

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE §
COMMISSION, §
§
PLAINTIFF, §
§
vs. §
§
BRIAN A. BJORK, THE ESTATE OF JOEL §
DAVID SALINAS, J. DAVID GROUP OF §
COMPANIES, INC., J. DAVID FINANCIAL §
GROUP, LP, SELECT ASSET §
MANAGEMENT, LLC, SELECT ASSET §
CAPITAL MANAGEMENT, LLC, SELECT §
ASSET FUND I, LLC, AND SELECT ASSET §
PRIME INDEX FUND, LLC, §
§
DEFENDANTS. §

CIVIL ACTION NO. 4:11 CV - 02830

**RECEIVER’S UNOPPOSED MOTION TO APPROVE
SETTLEMENT AND COMPROMISE OF CLAIM AGAINST NET WINNER**

TO THE HONORABLE KEITH P. ELLISON, UNITED STATES DISTRICT COURT:

Receiver, Steven A. Harr (“Receiver”), files this Motion to Approve Settlement and Compromise of Claims Against Net Winner (the “Motion”) relating to the settlement entered into between the Receivership Entities and a husband and wife investor couple, (the “Investors”),¹ individually, and in support of the same respectfully provides the following:

**I.
INTRODUCTION**

1. On August 1, 2011, the Securities and Exchange Commission (“SEC”) filed its Complaint against Defendants. In conjunction therewith, the SEC sought, and by Order

¹ The Receiver believes that the names of the Investors should not be disclosed to ensure that privacy and confidentiality can be maintained. For purposes of this Motion, the Receiver believes the identity of the Investors is not relevant. However, if the Court wishes to learn the identities of the Investors or would like to review any of the documents or records referenced herein, the Receiver is willing to produce these items under seal for in camera review.

Appointing Receiver (the "Order"), the Court appointed, Steven A. Harr as the Receiver for Brian A. Bjork, the Estate of Joel David Salinas, J. David Group of Companies, Inc., J. David Financial Group, LP, Select Asset Management, LLC, Select Capital Management, LLC, Select Asset Fund I, LLC, and Select Asset Prime Index Fund, LLC (collectively, the "Receivership Entities").

2. The Receiver was authorized to have complete and exclusive control, possession, and custody of all Receivership assets and Receivership records of Defendants. Receivership Assets and Receivership Records were defined in the Order as "assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities), of the [Receivership Entities] and all entities they own or control . . . , and the books and records, client lists, account statements, financial and accounting documents, computers, computer hard drives, computer disks, internet exchange servers, telephones, personal digital devices, and other informational resources of or in possession of the [Receivership Entities] or issued by [Receivership Entities] and in possession of any agent or employee of the [Receivership Entities]."²

3. The Receiver has been acting and fulfilling his duties as Receiver since his appointment and has conducted various investigations of the Receivership Entities with the intent to marshal the Receivership Assets for the benefit of the Receivership Entities' investors and creditors. These efforts have also included the review of corporate records, forensic accounting analysis, records from various legal counsel from the Receivership Entities, and forensic tracing. In conjunction with the Receiver's efforts, the Receiver has identified certain

² Order Appointing Receiver, ¶

individuals, including the Investors, whom he believes were “net winners” in the underlying fraudulent scheme; that is, individuals that took more money from the Receivership Entities than they actually paid into the Receivership Entities (hereinafter, “net winners”). While the Receiver has no evidence or reason to believe that the Investors, or any of the other net winners, were complicit in the underlying fraudulent scheme, justice and equity mandates that the Receiver claw back any and all net gains for the benefit of the entirety of the aggrieved investors.

II. RELEVANT FACTS

4. The Receiver provided the general public notice on multiple occasions of his intention and efforts to identify potential claw back claims. *See* Receiver’s Interim Reports [Dkt. Nos. 155, 185, et al]. With the assistance of the Receiver’s independent forensic accounting team, the Receiver compiled a list of individuals that likely qualify as net winners. The Receiver has analyzed this list and has determined that it would not be prudent or a good use of the resources of the estate to assert claims against all of the net winners identified. As a result, the Receiver has used his best judgment to identify a collection of individuals that made significant gains to target.

5. In or around April 2014, the Receiver sent communications to the Investors informing them that after a thorough forensic review of the available books and records of the Receivership Entities, the Receiver concluded that the Investors earned false profits on their investment with the Receivership Entities. Specifically, the Investors were informed that the Receiver’s forensic review determined that they collected potentially \$87,000 in false profits in excess of their initial investment. The Receiver demanded the entirety of such sums be remitted to the Receiver promptly.

6. The Receiver was shortly thereafter contacted by the Investors' counsel. The Investors' counsel represented to the Receiver that: (i) his clients vehemently dispute that they were actually net winners; and (ii) his clients lacked the financial wherewithal to satisfy the Receiver's demand. The Investors were unable to corroborate that they were not net winners because they were unable to obtain any bank records predating January 1, 2004.³

7. In response, the Receiver requested that the Investors provide and attest to a detailed personal balance sheet. The Investors timely provided this information and, upon review, the Receiver determined that the only lump sum funds available to the Investors were in generally exempt retirement accounts. Aside from these potentially exempt funds, the Investors have limited cash reserves available to satisfy any judgment. While it may be possible to forensically trace disbursements from the Receivership Entities into the Investors' retirement accounts, the Receiver is of the opinion that the time and resources that this would require would be cost prohibitive considering the amount in controversy. As a result, the Receiver over the last several weeks has engaged in serious settlement negotiations with counsel for the Investors.

8. After several back-and-forth discussions and offers, the Receiver has agreed to settle his claw back claims against the Investors for a single lump sum payment of \$5,000.00. Considering the Investors' current financial situation, the difficulty in attaching a judgment to retirement funds, and the Investors' general innocence, the Receiver is of the opinion that this is a fair and equitable settlement.

9. The terms of the settlement agreement have been negotiated and approved by Investors' counsel. The Investors have been made fully aware that the agreement is fully

³ Admittedly, the Receiver has also generally struggled to obtain bank records through formal and informal processes from before January 1, 2004.

conditioned upon approval from this Court. Moreover, the Receiver currently is in possession of a cashier's check for the settlement proceeds that he intends to maintain in trust until a decision is made by this Court.

II.
ARGUMENTS & AUTHORITIES

10. In receiverships, federal courts have broad equitable powers enabling them to fashion appropriate ancillary remedies necessary to grant full relief.⁴ A settlement by a receiver in a federal equity receivership is within the receiver's broad discretion and should be approved if it is fair.⁵ “[R]eceivers benefit from the general presumption that district courts favor settlements.”⁶ The District Court's determination of the fairness of a settlement by the Receiver is subject to the sound discretion of the Court and will be overturned only on a clear showing of abuse of discretion.⁷

11. A receiver's authority to settle claims is inherent in the charge to an equity receiver to collect assets. Specifically, since a court has the authority to authorize the receiver to collect assets, it must also be able to authorize the receiver to sue to collect any available assets. It naturally then follows, as a necessary corollary of the foregoing, that the receiver has the power, when so authorized by the court, to compromise claims either for or against the

⁴ See *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 369, 372 (5th Cir. 1982); *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1103-04 (2d. Cir. 1972).

⁵ *Gordon v. Dadante*, 336 Fed. Appx. 540 (6th Cir. 2009); *SEC v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395, 2002 WL 1792053 at *4-5 (S.D.N.Y. Aug. 2, 2002); *SEC v. Princeton Economic Int'l, Inc.*, No. 99 Civ. 9667, 2002 WL 206990 at *1 (S.D.N.Y. Feb. 8, 2002).

⁶ *Sterling v. Stewart*, 158 F.3d 1199, 1202 (11th Cir. 1998).

⁷ *Gordon v. Dadante*, 336 Fed. Appx. at 545 (holding that district court did not abuse its discretion in approving settlement agreement entered into by a receiver); *Sterling v. Stewart*, 158 F.3d at 1202 (quoting *Bennett v. Behring*, 131 F.2d 982, 986 (11th Cir. 1984)); *SEC v. Arkansas Loan and Thrift Corp.*, 427 F.2d 1171, 1172 (8th Cir. 1970) (no abuse of discretion in trial court's approval of receiver's settlement on fidelity bond claim).

receivership and whether in suit or not in suit.⁸ Thus, settlements and compromise are a normal part of the process of a receivership.

12. The Receiver believes that the settlement and compromise reached with the Investors is in the best interest of the Receivership Estate when considering the totality of the circumstances. As such, with the broad equitable authority possessed by the Court in these proceedings, the Receiver respectfully requests that the Court approve the subject settlement and compromise.

IV. **CONCLUSION**

WHEREFORE, the Receiver prays that the Court approve the settlement and compromise referenced in this Motion and enter an Order in the form submitted or for substantially the same relief in such form as the Court may find just and proper.

DATED: November 7, 2014

Respectfully submitted,

By: /s/ Sameer S. Karim

Steven A. Harr

Texas Bar No. 09035600

MUNSCH HARDT KOPF & HARR, PC

3800 LINCOLN PLAZA

500 N. AKARD STREET

(214) 855-7534 (telephone)

(214) 855-7584 (telecopy)

E-Mail: sharr@munsch.com

ATTORNEY IN CHARGE FOR RECEIVER

⁸ 3 Clark, Ralph Ewing, *A Treatise on the Law and Practice of Receivers*, § 770, p. 1424 (3d ed. 1992) (cited with approval in *SEC v. Credit Bancorp, Ltd.*, 2002 WL 1792053 at *4 (S.D.N.Y. Aug. 2, 2002)).

OF COUNSEL:

MUNSCH HARDT KOPF & HARR, PC

700 Milam St. Street, Suite 2700

Houston, Texas 77002

Sameer S. Karim

SDTX Bar No. 24076476

700 Milam St, Suite 2700

Houston, Texas 77002

Tel: (713) 222-4050

Fax: (713) 222-5850

skarim@munsch.com

CERTIFICATE OF CONFERENCE

On October 28, 2014, I conferred with Tim McCole and he stated that the Securities and Exchange Commission is not opposed to the relief sought in this motion.

/s/ Sameer S. Karim

Sameer S. Karim

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Clerk via the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Houston, Texas, this 7th Day of November 2014.

/s/ Sameer S. Karim

Sameer S. Karim