UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Marine Energy Systems Corporation, A South Carolina Corporation, Debtor(s).	C/A No. 97-01929-JW Adv. Pro. No. 98-80211-WB Chapter 7 **JUDGMENT**
Marine Energy Systems Corporation, A South Carolina Corporation, William J. Gilliam, Plaintiff(s), v. Gold Mountain Electric Power Co., Ma-Li Kuo, Craig M. Rankin, Levene, Neale, Bender & Rankin, LLP, Defendant(s).	FILED ___ O'clock & ___ min. __ M JUL 15 2008 United States Bankruptcy Court Columbia, South Carolina

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, the motion of William J. Gilliam to amend this Court's order of March 15, 2004 is denied.

John E Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 15, 2008

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Marine Energy Systems Corporation, A South Carolina Corporation, Debtor(s).	C/A No. 97-01929-JW Adv. Pro. No. 98-80211-WB Chapter 7 **ORDER**
Marine Energy Systems Corporation, A South Carolina Corporation, William J. Gilliam, Plaintiff(s), v. Gold Mountain Electric Power Co., Ma-Li Kuo, Craig M. Rankin, Levene, Neale, Bender & Rankin, LLP, Defendant(s).	

This matter comes before the Court on motion of William J. Gilliam ("Gilliam") to amend an order of this Court pursuant to Fed. R. Civ. P. 60(a) ("Motion"). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. Marine Energy Systems Corporation ("Debtor") commenced this case under chapter 11 of the Bankruptcy Code on March 4, 1997.[2]

[1] To the extent any of the Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law constitute Findings of Fact, they are so adopted.

[2] This case was previously assigned to the Hon. William T. Bishop. Following the retirement of Judge Bishop on February 28, 2006, this case was assigned to the undersigned.

2. Prior to the petition date, Gilliam was the president and sole shareholder of Debtor.

3. Concurrent with the administration of Debtor's estate, Gilliam was also a debtor in a case pending before this Court in case number 96-76468.

4. Gilliam and Debtor share common creditors including the Internal Revenue Service ("IRS") and the South Carolina Department of Revenue ("DOR").

5. On July 2, 1998, Debtor obtained confirmation of a chapter 11 plan. Success of Debtor's chapter 11 plan was based, in part, on a contribution by a new investment corporation, which was to receive funding from a company known as Gold Mountain Electric Power Co. ("Gold Mountain").

6. The confirmed plan was not funded and, on November 30, 1998, the Court converted this case on a motion of the United States Trustee, which was supported by creditors General Dynamics ("GD") and Bradford T. Whitmore ("Whitmore").

7. Following the conversion of the case, Ryan Hovis ("Trustee") was appointed as the chapter 7 trustee of Debtor.

8. Prior to conversion in 1998, Debtor, along with Gilliam, filed the above captioned adversary proceeding against Gold Mountain and certain professionals (the "Gold Mountain Suit") regarding Gold Mountain's failure to provide the funding for the confirmed plan and inducement by certain professionals to enter into an agreement with Gold Mountain, which caused Debtor and Gilliam damages.

9. Following conversion, Trustee was substituted for the Debtor to pursue the Gold Mountain Suit for the benefit of Debtor's estate.

10. According to the record of the case, Gilliam remained a party to the Gold Mountain Suit and neither Marine Energy Investment, Inc. ("MEII") nor Gilliam Exempt Family Trust ("GEFT") were ever made parties to the Gold Mountain Suit.

11. On January 5, 2004, after the case had been pending before the Court for six years and underwent arbitration, the Trustee filed a Notice of Proposed Settlement and Compromise ("Settlement Notice"), which proposed to settle this matter against certain professionals involved in Debtor's transactions with Gold Mountain.

12. The Settlement Notice was served on all creditors including the IRS, the DOR, Gilliam, MEII, and GEFT.[3]

13. The Settlement Notice provides in relevant part:

> YOU ARE HEREBY NOTIFIED THAT THE TRUSTEE intends to submit the following compromise or settlement to the court for approval and intends to submit the attached order to the court.
> NATURE OF DISPUTE: The debtor filed suit against, Craig Rankin, Esquire and Levene, Neale, Bender & Rankin, a law firm for negligence and negligent misrepresentation in connection with Debtor's plan sponsor. William Gilliam also filed suit against the same defendants on the same grounds. The defendants insurance carrier offered to settle all actions for $2,500,000.
> AMOUNT DISPUTED: $2,500,000 plus
> PROPOSED SETTLEMENT OR COMPROMISE: Craig Rankin, Esquire and Levene, Neale, Bender & Rankin, through their insurance carrier, will pay to the estate the amount of $2,200,000.00 and will pay $300,000 to William Gilliam in full settlement of any and all claims against the firm. From the $2,200,000, the Trustee will escrow $100,000. If the estate has adequate funds to fund the confirmed plan, the estate will retain the escrowed $100,000. If not, the $100,000 will be paid to William Gilliam.

14. The Settlement Notice does not reference a separate settlement agreement between the Trustee and any other party nor does it indicate that MEII was a settling party in the adversary. The Settlement Notice also does not indicate that any party other than Debtor's estate or Gilliam is entitled to the $100,000.00 escrowed by the Trustee.

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[3] Gilliam was served at two addresses and his estate was served through chapter 7 trustee Robert F. Anderson. Gilliam, MEII, and GEFT shared a common mailing address.

15. Neither Gilliam, MEII, nor GEFT objected to the Settlement Notice.

16. Whitmore responded to the Settlement Notice and requested further disclosure as to the funds being paid directly to Gilliam and the funds escrowed by the Trustee.

17. GD objected to the Settlement Notice to the extent the settlement proposed to pay funds to Gilliam rather than being paid towards a judgment[4] it obtained against Gilliam in the Northern District of California.[5]

18. On March 4, 2004, following a lengthy hearing, the Court approved the Settlement Notice. Present at the hearing were attorneys for the Trustee and Gilliam,[6] Whitmore, GD, and the Trustee. At no point during the hearing did any party reveal to the Court that a separate settlement agreement existed between the Trustee and other parties or that any party other than Gilliam or the Debtor's estate would be entitled to the $100,000.00 escrowed by the Trustee.

19. On March 15, 2004, the Court entered an order approving the Settlement Notice ("Settlement Order"). The Settlement Order is substantially the same as the proposed order attached to the Settlement Notice and served on creditors. The Settlement Order provides in relevant part:

> ORDERED, ADJUDGED, AND DECREED, that the Trustee is authorized to settle the claim against Craig Rankin, Esquire and Levene, Neale, Bender & Rankin, for the sum of $2,200,000.00 and enter into an appropriate release of said firm. Until further Order of this Court, the Trustee will retain $100,000 from these funds in escrow. If the estate has adequate funds to fund the Debtor's confirmed plan, this $100,000 will remain in the estate. If the estate does not have adequate funds to fund the confirmed plan, the $100,000 will be paid to William Gilliam.

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[4] GD had been awarded attorney's fees and costs for Gilliam bringing a frivolous suit against GD. See Gilliam v. Sonoma County, C/A No. C 02-3382BRW, 2003 WL 23341211 (N.D. Cal. Dec. 22, 2003).

[5] By a separate adversary, GD obtained an order from this Court attaching Gilliam's property. See General Dynamics Corp. v. Gilliam (In re Marine Energy Systems Corp.), C/A No. 97-01929-B, Adv. Pro. No. 04-80020-B, slip. op. (Bankr. D.S.C. Feb. 4, 2004).

[6] John Kern, the attorney making the appearance for Gilliam on March 4, 2004, also appears to represent MEII and GEFT based upon his correspondence to the Court in this matter.

20. The Settlement Order does not indicate a separate settlement agreement between the Trustee and other parties nor does it indicate that any party other than Gilliam or the Debtor's estate would be entitled to the $100,000.00 escrowed by the Trustee.

21. Following the entry of the Settlement Order, the IRS and the DOR served the Trustee with levies for taxes allegedly owed by Gilliam.

22. On September 6, 2005, Gilliam, in Debtor's case and in his personal bankruptcy case, filed a Motion Authorizing Payment of Settlement Proceeds ("Payment Motion"). Gilliam sought an order directing the Trustee to pay the remaining $100,000.00 settlement proceeds to GEFT[7] and MEII on grounds that MEII was a settling party in the Gold Mountain Suit[8] but the Settlement Notice and Settlement Order were inadvertently drafted and excluded MEII as a settling party[9] and that a prior order of this Court was *res judicata* on the entities entitled to the settlement proceeds.[10]

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[7] In his memo in support of the Payment Motion, Gilliam asserted that GEFT's rights to the remaining settlement proceeds spring from an assignment of Gilliam's stock in MESC and MEII. However, less than two months after the entry of the Settlement Order, in sworn schedules filed in a bankruptcy case filed in California, Gilliam asserted that the "common law" lien of GEFT was fully unsecured. See In re Gilliam, C/A No. 04-42153-RW11, Sch. D (Bankr. N.D. Cal. Apr. 30, 2004).

[8] As previously noted, MEII was never a party to the Gold Mountain Suit, thus it is unclear, based on the record of this adversary, as to MEII's authority or right to settle this adversary.

[9] Gilliam repeated this position in a suit between he and GD. See General Dynamics Corp. v. Gilliam (In re Marine Energy Systems Corp.), C/A No. 97-01929-B, Adv. Pro. No. 04-80020-B, Reply Brief from Gilliam (Bankr. D.S.C. Oct. 7, 2005).

[10] In the adversary proceeding between GD and Gilliam, it appeared that GD attached the $300,000 portion of the settlement proceeds. Judge Bishop entered an order indicating that the IRS and the DOR may have some interest in the attached $300,000 and ordered the Clerk of Court to provide these entities with notice of the attachment action. See General Dynamics Corp. v. Gilliam (In re Marine Energy Systems Corp.), C/A No. 97-01929-B, Adv. Pro. No. 04-80020-B, slip op. (Bankr. D.S.C. Sept. 15, 2004). Notwithstanding the entry of the order, Judge Bishop found, at a hearing on October 12, 2005, and GD agreed at that hearing, that the IRS and the DOR were not parties to GD's attachment action. Neither the IRS nor the DOR appeared in the attachment action and, by agreement of Gilliam and GD, the Court ordered the distribution of a portion of the $300,000 to MEII and GEFT. See id., slip op. (Bankr. D.S.C. Oct. 15, 2004). The Court does not consider this stipulated order to be *res judicata* on the issue of Gilliam's rights to the remaining $100,000 since that issue was not before the Court and the IRS and the DOR were not parties before the Court in the attachment action. See In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996) (discussing the elements of *res judicata*).

23. The IRS and the DOR timely objected to the Payment Motion, in part, on grounds that the remaining $100,000 was Gilliam's property and thus subject to their tax liens.

24. Gilliam argued, at the hearing on the Payment Motion, that there was a clerical error in the Settlement Order and that MEII should have been named as a party to the settlement and as a joint payee of the $100,000 in settlement proceeds.

25. The Court denied the Payment Motion by order entered on October 17, 2005 on grounds that the Gilliam Motion was premature based upon outstanding issues regarding Gilliam's tax liability. The Court also rejected Gilliam's request to *sua sponte* correct the alleged clerical error in the Settlement Order.

26. Gilliam moved to reconsider the order denying the Payment Motion. The Court entered an order on January 11, 2006 denying Gilliam's motion to reconsider, setting forth further grounds as to why it denied the Payment Motion including a finding that "Gilliam could not meet his burden of proving that the settlement proceeds should be paid to the Gilliam Exempt Family Trust and MEII, not Gilliam, as provided in the Court's March 14, 2004 Order."

27. Gilliam's appeal of the Court's denial of the Payment Motion was dismissed by the District Court.[11]

28. There appears to have been no appeal of the Court's oral order denying Gilliam's request to *sua sponte* correct an alleged clerical mistake in the Settlement Order.[12]

29. On February 11, 2008, after receiving competing demands by the IRS and the DOR,[13] the Trustee filed an adversary proceeding, case number 08-80017, seeking an order from this Court determining where the funds of Debtor's estate for William J. Gilliam should be paid.

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[11] Gilliam v. Internal Revenue Service, C/A No. 2:06-cv-01044-DCN, slip op. (D.S.C. Jul. 19, 2006).

[12] The written order appealed by Gilliam does not reference the Court's denial of Gilliam's oral Rule 60(a) motion nor does Gilliam's brief on appeal argue that the Court erred in denying his oral Rule 60(a) motion. Thus, it appears that the only matter on appeal before the District Court was whether this Court erred in failing to direct the Trustee to disburse the remaining settlement proceeds.

30. On March 17, 2008, Gilliam filed the Motion in this adversary seeking to amend the Settlement Order pursuant to Fed. R. Civ. P. 60(a) to merely add MEII as a settling party. In support of his Motion, Gilliam attached a draft copy of a settlement agreement, executed only by Gilliam, in his individual capacity and for MEII, on April 26, 2004,[14] more than a month after the entry of the Settlement Order.[15] Though not expressed in the Motion, it appears that Gilliam contends that the effect of granting the Motion would dissipate his interest in the remaining settlement proceeds and put those proceeds out of the reach of the claims or liens of the IRS and the DOR.[16]

31. The IRS and the DOR oppose the Motion[17] but the Trustee conceded at the hearing that the Settlement Notice and the Settlement Order are inconsistent with the un-filed settlement agreement.

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[13] The IRS and the DOR have since agreed that the lien of the IRS is senior to any lien held by the DOR.

[14] It appears that Gilliam was a debtor-in-possession in a case filed in the Northern District of California at the time Gilliam sought to enter into the settlement agreement upon which he now relies. Gilliam never sought nor obtained an order from that Court by April 26, 2004- the date he executed the settlement agreement, which granted him leave to enter into such a settlement agreement to compromise what would have been an asset of that estate. See In re Gilliam, C/A No. 04-42153-RW11, Motion for Leave to Execute Settlement Agreement (Bankr. N.D. Cal. Apr. 28, 2004) (Gilliam made a motion for leave to enter into this settlement agreement 2 days after he purports to have entered into it. This motion was never granted by the bankruptcy court and was opposed by GD on grounds that Gilliam proposed to pay the settlement proceeds to MEII and GEFT rather than to Gilliam). The utility of Gilliam's motion to approve the settlement agreement in the California case also appears doubtful considering that he was already bound by the terms of the Settlement Order, which plainly provides for a different distribution than that proposed in Gilliam's settlement agreement, and that Settlement Order could not be undone by a side agreement between Gilliam and other parties.

[15] Gilliam's attorney asserted at the hearing on the Motion that a settlement agreement was attached to the Settlement Notice filed with the Court on January 5, 2004. A review of the record reveals that no such agreement was attached or filed with the Settlement Notice nor was such agreement filed prior to the entry of the Settlement Order.

[16] Gilliam's proposed order merely provides that the "March 2004 Order is amended to include Marine Energy Investment, Inc. as an additional settling claimant." The styling of this proposed order is inconsistent with the Settlement Order in that the Settlement Order does not specifically identify the settling parties. The amendment is also inconsistent with the record of this adversary in that MEII was never substituted for Gilliam as a party in interest. Moreover, contrary to Gilliam's belief, the amendment proposed by Gilliam would not alter the plain, unambiguous language of the Settlement Order or the Settlement Notice, both of which each specifically allocated the $100,000 to Gilliam in his individual capacity.

[17] Gilliam contends that the IRS and the DOR lack standing to oppose the Motion. The Court does not need to reach the merits of this argument since Gilliam has failed to meet his burden of proof and it otherwise appears that Gilliam is not entitled to relief under Fed. R. Civ. P. 60(a) or is precluded from seeking such relief.

32. It appeared to the Court at the hearing on the Motion that a fully executed copy of the alleged settlement agreement had never been filed of record in this case. At the hearing, neither the Trustee nor Gilliam were in possession of documents that supported the alleged settlement. Each of these parties asserted that they would search their files for such documents and submit to the Court for inclusion in the record of this case- a stipulation agreed to by all parties.

33. Following the hearing, the Trustee submitted three documents for admission into the record.

34. The first document, titled "Stipulation Regarding Settlement Proceeds" and dated September 1, 2003, appears to be an agreement by MEII, Gilliam, and the Trustee to settle this adversary for $2.5 million dollars. This document specifically does not allocate these settlement proceeds among the parties.

35. The second document, titled "Confidential Settlement Agreement and Mutual Release," appears to be the same as the draft document attached by Gilliam to his Motion. Although this document appears to allocate the $300,000 portion of the settlement proceeds to Gilliam and MEII, the Court is unable to identify any provision in the document that allocates the contingent $100,000 payment to Gilliam. Gilliam's counsel also acknowledged at the hearing on the Motion that this agreement does not allocate the remaining $100,000 of the settlement proceeds. Like the draft document attached by Gilliam to his Motion, this document was also executed by the Trustee on April 26, 2004, more than a month after the entry of the Settlement Order and while Gilliam was a debtor-in-possession in a bankruptcy case pending in the Northern District of California.

36. The third document produced by the Trustee is titled "Litigation Proceeds Allocation Agreement." This document was executed by Gilliam, in his individual capacity, and the Trustee on December 19, 2003. The document specifically provides for the distribution of the $100,000 to Gilliam in the event the Debtor's plan is not funded.[18] The document makes no mention of MEII as a settling party to the Gold Mountain Suit nor does it provide for a distribution to MEII. This document is consistent with the allocation of the $2.5 million set forth in the Settlement Notice and the resulting Settlement Order, each of which followed Gilliam's execution of this document.

CONCLUSIONS OF LAW

Rule 60(a) of the Federal Rule of Civil Procedure allows the Court, on motion of a party or *sua sponte*, to correct clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission.[19] See FED. R. CIV. P. 60(a). The rule allows for the correction of errors at any time after an order or judgment has been entered but the rule is strictly limited to correcting errors that are clerical in nature.[20] See McGuffin v. Barman (In re BHB Enterprises, LLC), C/A No. 97-01975-W, Adv. No. 97-80227-W, slip op. (Bankr. D.S.C. Nov. 7, 2006) (aff'd Baumhaft v. McGuffin, C/A No. 4:06-CV-3617-RBH, 2007 WL 2783404 (D.S.C. Sept. 21, 2007)) (aff'd C/A No. 07-2177 (4th Cir. Jul. 8, 2008)). "In order for an error to be clerical, there must be some inconsistency between what was expressed during the proceeding

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[18] The document also provides for the distribution of the $300,000 to Gilliam.

[19] The Settlement Order became a final order prior to the stylistic amendments to Rule 60 on December 1, 2007. See Pro Football Weekly, Inc. v. Gannett Co., Inc., 988 F.2d 723, 725 (7th Cir. 1993) (holding that proceedings concluded prior to the amendment of a procedural rule are governed by the prior version of the procedural rule).

[20] Since the entry of the Settlement Order, Rule 60(a) has been restyled and now states that the court may "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." This amendment to Rule 60(a) is not material and would not affect the outcome of the Motion. See Caterpiller Financial Services Corp. v. F/V Site Clearance I, 2008 WL 1866961, * 5, n.8 (4th Cir. Apr. 25, 2008) (unpublished) (describing the changes to Rule 60(a) as a mere restyling of the prior version of the rule); FED R. CIV. P. 60, Notes of Advisory Committee on 2007 Amendments ("The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only").

and what the judgment reflects." McGuffin, slip op. at 5. Though Rule 60(a) may be used to more clearly reflect the Court's contemporaneous intent at the time the judgment was entered, the rule may not be used to reflect a new or subsequent intent based upon a perception that the original judgment was incorrect. See id. at 5-6. The rule is not limited to errors by the Court or the clerk but the error at issue must be one of recitation of the judgment that is mechanical in nature, such as errors in copying, transcription, or calculation. See In re Transtexas Gas Corp., 303 F.3d 571, 581-82 (5th Cir. 2002). The error should also be apparent on the record and the error must not involve an error of substantive judgment. See Kosnoski v. Howley, 33 F.3d 376 (4th Cir. 1994) (discussing Rule 60(a) and its application to correcting a judgment based upon the record); McGuffin, slip op. at 6.

I. Gilliam Has Failed to Meet His Burden of Proof

Gilliam bears the burden of proof on the Motion, which he has failed to meet. Gilliam introduced no evidence and offered no testimony in support of the Motion. The record of this adversary and the main case, prior to the entry of the Settlement Order, is devoid of any indication that MEII is a settling party to this adversary or that it had any rights to the $100,000 settlement proceeds.[21] Gilliam's reliance on an out-of-court agreement that post-dates[22] the entry of the Settlement Order and that was not incorporated into the Settlement Notice or Settlement Order is wholly insufficient for this Court to amend the Settlement Order and add MEII as a settling party or otherwise find that MEII has rights in the $100,000 settlement proceeds. See

[21] Though not forming the basis of this Court's opinion, the Court observes that Gilliam, in a bankruptcy case filed in the Northern District of California a month after the entry of the Settlement Order, indicated an interest in the "Gold Mountain Litigation" and failed to reveal in his schedules that MEII or any other party had a joint ownership interest in such litigation. See In re Gilliam, C/A No. 04-42153-RW11, Sch. B (Bankr. N.D. Cal. Apr. 30, 2004).

[22] This document does not allocate the distribution of the $100,000 and to the extent it forms the basis for altering the Settlement Order, it was not noticed to creditors in this case nor was it approved by the Bankruptcy Court in Gilliam's personal bankruptcy case in the Northern District of California at the time Gilliam executed the agreement.

Morrison v. Brosseau, 377 B.R. 815, 824 (E.D. Tex. 2007) (finding a settlement agreement, not attached to nor mentioned in a trustee's motion, was not approved by the bankruptcy court and the terms of that agreement were not incorporated into the bankruptcy court's order). Gilliam, a sophisticated party who has a juris doctorate degree,[23] never made MEII a party to the adversary nor did he object to the Settlement Notice. Moreover, the only documents in the record of the adversary or the main case that mention the allocation of the $100,000 in settlement proceeds provide that this sum is either to be paid to Gilliam, in his individual capacity, or used by Debtor's estate if the plan is revived. Gilliam has failed to offer any evidence that the Court or creditors were aware that MEII was a settling party or that this Court, on March 4, 2004, approved MEII as a settling claimant and therefore the Motion is denied.[24]

II. The Settlement Order is Consistent With the Record

Aside from Gilliam's failure to meet his burden of proof, this Court will not *sua sponte* amend the Settlement Order as there appears to be no grounds to do so under Fed. R. Civ. P. 60(a). First, the error at issue is not apparent on the record of this case. Neither the Settlement Notice nor the hearing on the Settlement Notice revealed that the Trustee had the authority to distribute the remaining $100,000 to any party other than Gilliam nor did it reveal that MEII was a party to any settlement agreement in this adversary. In a hearing that spanned more than an hour on March 4, 2004, the Trustee[25] and creditors of Gilliam and Debtor[26] discussed the

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[23] See Gilliam v. Sonomo County, C/A No. C 02-3382BRW, slip op. at 18 (N.D. Cal. Jun. 13, 2005) ("Gilliam has a law degree and professional experience clerking for licensed attorneys... Gilliam is thus 'not the common type of pro se litigant[] who would normally be entitled to more solicitous and generous consideration.'").

[24] This Order does not alter any rights or releases that the defendants to this adversary may have received from MEII.

[25] March 4, 2004:

GD Attorney: "Then your Honor I would ask a rhetorical question. Why would they put a settlement in front of your Honor to rule upon **that would bless the payment of funds to Mr. Gilliam? If that is not within the Court's jurisdiction to approve then why is that a part of settlement?**"

Trustee: "I think I can answer that your Honor. That's just a matter of disclosure."

jurisdiction of the Court over the $100,000 as it relates to Gilliam's creditors; sought to clarify the rights of the creditors to such settlement proceeds;[27] and discussed the ability of Gilliam's creditors to reach such funds through the Trustee.[28] Not once at that hearing did any party assert that the $100,000 may go to parties other than Gilliam or that MEII was a party to this action. The Trustee[29] and the Trustee's counsel[30] repeatedly represented to the Court and to creditors

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[26] March 4, 2004:
Court: "Now Mr. Gilliam will get something won't he from and through the Trustee in this Settlement"
GD Attorney: **"There is $100,000.00 that under certain conditions may actually go to Mr. Gilliam** and we would like the opportunity to attach that money subject to the condition occurring."
Court: **"...I can clearly see how I would have jurisdiction to attach that...."**

[27] Whitmore Attorney: "...If that's a condition of Mr. Gilliam's settlement then we object and we did file an objection and a reservation of rights. It was very unclear as to what that provision meant because it is inconsistent with a pre-approved [2002] settlement agreement. The claims of the MESC estate are the claims of Mr. Hovis to pursue on behalf of creditors, proceeds are to be distributed pursuant to the trust agreement, and if that Order or settlement is trying to rewrite that [2002] settlement agreement then we do object."
Trustee Attorney: "We are not trying to rewrite the [2002] settlement agreement. The fifth paragraph says that the litigation claim is limited to only MESC's estate's claims and what we are essentially saying is that **the determination as to whose $100,000 this will be is predicated upon one thing- either its Mr. Gilliam's money if one thing happens, it's the estate's money if another thing happens. That was the deal.... If that's the objection that is sustained that was not the predicate upon which this case was resolved."**

[28] March 4, 2004:
Court: "If the money is not there in the trust for him [Gilliam] to get the 20% doesn't he get the $100,000.00?"
Trustee Attorney: "There is a $100,000.00... and frankly Mr. Hovis can probably explain it better than I can. Which is Mr. Hovis's money unless something doesn't happen and **then it may go to Mr. Gilliam.** So its kind of a contingent payment. It is a fee that will remain in place with Mr. Hovis."
Court: **"Those funds could be attached if they materialize."**
Trustee Attorney: **"Correct."**

[29] March 4, 2004:
Trustee: "This is what we reached- a settlement with Mr. Gilliam. **That's the way it was noticed and I think this is the way the settlement needs to come down.** Now that $100,000 may or may not go to Mr. Gilliam. **My suspect is that it will go to Mr. Gilliam some day.... This is what we agreed to after a whole lot of work and I think that this settlement agreement needs to be approved as it is."**

that the remaining settlement proceeds would go to Gilliam and that settlement, in the fashion proposed to the Court, was the only means by which settling parties would accept the terms of the proposed settlement.[31] Gilliam, although served with the Settlement Notice, and attending the hearing on the Settlement Notice through counsel,[32] did not object to the Settlement Notice or to the representations to the Court about his rights or the rights of MEII[33] to the $100,000 at the hearing on the Settlement Notice nor did he file post-judgment motions under Rule 59(e) or 60(b). Likewise, neither MEII nor GEFT objected to the terms of the Settlement Notice nor appealed the Settlement Order.

Though Gilliam urges the Court to consider the error in drafting the Settlement Notice as an error that may be remedied under Fed. R. Civ. P. 60(a), this rule is limited to remedying an inconsistency between what was expressed by the Court at a hearing and that expressed in an order. See McGuffin, slip op. at 5. In this case, there is no inconsistency between the recitation of the settlement approved on the record and the resulting Settlement Order entered by the

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30 March 4, 2004:
Trustee Attorney: "**The order was very carefully crafted in the fashion that it was crafted**.... The order says specifically that the trustee will receive $2.2 million if the estate has adequate funds to fund the confirmed plan this $100,000 will remain in the estate. **If it does not, the $100,000 goes to Mr. Gilliam.** Effectively that $100,000 is escrowed because neither party necessarily has made a determination of who is to get it. **But if the plan is not reactivated the order that was submitted and is to be approved says that money will go to Mr. Gilliam. I don't want an order entered that now suddenly changes that because that is the basis on which Mr. Gilliam agreed to settle** the global case with Lloyd's and the law firm we sued and the people we sued."

31 March 4, 2004:
Trustee Attorney: "If it's [the plan] implemented then the money stays in the estate. If it's not implemented then it's considered part of his [Gilliam's] claim. **That's the way it was done. That's the only way it was done."**

32 March 4, 2004:
Court: "So he [Gilliam] obviously knew about the hearing date today on this matter otherwise you would not have known when to come."
Kern: "That much is evident."

33 Gilliam has also asserted in various pleadings that John Kern, the attorney who made an appearance for Gilliam on March 4, 2004, also represents MEII and GEFT. See In re Marine Energy Systems Corp., C/A No. 97-01929-B, Gilliam Motion (Banrk. D.S.C. Sept. 14, 2005). Kern has also represented to the Court that he is an attorney for GEFT and MEII but he failed to interpose an objection to the proposed settlement on behalf of MEII or GEFT at the hearing on March 4, 2004.

Court.[34] The Court approved precisely the agreement it was asked to approve and that which was noticed to creditors- a settlement with a contingent distribution to Gilliam. See Baumhaft, 2007 WL 2783404, * 4 (holding "[a]n error that merely misstates what was actually done or decided is a clerical error"). The contemporaneous intent of the Court in approving the settlement, as noticed, is not only reflected on the record at the hearing on March 4, 2004 but also at subsequent hearings at which the presiding judge,[35] common creditors,[36] and the Trustee,[37] each of whom attended the March 4, 2004 hearing, acknowledged that Gilliam was to receive the $100,000 from the Settlement Order.[38] The Settlement Notice is substantive and it failed to incorporate the terms of the parties' out-of-court, undisclosed settlement agreement that post-dates the entry of the Settlement Notice and the Settlement Order and therefore those terms,

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[34] Gilliam cites in support of his position the case of Pattiz v. Schwartz, 386 F.2d 300 (8th Cir. 1968). The Pattiz case is so factually dissimilar to this case so as to not merit serious consideration but the case appears to not support Gilliam. The Eighth Circuit affirmed the trial court's use of Rule 60(a) to correct an error that was evident in the record of the court's prior proceedings and to reflect the court's intent. In this case, the record of the prior proceeding evidences no error in the Settlement Order and the Court's intent is accurately reflected in the Settlement Order.

[35] October 12, 2005:

Court: **"The order indicates that the $300,000 belongs to you and the order of the Court says that the $100,000 is William Gilliam's. There is an unappealed order of the Court that says that.**

[36] October 12, 2005:

Court: "Mr. Knowlton, you were there and the last order that freed up the money that you had an interest in, the $50,000 order indicating that the $250,000 would go to Mr. Kern as attorney for MEII and the Gilliam Exempt Family Trust."

GD Attorney: **"Your Honor, our position is the same as Mr. Hovis- we just went by the [Settlement] Order. The Order said that Gilliam was going to get $100,000.** He owed us money for attorney's fees and sanctions in California. We actually settled that portion of the case where $50,000 is sitting in an escrow account as a supersedeas bond for the appeal.... **If he was not entitled to some of that money then why do we have that money in a settlement agreement sitting as a supersedeas bond for his appeal out in California?"**

[37] October 12, 2005:

Trustee: "Your Honor, all I have to go by is the [Settlement] Order. Of course, it's my order in my case.... When this all started we had 2 and a half million dollars on the table and, the defendant, and **we were fighting with Mr. Gilliam over who got what share of the pie and this is where we ended up.** I wonder if was supposed to be, **if it was not supposed to be Mr. Gilliam in this order back in March of 2004 why Mr. Gilliam didn't raise that issue at that time or the notice at that time."**

[38] This is also consistent with the Litigation Proceeds Allocation Agreement, which appears to have been executed by Gilliam immediately prior to the Trustee filing the Settlement Notice.

to the extent they would require a different distribution or impact the rights of different parties,[39] are properly not a part of this Court's Settlement Order.[40] See In re Proveaux, C/A No. 07-05384-W, slip op. at 6 (Bankr. D.S.C. Mar. 31, 2008) (finding an order approving sale may not have incorporated the terms of the parties' agreement, other than the purchase price, since those terms were not contained in the debtor's application to sell). This is not an error that can be remedied by a motion under Rule 60(a).

III. The Alleged Error Would Be Substantive

The alleged error would also be substantive in nature and therefore not within the scope of Rule 60(a). Amending the Settlement Order, as Gilliam proposes, gives new rights to entities related to Gilliam, which were not noticed to the creditor body. Gilliam's and Debtor's common creditors were acutely concerned with the distribution of the $100,000 in as much as the record reflects the parties' intent and desire that this portion of the settlement proceeds be subject to distribution to such creditors, either through a revived chapter 11 plan in this case or an attachment action in this Court.[41] The common creditors' reliance on the Settlement Notice and the Settlement Order is also evident by the fact that the IRS and the DOR each served the Trustee with levies for taxes allegedly owed by Gilliam immediately following the entry of the Settlement Order. Allowing an unnoticed, unapproved distribution to MEII or GEFT creates

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[39] As previously noted, the partially executed Confidential Settlement Agreement and Mutual Release, relied on by Gilliam and filed by the Trustee, although it identifies MEII as a settling party, does not allocate the $100,000 to MEII.

[40] Even assuming Judge Bishop had some awareness that MEII was a settling party under a separate settlement agreement, this awareness is insufficient to make the terns of that agreement part of the Settlement Order. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) ("The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order").

[41] March 4, 2004:

GD Attorney: "I do not hear any objections to reservation language in the order approving settlement that allows us conditionally to assert a claim over a portion of the funds that might go to Gilliam at the appropriate time that they would be subject to disbursement to Mr. Gilliam."

Trustee: "I have no problem with that at all your Honor."

rights in these parties not approved by the Court or Debtor's creditor body, which includes the IRS and the DOR, that received the Settlement Notice and is therefore substantive in nature.[42]

IV. Gilliam Lacks Other Grounds to Amend the Settlement Order

The rules of contractual interpretation also govern consent decrees. See U.S. v. Armour & Co., 402 U.S. 673, 681, 91 S.Ct. 1752 (1971). The meaning of the Settlement Order must be construed from within the four corners of the document and "not by reference to what might satisfy the purposes of one of the parties to it." See id., 402 U.S. at 682. In similar cases, bankruptcy courts have refused to vacate or modify approved settlements on grounds that the notice settlement was improperly drafted or announced by the trustee absent a showing of mutual mistake or fraud. See In re WorldCorp, Inc., 252 B.R. 890, 897 (Bankr. D. Del. 2000) (denying a motion to correct an approved settlement based upon the allegation that it was improperly drafted); In re Check Reporting Services, Inc., 137 B.R. 653, 658 (Bankr. W.D. Mich 1992) (finding no basis for relief from a settlement order based upon a unilateral mistake by the trustee's counsel in drafting the settlement approved by the bankruptcy court); In re Abingdon Realty Corp., 18 B.R. 571, 573 (Bankr. E.D. Va. 1982) (finding an approved settlement binding although the trustee misstated material terms of the agreement). In this case, there is nothing in the record to indicate that the settling defendants in the adversary made a mistake in agreeing to the settlement, as noticed, that provided for a distribution to Gilliam. Further, there appears to be no mistake by the Trustee or his counsel in requesting that the Court approve the Settlement Notice, which omits MEII and provides for a payment to Gilliam, based upon their statements[43]

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[42] In various pleadings, Gilliam has asserted that he assigned his rights and MEII's rights in this adversary to GEFT but, if this is true, the record fails to reflect a substitution of MEII or GEFT for Gilliam in this adversary. This position also appears inconsistent with Gilliam's execution of the Litigation Proceeds Allocation Agreement and with MEII's and GEFT's failure to object to the Settlement Notice and failure to appeal the Settlement Order.

[43] March 4, 2004:

on the record at the hearing on the Settlement Notice.[44] Finally, there is no evidence that Gilliam, who was served with the Settlement Notice and appeared at the hearing on the Settlement Notice through counsel, was fraudulently induced to compromise his claim on the terms set forth in the Settlement Notice and the Settlement Order.

V. Gilliam is Precluded from Raising the Issue of Payment of the Settlement Proceeds to MEII

Claim preclusion occurs when: 1) there is a final judgment on the merits, 2) the parties are identical or in privity, and 3) the claims involved in the second matter are the same as the claims involved in the first matter. See In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996). To the extent Gilliam is seeking to put at issue whether MEII is the proper party to receive payment of the remaining settlement proceeds from the Settlement Order, he is precluded from doing so.

Gilliam put at issue whether MEII was the proper party to receive payment of the remaining settlement proceeds from the Settlement Order in the Payment Motion and at the hearing on the Payment Motion[45] and whether this Court committed a clerical error in the Settlement Order.[46] The parties- Gilliam, the Trustee, the IRS, and the DOR- are the same

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Trustee Attorney: **"[T]he determination as to whose $100,000 this will be is predicated upon one thing- either its Mr. Gilliam's money if one thing happens, it's the estates money if another thing happens. That was the deal."**

[44] Based upon the record, the Court finds that the Trustee should be equitably estopped from taking a position inconsistent with that taken by him and his attorneys at the prior hearings before this Court with regard to MEII's and Gilliam's rights under the Settlement Order, which position has been relied upon by Debtor's and Gilliam's common creditors in this matter. See In Georgetown Steel Co. LLC, 318 B.R. 340, 350 (Bankr. D.S.C. 2004) (discussing the elements of equitable estoppel).

[45] October 12, 2005:

Gilliam: "The thing that says 'pay Gilliam $100,000.' What it should have said if it was tracking what the settlement agreement with Gold Mountain said was 'pay MEII and Gilliam.'"

[46] October 12, 2005:

Gilliam: "So the motion is served saying please pay out settlement proceeds- and that was before your Honor on March 4th of 2004- it says 'Gilliam.' If it had accurately reflected what the settlement documents said it would have said MEII and Gilliam. It just didn't. **I think that certainly would say *sua sponte* correct a clerical error.**"

parties that appeared at the contested hearing on the Payment Motion. Finally, the Court's finding that Gilliam "could not meet his burden of proving that the settlement proceeds should be paid to the Gilliam Exempt Family Trust and MEII, not Gilliam, as provided in the Court's March 14, 2004 Order" and its implicit denial[47] of Gilliam's request to correct a "clerical error" to name MEII as a settling party are final orders[48] on the merits of those issues and thus will not be revisited in this proceeding.

CONCLUSION

Based upon the foregoing, the Motion is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 15, 2008

October 12, 2005:

Gilliam: "Your Honor the Gold Mountain settlement on its face doesn't just say Gilliam. It says MEII and Gilliam. It says that on its face. **At a minimum there is a clerical error.**"

[47] It appears from the record that Judge Bishop initially considered amending the Settlement Order to add MEII as a settling party but ultimately decided not to so amend.

[48] United States District Court Judge David Norton appears to have dismissed Gilliam's appeal on whether the settlement proceeds should be disbursed to Gilliam or to other parties on grounds that the merits of the taxing authorities' interests had not been fully adjudicated. See Gilliam v. Internal Revenue Service, C/A No. 2:06-cv-01044-DCN (D.S.C. Jul. 19, 2006). It does not appear that Gilliam appealed or that the District Court considered the merits of the denial of Gilliam's oral motion to correct the alleged clerical error in the Settlement Order.