconsider, effectively reconsidering Judge Rose's oral ruling. Having considered the testimony of the witnesses and the extensive record in this case, and having considered the arguments of the parties, the Court now makes its own findings of fact and conclusions of law on the Motion for Final Hearing.

FACTS

1. Santa Fe Private Equity Fund, L.P. (commonly referred to as "Fund I") filed a Chapter 7 Bankruptcy on June 4, 1987. Robert Hilgendorf was appointed Trustee ("Trustee").
2. The first meeting of creditors under 11 U.S.C. § 341 was held on July 7, 1987. The creditors had 90 days from the 341 meeting to file proofs of claim: i.e., October 5, 1987.
3. Santa Fe Private Equity Fund II ("Fund II") was not a debtor in this Court, but was in receivership in a proceeding in the First Judicial District Court for Santa Fe County, New Mexico. John Clark was appointed receiver in that proceeding.
4. Aaron D. Silver, a/k/a A. David Silver, was a managing partner of Fund I and Fund II. Mr. Silver was a debtor in a Chapter 11 proceeding.
5. John Clark, as receiver of Fund II, filed a Proof of Claim on November 6, 1987 (apparently some 32 days after the deadline), in the amount of Three Hundred Ninety-Four Thousand and 00/100 Dollars ($394,000). The Claim was based upon payment of a guarantee to Los Alamos National Bank of a Fund I debt. The Claim was amended on April 6, 1988, to the amount of One Million Three Hundred Fifty-Nine Thousand Fifty-One and 00/100 Dollars ($1,359,051).

6. Fund II assigned its claims to Lincoln pursuant to a settlement agreement between Lincoln, Fund II and others, as part of the settlement reached between John Clark and Fund II's limited partners with respect to claims asserted in a dissolution proceeding filed by the limited partners of Fund II and in other claims and actions. On April 21, 1988, a settlement agreement, including the assignment of the claim from Fund II to Lincoln, was approved by the First Judicial District Court, Santa Fe County, in Acacia Mutual Life Insurance company v. ADS Associates, No SF 860279 (c).

7. On May 12, 1988, Robert A. Johnson ("Johnson") of Kemp, Smith, Duncan & Hammond, P.C. filed a notice of appearance and request for notice for Lincoln, stating he was appearing for Lincoln itself and as assignee of Fund II. A copy of the notice of appearance was served on the Trustee, Walter J. Melendres (Attorney for Fund II), and the United States Trustee on May 12, 1988.

9. Johnson received notices in the case mailed November 4, 1988, June 5, 1989, July 24, 1989, December 6, 1989, and July 30, 1989, January 15, 1991, June 17, 1991, May 21, 1992, August 17, 1992, December 10, 1992, April 6, 1993, and September 28, 1993. All of these notices were addressed to Johnson as Attorney for Lincoln National Life. Johnson reasonably believed he was receiving all notices in

the case, as requested. Between 1992 and 1994 there were several other notices to creditors and parties in interest that were mailed to approximately 90 creditors including Lincoln.

10. In the fall of 1990, Johnson asked the Trustee for a list of claims to which the Trustee would object. The Trustee responded with a letter dated October 26, 1990, that included a draft of "Trustee's objections to claims" that did not include an objection to Lincoln's claim. This response reasonably lead Johnson to believe there was no problem with the Fund II claim. Johnson responded with a letter dated November 5, 1990 that suggested an additional objection to the claim of A. David Silver.

11. The Trustee had actual knowledge of the involvement of Johnson and Lincoln in the case, and should have had actual knowledge of the role of Lincoln as assignee of the claim of Fund II.[2]

12. The Trustee filed his Objections to Claims on August 28, 1992, which included an objection to the claim filed by Fund II on the grounds that the claim was an insider claim and there was a lack of documentation. The Trustee served John Clark and Walter Melendres. Melendres testified that he did

[2] See finding no. 32, at page 10.

not receive the objection. On August 31, 1992, the Trustee sent Notice of the Objections to claims to John Clark and Walter J. Melendres. Melendres testified that he did not receive the notice. Neither the objection or the notice thereof show that they were sent to Johnson, and Johnson did not receive them. The Trustee knew or should have known at the end of August, 1992, that Johnson represented Lincoln as assignee of the Fund II claim.

13. On October 16, 1992, a Notice of Preliminary Hearing on the Objections to Claim was sent to both John Clark and Walter J. Melendres.

14. At the time the Objections to claims were filed and served, Lincoln was not on the claims register because it had not yet filed a statement of transferee's claim.

15. On March 25, 1994, the Trustee filed a Motion to Allow and Disallow Claims. This Motion set a final hearing for April 7, 1994, and notice of the hearing was mailed to John Clark, and Walter J. Melendres. The notice does not show that it was mailed to Johnson.

16. On April 20, 1994, the Court entered a Final Order Allowing and Disallowing Claims. This Order disallowed the claim of Fund II. The Order was not served on Johnson or Melendres.

17. On March 30, 1995, the Trustee filed an Amended Motion to Make Interim Distribution. The Amended Motion was not

served on Melendres or Johnson. The Notice of this Motion shows that it was mailed to the mailing matrix on April 5, 1995. Johnson appears on the mailing list. The Notice was sent via U.S. Mail to the correct address for Johnson. At the hearing before Judge Rose, Johnson testified that he had not received this notice. Johnson testified at the hearing before this Court, however, that since the original hearing his office conducted a computer search of incoming documents and found that in fact his office had received the notice of the interim distribution on April 6. Johnson's office uses a specific office-wide procedure to ensure that mail is routed to the appropriate person for handling. Johnson testified, however, that he never saw the notice, and this testimony is credible.[3]

18. Johnson was in and out of the office for medical reasons in April of 1995, but the file was being handled by another attorney in his office.

19. The Trustee obtained an order for an interim distribution to creditors on May 3, 1995 and distributed a large majority of the estate's funds pursuant to the order. Johnson did not

[3] Three witnesses testified at the September 1, 1999 evidentiary hearing before this Court, allowing this Court to assess their credibility directly: Robert A. Johnson, Robert N. Hilgendorf, and Walter J. Melendres. The Court found all three witnesses credible.

receive a copy of this order. Because Fund II's claim had been denied, no dividend was paid on the claim.

20. In the fall of 1996 Johnson received a notice regarding reconsideration of another creditor's claim; Johnson had never received the order on that claim, so he reviewed the court file. At this point he discovered that Lincoln's claim had been denied. Johnson's associate contacted the Trustee in an attempt to get the disallowance of Lincoln's claim set aside, but the Trustee refused.

21. On November 19, 1996, Lincoln filed a Statement of Transferee's Claim.

22. On November 22, 1996, Lincoln filed a Motion for Reconsideration of the order disallowing its claim.

23. On February 5, 1997, an Order Pursuant to Rule 3001(e) was entered substituting Lincoln for Fund II.

24. On August 25, 1997 Judge Rose entered an Order Granting Lincoln National's Motion for Reconsideration of Order Disallowing Claim on the basis of inadvertence or excusable neglect. This Order set aside that portion of the April 20, 1994, order that disallowed Lincoln's claim. This Order has not been appealed.[4]

[4] In so finding, the Court makes no ruling on whether the August 25, 1997 order was or is appealable.

25. Lincoln therefore has a claim pending, to which objections have been filed.

26. On September 15, 1997 Lincoln filed its Motion for Final Hearing on Lincoln National's Claim and to Amend Order for Interim Distribution and to Compel the Trustee to Act to Recover Payments. The Trustee filed an objection on September 25, 1997. On June 5, 1998, Lincoln gave notice to all creditors of the filing of the Motion for Final Hearing. The Abeles filed their objection on June 12, 1998. Arinco filed its objection and a Memorandum of Law on July 8, 1998. Lincoln also filed a Memorandum on July 8, 1998.

27. Judge Rose conducted a hearing on the Motion for Final Hearing and objections thereto on July 9, 1998. At the conclusion of the evidence, Judge Rose orally denied the motion without making any findings of fact or conclusions of law, and directed counsel for Arinco to prepare the order. The Court then set a presentment hearing for July 29, 1998 on the order. At the presentment hearing, Lincoln requested findings and conclusions, and Judge Rose directed the parties to submit proposed findings and conclusions within twenty days. Lincoln and Arinco filed these on August 18, 1998; Lincoln filed its objection to Arinco's proposed findings and conclusions on August 25, 1998.

28. On September 10, 1998, Eastham (the successor to Kemp, Smith, Duncan & Hammond, P.C.) filed its Motion to Reconsider the oral denial of Lincoln's Motion for Final Hearing together with a supporting memorandum. Arinco objected to the motion on September 23, 1998, to which Eastham replied on October 2, 1998.

29. On or about October 14, 1998, the Court set a final hearing on Eastham's Motion to Reconsider for December 7, 1998.

30. On December 3, 1998, Judge Rose entered Findings of Fact and Conclusions of Law on Lincoln's Motion for Final Hearing. At the December 7, 1998, hearing Judge Rose indicated that the case was being transferred to a new judge, and stated that the Motion for Reconsideration should be heard by the new judge.

31. This Court conducted a status conference on January 13, 1999, during which the Court asked for briefs on the ability of a successor judge to reconsider rulings made by a predecessor judge. On April 16, 1999, this Court entered a Certification pursuant to Bankruptcy Rule 9028. On April 16, 1999, the Court also entered a memorandum opinion that found, essentially, that a successor judge could reconsider rulings made by a predecessor judge. The Court then held an evidentiary hearing on September 1, 1999, on the Motion to Reconsider and Lincoln's Motion for Final Hearing.

32. At the September 1 hearing, the Trustee testified that while he knew of Johnson's and Lincoln's involvement in the case before the filing of the claims objections, he could not recall the specificity of any discussions. He also testified that in all his years as a trustee he never adjusted a mailing list or notice based on any personal knowledge he had; rather, he relied on his legal assistants to maintain the mailing lists. The Trustee also adopted his deposition testimony that he does not pay any attention to notices of appearance and requests for notice received by his office, that he hands them to his legal assistant and relies on her to do what she does and on the clerk's office to do what it does to maintain the mailing list[5]. The

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[5]At the July 9, 1998 hearing the Trustee testified:

Q. But didn't the notice of appearance and that request for notice of abandonment filed by Mr. Johnson and served on you–

A. I did not see a request for notice of abandonment.

Q. It's in the Court file. I didn't include it as part of the exhibits – the notice of appearance – excuse me. That was served on you, correct?

A. I don't read those. I hand them to my legal assistant and she does what she does to reflect any change in the matrix. I know the Court is going to get those and put them on the matrix. I don't pay any attention to them.

Q. What do you normally do with an [sic] notice of appearance when you receive it?

A. I don't do anything. I hand it over to my legal assistant, and it's usually marked NB note BA, or something. I don't have any recollection of ever receiving that.

Q. Do you have any follow up with your assistant with how those notices of appearance are processed, or do you just rely on them entirely to handle that?

Trustee also testified that this (i.e., during the September 1, 1999 hearing) was the first time he carefully read Johnson's May 12, 1988, entry of appearance and request for notice that disclosed that Lincoln was the assignee of Fund II.

32. There is no evidence in the record that granting Lincoln's Motion for Final Hearing would be inequitable or would cause hardship to the Trustee or to other creditors. There was no evidence presented that any creditor relied, detrimentally or otherwise, on the Trustee's, Lincoln's, or Johnson's actions.[6]

33. Lincoln was defaulted without sufficient notice and it would be inequitable to deny Lincoln its pro rata share of the estate.

THE MOTION TO RECONSIDER

Eastham (and Lincoln, by adoption) essentially argues that Judge Rose's oral ruling on Lincoln's Motion should be set aside because it is erroneous, inequitable, and allows other creditors

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A. She has been with me 15 years, and I rely on her to do that, whatever. As I said, I think it's up to the clerk of the court take these notices and reflect them on the matrix, and so that's what's done.
Transcript, pages 44-45.

[6] Nothing in this opinion is intended to preclude any individual creditor from arguing estoppel or detrimental reliance if sued for disgorgement. See footnote 17.

to receive a windfall. Arinco responded that the motion raised no new issues, either evidentiary or legal, arguing that therefore the motion should be denied. The Trustee also responded that the motion raised no new issues, and further argued that since the relief requested is subject to equitable considerations Lincoln should be estopped from challenging the prior orders because of its failure to object to the interim distribution, failure to establish procedures for forwarding of mail from Fund II's counsel, and failure to review court files.

The stated basis of the Motion to Reconsider is Rule 60. Rule 60, which pertains to "relief from judgment or order" technically does not apply because no judgment or order has been entered. See F.R.Civ.P. 60. The Court will therefore construe the motion as a motion for a new trial or amendment of Judge Rose's announced judgment under Rule 59(a)(2)[7], or as a motion to amend findings under Rule 52(b)[8]. See Hilst v. Bowen, 874 F.2d

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[7] Rule 59(a)(2) provides:
A new trial may be granted to all or any of the parties and on all or part of the issues ... (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

[8] Rule 52(b) provides:
On a party's motion filed no later than 10 days after

725, 726 (10th Cir. 1989)(District court properly construed motion for reconsideration as one under Rule 59 when filed after Court's oral ruling but before entry of judgment). See also Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996):

> We have also held that Rule 60(b)(1) is not available to allow a party merely to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument. ... Rather, those kinds of arguments must be addressed within the context of a Rule 59 motion.

(Citations omitted); National City Bank of Cleveland v. 6 & 40 Investment Group, Inc. (In re 6 & 40 Investment Group, Inc.), 752 F.2d 515, 515-16 (10th Cir., 1985)("Any kind of motion that draws into question the correctness of the district court judgment is considered to be a motion 'to alter or amend the judgment' under Civil Rule 59(e)."); and National Metal Finishing Company, Inc. v. Barclaysamerican/Commercial Inc., 899 F.2d 119, 122 (1st Cir. 1990)(discussing similarity between Rule 59(e) and Rule 52 relief).

In general, the need to correct clear error or prevent manifest injustice is a ground warranting a motion to reconsider under Rule 59. Servants of the Paraclete v. John Does I-XVI, 204

> entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59 .

F.3d 1005, 1012 (10th Cir. 2000), citing Brumark Corporation v. Sampson Resources Corporation, 57 F.3d 941, 948 (10th Cir. 1995). Although other grounds include an intervening change in the controlling law, or discovery of new evidence previously unavailable, id., a motion for reconsideration is also appropriate where the court has misapprehended the facts, a party's position, or the controlling law. Id. Thus, there is no absolute requirement that the movant present new issues in a motion for reconsideration, as Arinco and the Trustee suggest. Van Skiver v. United States, 952 F.2d 1241, 1244 (10th Cir.) cert. denied 113 S.Ct. 89 (1992)(a motion that reiterates the original issues and which seeks to challenge the legal correctness of the judgment by arguing that the court misapplied the law or misunderstood the movant's position is properly brought under rule 59). See also National Metal Finishing, 899 F.2d at 123-24 (Rule 59 is properly invoked to request the court to reconsider, vacate, or reverse its prior holding). A Court has the power under either Rule 52 or 59 to amend findings of fact and conclusions of law even when doing so results in a reversal of its initial judgment. Id. at 124.

Rule 61 (Harmless Error) sets out a workable test for when to grant a rule 59 motion: an error is not grounds for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice." Libutti v. United

States, 178 F.3d 114, 118 (2nd Cir. 1999)(quoting Fed.R.Civ.P. 61, made applicable to bankruptcy matters by Fed. R. Bankr. P. 9005).

Cases discussing Rule 59 speak in terms of "clear error," "manifest error" or "manifest injustice," see, e.g. Union Camp Corporation v. United States, 963 F.Supp 1212, 1213 (Ct. Int'l Trade 1997)(decision should not be disturbed unless it is "manifestly erroneous"). These concepts are generally appellate standards, however, and do not have the same meaning or policy considerations in the context of a trial court's reviewing its own findings for error. National Metal Finishing Company, Inc., 899 F.2d at 124-25. Therefore, as applied, appellate courts uphold a reconsidered opinion unless it is clearly erroneous. Id. at 125. See, e.g. Servants of the Paraclete, 204 F.3d at 1012 (reciting "clear error" and "manifest injustice" grounds, but concluding that reconsideration is appropriate "where the court has misapprehended the facts, a party's position, or the controlling law"). This appears to be particularly true in cases where successor judges are called upon to reconsider matters. See United States v. O'Keefe, 128 F.3d 885, 891 (5th Cir. 1997) (in many instances one judge must reconsider an order previously granted by another judge; second court should follow ruling unless the prior decision was erroneous, is no longer sound, or would create injustice).

Therefore, the real issue before the Court is whether the oral ruling and the findings of fact and conclusions of law were erroneous or are inconsistent with substantial justice. To determine this, the Court needs to review Lincoln's Motion for Final Hearing and the objections thereto[9], the evidence[10], arguments, and law that culminated in Judge Rose's oral ruling and findings of fact and conclusions of law.

LINCOLN'S MOTION FOR FINAL HEARING

Lincoln's Motion for Final Hearing seeks three things: 1) a final hearing on the objection to its amended claim, 2) an order amending the order for interim distribution, and 3) an order compelling the Trustee to recover overpayments or alternatively allowing Lincoln to pursue the overpayments. Lincoln argues that, assuming its claim is ultimately upheld, there are thirteen unsecured creditors that have already received distributions that exceed the amounts to which they would be entitled. Citing In re

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[9] Those portions of the Trustee's objection to the Motion to Reconsider that address the merits of Lincoln's Motion for Final Hearing will be discussed below.

[10] On July 9, 1998, Judge Rose conducted an evidentiary hearing on the Motion for Final Hearing. This Court reviewed that evidence as part of the Rule 9028 certification, and then conducted another evidentiary hearing on the Motion for Final Hearing and the Motion to Reconsider on September 1, 1999. In effect, of course, the September 1, 1999 hearing constituted a de facto granting of the Motion to Reconsider (that is, by conducting the hearing and writing this opinion, this Court has effectively agreed to look at the issues again and consider whether another disposition is appropriate).

Kelderman, 75 B.R. 69 (Bankr. S.D. Ia. 1987), In re Kingston Turf Farms, 176 B.R. 308 (Bankr. D. R.I. 1995),Danning v. General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.), 779 F.2d 480 (9th Cir. 1985) ("Jules Meyers Pontiac") and Rawlings v. United States (In re Madden), 338 F. Supp. 47 (D. Id. 1975), Lincoln argues that the Trustee has a right and obligation to recover the excess dividends. Lincoln also compares this case to In re Frontier Enterprises, Inc., 70 B.R. 356 (Bankr. C.D. Il. 1987), in which the court held that an error in distribution of funds was cause to reopen the case and amend the distribution order.

Furthermore, based on United States v. Rhodey (In re R & W Enterprises), 181 B.R. 624 (Bankr. N.D. Fl. 1996), Lincoln claims that the relief requested does not prejudice the unsecured creditors because there is no prejudice to creditors who receive monies to which they are not entitled. Lincoln also argues that because the distribution made in this case was an "interim" distribution it is recoverable, citing Farmers State Bank v. Miner (Matter of Monson), 87 B.R. 577 (Bankr. W.D. Mo. 1988) and Fulton County Silk Mills v. Irving Trust Co. (In re Lilyknit Silk Underwear Co., Inc.), 73 F.2d 52 (2nd Cir. 1934) ("Lilyknit Silk Underwear"). Finally, Lincoln argues that because the interim order of distribution was based upon the order disallowing its claim, now that the order disallowing claim has been set aside

the interim order of distribution must also be set aside, based on Northern Bank v. Dowd, 562 N.W.2d 378 (Neb. 1997); Mahoney v. Mahoney, 567 N.W.2d 206 (N.D. 1997); and Mutual Life Insurance Company of New York v. Bohart (Matter of Bohart), 743 F.2d 313 (5th Cir. 1984).[11] Therefore, Lincoln seeks an order amending the order of interim distribution and, alternatively, an order compelling the Trustee to recover the overpayments or an order allowing Lincoln to pursue the overpayments directly.

The Trustee responded to Lincoln's motion, claiming that notice of the motion should be given to all creditors, and arguing that it was premature to consider Lincoln's motion until there was a final determination on the pending objection to Lincoln's claim. Subsequently the parties entered a stipulated order that provided, in part, that Lincoln's claim could be deemed allowed solely for the purpose of determining Lincoln's motion to amend distribution and to compel the Trustee to recover payments.[12] Notice of the stipulation and Lincoln's motion was

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[11] This argument is discussed in the context of the Rule 60(b)(5) analysis, at pages 29-31.

[12] Lincoln, the Trustee and Arinco believe that it is less work for the parties and the Court to litigate the distribution order than to litigate the claim objection. Since Lincoln's proving up a sufficient claim and obtaining an amended distribution order are each necessary but not sufficient conditions for Lincoln to obtain the relief it seeks, the Court is first deciding the issue of amending (or, more accurately, setting aside) the distribution order, as the parties have requested.

then given to all creditors and parties in interest, with an opportunity to object. Two creditors objected. Therefore, it seems that the Trustee's notice objection has been satisfied.

The Trustee also argued that a trustee has no absolute right to recover dividends in this situation; rather, he argues, that right is subject to the Court's discretion after considering the equities of the case. E.g., Jules Meyers Pontiac, 779 F.2d at 481-82. The Trustee also argued that Lincoln should be equitably estopped from seeking this relief. The Court has found that Johnson did not receive notice of the objection to Fund II's claim; therefore Johnson had no duty to object to it. Furthermore, there is no evidence that Johnson should have taken steps to have mail forwarded from Fund II's prior counsel after entering his own appearance in this case, and the Court will not so rule as a matter of law. The Court has also found that once Johnson discovered that Lincoln's claim had been denied, he proceeded timely to remedy the situation. Having entered an appearance, Johnson was entitled to believe he would receive notice, particularly with respect to matters affecting his client's claim. See City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 297, 73 S.Ct. 299, 301 (1953)(creditors have right to assume that statutory 'reasonable notice' will be given them before their claims are barred); Reliable Electric Co., Inc. v. Olson Construction Company, 726 F.2d 620, 622 (10th Cir.

1984)(same); Matter of Kelderman, 75 B.R. 69, 70 (Bankr. S.D. Ia. 1987)("No further action was required on the part of [creditor] as its claim would be deemed allowed unless an objection was made pursuant to 11 U.S.C. section 502(a).") In sum, the Court does not find any grounds that estop Lincoln from seeking relief.

Creditors Richard and Kathleen Abeles also filed an objection to Lincoln's Motion. They argued that it would be unfair to recover dividends because Lincoln had actual notice of the distribution. However, the Court finds that Lincoln did not have actual notice. Even if Lincoln had notice, however, the notice issue was particularly relevant to the motion to reconsider the order sustaining the objection to the claim, which Judge Rose has already decided. See 11 U.S.C. § 502(j) ("A reconsidered claim may be allowed or disallowed according to the equities of the case.") Now that the order sustaining the objection to the claim has been set aside, however, the real issue is the legal effect of that action.

Creditor Arinco also filed an objection to Lincoln's motion, in the form of a memorandum of law. Arinco, citing Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458 (6th Cir. 1991), Jules Meyers Pontiac, 779 F.2d at 480, and 4 Collier on Bankruptcy ¶ 502.11[2] (15th Ed. Rev. 1999), argues that the Trustee is not required under 11 U.S.C. section 502(j) to recover payments authorized by the court and properly

paid to creditors; rather, the Trustee has only the power but not an absolute right to recover "erroneously" paid dividends. This power originally stemmed from section 57(l) of the old Bankruptcy Act. Under that former law the Court was required to consider the equities of a case before authorizing recovery. Arinco argues that this authority should not be given if the payments were authorized by the Court and proper at the time. Furthermore, Arinco claims that section 502(j) by its express terms cannot upset prior proper distributions made on allowed claims: 502(j) contains a procedure for the omitted creditor to "catch up" by suspending dividends to the original creditors until the omitted creditor has obtained parity.

Next, Arinco argues that the Trustee may not use section 549 to recover dividends, but even if the Trustee were so allowed, recovery in this case is barred by the statute of limitations in section 549(d). The Court does not find this argument relevant, because Lincoln's motion does not base its relief on section 549. Section 549(d) limits its applicability to "an action or proceeding under this section" (emphasis added), so by its express terms would not apply to relief requested under section 502. Finally, Arinco argues that the cases cited by Lincoln only deal with "erroneous" distributions, which is not applicable to this case because the distributions in this case were not erroneous when made.

Discussion

As an initial matter, the Court finds that it has the jurisdiction to deal with the subject matter of these motions, despite the fact that dividends have already been paid. See Elliott v. Maynard, 40 F.2d 17, 18 (6th Cir. 1930)("[T]he mere payment of dividend upon a claim cannot operate as an estoppel to a petition later filed to re-examine and expunge."); Matter of Monson, 87 B.R. at 589, citing Lilyknit Silk Underwear Co., Inc., 73 F.2d 52 (distributions made prior to final distribution remain subject to recovery); United States v. Wyle (In re Pacific Far East Lines, Inc.), 889 F.2d 242, 248 (9th Cir. 1989)(payments from an estate cannot operate as estoppel to a petition to reconsider and expunge claim)(decided under former law); Matter of Pittsburgh Railways Company, 253 F.2d 654, 657 (3rd Cir. 1958)(where assets and claims have been under jurisdiction of the bankruptcy court, that jurisdiction continues until the case is closed.)(Decided under former law.) See also Shaia v. Durrette, Irvin, Lemons & Bradshaw, P.C. (In re Metropolitan Electric Supply Corp.), 185 B.R. 505, 512 (Bankr. E.D. Va. 1995)(Section 105 authorizes chapter 7 trustee to recover chapter 11 administrative expenses to pay chapter 7 administrative claims and to prorate chapter 11 expenses.)

The starting point for an analysis of Lincoln's Motion for Final Hearing is the statute itself. Section 502(j) provides:

> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Judge Rose has already reconsidered the disallowance of Lincoln's claim, and entered an order setting aside the disallowance. That order has not been challenged. Therefore the first two sentences of section 502(j) are not relevant; the third and fourth sentences are at the heart of this dispute. Arinco argues that the third sentence's plain language insulates prior payments from the Trustee's recovery, claiming that Lincoln's sole remedy is the "catch up" provision. It also argues that no "excess" payment is involved: because prior payments were authorized by court order, Arinco claims the fourth sentence does not apply. On the other hand, Lincoln argues that the Trustee's fiduciary duties and the fourth sentence allows or requires the Trustee to recover payments. Having considered the law and the facts in this case, the Court finds that Lincoln's argument should prevail.

A Court should give effect to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520 (1955). Arinco's first interpretation of section 502(j), i.e., that it presumptively validates previous dividends and insulates those dividends from a trustee's attack to recover them, and which would incidentally limit Lincoln to the sole remedy of "catching up", ignores the last sentence. That last sentence provides that a trustee's right to recover excess payments is not affected by the presumed validity of prior transfers or the "catch up" procedure. If Arinco's reading of the statute were correct, the fourth sentence would be mere surplusage.

In addition, the third and fourth sentences can easily and logically be read together; to wit, other claims holders may not receive further payments from the estate until the omitted creditor has "caught up" (sentence 3), but that provision does not preclude the trustee from recovering excess payments (sentence 4). Therefore, the Court cannot interpret the third sentence in the manner Arinco suggests.

Arinco's second argument, that the fourth sentence does not apply, also does not seem correct. Arinco argues that because the dividends were properly authorized (and correct at the time), there cannot be an "excess" payment for a trustee to recover. The problem is that Arinco equates "excess" with "erroneous."

The statute, however, does not say "erroneous", it only says "excess". "Excess" is not defined by the Bankruptcy Code. "When a word is not defined within the statute, it is given its ordinary meaning, with all due consideration to the context." Davila-Perez v. Lockheed Martin Corporation, 202 F.3d 464,468 (1st Cir. 2000)(citations omitted.) And, when a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Industries, Inc., 489 U.S. 235, 241 (1989). Black's Law Dictionary 561 (6th ed. 1990) defines "excess" as "Degree or amount by which one thing or number exceeds another." This definition does not contain any connotation of error or wrongfulness; it is a number, neither right nor wrong. Nor does section 502(j)'s context imply that a trustee can only recover wrongful distributions. If Congress had meant for the trustee to be able to recover only erroneous payments, it would have said so explicitly. See Ron Pair Enterprises, Inc., 489 U.S. at 242 n.5 ("Had Congress intended §506(b) apply only to consensual liens, it would have clarified its intent by using the specific phrase, 'security interest,' which the Code employs to refer to liens created by agreement. 11 U.S.C. §101(45).") The Court cannot, therefore, read the last sentence of 502(j) as equating "excess" with "erroneous" or requiring an "erroneous" distribution as a condition of recovery. In sum, if there has been an "excess"

distribution, section 502(j) does not alter or limit the trustee's right to recover that excess payment.

In this case there has been an excess payment. The parties have stipulated that Lincoln has a claim for the purpose of this motion. Had that claim been included on the interim distribution, each creditor would have received a smaller dividend. In other words, the thirteen creditors that received interim dividends have received a windfall at the expense of Lincoln. See Kelderman, 75 B.R. at 71.

The next task for the Court is to determine exactly what rights a trustee does have to recover excess payments. Section 502(j) acknowledges the existence of that "right to recover ... excess payment[s]". 11 U.S.C. § 502(j). Bankruptcy Rule 9024 states that a motion for reconsideration of an order allowing or disallowing a claim entered without a contest is not subject to the one year limitation prescribed in Rule 60(b). 28 U.S.C. §§ 157(b)(2)(B) and (C) state that claims matters are core proceedings. Rule 3008 allows a party in interest to move for reconsideration of an order allowing or disallowing a claim. The Code has no section, however, that explicitly states "The trustee may recover excess dividends." Compare 11 U.S.C. § 547(b) (trustee may avoid preferences); 11 U.S.C. § 548(a) (trustee may avoid fraudulent transfers); 11 U.S.C. § 549(a) (trustee may

avoid certain post-petition transfers); and former section 57(l) of the Bankruptcy Act:

> Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor.

11 U.S.C. § 93(l)(emphasis added)(repealed).

Rather, the trustee's right is based on caselaw and the Court's "ancient and elementary power" to reconsider prior orders. Kelderman, 75 B.R. at 70; Lilyknit Silk Underwear, 73 F.2d at 54 ("In the exercise of a duty imposed by the bankruptcy law, the trustee may invoke such general equitable principles as are applicable. Among them is the power to require restitution of what has been taken by the enforcement of a judgment subsequently reversed." (Citations omitted.)) The standards for amending orders are found in Rule 60(b)[13] of the Federal Rules of

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[13]Rule 60(b) provides:
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

Civil Procedure, which are made applicable by Bankruptcy Rule 9024.

The order for interim distribution was entered on May 3, 1995. Lincoln's motion to amend order of interim distribution was filed on September 15, 1997. Therefore, Lincoln cannot obtain relief under the first three subdivisions of Rule 60(b), which require that the motion be filed within one year[14]. Also, the Order was not void; therefore, Rule 60(b)(4) does not apply. Relief is possible only under Rule 60(b)(5) or 60(b)(6).

Federal Rule 60(b)(5).

Federal Rule 60(b)(5) allows relief from a judgment if a prior judgment upon which it is based has been reversed or

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> equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

[14]Had the motion been filed within one year, relief under Rule 60(b)(1) would probably have been in order. This subsection applies when the judge has made a substantive mistake of law or fact in a judgment or order. It seems there were a series of mistakes in this case: the failure of the Trustee to be aware of Lincoln's role despite the communications that had taken place, the failure of Lincoln to record the assignment of the claim before the interim distribution, the entry of the order disallowing claim without notice to Lincoln despite earlier indications in the file that Lincoln had been assigned the claim, the failure of Melendres to receive documents; Johnson's failure to see the notice of interim distribution. Whether these were mistakes of law or mistakes of fact, this series of mistakes resulted in a disallowed claim and interim distribution which, in retrospect, were just wrong.

otherwise vacated. This rule applies when the law of the case changes. See Coltec Industries, Inc. v. Hobgood, 184 F.R.D. 60, 62 (D. Pa. 1999). A decision is "based on" a prior judgment when the prior judgment is a necessary element of the decision. Id. See also, e.g., Assoc. for Retarded Citizens of Connecticut, Inc. v. Thorne, 68 F.3d 547, 553 (2nd Cir. 1995)(after an appeal was taken, trial court awarded prevailing party statutory fees and costs; appellate court reversed judgment and noted that under Rule 60(b)(5) the award of attorney fees should be vacated.) "Based on" carries "the sense of res judicata, or collateral estoppel, or somehow part of the same proceeding." Tomlin v. McDaniel, 865 F.2d 209, 210-11 (9th Cir. 1988). See also Butler v. Eaton, 141 U.S. 240, 243-44, 11 S.Ct. 985, 987 (1891)(a judgment was "based directly upon" a judgment which the Supreme Court had just reversed; ***held*** the second judgment "has become erroneous" and should be reversed)(predating Federal Rules of Civil Procedure).

In this case, the interim order of distribution was predicated, in large part, on the order disallowing Lincoln's $1.36 million claim. The order setting aside the disallowance of Lincoln's claim changed the law of this case. Now there are insufficient funds to pay Lincoln its pro-rata share of the estate. Therefore, the interim order of distribution in this

case should also be set aside[15]. Accord Kingston Turf Farms, 176 B.R. at 310 (court "unwisely" directed payment of an administrative creditor in full; case later became administratively insolvent; held disgorgement required); In re Crotts, 87 B.R. 418, 419 and 421 (Bankr. E.D. Va. 1988)(after confirmation of chapter 13 plan and commencement of dividends, court determines that estate asset is held in constructive trust; held plan vacated and trustee ordered to recover dividends).

Federal Rule 60(b)(6).

Alternatively, Federal Rule 60(b)(6) allows relief from a judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) should be liberally applied to situations not covered by 60(b)(1) through 60(b)(5),

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[15]The Court is not suggesting that every case where a claim is reconsidered and allowed after a partial distribution has taken place would require an amendment to the order of distribution. For example, if the interim distribution left sufficient funds to pay the added creditor its pro rata share, it would not serve any purpose for the trustee to recover funds. Similarly, in an ongoing chapter 12 or chapter 13 case where the dividend is a certain percentage of the allowed claim there would be no purpose in recovering dividends only to redistribute them, in the same amounts and to the same creditors. In these cases the Court would likely find that the trustee had no right to recover (there would be no "excess" payment), and the third sentence of 502(j) would govern the proceedings, preserving the validity of the prior transfers. Also, in the case of a confirmed chapter 11 plan, prior payments may not be recoverable given the res judicata status awarded to confirmation orders. See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc., 930 F.2d at 464 ("Section 502(j) was not intended to provide an avenue of attack on the finality of a binding order of confirmation.").

balancing the "sound interest underlying the finality of judgments" with the need to take appropriate action in the furtherance of justice. Fleming v. Gulf Oil Corporation, 547 F.2d 908, 911-12 (10th Cir. 1977)(quoting 7 James Wm. Moore et al., Moore's Federal Practice, 342-43 (1975)). The interim order of distribution was not a final order. See Aucoin v. Southern Insurance Facilities Liquidating Corporation (In re Aucoin), 35 F.3d 167, 169 (5th Cir. 1994)(a decision is final when it ends litigation on the merits and leaves nothing for the court to do but execute the judgment). The Trustee still needed to complete administration of the case and distribute the balance of funds. Therefore, when performing the Rule 60(b) balancing test on this interim order, the lack of finality undermines the policy reason to uphold the order.

Rule 60(b)(6) relief is "extraordinary and may only be granted in exceptional circumstances," Servants of the Paraclete, 204 F.3d at 1009 (citations omitted), and only when such action is necessary to accomplish justice, State Bank of Southern Utah v. Gledhill (In re Gledhill), 76 F.3d 1070, 1080 (10th Cir. 1996). Finally, because Rule 60(b) is inherently equitable, the granting of Rule 60(b) relief can be challenged on equitable grounds, such as when property rights become prejudiced. Woods v. Kenan (In re Woods), 173 F.3d 770, 780 (10th Cir. 1999).

Given this framework, the Court must examine the equities of the case. Creditors received an interim dividend in 1995; being an interim dividend, they are on notice that administration of the case and distribution are not final. Lilyknit Silk Underwear, 73 F.2d at 53 (nonfinal payments are "tentative"); In re Kingston Turf Farms, 176 B.R. at 310 (interim payments are "on account" and always subject to review). The dividends the creditors received were in excess of the amounts to which they are in fact entitled. Recovery of an excess dividend is not prejudicial to creditors that received monies to which they are not entitled. In re Kingston Turf Farms, Inc., 176 B.R. 308, 309 (Bankr. D. R.I. 1995); In re Guild Music Corporation, 163 B.R. 17, 18 (Bankr. D. R.I. 1994); In re Frontier Enterprises, Inc., 70 B.R. 356, 360 (Bankr. C.D. Il. 1987). Therefore, the relief Lincoln seeks does not upset any property rights. See also United States v. Rhodey (R & W Enterprises), 181 B.R. 624, 634-35 (Bankr. N.D. Fl. 1994)("equities of case" demand an equitable redistribution when original distribution was wrong). Compare Woods, 173 F.3d at 780 (debtors were not prejudiced by non-receipt of funds on which they had no equitable claim).

On the other hand, Lincoln should have the opportunity to defend the objection to its claim and, based on the results of that claim litigation, to participate pro-rata in the distributions from the estate. See City of New York v. New York,

N.H. & H.R. Co., 344, U.S. at 297, 73 S.Ct. at 301 (1953) (creditors have right to assume that statutory "reasonable notice" will be given them before their claims are barred) and Union Bank v. Wolas, 502 U.S. 151, 161, 112 S.Ct. 527, 533 (1991)(discussing prime bankruptcy policy of equality of distribution among creditors.)

Relief under Rule 60(b)(6) has been granted in similar situations where a party has not had adequate notice of the entry of a judgment or order. See e.g., Fleming v. Gulf Oil Corporation, 547 F.2d 908, 913 (10th Cir. 1977)(Rule 60(b)(6) relief granted two years after dismissal was entered without proper notice to plaintiff.); Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2nd Cir. 1963)("Had notice of the entry of judgment been given in this case, the plaintiffs would have been forewarned of the necessity of moving to vacate within one year [to pursue Rule 60(b)(1) relief]." Rule 60(b)(6) relief granted); Molloy v. Wilson, 878 F.2d 313, 316 (9th Cir. 1989)(adopting Radack). In this case, the evidence shows that Lincoln's attorney became aware of the default for the first time some 17 or 18 months after its entry, and promptly acted to set it aside. There is nothing in the record to show that the delay has changed anything. See Fleming, 547 F.2d at 913. There is no evidence or testimony that the timing has prejudiced any creditor.

Furthermore, there is a long line of cases holding that Rule 60(b) is to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments. Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969)(collecting cases). These cases indicate that if the delay is short, there is an absence of gross neglect on the part of the plaintiff, a lack of prejudice to defendant, and the assertion of a meritorious defense[16], then it is an abuse of discretion by the trial court to not set aside the default. Id. This seems to describe this case.

Finally, relief has also been granted under Rule 60(b)(6) when circumstances change significantly during the course of a bankruptcy case. State Bank of Southern Utah v. Gledhill, (In re Gledhill), 76 F.3d 1070, 1081-82 (10th Cir. 1996). In the case before the Court, the disallowance of Lincoln's claim was set aside after the interim order of distribution and payment thereon. The Court finds that this is a sufficient change in circumstances that amendment of the interim order is needed to accomplish justice.

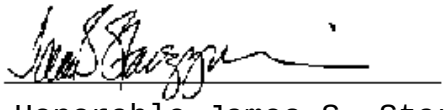
Conclusion

[16]The Court treats the parties' stipulation that Lincoln has a claim for the purpose of this motion as equivalent to the assertion of a meritorious defense.

For the reasons set forth above, Eastham's motion to reconsider the oral ruling made by Judge Rose should be (and in fact has been) granted. Upon reconsideration of the oral ruling and pursuant to Rule 60(b), the Court finds that the equities of this case require that Lincoln be permitted to prove up its claim, and that the interim order of distribution should be amended in the event that Lincoln proves up a large enough claim.

The next logical step is to determine the amount if any of Lincoln's claim. The Court will set a preliminary hearing on this matter. Pending the resolution of Lincoln's claim, the Court will reserve a decision on the question of whether the Trustee or Lincoln should pursue recovery of any excess payments.[17]

Orders implementing the foregoing will issue.



Honorable James S. Starzynski
United States Bankruptcy Judge

[17]Counsel for Lincoln argued that the notice of the motion to compel the Trustee to recover overpayments should be claim preclusive as to the Trustee recovering overpayments in the event the motion is granted. The Court disagrees. Any action by a Trustee to recover property would need to be brought by adversary proceeding. See Bankruptcy Rule 7001(a).

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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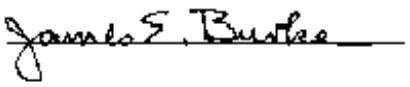

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