UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 08-81565-CIV-HURLEY/HOPKINS

SECURITES AND EXCHANGE COMMISSION

Plaintiff,

vs.

CREATIVE CAPITAL CONSORTIUM, LLC, et al.,

Defendants.
_____/

RECEIVER'S UNOPPOSED MOTION FOR APPROVAL OF SETTLEMENT OF ACTION AGAINST BANK OF AMERICA, N.A.

Jonathan E. Perlman, Esq., court-appointed receiver (the "Receiver") for Creative Capital Consortium LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc., (collectively, the "Receivership Entities"), and also the Plaintiff in the action against Bank of America, N.A. ("BANA") styled *Perlman v. Bank of America, N.A.*, No. 11-80331-CIV-HURLEY/HOPKINS (S.D. Fla.) (the "Bank of America Action"), hereby files this unopposed motion for approval of settlement of all claims in the Bank of America Action (the "Motion for Approval") and states:

Background

1. On December 29, 2008, the Securities and Exchange Commission ("SEC") filed its Complaint for Injunctive and Other Relief (the "SEC Complaint") against George Theodule and certain of the Receivership Entities in this action. The SEC alleged that Theodule, through certain Receivership Entities, sold unregistered securities and violated various sections of the

Securities Exchange Act of 1934 (the "Exchange Act"). More specifically, the SEC alleged that Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC and George L. Theodule (collectively, the "SEC Defendants") all violated section 10(b) of the Exchange Act. The SEC sought a permanent injunction against the SEC Defendants to restrain them from any further securities law violations.

2. On December 29, 2008, at the SEC's request, the Court entered an order appointing the Receiver as equity receiver over the SEC Defendants, their subsidiaries, successors and assigns, in this action (the "Receivership Order") [ECF No. 8]. Thereafter, by orders dated December 31, 2008 and September 21, 2009, respectively, the receivership was expanded to include United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc., and Unity Entertainment Group, Inc. [ECF Nos. 14, 162].

3. Under the terms of the Receivership Order, the Receiver is authorized to investigate the affairs of the Receivership Entities, to marshal and safeguard these entities' assets, and to institute legal proceedings for the benefit and on behalf of the Receivership Entities' investors and other creditors. Additionally, and pursuant to the Receivership Order, the Receiver is authorized and has standing to assert claims against third parties including but not limited to: (i) all legal and equitable claims available to the Receivership Entities prior to the institution of this action; and (ii) claims to avoid and recover fraudulent and preferential transfers for the Receivership Entities.

4. Pursuant to the Receivership Order, the Receiver and his professionals attempted to locate and secure money illegally raised (and any proceeds thereof) from investors by and through the Receivership Entities. During the investigation, the Receiver and his counsel

identified potential claims against financial institutions and individuals for liability under Florida Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. §726.101 et seq. and other theories of liability. As a result, the Receiver initiated various actions seeking, among other relief, to avoid and recover assets fraudulently transferred from the possession of the Receivership Entities, including the filing of the Bank of America Action.

5. As expected, Defendant BANA vigorously defended the Bank of America Action including moving for summary judgment on all claims.

6. On December 17, 2014, BANA and the Receiver mediated this matter and thereafter entered into a settlement to resolve and settle the Bank of America Action on the terms and conditions contained therein (the "Settlement Agreement") that, at the Receiver's request, is conditioned upon this Court's approval.

7. The settlement is memorialized in the Settlement Agreement attached hereto as Exhibit "A".

8. With the advice of counsel, the Receiver exercised his business judgment and determined that it was in the best interest of the Receivership Entities to enter into the Settlement Agreement. Under the Settlement Agreement, BANA will pay to the Receiver $2,750,000 upon expiration of any appeal period after this Court's Order approving this settlement.

9. The Receiver now seeks Court approval of the settlement of the Bank of America Action.

Memorandum of Law

The "All Writs Act," 28 U.S.C. § 1651(a), provides a district court with the authority to enter orders that protect its jurisdiction and ensure enforcement of its orders. See 28 U.S.C. § 165 1(a)(2003). Section 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

Id. Section 1651(a) provides a district court with a "legislatively approved source of procedural instruments designed to achieve 'rational ends of the law'." *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). Pursuant to § 1651(a), a district court, unless specifically confined by Congress, "may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *See id*. (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). The authority granted to a district court under § 1651(a) should be applied flexibly where in conformity with these principals. *See id*.

The Court's use of the All Writs Act to approve the settlement is particularly appropriate as the settlement of this action will implement this Court's directive in the Receivership Order that the Receiver is authorized to "institute such actions and legal proceedings" against third parties on behalf of the Receivership Entities and "compromise or settle [these] legal actions." [ECF No. 8, ¶¶ 2, 6]. Moreover, the Receiver was empowered to enter into "agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties." *Id*. at ¶ 8. The Settlement Agreement will enable the Receiver to discharge his duty of bringing legal actions on behalf of the Receivership Entities in a just and efficient manner.

In considering whether to approve a settlement negotiated by an equity receiver, a district court will examine the parameters of the receivership order's mandate. In approving a federal equity receiver's negotiated settlement, the court in *SEC v. Credit Bancorp, Ltd*., 2001 WL 1658200 at *2 (S.D.N.Y. Dec. 27, 2001), held that "[i]t is enough that the Receiver's request for settlement falls well within the broad discretion granted to him by the [Receivership Order] and the ordinary powers of a receiver." *Id*. at 2. There, the order authorized the receiver to

"investigate, prosecute, ... compromise and adjust actions in any state, federal or foreign court or proceeding of any kind as may in his sole discretion be advisable to or proper to recover or conserve funds, assets, or property of Credit Bancorp" *Id*. at *1. The court reasoned that this authority comports with the ordinary practice of receivers: "[T]he receiver has the power, when so authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit." *Id*. at *2 (quoting 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d ed. 1959)). Subsequently, in *SEC v. Bancorp, Ltd*., 2002 WL 1792053 (S.D.N.Y. Aug. 2, 2002), the same court approved another receiver settlement with financial institutions because it was within the receiver's discretion based on the Receivership Order and the ordinary practice for receivers. *Id*. at *4-*5.

This Court's Receivership Order [ECF No. 8] empowered the Receiver to "institute such actions and legal proceedings . . . [to recover] wrongfully, illegally or otherwise improperly misappropriated or transferred monies or other proceeds directly or indirectly traceable from investors in Creative Capital, including against Creative Capital, its officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or against any transfer of money or other proceeds directly or indirectly traceable from investors in Creative Capital" against third parties "as the Receiver deems necessary" and to "defend, compromise or settle legal actions." The Receivership Order also directs the Receiver to make "such agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties." *Id*. at ¶ 8. The Receiver has executed the Settlement Agreement (which is conditioned on Court approval) as he deems it prudent to resolve the Receiver's claims, and it comports with the ordinary practice of receivers. Therefore, the Settlement falls within the Receiver's mandate

from this Court and the Court should approve the Settlement Agreement. *See SEC v. Credit Bancorp*, 2001 WL 1658200, at *2; *SEC v. Bancorp, Ltd.*, 2002 WL 1792053 at *4-*5.

In considering whether to approve a settlement, the court should also consider whether the agreement is fair. In *Sterling v. Stewart*, 158 F.3d 1199, 1203 (11th Cir. 1998), shareholders appealed the district court's approval of a settlement proposed by a receiver that terminated their derivative suit. *Id*. at 1200-1201. The shareholder argued that the district court erred because it did not apply "vigorous scrutiny" in evaluating the receiver's settlement as required by Delaware law. Rather, the district court relied on a less stringent mandate set out in *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977), stating that the "District Court must find that the settlement is fair, adequate, and reasonable," and the six-factor test for fairness under *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984). In evaluating whether the settlement was fair, the *Sterling* district court examined: (1) the likelihood of success; (2) the range of possible discovery; (3) the point on or below the range of discovery at which settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of the litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement is achieved. *Id*. at 1204 n.6 (citing *Bennett*, 737 F.2d at 986).

In this case, the Receiver has determined that the settlement is fair, adequate, and reasonable. *See Cotton*, 559 F.2d at 1330. All applicable *Bennett* factors favor approval of the settlement. The claims alleged in this case are factually and legally complex, and the predictability of a result in litigation is uncertain. Avoiding the complexity, expense and uncertainty of this litigation will also drastically reduce costs to the Receivership estate and also allow for more focused prosecutions of other matters, including another FINRA arbitration being

set for final hearing in 2015 and a substantial lawsuit against a bank set for trial before the Court in April/May 2015.

The probability of any litigation resulting in a benefit to the estate equivalent to the certainty of the settlement also weighs in favor of granting the Motion. The risks and costs associated with litigation would be substantial. The settlement thus also avoids uncertainty, inconvenience and delay to Receiver's efforts to pursue all of the claims of the Receivership estate.

CERTIFICATION

Pursuant to Local Rule 7.1.A.3, undersigned counsel hereby certifies that the Receiver has conferred with Robert Levenson, counsel for Plaintiff, the Securities and Exchange Commission in the SEC action, and represents that the SEC has no objection to the relief sought by the Receiver in this Motion for Approval.

WHEREFORE, the Receiver, Jonathan E. Perlman, Esq., respectfully requests that this Court enter an order approving the settlement of the Bank of America Action and providing for such other and further relief as may be just and proper. A proposed form of order is attached.

Dated: December 31, 2014

Respectfully submitted,

s/ Jonathan E. Perlman, Esq.
JONATHAN E. PERLMAN, ESQ.
RECEIVER

-and-

s/ W. Barry Blum
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via CM/ECF on all counsel for all parties-in-interest on the attached service list this 31st day of December 2014.

s/ W. Barry Blum
W. BARRY BLUM

SERVICE LIST

***Securities and Exchange Commission v. Creative Capital Consortium, LLC* et. al.**
CASE NO.: 08-CIV-81565-HURLEY/HOPKINS

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