

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION	:	
Plaintiff,	:	
	:	00 Civ 2685 (MGC)
v.	:	
	:	
ENTERPRISES SOLUTIONS, INC.	:	
HERBERT S. CANNON	:	
DR. JOHN A. SOLOMON,	:	
	:	
Defendants,	:	
And	:	
	:	
ROWEN HOUSE, LTD,	:	
MONTVILLE, LTD.,	:	
	:	
Relief Defendants.	:	
	:	

**ORDER AFFIRMING RECEIVER'S DETERMINATION**

This cause comes on to be heard on the request of Phillip S. Stenger (the "RECEIVER") in his status as Receiver pursuant to the "Order for Appointment of Receiver and Administration of Fund" entered by this Court on July 23, 2003 (the "APPOINTING ORDER"), by and through his attorneys, Stenger & Stenger, P.C., for an order of this Court affirming his "Receiver's Determination of Claimant's Net Stock Loss" dated October 25, 2005 for David Shor *et al.* (Claim Number ESI 129) (the "RECEIVER'S SHOR DETERMINATION").<sup>1</sup> By letter dated February 21, 2006, David Shor objected to the RECEIVER'S determination that the Shors were not entitled to share in the distribution of the FUND.

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<sup>1</sup> The RECEIVER'S SHOR DETERMINATION is attached as Exhibit A hereto and is incorporated herein by reference.

## BACKGROUND

The general background of this matter is set forth in this Court's "*Opinion*" dated June 6, 2001, and its "*Order Approving Plan of Distribution and Providing for Implementation Thereof*" dated May 5, 2005 (the "**DISTRIBUTION PLAN APPROVAL ORDER**").<sup>2</sup>

Pursuant to the Plan of Distribution approved by the DISTRIBUTION PLAN APPROVAL ORDER" (the "**DISTRIBUTION PLAN**"), this Court established a detailed procedure for the filing of claims by "POTENTIALLY ELIGIBLE CLAIMANTS." One such claim was filed by David Shor and his wife Judi.<sup>3</sup>

The Shors' PROOF OF CLAIM FORM (the "**SHOR CLAIM**") asserted aggregate stock purchases of \$129,000.<sup>4</sup> However, the RECEIVER'S SHOR DETERMINATION denied the claim in its entirety for multiple reasons:

1. Improper documentation of the claim;<sup>5</sup>
2. Lack of status as an "ELIGIBLE CLAIMANT;"<sup>6</sup>
3. Lack of any "NET STOCK LOSS."<sup>7</sup>

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<sup>2</sup> Terms defined in the DISTRIBUTION PLAN APPROVAL ORDER or the DISTRIBUTION PLAN shall have the same meanings when used herein as when used in the order and/or plan.

<sup>3</sup> Shor has cooperated with the Plaintiff Securities and Exchange Commission in establishing the fraudulent nature of Defendant ENTERPRISES' scheme.

<sup>4</sup> While the SHOR CLAIM was filed in the name of both the Shors, Judi Shor did not sign the PROOF OF CLAIM FORM. The SHOR CLAIM is attached as **Exhibit B** hereto and is incorporated herein by reference.

<sup>5</sup> The SHOR CLAIM was not substantiated with any proof of payment for the alleged investments or any documentation indicating that the investments were made in *ENTERPRISES*. Furthermore, in addition to Judi Shor's failure to sign the claim form, no documentation was provided concerning her alleged inheritance from her father of her portion of the claim.

<sup>6</sup> Three of the four purchases asserted by the Shors were not made during the "RELEVANT TIME PERIOD" of March 1999 through April 2000. No information was provided concerning the timing of the fourth purchase.

The DISTRIBUTION PLAN provided a procedure through which a POTENTIALLY ELIGIBLE CLAIMANT who was dissatisfied with the RECEIVER'S DETERMINATION concerning its claim could request reconsideration by the RECEIVER. No such reconsideration was requested by the Shors. However, to avoid uncertainty, the RECEIVER has requested that the Court affirm his rejection of the Shor claim.<sup>8</sup>

The RECEIVER has advised the Court that the NET STOCK LOSSES of POTENTIALLY ELIGIBLE CLAIMANTS that have been approved by RECEIVER significantly exceed the amount available for distribution to ELIGIBLE CLAIMANTS.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The RECEIVER properly rejected the claim of the Shors. The SHOR CLAIM (Ex. B) fails to provide any proof of payment for the claimed investments as required by the PROOF OF CLAIM FORM approved by this Court and by the DISTRIBUTION PLAN itself, nor did the Shors provide any documentation that the investments were made in ENTERPRISES. [PROOF OF CLAIM FORM, "Guidelines" ¶1, "Investment Information;" DISTRIBUTION PLAN, ¶II.(v)] The largest investment claimed by the Shors – \$100,000 – was an alleged inheritance by Judi Shor from her father; however, there was no information submitted concerning the date of this investment, no documentation concerning the alleged inheritance was provided, and Judi Shor did not sign the SHOR CLAIM.

Aside from the failure of the Shors to document their alleged investments, "ELIGIBLE CLAIMANTS" are limited to those who purchased stock of ENTERPRISES *during*

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<sup>7</sup> A claimant's "NET STOCK LOSS" is defined as the price paid per share *less* \$2.00 times the number of shares, less amounts realized through sales of ENTERPRISES stock. The Shors' PROOF OF CLAIM FORM stated that the purchase price for all four of their purchases was \$1.00 per share, which would leave them with a *no* NET STOCK LOSS.

<sup>8</sup> See the RECEIVER'S report letter to this Court dated February 17, 2006 (the "RECEIVER'S REQUEST").

the “RELEVANT TIME PERIOD” – March 1, 1999 to April 30, 2000. [DISTRIBUTION PLAN, ¶¶I.(xiv) and I.(xxix)] Three of the four alleged purchases by the Shors were made in 1997; no information is provided concerning the date of the fourth purchase. See SHOR CLAIM, p. 4. The Shors therefore did not qualify as “ELIGIBLE CLAIMANTS.” Furthermore, even if the Shors had qualified as “ELIGIBLE CLAIMANTS,” they would not have sustained any “NET STOCK LOSS” which, as defined in the DISTRIBUTION PLAN, is the price paid by the claimant per share *minus two dollars per share*, times the number of shares, less amounts realized through sales of ENTERPRISES stock:<sup>9</sup> in other words, the Net Stock Loss is limited to the amount by which the per-share purchase price paid by the claimant *exceeds \$2.00 per share*. Since the price paid per share by the Shors in all four purchases was only *one dollar* per share (see the SHOR CLAIM, p. 4), they sustained no NET STOCK LOSS as defined in the DISTRIBUTION PLAN.

In determining relief in an equity receivership, the Court has “broad powers and wide discretion.” *SEC v. Elliott*, 953 F.2d 1560, 1566-67 (11<sup>th</sup> Cir. 1992). See also *SEC v. Forex Asset Management LLC*, 242 F.3d 325, 331 (5<sup>th</sup> Cir. 2001); *SEC v. Wang*, 944 F.2d 80, 83-88 (2<sup>nd</sup> Cir. 1991) (“*Wang*”); *SEC v. Hardy*, 803 F.2d 1034, 1037-39 (9<sup>th</sup> Cir. 1986). As a part of that discretion, payments may be made to certain groups of claimants and denied to others. *Wang*, 944 F.2d at 85-88; *SEC v. Levine*, 881 F.2d 1165, 1182 (2<sup>d</sup> Cir. 1989); see also *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 660-61 (6<sup>th</sup> Cir. 2001). The DISTRIBUTION PLAN adopted by this Court, and its application to the Shors in this instance, clearly fall within that discretion.

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<sup>9</sup> See DISTRIBUTION PLAN, ¶I.(xxii). Under the DISTRIBUTION PLAN, ELIGIBLE CLAIMANTS are to share in distributions in the ratio of their APPROVED NET STOCK LOSSES. DISTRIBUTION PLAN, ¶II.(xiv).

The Shors' February 21, 2006 letter of response does not address a single one of the issues raised in the RECEIVER'S REQUEST, other than with irrelevancies. Instead, the letter cites "my cooperation and the cooperation of my family" and "the promises made by the attorney at the SEC with whom we worked..." as their basis for sharing in distributions from the FUND.

As the cases cited above hold, this Court has broad discretion in setting the terms of a plan of distribution for disgorgement proceeds and may decide to make payments to certain classes of claimants and deny payments to others. Furthermore, Mr. Shor's own words show that he was not relying upon any "promises," but simply hoped that he might share in the distribution: see Mr. Shor's letter to the Receiver dated November 4, 2003, in which he states:

"I am *hoping* that my family, especially in consideration of our cooperation with the SEC in bringing Cannon and the others to justice, will be *considered* when *you and the Court* decide upon the distribution of the funds in the pool."<sup>10</sup> (Emphasis supplied) T.A.C.

In formulating the DISTRIBUTION PLAN, it was necessary to establish how "losses" were to be calculated, including a relevant time period. The "RELEVANT TIME PERIOD" commencement date selected by the DISTRIBUTION PLAN – March 1, 1999 – represented the date when the extreme rise in ENTERPRISES' stock prices began;<sup>11</sup> the Court finds this to be a reasonable decision. The RECEIVER has further advised the Court that the \$2.00 "floor" selected for use in calculating the claimants' "NET STOCK LOSSES" represented the average low price paid for the stock; the Court finds that this decision also was reasonable.

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<sup>10</sup> This November 4, 2003 letter from Mr. Shor is attached as **Exhibit D**.

<sup>11</sup> See the RECEIVER'S REQUEST (**Ex. B**).

If the Shors were dissatisfied with the RECEIVER'S SHOR DETERMINATION, the DISTRIBUTION PLAN provided a clear and adequate remedy: the filing, within twenty calendar days of the date of mailing of the RECEIVER'S DETERMINATION NOTICE, of a written request for reconsideration. DISTRIBUTION PLAN, ¶II.(vii). This right to seek reconsideration was clearly spelled out at p. 3 of the RECEIVER'S DETERMINATION NOTICE mailed to the Shors on October 25, 2005. No such request was filed by the Shors until the RECEIVER'S REQUEST was filed, the Shors letter being dated approximately 127 calendar days after the mailing of the Receiver's SHOR DETERMINATION. Even if the Shors had a valid claim, this failure to contest the RECEIVER'S SHOR DETERMINATION served as a permanent waiver of the Shors' right to object to or contest the RECEIVER'S SHOR DETERMINATION. DISTRIBUTION PLAN, ¶II.(vii).

Mr. Shor's latest letter complains of prior communication problems; however, there is no suggestion that he did not receive the RECEIVER'S DETERMINATION NOTICE denying his claim nor does he deny that he and his wife failed to seek reconsideration of that determination as required by the DISTRIBUTION PLAN.<sup>12</sup>

The NET STOCK LOSSES of claimants whose claims have been approved by the RECEIVER substantially exceed the amount available for distribution to ELIGIBLE CLAIMANTS; thus, no distributions can be made to the ELIGIBLE CLAIMANTS until the list of those claimants, and the amount of their approved claims, are finalized. If new claimants are permitted to file claims, or newly to contest their claim determinations,

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<sup>12</sup> The Shors still have not complied with the provisions of the DISTRIBUTION PLAN, but are attempting to file an untimely appeal directly with the Court, bypassing the reconsideration procedure.

after the filing “bar” dates, the list of approved claimants, and their percentages of participation, cannot be finalized and no distributions can be made.

Under the DISTRIBUTION PLAN, the burden is on the POTENTIALLY ELIGIBLE CLAIMANT to establish the validity and amount of its claim, and that it qualifies as an ELIGIBLE CLAIMANT. [DISTRIBUTION PLAN, ¶II.(vi)] The Shors did not sustain that burden in either of these areas. Instead, it is clear that the Shors had *no* NET STOCK LOSS, did not purchase during the RELEVANT TIME PERIOD and chose not to document their claims as required by the PROOF OF CLAIM FORM approved by the Court.

**WHEREFORE, IT IS HEREBY ORDERED AND DIRECTED** that:

- A) The RECEIVER’S SHOR DETERMINATION is hereby affirmed by this Court;
- B) The Shors did not properly document their claim;
- C) The Shors do not qualify as ELIGIBLE CLAIMANTS and have not suffered a NET STOCK LOSS as defined in the DISTRIBUTION PLAN;
- D) The Shors have not sustained their burden of proof to establish the validity and amount of their claim and that they qualify as ELIGIBLE CLAIMANTS;
- E) Any rights of the Shors to object to the RECEIVER’S SHOR DETERMINATION were waived by their failure to seek reconsideration of the RECEIVER’S SHOR DETERMINATION as provided in the DISTRIBUTION PLAN; and

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F) The Court finding no just cause for delay, this Order is hereby entered as a final, appealable order.

**SO ORDERED** this 29<sup>th</sup> day of March, 2006.

*Miriam Goldman Cedarbaum*  
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HONORABLE MIRIAM GOLDMAN CEDARBAUM  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK