

Judge Snubs SEC Again In Favor Of Merchant Capital

6/13/2008 --- In a suit remanded by an appeals court, a federal judge again rebuffed the U.S. Securities and Exchange Commission Tuesday, dismissing the agency's claims against Merchant Capital LLC and refusing to impose penalties on the grounds that the principals of the debt-purchasing business had acted in good faith.

Judge Martin H. Shoob of the U.S. District Court for the Northern District of Georgia reconsidered his earlier dismissal at the behest of the U.S. Court of Appeals for the Eleventh Circuit, but again denied the SEC's request for remedies, reasoning that Merchant Capital and its principals, Steven C. Wyer and Kurt V. Beasley, acted in good faith and did not defraud investors.

"Notwithstanding the court of appeals' findings, the court believes that the evidence still shows that defendants acted at all times in good faith, and that it was their intention to operate the RLLPs as viable, albeit risky, businesses for the benefit of all the partners as well as themselves," Judge Shoob wrote.

Gregory Bartko, lead counsel for the defendants, commended the court's decision, noting the flimsiness of the SEC's claims as well as Judge Shoob's thorough understanding of the case.

"The SEC had a steep uphill battle from day one, as it was quite clear that Wyer and Beasley never intended to defraud investors. We'll see what, if anything, the SEC chooses to do, but for now we are all very pleased," Bartko said.

The SEC launched the suit in November 2002, alleging that the defendants raised more than \$20 million from over 350 investors through a fraudulent scheme involving the sale of interests in registered limited liability partnerships, which purchased and collected consumer debt.

The defendants sold general partnership interests in Colorado RLLPs they formed to purchase and collect debt pools consisting of delinquent consumer debt, which they would sell into the secondary debt market after 12 to 18 months.

The SEC charged Wyer and Beasley with three counts of fraud, arguing that Merchant misled investors about the fees charged in connection with the partnerships, and concealed the poor performance of some of the RLLPs.

Deeming the RLLPs securities, the SEC further accused Wyer and Beasley of engaging in the sale of partnership interests without registration.

In November 2005, Judge Shoob dismissed the SEC's claims, concluding that RLLPs were not securities and the defendants had not committed fraud, detailing his decision in a 110-page order.

The SEC appealed the decision, and in April 2007, the Eleventh Circuit reversed in part, vacated in part and remanded the case. The appeals court ruled that RLLPs were in fact contracts covered by the federal securities laws.

Judge Shoob, however, stuck to his guns, holding that even if RLLPs are viewed as securities, the defendants' omissions to potential partners failed to qualify as punishably deceptive or reckless actions.

"After considering the arguments submitted by the parties, and reviewing the entire record in light of the court of appeals' opinion and the specific factors enumerated above, this court remains firmly convinced that defendants lacked the requisite scienter to support a finding that they engaged in securities fraud," the judge wrote.

Judge Shoob refused to impose money penalties or order disgorgement, deeming the defendants' conduct to be far short of the fraud, manipulation or reckless disregard necessary to require such penalties.

It is not known whether or not the SEC will again appeal the decision, which accepted the Eleventh Circuit's rule that RLLPs are securities, but flatly refused to penalize the defendants for being unregistered issuers of those securities.

Attorneys for the SEC were not available for comment.

Merchant Capital is represented by the Law Office of Gregory Bartko.

The case is Securities and Exchange Commission v. Merchant Capital LLC et al., case number 1:02-cv-02984, in the U.S. District Court for the Northern District of Georgia.