

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

SECURITIES AND EXCHANGE
COMMISSION

Plaintiff,

v.

ARTHUR LAMAR ADAMS AND
MADISON TIMBER PROPERTIES, LLC

Defendants.

Case No. 3:18-cv-252

Hon. Carlton W. Reeves, District Judge
Hon. F. Keith Ball, Magistrate Judge

ALYSSON MILLS, IN HER CAPACITY
AS RECEIVER FOR ARTHUR LAMAR
ADAMS AND MADISON TIMBER
PROPERTIES, LLC,

Plaintiff,

v.

MICHAEL D. BILLINGS and
MDB GROUP, LLC;
TERRY WAYNE KELLY, JR. and
KELLY MANAGEMENT, LLC;
and WILLIAM B. MCHENRY, JR. and
FIRST SOUTH INVESTMENTS, LLC,

Defendants.

Case No. 3:18-cv-679

Arising out of Case No. 3:18-cv-252,
Securities and Exchange Commission v.
Arthur Lamar Adams and Madison
Timber Properties, LLC

Hon. Carlton W. Reeves, District Judge
Hon. F. Keith Ball, Magistrate Judge

ORDER APPROVING SETTLEMENT

Before the Court is the Motion for Entry of Consent Judgment and Approval of Proposed Settlement filed by Plaintiff Alysson Mills, in her capacity as the court-appointed receiver (the “Receiver”) for Arthur Lamar Adams (“Adams”) and Madison Timber Properties, LLC (“Madison Timber”). The motion was filed in the case styled *Alysson Mills vs. Michael D. Billings, et al.*, No. 3:18-cv-679 (S.D. Miss) (“Recruiter lawsuit”), itself arising out of *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC*, No. 3:18-cv-252 (S.D. Miss) (“S.E.C. lawsuit”).

The motion asks the Court to approve the Receiver’s proposed settlement with Terry Wayne Kelly, Jr. and Kelly Management, LLC (“Kelly”), a defendant in the Recruiter lawsuit.

After notice and hearing, and after having considered the filings and arguments of counsel, the Court **GRANTS** the motion.

BACKGROUND

The Receiver’s complaint

On October 1, 2018, the Receiver filed a complaint against Michael D. Billings and MDB Group, LLC; Terry Wayne Kelly, Jr. and Kelly Management, LLC; and William B. McHenry, Jr. and First South Investments, LLC. The complaint alleges the defendants received more than \$16,000,000 in Madison Timber “commissions.” The complaint seeks to return that money to the Receivership Estate, to maximize funds available for distribution to victims.

The Receiver offered to suspend further litigation against a defendant if the defendant agreed to 1) make a full and complete financial disclosure, 2) commit to attempt to negotiate a settlement in good faith, and 3) preserve assets pending negotiations. Terry Wayne Kelly, Jr. and Kelly Management, LLC (“Kelly”) agreed.

Kelly's finances

The Receiver obtained from Kelly sworn financial disclosures and supporting documentation, including federal and state income tax returns and supporting schedules and work papers for the years in question; operating agreements for limited liability companies of which Kelly is a member; documentation pertaining to assets and liabilities for limited liability companies of which Kelly is a member; documentation pertaining to life insurance policies of which Kelly is a beneficiary or in which Kelly has an interest; and records for Kelly's bank and retirement accounts. The Receiver's counsel also separately examined Kelly under oath regarding his finances.

The Receiver and Kelly undertook extensive and thoughtful negotiations and the Receiver concluded that settlement with Kelly is in the Receivership Estate's best interest.

The Receiver's proposed settlement with Kelly

As a precondition to settlement, Kelly consents to the entry of a Consent Judgment [**Exhibit A** to the Receiver's Motion] against him in the full amount of \$8,217,804, reflecting the net "commissions," before taxes, that he received between 2010 and April 2018. The Receiver agrees, however, that she will release Kelly from liability for the judgment if he complies with the proposed Settlement Agreement [**Exhibit B** to the Receiver's Motion].

The proposed Settlement Agreement¹ provides that Kelly shall make civil restitution payments by transferring the following assets currently in his possession to the Receivership Estate in order to come into compliance with the law:

¹ The Receiver and Kelly entered into a clarifying addendum to the Settlement Agreement on December 20, 2018, in which the Receiver and Kelly acknowledged that "any and all payments or transfers made under Section 2 of the Settlement Agreement are civil restitution payments made by Kelly in order to come into compliance with the law." All references in this Order to the "Settlement Agreement" refer to the Settlement Agreement, as modified on December 20, 2018.

- \$836,000 in cash currently sitting bank accounts, subject to a tax escrow;
- \$500,000 in proceeds from retirement accounts in Kelly's name;
- all proceeds from the liquidation of life insurance policies in Kelly's name or to which he is entitled to the cash value;
- all proceeds from the liquidation of Kelly's interest in 707, LLC;
- any proceeds Kelly receives for his interest in 315 Iona, LLC; and
- Kelly's interest in KAPA Breeze, LLC.

In addition to transferring the foregoing assets to the Receivership Estate, Kelly shall, among other things:

- execute a promissory note in the original principal amount of \$400,000 due and payable in two and a half years that may be prepaid in the amount of \$100,000 if paid in 365 days, \$200,000 if paid in 547 days, or \$300,000 if paid in 730 days;
- restate his federal and state income tax returns for the years in question, as permitted by law, and transfer 90% of any refunds received to the Receivership Estate; and
- cooperate with the Receiver's ongoing efforts to recover money for the Receivership Estate.

The Receiver has advised the Court that the foregoing² represents a value of approximately \$2,000,000 to the Receivership Estate. The Receiver believes this amount exceeds any amount the Receiver could obtain if she litigated her claim against Kelly to final judgment.

The Court and the Receiver are mindful that if Kelly required the Receiver to litigate her claim against him to final judgment, Kelly would be unable to pay the final judgment and likely would file for bankruptcy. If Kelly filed for bankruptcy, the Receivership Estate would compete with other creditors for a share of Kelly's assets. The final judgment would be virtually uncollectable.

² The foregoing is intended solely as a summary of the terms of the proposed Settlement Agreement. In all events, the specific terms of the proposed Settlement Agreement and Consent Judgment shall control.

Furthermore, Mississippi law exempts qualified retirement plans and certain life insurance proceeds from bankruptcy proceedings or collection by judgment creditors,³ meaning that Kelly's retirement accounts and life insurance policies would not be available to satisfy any final judgment if he filed for bankruptcy or if the Receiver attempted to collect on the final judgment. The Receiver can obtain these assets now only because Kelly has voluntarily agreed to transfer them to the Receivership Estate.

The Receiver would spend considerable time and money litigating her claim against Kelly to final judgment. Kelly also would spend considerable time and money defending against the Receiver's claim. The time and money spent on litigation, which currently is being funded on an hourly basis, is time and money the Receivership Estate would never recover.

For all these reasons, the Receiver recommends settlement with Kelly on the proposed terms now, and the Court accepts her recommendation.

In exchange for the value Kelly promises to give to the Receivership Estate, Kelly shall receive what is known as a "bar order" which shall bar any person or non-regulatory entity from asserting claims against Kelly arising out of, in connection with, or relating to Madison Timber Properties, LLC. "Courts utilize bar orders if they are both necessary to effectuate a settlement and 'fair, equitable, reasonable, and in the best interest of the Receivership Estate.'" *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-00298, 2017 WL 9989250, at *2 (N.D. Tex. Aug. 23, 2017). The Receiver believes a bar order is an effective way to ensure maximum net recovery from Kelly that can be distributed equitably to investors through the Receivership Estate, and the Court agrees.

³ MISS. CODE ANN. §§ 85-3-1(e), 85-3-11.

The public's interest

The Court, mindful that victims of the Madison Timber Ponzi scheme have a substantial interest in the Receiver's claim against Kelly and the proposed resolution of it, allowed interested parties an opportunity to be heard before the proposed settlement was approved.

The Court entered an Order Setting Hearing, filed in the Court's public record for the cases styled *Securities & Exchange Commission vs. Adams, et al.*, No. 3:18-cv-252 (S.D. Miss), and *Alysson Mills vs. Michael D. Billings, et al.*, No. 3:18-cv-679 (S.D. Miss). The Order Setting Hearing instructed the Receiver to provide victims a copy of the Order Setting Hearing; the proposed Consent Judgment, Settlement Agreement, and Order Approving Settlement; and instructions for submitting comments or objections via her website and, separately, correspondence sent via U.S. Mail.

Victims or other interested parties who wished to submit comments or objections were advised to do so at least five days prior to the Court's hearing, either by submitting the comments or objections to the Court or to the Receiver, who submitted them to the Court. Victims or other interested parties who wished to address the proposed settlement at the hearing were given an opportunity to be speak.⁴

The Court is satisfied that the notice and hearing provided gave victims and interested parties a full and fair opportunity to be heard and gave the Court the benefit of their opinions as

⁴ The Receiver received correspondence from two victims which indicated their approval of the settlement. Their correspondence was entered into the record. No other victims accepted the Court's invitation to come forward to offer comments, and counsel for Kelly announced at the hearing that his client consented to and agreed with the entry of the judgment.

the Court assessed the proposed settlement's merits. The notice and hearing provided was efficient and desirable under the circumstances, given the particular interests at stake.⁵

ORDER

After notice and hearing, and after having considered the filings and arguments of counsel, the Court finds that the terms of the Settlement Agreement are adequate, fair, reasonable, and equitable; and that a bar order is appropriate. The Settlement Agreement should be and is hereby **APPROVED**.

Accordingly, the Court hereby **ORDERS** as follows:

1. The terms used in this Order Approving Settlement that are defined in the Settlement Agreement between the Receiver and Kelly, unless expressly otherwise defined herein, shall have the same meaning as in the Settlement Agreement.

2. This Court has "broad powers and wide discretion to determine the appropriate relief in an equity receivership," including the "inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws." *S.E.C. v. Kaleta*, 530 Fed App'x 360, 362 (5th Cir. 2013) (*Kaleta I*) (quoting *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980)). These "ancillary relief" measures include "injunctions to stay proceedings by nonparties against the receivership" and "bar orders to secure settlements in receivership proceedings and to 'preserve the property placed in receivership pursuant to SEC actions.'" *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-00298-N, 2017 WL 9989250, at *2 (N.D. Tex. Aug. 23, 2017) (quoting *Kaleta I*, 530 Fed. App'x at 362).

⁵ The Court takes no position on whether notice or hearing is appropriate prior to the Court's approval of possible future settlement with other parties.

3. This Court has jurisdiction over the subject matter of this action, and the Receiver is a proper party to seek entry of this Order Approving Settlement.

4. The notice provided by this Court in the Order Setting Hearing and by the Receiver through her website and the U.S. Mail was reasonably calculated, under the circumstances, to apprise all interested parties, and in particular, victims of the Madison Timber Ponzi scheme, of the Settlement Agreement and the releases and bar order provided therein. The notice was also reasonably calculated, under the circumstances, to apprise all interested parties, and in particular, victims of the Madison Timber Ponzi scheme, of their right to object to the Settlement Agreement and the releases and bar order provided therein and to appear at the hearing on the motion. The notice was adequate, sufficient, and the best notice practicable and met all applicable requirements of law.

5. The Settlement Agreement was reached after a full investigation of the facts by the Receiver. The Settlement Agreement was negotiated, proposed, and entered into between the Receiver and Kelly in good faith and at arm's length. The parties were well-represented and competent to evaluate the strengths and weaknesses of all claims and defenses.

6. The Settlement Agreement will generate a significantly greater recovery to the Receivership Estate than would be the case were the Receiver to obtain and attempt to collect on a final judgment against Kelly in the amount prayed for in the captioned action, which would almost certainly force Kelly into bankruptcy.

7. The bar order enjoining any person or non-regulatory entity⁶ from commencing or continuing any judicial, administrative, arbitration, or other proceeding, and/or asserting or

⁶ To be clear, the U.S. Attorney's Office, the F.B.I., the S.E.C., and the Mississippi Secretary of State, among other law enforcement bodies, are not affected by the Settlement Agreement or Bar Order. The Court does not purport to approve any settlement that would interfere with their separate work.

prosecuting any causes of action against Kelly arising out of, in connection with, or relating in any way to Madison Timber Properties, LLC, including, but not limited to any cause of action arising out of or relating to any investment in Madison Timber is necessary and appropriate ancillary relief to this settlement. *See Kaleta I*, 530 Fed. App'x at 362.

8. The parties and their counsel have at all times complied with the requirements of Rule 11 of the Federal Rules of Civil Procedure.

9. The Court finds that the Settlement Agreement is, in all respects, fair, reasonable, and adequate, and in the best interests of all parties claiming an interest in or asserting any claim against Kelly or the Receivership Estate. The Court further finds that a bar order is a necessary component to achieve the Settlement Agreement and to ensure maximum recovery to the Receivership Estate.

10. The Settlement Agreement, the terms of which are fully set forth in the document itself, is hereby fully and finally approved. The parties are directed to implement and consummate the Settlement Agreement in accordance with its terms and with this Order Approving Settlement.

11. The Court hereby permanently bars, restrains, and enjoins any person or non-regulatory entity from commencing or continuing any judicial, administrative, arbitration, or other proceeding, and/or asserting or prosecuting any causes of action against Kelly arising out of, in connection with, or relating in any way to Madison Timber Properties, LLC including, but not limited to any cause of action arising out of or relating to any investment in the Madison Timber Ponzi scheme.

12. Nothing in this Order Approving Settlement or the Settlement Agreement and no aspect of the Settlement Agreement or negotiation thereof is or shall be construed to be an admission or concession of any violation of any statute or law, of any fault, liability, or wrongdoing, or of any infirmity in the claims or defenses of any party in any other proceeding.

13. Kelly shall deliver or cause to be delivered the Settlement Assets in accordance with the terms of the Settlement Agreement. The Court specifically directs Kelly to abide by the cooperation covenants set forth in Paragraphs 3(c)(i)-(v) of the Settlement Agreement.

14. Upon Kelly's satisfaction of Kelly's obligations under the Settlement Agreement, the Receiver shall file a motion to dismiss her claims against Kelly.

15. Without in any way affecting the finality of this Order Approving Settlement, the Court retains continuing and exclusive jurisdiction over the parties for the purposes of, among other things, the administration, interpretation, consummation, and enforcement of the Settlement Agreement and Consent Judgement, including, without limitation, the releases and bar order described therein.

16. The Court expressly finds and determines, pursuant to Federal Rule of Civil Procedure 54(b), that there is no just reason for any delay in the entry of this Order Approving Settlement, which is both final and appealable, and immediate entry by the Clerk of the Court is expressly directed.

17. This Order Approving Settlement shall be filed in the Court's public record for both the S.E.C. lawsuit and the Recruiter lawsuit and shall be served by counsel for the Receiver, via email, first class mail or international delivery service, on any person or entity that filed an objection to approval of the Settlement Agreement.

SO ORDERED, this the 21st day of December, 2018.

s/ CARLTON W. REEVES
United States District Judge