

FILED
CHARLOTTE, NC

JUL 13 2009

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF NC

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

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

v.

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.

**OBJECTION TO RECEIVER'S MOTION FOR APPROVAL OF PROPOSED
CLAIMS DISTRIBUTION METHOD**

Jeffrey A. Brotherton / JAZAC, LLC, investors ("Investor") and victims in this action,
hereby presents this

Objection to Receiver's Motion for Approval of Proposed Claims Distribution Method

and in support thereof, respectfully shows the Court as follows:

BACKGROUND

The Receiver in this case has recovered \$2,346,901.39, and less Court approved expenses of \$59,440.88, a balance of \$2,287,460.51 is on deposit in the Receivership account. The Receiver will distribute available funds, less the costs of administration of the Receivership and any other disbursements approved by the Court, to customers of Defendant Barki, LLC (the “Investors”), pursuant to a distribution method approved by the Court. The Receiver does not expect to recover sufficient funds to refund all of the Investor’s capital investments in full. Therefore the Receiver has presented a Motion before the Court to approve an equitable distribution of available funds to Investors based on “The Rising Tide Method”.

RELIEF REQUESTED

By this Objection, the Investor seeks approval of an alternate, more equitable method of distribution of available funds known as “The Net Investment Method” .

ARGUMENT

District Courts have the latitude in exercising their equitable powers in approving a distribution plan for receivership funds. However, there are “no neat answers to the various equities involved” in Ponzi scheme cases where each of the investors were

equally responsible for trusting the wrongdoer. *Johnson v Studholme*, 619 F. Supp. 1347, 1350 (D. Colo. 1985), *aff'd sub nom, Johnson v. Hendricks*, 833 F.2d 908 (10th Cir. 1987).

In cases where there are both net losers – those who put in more than they took out – and net winners – those who took out more than they put in – among the Ponzi scheme victims, there are four basic distribution methods that may be employed for making distributions on allowed claims. *Commodity Futures Trading Comm'n v. Equity Financial Group, LLC*, 2005 WL 2143975 at *24 (D.N.J. 2005). Those methods include:

- (1) ignoring withdrawals for the purposes of calculating claims;
- (2) requiring that all withdrawals be repaid and then redistributed through the distribution process;
- (3) employing a net investment method in which any withdrawals are subtracted from the total amount invested and the claim is allowed in the net amount (the “net investment method”) or;
- (4) allowing investors to keep withdrawals they received but crediting such withdrawals against the investors’ pro rata shares on the full amounts invested (the “rising tide method”).

The Receiver has filed a Motion with the Court to approve the above method number (4), the “rising tide method”. Under this method, distributions would be made only to customers who received withdrawals that were less than the percentage distribution to be made by the receiver. No distributions would be made to customers who have already received withdrawals greater than the percentage distribution made, regardless of their net losses. If one customer invested \$20,000 and took no withdrawals, the net loss is

\$20,000. Conversely, if another customer invested \$200,000 and prudently took withdrawals of \$80,000 over time, a net loss of \$120,000 is incurred. Assuming a distribution percentage of 25%, under the “rising tide method” the latter customer receives no distribution and suffers a \$120,000 loss while the first customer receives \$5,000 but only suffers a \$15,000 loss.

Evidence has not been presented that indicates any customer was ever denied a withdrawal request of any amount at any time. All customers had the opportunity and the right to invest or withdrawal at their discretion and of free will. Those that chose to exercise that right and make prudent withdrawals should not be penalized because others elected not to. Under the “net investment method”, all customers are treated equally. Distributions are based strictly on the net investment (total invested – total withdrawals) or in this case, actual losses. In either method, fictitious profits are disregarded and only actual investments and withdrawals are taken into account. For these reasons, the Investor believes that the “net investment method” offers the best means of achieving equality among all Investors in this case.

WHEREFORE, the Investor prays that the Court will enter an Order:

- (1) Rejecting the “rising tide method” for calculating claims distributions in this case;
- (2) Approving the “net investment method” for calculating claims distributions in this case as was my understanding in talking with Anne Termine of the CFTC early on in this process; and
- (3) Granting such further relief as is just and proper.

This 13th day of July, 2009.



Jeffrey A. Brotherton
JAZAC, LLC
154 Elysian Dr.
Mooresville, NC 28117
704-400-1937
Jeff.brotherton@msssolutions.com