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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)

**RECEIVER'S REPLY TO NOTICE OF OBJECTION TO RECEIVER'S MOTION TO
APPROVE SETTLEMENT AGREEMENT**

Joseph W. Grier, III, as Receiver (the "Receiver") for the assets of Barki, LLC ("Barki"), Bruce C. Kramer ("Kramer"), Rhonda A. Kramer and Forest Glen Farm, LLC, respectfully submits *Receiver's Reply to Notice of Objection to Receiver's Motion to Approve Settlement Agreement* (the "Reply").

INTRODUCTION

1. On May 10, 2010, the Receiver filed *Receiver's Motion for Approval of Settlement* (D.E. 166) ("Receiver's Motion") seeking approval of a settlement agreement between Jennifer Puckett and the Receiver as to a "Net Gain" on Barki Account 1.04 (the "Settlement Agreement").

2. On May 18, 2010, Ronald E. and Lucinda L. Chaney filed their *Notice of Objection to Receiver's Motion to Approve Settlement Agreement* (the "Objection") (D.E. 168) objecting to the relief requested in Receiver's Motion.

SPECIFIC REPLY TO OBJECTION

3. In determining the amount of the Net Gain, the Receiver analyzed the books and records of Barki, bank statements of both Barki and Ryan and Jennifer Puckett and wire transfer records. Total funds "deposited" into Barki from the Pucketts was \$331,000 and the total of Barki funds distributed to the Pucketts was \$832,996. All funds attributable to the Pucketts on the books and records of Barki, whether characterized as deposits, withdrawals, distributions or payments were documented in Account 1.04. Account 1.04, on the books and records of Barki, was in the name of Ryan Puckett. The Net Gain on Account 1.04, regardless of basis of payment from Barki to the Pucketts, totaled \$501,996 (the "Net Gain"). The Receiver has causes of action available to him to pursue the Net Gain of \$501,996 from Jennifer Puckett and the Estate of Ryan Puckett.

4. The Receiver has vigorously pursued collection of the total of the Net Gain and "Net-Winnings" of other Barki customers during the course of the Receivership.

5. Of the eleven Barki "Net-Winners" (Barki customers whose distributions from Barki exceeded their deposits into Barki), the Receiver has settled and obtained Court approval as to five (not including the settlement reached as to Account 1.04) at 80% of the net-winnings. After thorough due diligence in investigating the possibility of collection, the Receiver has decided not to pursue four Net-Winners because the cost to the Receivership Estate in pursuing judgments and other collection efforts would greatly exceed any possibility of collecting any funds for the

benefit of the Receivership Estate. Settlement with the final Net-Winner is currently being documented.

6. After thorough due diligence into the assets, liabilities of Jennifer Puckett and the Estate of Ryan Puckett, as well as the income potential of Jennifer Puckett, the Receiver is confident that the only source of recovery of the Net Gain for the benefit of the Receivership Estate, i.e., the only available asset of Jennifer Puckett and the Estate of Ryan Puckett, is the expectation that they will receive claimed Federal and State income tax refunds (“Tax Refunds”).

7. In performing this due diligence, the Receiver’s accountant reviewed the tax forms filed on behalf of Jennifer Puckett and the Estate of Ryan Puckett and provided the Receiver with an independent analysis and projection as to the Tax Refunds.

8. The total amount claimed by Jennifer Puckett and the Estate of Ryan Puckett for the Tax Refunds, excluding any interest due, is \$295,576.00. The Receiver’s accountant’s analysis calculated the estimated refunds to be \$246,276.00, excluding any interest due. The total anticipated Tax Refunds are less than the total Net Gain; even a 100% recovery of the Tax Refunds would not likely equal 80% of the Net-Gain. Nevertheless, recovery of 80% of either figure for the Tax Refunds (less accounting fees) would be of substantial benefit to the Receivership Estate.

9. The Receiver believes the Tax Refunds will be paid and that they are a viable source of recovery for the Receivership Estate.

10. The Receiver is confident that the Tax Refunds are the only source of any recovery for the Receivership Estate as to the Net Gain and that pursuit of 80% of the *Net Gain* (as opposed to 80% of the *Tax Refunds*) would result in the Receiver facing pursuit of the Tax Refunds without the cooperation of Jennifer Puckett (as more fully discussed below).

RECEIVER'S FURTHER CONSIDERATIONS IN AGREEING TO SETTLE AS TO A PERCENTAGE OF THE TAX REFUNDS

11. Pursuant to the Receivership Order, the Receiver has the authority to “[i]nitiate, defend, *compromise*, adjust intervene in, dispose of, or become a party to any actions in state federal or foreign court necessary to preserve or increase the assets of the Defendants or Relief Defendants or to carry out his or her duties pursuant to this Order.” *Receivership Order* at 10 (emphasis added). This provision is in line with the ordinary practice for receivers and comports with the general understanding that receivers have the power to settle claims with court authority. *S.E.C. v. Credit Bancorp, Ltd.*, 2002 WL 1792053 at *4 (S.D.N.Y. Aug. 2, 2002) (citing 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d ed.1959)). A federal equity receiver’s recommendation with respect to settlements of possible litigation claims is generally accorded deference, and approval of such settlements lies within the court’s sound discretion. *See Sterling v. Stewart*, 158 F.3d 1199, 1203-04 (11th Cir. 1998) (affirming district court’s order authorizing receiver’s settlement of claim for usurpation of corporate opportunity).

12. There are no federal rules that set out a standard for considering settlements in equity receivership cases. *Gordon v. Dadante*, 336 Fed. Appx. 540, 549 (6th Cir. 2009). In general, however, a receiver’s proposed settlement should be approved if the court finds that it is fair. *S.E.C. v. Princeton Economic Intern., Ltd.*, 2002 WL 206990 at *1 (S.D.N.Y. Feb. 8, 2002). Considerations related to fairness include determining “whether such action is prudent in the administration of the assets of the estate.” *Id.* (quoting *S.E.C. v. Arkansas Loan & Thrift Corp.*, 297 F.Supp. 73, 78 (W.D. Ark. 1969) (citation omitted), *aff’d*, 427 F.2d 1171 (8th Cir. 1970)). In addition, the courts consider balancing “(1) the probable validity of the claim; (2) apparent difficulties attending to its enforcement through the courts; (3) the collectability of the judgment

thereafter; (4) the delay and expenses of the litigation to be incurred; and (5) the amount involved in the compromise.” *Id.*

13. Upon the Receiver’s conclusion that the only source of recovery of any portion of the Net Gain is the Tax Refunds, the Receiver vigorously pursued that avenue of collection from Jennifer Puckett.

14. Despite the fact that amended tax returns have been filed, the Tax Refunds have not been received by Jennifer Puckett and, in fact, the Internal Revenue Service is in the process of reviewing those returns. Jennifer Puckett has had to personally meet with the I.R.S. on at least one occasion to provide additional information and answer questions as to the filed tax returns. Without Jennifer Puckett’s cooperation with the taxing authorities, there is a substantial possibility that the tax refunds will not be processed in such a manner as to generate the Tax Refunds.

15. Further, upon information and belief, any Tax Refund checks will be made payable jointly to Jennifer Puckett and the Estate of Ryan Puckett. Accordingly, the Receiver expects that there may be hurdles to overcome with respect to Ryan Puckett’s estate in conjunction with obtaining a portion of the Tax Refunds for the benefit of the Receivership Estate. The Receiver expects that some issues will be alleviated with Jennifer Puckett’s cooperation. As part of the Settlement Agreement entered into with Jennifer Puckett, she has agreed to work with the Receiver in good faith with respect to obtaining any approvals the Receiver deems necessary as to the settlement, including but not limited to resolving issues with any decedent’s estate that may be opened in the name of Ryan Puckett and negotiating checks for the Tax Refunds.

16. Though the Receiver initially sought to collect additional amounts, he agreed to an 80% - 20% split of the Tax Refunds with Jennifer Puckett, in part, to assure her cooperation in obtaining the funds for the Receivership Estate. Further, absent allowing a capped payment of accountant's fees for services including preparation of tax returns and handling taxing authority inquiries incurred by Jennifer Puckett, the Receivership would have had to bear these expenses in the form of paying the Receiver's Accountants to perform the same duties.

17. Absent the proposed settlement, were the Receiver to pursue recovery of 100%, or even 80% of the Net Gain, the Receiver would have to, at the outset, litigate against Jennifer Puckett and the Estate of Ryan Puckett to seek a judgment for the benefit of the Receivership Estate. Though the Receiver is confident that the claim for the Net Gain is a valid claim, during negotiations with Jennifer Puckett, issues were raised that indicated that she had defenses that would have had to be overcome by the Receiver.

18. Only upon obtaining a judgment against Jennifer Puckett and the Estate of Ryan Puckett, would the Receiver have been able to proceed with enforcement of the judgment, including addressing any issues as related to Ryan Puckett's Estate.

19. Enforcement of a judgment entails collecting against assets of the judgment debtors. In this case the Receiver would be seeking satisfaction of a judgment from assets of Jennifer Puckett and the Estate of Ryan Puckett. As stated above, the only assets the Receiver has been able to identify are the Tax Refunds. Obtaining the Tax Refunds for the benefit of the Receivership Estate in a contested situation would be a difficult, uncertain and lengthy process.

20. Litigation and collection of the Net Gain, absent settlement, would greatly increase the legal expenses to the Receivership Estate with no clear indication of recovery.

21. The Receiver negotiated the Settlement Agreement taking these issues into consideration and, thus avoiding a much more risky and uncertain path for recovery of any of the Net Gain for the benefit of the Receivership Estate.

22. Given these considerations, the Receiver asserts that the settlement is fair and that the compromise is prudent vis-à-vis the administration of the assets of the Receivership Estate.

23. In this matter, and in all matters as related to this Receivership, the risks and uncertainties of litigation as well as the costs and delays inherent in litigation have at all times been taking into consideration.

RELIEF REQUESTED

24. The Receiver asserts that the Settlement Agreement with Jennifer Puckett reflects the best interests of the Receivership Estate and respectfully requests that the Court deny the Objection and Grant Receiver's Motion.

WHEREFORE, for the reasons outlined herein, the Receiver requests entry of an Order approving the Settlement Agreement and granting such other relief as is just and proper.

This is the 4th day of June, 2010.

/s/Anna S. Gorman
Anna S. Gorman (State Bar No. 20987)
Joseph W. Grier, III (State Bar No. 7764)
Grier Furr & Crisp, PA
101 N. Tryon Street, Suite 1240
Charlotte, NC 28246
Telephone: (704) 332-0207; Fax (704) 332-0215
jgrier@grierlaw.com
agorman@grierlaw.com