

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

**U.S. COMMODITY FUTURES TRADING
COMMISSION,**

Plaintiff,

v.

CASE NO. 3:09-CV-106(GCM)

**BARKI, LLC, a North Carolina limited
liability company;
BRUCE C. KRAMER, an individual,**

Defendants, and

**RHONDA A. KRAMER, an individual, and
FOREST GLEN FARM, LLC, a North
Carolina limited liability company,**

Relief Defendants.

**RESPONSE (OBJECTION) OF HARRIS, WRAY, BOYLES AND PUCKETT
TO
RECEIVER'S MOTION FOR (1) APPROVAL OF PROPOSED CLAIMS
VERIFICATION PROCEDURES, CLAIMS BAR DATE, AND PROPOSED
CLAIMS DISTRIBUTION METHOD; AND (2) FOR AUTHORITY
TO MAKE INTERIM DISTRIBUTIONS TO INVESTORS**

NOW COME Tony C. Harris ("Harris"), David Wray ("Wray"), Boyles, LLC ("Boyles"), and Don and Jan Puckett (collectively "Puckett"), all of whom were investors in Barki, LLC ("Investors") and who object to the Receiver's Motion for (1) Approval of Proposed Claims Verification Procedures, Claims Bar Date, and Proposed Claims Distribution Method; and (2) for Authority to Make Interim Distributions to Investors (the "Motion"). In support thereof, Investors show unto the Court the following:

1. The objection of Investors relates solely to the proposed claims distribution method. As the Motion indicates, four different methods have been developed by Courts in the past to deal with the rather profound and challenging issue of what is the fairest way to

distribute funds recovered in a Ponzi-type scheme to the group of investors who were the victims of that scheme. Of these four methods, the Motion also correctly notes that only two, the “rising tide method” proposed by the Receiver, and the “net investment method” advocated by Investors, are suitable for application in situations such as the instant one. The rising tide method distributes nothing to investors who withdrew more than whatever turns out to be the distributional percentage paid through the receivership, and reduces distributions up to that percentage by the amount of the investor’s prior withdrawals. Under the net investment method, an investor is paid the distributional percentage of his or her net investment loss (transfers in minus withdrawals).

2. Investor Harris transferred \$672,000.00 to Barki, LLC and withdrew \$307,000.00 from Barki, LLC; Investor Wray transferred \$750,000.00 to Barki, LLC and withdrew \$350,000.00 from Barki, LLC; Investor Boyles transferred \$526,400.00 to Barki, LLC and withdrew \$284,500.00 from Barki, LLC; and Investor Puckett transferred \$1,857,000.00 to Barki, LLC and withdrew \$784,983.00 from Barki, LLC. Under the Receiver’s proposed claims distribution method, no Investor would receive any distribution; under the net investment method, however, Investor Harris would receive (based upon a 25% distribution) \$91,250.00, Investor Wray would receive \$100,000.00, Investor Boyles would receive \$60,475.00, and Investor Puckett would receive \$268,004.00.¹ This is a very large disparity.

3. A few arguments can be made in favor of the proposed claims distribution method, as are set forth in the Motion. Numerous arguments, however, can be made in favor of the net investment method, which include:

¹ Attached hereto as Exhibit A is a breakdown of the date and amount of each transfer and each withdrawal made by each Investor from each account. Note also that the mother of Investor (Jan) Puckett, Ruth Townsend, had a separate account (#44.07) with Barki, LLC to which she transferred \$250,000.00 – representing her entire life savings – and withdrew \$178,816.00. She, too, would receive nothing under the proposed claims distribution method but would receive \$17,795.75 under the net investment method.

a. Logic. It is the most logical way to treat investors as a group from and after the date the scheme came to light and collapsed, as each investor receives the exact same percentage of his (or her) loss out of the limited funds available to the Receiver for distribution. It is, moreover, this date that is the logical measuring point for determining an investor's right to a distribution. None of the investors were criminals in any sense of the word; at most, they were gullible and duped into trusting someone that should not have been trusted, to varying degrees. Because the Receiver has already announced that he will seek recovery of any withdrawals that were made in excess of transfers, no investor will realize any profit in connection with the scheme Barki, LLC perpetrated. Everyone will be a loser, the only issue being how much of a loss will be suffered by each investor. If an investor were actually guilty of some type of criminal behavior or other misconduct or stood to gain real profit from the scheme, it might make sense to go back to a time prior to its collapse for "equality of distribution" purposes. Here, however, it makes little or no sense to do so. If an investor made a withdrawal, the withdrawal will still be taken into account under the net investment method. The proposed claims distribution method, however, penalizes investors for the prudent act of taking money out of the venture by reducing dollar-for-dollar every withdrawal made by an investor who did not withdraw more than the prorata distributional percentage ultimately to be paid by the Receiver.

b. Doesn't Reward Greed. Arguably, investors who never took any money "off the table" were bigger risk takers or exercised less caution than those who made withdrawals after receiving a "reasonable" rate of return or becoming a bit skeptical of the scheme. Such behavior does not need to be rewarded with a disproportionate share of the limited funds available for distribution by the Receiver. Moreover, while the Motion would seem to make it appear as though investors who made withdrawals are still benefiting to some extent from the withdrawal under the proposed claims distribution method, the simple fact is that no investor whose total withdrawals were less than the prorata distributional percentage ultimately to be paid by the Receiver will receive a greater aggregate return under the proposed claims

distribution method than investors who withdrew nothing during the life of the scheme. The only “benefit” an investor who made withdrawals can possibly get under the proposed claims distribution method is not having to return any money to the Receiver.

c. Fairness. The net investment method is the fairest distribution method because it simply pays each investor the same percentage of his or her loss. It is completely straightforward and impartial. Moreover, the net investment method bestows a fairer degree of credit upon individuals such as Investors who sought and obtained distributions. No distribution was ever “foisted” upon an investor or made to an investor without request or demand by the investor (indeed, Investor Boyles and Investor Puckett made withdrawals primarily to pay the substantial amount of taxes, allocated to them in K-1s prepared by Barki, LLC, upon the alleged profits they were required to recognize). Almost \$5 Million is available for distribution to investors generally and it is patently unfair for none of it to be distributed to Investors or others similarly situated simply because they voluntarily withdrew funds – in some cases as early as 2005 – before learning the venture was a sham.

d. Avoids Arbitrary and Inconsistent Results. Bizarre outcomes result from the proposed claims distribution method. For example, a certain investor transfers \$800,000.00 to Barki, LLC on Monday, changes his mind on Tuesday by withdrawing same, and then decides to go ahead and re-invest the \$800,000.00 on Wednesday. Only one transaction has really occurred here – the transfer of \$800,000.00 from the unfortunate investor to the Ponzi scheme operator. However, the proposed method of distribution would treat this example as a transfer of \$1.6 Million and a withdrawal of \$800,000.00, resulting in the investor receiving nothing under the proposed claims distribution method. That same investor would have received the logical sum of \$200,000.00 (assuming a 25% distribution) under the net investment method. A less dramatic but equally illustrative example is that of the investor who transferred \$200,000.00, withdrew \$75,000.00 at some later date and then ultimately plowed the money back into the venture. Such an investor has absolutely nothing to show for his misfortune as he

has retained none of the funds withdrawn. However, the proposed claims distribution method penalizes this investor by paying nothing whatsoever upon his claim (assuming, again, a 25% distribution) but would have paid \$50,000.00 to that same investor had he simply fallen asleep after putting in his initial \$200,000.00. This type of inconsistent result is completely unsupportable, arbitrary beyond measure, and unfair in the truest sense. Yet, as set forth in Subparagraph (e) below, it is very typical of what occurred in this case among investors in general and specifically what has happened relative to Investors. The proposed claims distribution method thoroughly punishes most investors who took money out and then put money back in by denying these investors what would have been distributed to them by the Receiver had they simply done nothing – even though the net effect of the underlying transfers and withdrawals is the same.

e. Better Suited to Facts of this Case. The overwhelming majority of investors made at least some significant withdrawal from Barki, LLC before the scheme collapsed.² Thus, under the facts of this case, the net investment method would create the fairest distribution scheme for the greatest number of investors. Indeed, an initial analysis of Exhibit B demonstrates that of the 75 total investors, 47 of them would receive absolutely nothing under the claims distribution method proposed by the Receiver. Regardless of whether the “rising tide method” serves a valid purpose in some cases, it clearly should not be implemented in a situation where it deprives almost two-thirds (2/3) of the investors of all benefit of the Receivership, especially where another (and arguably fairer) method of distribution exists, as advocated in this Response, which would provide benefits to 64 out of the 75 investors (85% of the total).³ Moreover, many investors in general, and three of the four Investors, made withdrawals from Barki, LLC and then later transferred all or a substantial portion of the amount

² See schedule attached hereto as Exhibit B. Only 15 investors did not make withdrawals.

³ If investors who withdrew more than they transferred in, and therefore could never share in a distribution, regardless of the method, are not included in the totals, the percentage of investors sharing in the proposed claims distribution method is 20% whereas it is 100% under the net investment method.

of the withdrawal back into the venture. Investor Harris transferred \$235,000.00 back into Barki, LLC after having made prior withdrawals, which figure represents over 75% of his total withdrawals. Investor Puckett withdrew \$162,000.00 in 2006 only to re-invest \$372,000.00 in 2007, and withdrew \$229,000.00 in 2007 but re-invested \$730,000.00 in 2008. Investor Boyles transferred in over \$171,000.00 after having made earlier withdrawals of \$284,500.00. These Investors and others who did likewise will be further penalized along the lines of the example set forth in Subparagraph (d) because they are having held against them funds which they no longer possess, much as if the funds had never been withdrawn in the first place.⁴

f. Balance. The net investment method strikes a good balance or midpoint between the proposed claims distribution method and the first of the four potential distribution methods identified in the Motion (which would pay each investor a percentage of his or her claim without regard to prior withdrawals made by the investor).

4. Due process requires that a hearing be held upon this Response and upon the Response of any other investor who files one in a timely manner, and that any investor who files a Response be permitted to submit a Memorandum of Law at or prior to the time of hearing for consideration by the Court. Many if not most of the investors in this case will gain or lose hundreds of thousands of dollars depending on whether the proposed claims distribution method or the net investment method is ultimately ordered by this Court. Moreover, the undersigned first became aware of this matter less than a week ago, was retained over the course of the next several days, and is unable to perform the legal research necessary to advise the Court of substantially all of the arguments and legal support for the net investment method on or before the July 13, 2009 deadline.

⁴ One way to eliminate the gross unfairness resulting under the proposed claims distribution method to investors who withdrew money and later put more money into the venture is to implement, at least in part, a scheme of distribution which follows the concept underlying the preference exception under Section 547(c)(4) of the Bankruptcy Code, known as the “new value” exception. Any investor who withdrew funds only to put “new value” back into the venture later would have the withdrawal “netted out” to the extent of the new value.

WHEREFORE, Investors pray the Court as follows:

1. That the net investment method, as opposed to the proposed claims distribution method, be ordered by this Court as the claims distribution method to be implemented in this case;
2. That a hearing be held upon this Response, and upon the Response of any other investor which has been timely filed, and that Investors and such other responding investors be given not less than 20 days notice of the date and time set for such hearing;
3. That Investors and any other responding investor be allowed to file a Memorandum of Law at or prior to such hearing; and
4. That Investors have such other and further relief as to the Court may seem just and proper.

This the 13th day of July, 2009.

/s/ Marc R. Gordon

Marc R. Gordon

Attorney for Investors Harris, Wray, Boyles and Puckett

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OF COUNSEL:

GIORDANO, GORDON & BURNS, P.L.L.C.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing Response (Objection) of Harris, Boyles and Puckett to Receiver's Motion for (1) Approval of Proposed Claims Verification Procedures, Claims Bar Date, and Proposed Claims Distribution Method; and (2) for Authority to Make Interim Distributions to Investors was filed electronically on this date through the Court's ECF system and that the party listed below has been served via U.S. Mail with a true and correct copy of said Response:

Joseph W. Grier III
Grier, Furr & Crisp, P.A.
101 N. Tryon Street, Suite 1240
Charlotte, NC 28246

This the 13th day of July, 2009.

/s/ Marc R. Gordon
Marc R. Gordon
Attorney for Investors Harris, Wray, Boyles and Puckett

Exhibit A

Harris, Anthony C. (Tony)	1/24/2007	225,000.00		
	11/07/2007	12,000.00		
	2/29/2008	200,000.00		
	4/00/2008	0	18,500.00	
	5/00/2008	0	253,500.00	
	6/00/2008	0	3,500.00	
	7/00/2008	0	3,500.00	
	8/00/2008	0	3,500.00	
	9/03/2008	200,000.00	0	
	10/00/2008	0	3,500.00	
	1/00/2009	0	21,000.00	
	2/09/2009	35,000.00		
	Harris Totals:	\$672,000.00	\$307,000.00	-\$365,000.00

David Wray

Date	Transferred	Withdrawn
2/26/08	\$250,000.00	
4/24/08	\$250,000.00	
11/12/08	\$250,000.00	
12/30/08		\$350,000.00

BOYLES, LLC

Barki #3.05

<u>DATE</u>	<u>INVESTMENT DEPOSIT</u>	<u>WITHDRAWAL</u>	<u>BALANCE</u>
4/15/2005	\$50,000.00		\$50,000.00
5/4/2005	\$35,000.00		\$85,000.00
8/4/2005	\$15,000.00		\$100,000.00
9/2/2005	\$180,000.00		\$280,000.00
9/23/2005	\$20,000.00		\$300,000.00
<u>12/6/2005</u>	\$20,000.00		\$320,000.00
YEARLY TOTALS	<u>\$320,000.00</u>		
2/28/2006	\$27,400.00		\$347,400.00
4/13/2006		\$53,500.00	\$293,900.00
<u>8/23/2006</u>	\$25,000.00		\$318,900.00
YEARLY TOTALS	<u>\$52,400.00</u>	<u>\$53,500.00</u>	
1/10/2007		\$20,000.00	\$298,900.00
4/15/2007		\$25,000.00	\$273,900.00
6/15/2007		\$25,000.00	\$248,900.00
9/19/2007		\$25,000.00	\$223,900.00
<u>11/1/2007</u>	\$30,000.00		\$253,900.00
YEARLY TOTALS	<u>\$30,000.00</u>	<u>\$95,000.00</u>	
1/14/2008		\$36,000.00	\$217,900.00
2/4/2008	\$14,000.00		\$231,900.00

BOYLES, LLC

Barki #3.05

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<u>DATE</u>	<u>INVESTMENT DEPOSITED</u>	<u>WITHDRAWAL</u>	<u>BALANCE</u>
3/31/2008		\$50,000.00	\$181,900.00
7/15/2008	\$100,000.00		\$281,900.00
9/3/2008		\$20,000.00	\$261,900.00
<u>12/3/2008</u>		\$30,000.00	\$231,900.00
YEARLY TOTALS	<u>\$114,000.00</u>	<u>\$136,000.00</u>	
2/11/2009	\$10,000.00		\$241,900.00
YEARLY TOTALS	<u>\$10,000.00</u>		
GRAND TOTALS	\$526,400.00	\$284,500.00	\$241,900.00

BARKI LLC
Investor Account Analysis

Exhibit B

		Date of Initial	Total	Total	Net	
		Investment	Investments	Distributions	Investment	
Anderson	Mike & Diane	10/31/2007	200,000	-	200,000	
BAMA LLC		6/30/2007	475,600	(405,000)	70,600	* includes \$10,000 invest made in 2/09
Bledsoe	Mike	8/16/2005	670,000	(400,000)	270,000	
Boyles	Jimmy	4/18/2005	516,400	(294,500)	221,900	* includes 2/09 distrib of \$10,000
Bronson	Mike	6/30/2008	500,000	-	500,000	
Brotherton	Jeff	11/30/2006	719,500	(234,000)	485,500	
C&D Rivers		10/31/2008	250,000	-	250,000	
Carter	Bob	1/31/2007	660,000	(340,000)	320,000	* includes 2/09 distrib of \$55,000
Carter	Mike	1/31/2006	230,000	(112,500)	117,500	
Chaney	Ron & Cindy	1/31/2008	950,000	-	950,000	
Cobb	Chris & Kelley	6/20/2005	300,000	(114,500)	185,500	* includes 2/09 distrib of \$25,000
Coupled Investment Partnership		4/30/2007	408,206	(154,500)	253,706	
Cox	Mike	9/30/2007	344,879	(242,000)	102,879	
Cox	Ted & Shannon	9/30/2006	409,054	-	409,054	
Craig	Mac	5/10/2005	810,000	(927,066)	(117,066)	
Danzer	Rick	1/31/2008	440,000	(68,000)	372,000	
Darby	Allen	6/20/2005	125,000	(182,591)	(57,591)	
Davis	Cissy	8/16/2005	465,000	(495,000)	(30,000)	
Dittloff	Pam & Ambrose	12/31/2006	244,000	(48,000)	196,000	
Early Ltd		1/31/2008	513,836	(165,000)	348,836	
Edwards	Don	10/31/2006	300,000	(130,000)	170,000	
Edwards	Hunter	1/21/2005	2,700,000	(2,490,000)	210,000	
Emmerling	Luke	1/31/2008	425,000	-	425,000	
Evans	Bryan	11/30/2008	75,000	-	75,000	
Evergreen Financial Holdings		11/30/2008	337,500	-	337,500	
EVF Investments		10/31/2008	800,000	(38,954)	761,046	
Feagin (Feaview Farms)	Ken	8/25/2005	3,299,566	(2,265,270)	1,034,296	
Goldner	James	6/30/2006	425,000	-	425,000	
Green	Anita	7/31/2007	427,000	(411,620)	15,380	
Green	Scott	7/31/2007	604,620	(328,000)	276,620	
Harris	Bradley	7/31/2007	100,000	-	100,000	
Harris	Charles	7/31/2006	400,000	(11,000)	389,000	
Harris	Tony	1/31/2007	820,900	(407,000)	413,900	*includes \$35,000 invest in 2/09
Harris (Harris Investor Group)	Steven	1/31/2006	490,000	(230,250)	259,750	
Harwell	Steven	9/30/2008	336,525	-	336,525	
Hobart	Tony	10/31/2006	1,200,000	(855,000)	345,000	*includes 2/09 distrib of \$500,000
Hopkins	Greg	4/30/2006	452,984	(222,000)	230,984	*includes 2/09 distrib of \$7,000
Icard	Ben	8/31/2006	335,000	(359,000)	(24,000)	
JBR Investment Group		5/31/2008	348,000	(140,000)	208,000	
Johnston	Bob	4/30/2007	913,300	(30,000)	883,300	*includes \$4,000 invest in 2/09
King	Emma	8/16/2005	97,390	(168,475)	(71,085)	
King	Jimmy	5/31/2007	535,000	(430,000)	105,000	
King	Watson	10/31/2007	250,000	(50,000)	200,000	
Klein	David	6/30/2006	270,209	(477,593)	(207,384)	
Kothe-Burt Investments		2/2/2009	659,052	-	659,052	* invested in 2/09
L & J Ltd. Partnership		3/31/2008	450,000	(22,000)	428,000	
Lambeth	Lloyd	3/31/2007	1,349,997	(604,611)	745,386	
Lambeth	Marianne	9/30/2007	469,248	(141,500)	327,748	
Lambeth	Rick	9/30/2007	329,248	(85,000)	244,248	
Lingerfelt	Chuck & Bonnie	8/16/2005	270,000	(60,000)	210,000	
Logan	Brian	11/30/2007	250,000	(136,500)	113,500	*includes distrib of \$100,000 2/20/09
Manzella	John & Gail	10/31/2006	225,839	(79,500)	146,339	
Manzella	John & Jackie	5/31/2006	300,000	(92,000)	208,000	
Martin	James	7/31/2007	370,000	-	370,000	
Maye	Gene	1/31/2008	725,000	(8,000)	717,000	
Maye	Lance	1/31/2008	1,230,000	(43,000)	1,187,000	
Mogul	Lee	2/28/2007	308,733	(170,000)	138,733	
Page	Richard	6/30/2006	240,000	(196,000)	44,000	
Parsons	Clayton	2/25/2009	100,000	-	100,000	* invested in 2/09
Pettit	Ken	4/30/2006	927,000	(675,000)	252,000	
Pooley	Matt & Maureen	12/31/2007	250,000	-	250,000	
Puckett	Don	2/10/2005	1,857,000	(849,484)	1,007,516	
Puckett	Jan	2/28/2008	180,250	(4,637)	175,613	
Puckett	Ryan	6/1/2004	331,000	(807,996)	(476,996)	
Randolph	Mike	9/30/2005	329,431	(100,000)	229,431	
Roche	Joe	9/20/2005	900,000	(390,000)	510,000	
Shuster	John & Betsy	8/31/2006	410,000	(282,000)	128,000	
Sumrell	Bette	7/1/2005	75,000	(83,250)	(8,250)	
Sumrell	Ivey	7/1/2005	260,000	(351,820)	(91,820)	
Sumrell	Jim	7/22/2005	75,000	(142,200)	(67,200)	
Tans	Alvin	11/8/2005	300,000	(392,696)	(92,696)	
Townsend	Ruth	6/30/2007	250,000	(171,154)	78,846	
Townsend	D.W.	6/30/2007	553,887	(36,000)	517,887	
Wray	David	2/28/2008	750,000	(350,000)	400,000	
Wright	Gary	10/31/2007	275,000	(145,000)	130,000	
			<u>40,175,154</u>	<u>(19,646,167)</u>	<u>20,528,987</u>	

NOTE:

Above numbers reflect January, 2009 investments and distributions according to Kramer's records unless otherwise noted. There may be discrepancies!!!