

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

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

Plaintiff,

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.

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

**REPLY BY RECEIVER TO MEMORANDUM OF LAW IN SUPPORT OF
RESPONSE (OBJECTION) OF HARRIS, WRAY, BOYLES AND PUCKETT**

Joseph W. Grier, III, the Court-appointed receiver (“Receiver”) in this action (the “Receiver”), through counsel, hereby presents this *Reply by Receiver to Memorandum of Law in Support of Response (Objection) of Harris, Wray, Boyles and Puckett* (the “Memorandum”) (D.E. 118) and respectfully shows the Court as follows:

Pending before the Court is a determination of the distribution methodology to be used in this case. The Receiver proposed that the Court approve the “rising tide” method for calculating distributions in his motion requesting approval of certain claims procedures (the “Claims Motion”) filed on June 23, 3009. (Claims Motion, at 8-12) (D.E. 67). The Memorandum was filed on behalf of four Barki, LLC customers who object to the Receiver’s proposal and support, instead, the “net investment” method for calculating distributions. (Mem. at 1).

The Memorandum cites to a Fourth Circuit opinion, *Anderson v. Stephens*, 875 F.2d 76 (4th Cir. 1989) as controlling authority in this case, stating that “the Fourth Circuit Court of Appeals has actually adopted the net investment method as the proper method of distribution in federal receivership cases such as the instant one.” (Mem. at 2) (emphasis in original).

The *Anderson* court considered an appeal of a decision by the Western District of Virginia, *CFTC v. Franklin*, 652 F.Supp. 163 (W.D.Va. 1986).¹ In that case, the Fourth Circuit decided the “narrow issue of whether it was proper for the district court to rule that checks deposited to [a frozen account] after entry of the . . . freeze order were to be included in the Receiver’s general account and distributed pro rata” to all investors. 875 F.2d at 78. It was specifically in the context of its “decision that checks deposited into Franklin’s account after the freeze order was issued” could not be included in the receivership estate that the court “review[ed] the rationale of the Receiver’s plan and the district court opinion.” *Id.*

Although the *Anderson* opinion makes reference to “pro rata distributions,” these references are limited to the discussion of the issue before the court: whether investor funds deposited to a frozen account after entry of the freeze order were part of the receivership estate. *Id.* at 78-79, 81. *Anderson* does not discuss the net investment method in comparison to any other distribution methodology. *See id.* at 79-81. Indeed, the *Anderson* court’s only reference to the manner in which distributions were to be made in the *Franklin* case is included in a footnote that sets out the priority for distributions and states, without comment, that the third priority² was to be a:

Return of residual funds to FIG investors on a pro rata basis. These payments would be made regardless of any purported profits or losses on the investments,

¹ The *Franklin* case was cited in the Claims Motion for its discussion of various distribution methods and its approval of the net investment method. (Claims Mot. at 9-10).

² Distributions to investors were to be made after (1) payment of administrative expenses, including legal fees, and (2) the return of funds deposited after entry of the freeze order. 875 F.2d at 79 n.6.

and would be reduced by the full amount of any payments that were made to FIG investors as purported profits on their investments.

875 F.2d at 79 n.6.

The Memorandum quotes from another Fourth Circuit opinion, *United States v. Vanguard Inv. Co.*, 6 F.3d 222 (4th Cir. 1993) for its favorable comments about the *Franklin* decision, overturned in part by *Anderson*. (Mem. at 4). However, the Memorandum cuts off the quotation from *Vanguard* at a crucial point. *Id.* The full quotation is as follows:

Although we reversed that judgment [in *Franklin*] based on our conclusion that the plaintiff investors weren't in fact similarly situated with the others, we did not disapprove the general approach taken by the district court.

We reaffirm that position here, *holding that a district court in its discretionary supervision of an equitable receivership may deny remedies like rescission and restitution* where the equities of the situation suggest such a denial would be appropriate.

Vanguard, 6 F.3d at 227 (emphasis added). The *Vanguard* opinion does not discuss how distributions were to be calculated in that receivership case. *See id.* at 225-28.

In summary, based on a review of the *Anderson* and *Vanguard* decisions, the Receiver maintains that the issue of the appropriate distribution methodology to be applied by District Courts sitting in equity is undecided in the Fourth Circuit.

This is the 8th day of October, 2009.

/s/ A. Cotten Wright

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the *Reply by Receiver to Memorandum of Law in Support of Response (Objection) of Harris, Wray, Boyles and Puckett* were served by email or the CM/ECF system upon the following parties:

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This the 8th day of October, 2009.

/s/ A. Cotten Wright

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