UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff,
v. Case No. 09-cv-3332 (MJD/FLN)

TREVOR COOK et al.,
Defendants,

R.J. ZAYED,
Receiver.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

v. Case No. 09-cv-3333 (MJD/FLN)

TREVOR G. COOK, et al.,
Defendants,

R.J. ZAYED,
Receiver.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

v. Case No. 11-cv-574 (MJD/FLN)

JASON BO-ALAN BECKMAN, et al.,
Defendants,

R.J. ZAYED,
Receiver.

MEMORANDUM IN SUPPORT OF RECEIVER'S MOTION FOR AN ORDER APPROVING SEVENTH INTERIM DISTRIBUTION AND PAYMENT OF CONTINGENT FEE COUNSEL

R.J. Zayed, in his capacity as Receiver in the cases of *CFTC v. Cook, et al.*, 09-cv-3332 (D. Minn.), *SEC v. Cook, et al.*, 09-cv-3333 (D. Minn.), and *SEC v. Beckman, et al.*, 11-cv-574 (D. Minn.), respectfully moves the Court for an Order approving (1) the Receiver's plan for a Seventh Interim Distribution to the victims of this fraud and (2) payment to contingent fee counsel, Reid, Collins & Tsai ("Reid Collins"), for their work in obtaining the funds that the Receiver seeks to distribute. The distribution and contingent fee payment would be made with the funds generated from the recent sale of the Receiver's claim in the Peregrine Financial Group, Inc. ("PFG") bankruptcy, which generated $1,430,000.00 for the Receivership ("PFG Proceeds"). In this motion, the Receiver seeks to make a Seventh Interim Distribution to the victims of this fraud in the amount of $1,001,000.00, and to pay the Reid Collins firm the agreed-upon contingent fee of $429,000.00 for their work in securing the PFG Proceeds.

BACKGROUND

A. The Receiverships

On November 23, 2009, the United States Securities and Exchange Commission ("SEC") and the United States Commodity Futures Trading Commission ("CFTC") filed lawsuits against Trevor Cook, Patrick Kiley, and various entities controlled by them (collectively referred to as the "Receiver Estates"). (Case No. 09-cv-3333 ("SEC case"), Dkt. No. 1; 09-cv-3332 ("CFTC case"), Dkt. No. 1.)

On November 23, 2009, the Court established the Receivership in the related SEC and CFTC cases and appointed R.J. Zayed as Receiver. (*See* SEC Dkt. No. 13; *see also* SEC Dkt. No. 18; SEC Dkt. No. 68; SEC Dkt. No. 14; SEC Dkt. No. 15; CFTC Dkt. No. 21; CFTC Dkt. No. 96.)

On March 7, 2011, the SEC filed a lawsuit against Jason Bo-Alan Beckman and an entity he controlled for their part in the interrelated scheme. (11-cv-574, Dkt. No. 1 ("Beckman case").) On March 8, 2011, this Court appointed R.J. Zayed as Receiver over the estate of Mr. Beckman and his business. (Beckman Dkt. Nos. 9-10.)

B. The PFG Matter

The PFG Proceeds stem from the Receiver's efforts to recover approximately $48 million in fraudulent transfers from the Ponzi scheme to PFG. (*Zayed v. PFG*, 12-cv-269, Dkt. No. 1 (D. Minn. Feb. 1, 2012.) The Court authorized the Receiver to retain the Reid Collins firm on a contingent fee basis to pursue the Receiver's claims against PFG. (E.g. SEC Dkt. No. 900.) On February 1, 2012, the Receiver filed a 207-paragraph complaint alleging nine separate causes of action for fraudulent transfer based on PFG's violation of industry rules, regulations, guidelines and practices, as well as its own compliance policies and procedures in allowing the Receiver Estates to open and trade in various PFG accounts. (*Zayed v. PFG*, 12-cv-269, Dkt. No. 1.)

Shortly after the Receiver filed suit, PFG was exposed as a fraud in its own right, when its founder and CEO, Russell R. Wasendorf, Sr., attempted to take his own life and later pleaded guilty to embezzling more than $100 million. (Declaration of William T. Reid, July 29, 2014 ("Reid Decl."), SEC Dkt. No. 1140, at ¶¶ 8-10.) In the wake of that news, PFG immediately filed for bankruptcy protection. (12-cv-5383 (N.D. Ill.); 12-27488 (Bankr. N.D. Ill.).)[1] As a result, the Receiver's lawsuit against PFG was automatically stayed pursuant to the bankruptcy laws. (Reid at ¶ 11.) The Receiver then filed 12 claims in the PFG bankruptcy case, which would become the new venue for the Receiver's claims against PFG. (*Id*.) After nearly a year of negotiations, the Receiver and the PFG bankruptcy trustee settled the Receiver's claims for an allowed general unsecured claim in the amount of $10 million ("Allowed PFG Claim"). (*Id*. at ¶ 12.) After an extensive cost-benefit analysis and in close consultation with the Court, the Receiver determined that it was in the best interest of the victims of this fraud to sell the Receiver's Allowed PFG Claim at auction. (SEC Dkt. Nos. 1137-1140.) On August 12, 2014, the Court granted the Receiver's motion to proceed with the sale. (SEC Dkt. No. 1144.)

The auction sale of the Receiver's Allowed PFG Claim was held on September 16, 2014. (SEC Dkt. No. 1150, at 4.) The winning bid was $1,430,000.00. (*Id*.) On October 15, 2014, the Court granted the Receiver's motion to approve the sale. (SEC Dkt. No. 1159.) Pursuant to the Terms and Conditions governing the transaction, the sale of the Allowed PFG Claim closed on November 17, 2014. (SEC Dkt. 1140-4.) The Receiver was then required to hold the funds in escrow for 21 days to allow for the transfer of claim to be recorded in the PFG bankruptcy case. (Id.) As of December 9, 2014, the PFG Sale Proceeds are free and clear for distribution.

[1] A criminal complaint was also filed against Wasendorf. (12-cr-2021 (N.D. Iowa).) He is now serving a 50-year prison sentence.

ARGUMENT

A. Proposed Seventh Interim Distribution

The Receiver proposes to make a *pro rata* distribution of the PFG Proceeds as follows: $1,001,000.00 in checks and $59.72 in credits to claimants identified in the Third Amended Final Claims List. (*E.g.*, SEC Dkt. No. 1110-1.) The distribution rate for the Receiver's proposed Seventh Interim Distribution is approximately 0.7%, which would bring the total distribution rate to-date to 6.9%, or approximately seven cents for every dollar lost to the fraud. The Receiver's proposed payments to victims in the Seventh Interim Distribution range from $34.49 to $40,085.19, with an average distribution amount of $1,392.21. (Declaration of Tara C. Norgard, December 9, 2014 ("Norgard Decl."), ¶ 2.) With the proposed Seventh Interim Distribution, the Receiver's total distribution to victims of the fraud to-date would be $10,059,106.88.

Consistent with the Receiver's prior interim distributions (and the law of restitution generally), claimants who have recovered lost funds from sources other than the Receiver and have an overall recovery that exceeds the median distribution rate to all victims in these cases will be excluded from this distribution or have their *pro rata* shares proportionately reduced so that the Receiver's distributions do not put any investor ahead of the others in terms of recoveries. (*See* SEC Dkt. No. 933, ¶5(e); *see generally* 18 U.S.C. § 3664(j)(2) (explaining that a victim's restitution is reduced by subsequent recoveries); *see also* SEC Dkt. No. 975; Beckman Dkt. No. 382; SEC Dkt. No. 1024.)

The Receiver respectfully submits that the proposed Seventh Interim Distribution is in furtherance of the Court's Receivership Orders and the law of equity receiverships.

The Court has broad discretion in determining relief in an equity receivership. *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978) ("The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."). As noted by the Ninth Circuit, "reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld. A district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad discretionary power." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The district court's choice of distribution plan is reviewed for abuse of discretion. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (holding that "the district court's distribution plan will not be disturbed on appeal unless that discretion has been abused").

Courts have also consistently found *pro rata* distributions to be appropriate, especially for fraud victims of Ponzi schemes. *Donell v. Kowell*, 533 F.3d 762, 776 (9th Cir. 2008) ("[C]ourts have long held that is more equitable to attempt to distribute all recoverable assets among the defrauded investors who did not recover their initial investments rather than to allow the losses to rest where they fell."); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-9 (2d Cir. 2002); *see also SEC v. George*, 426 F.3d 786, 799 (6th Cir. 2005)*; Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (rejecting tracing "fiction" where receivership fund consisted of money acquired by fraud perpetuated against many victims); *SEC v. Forex Asset Management LLC*, 242 F.3d 325, 331-2 (5th Cir. 2001); *CFTC v. Topworth International, Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir.

1999); *United States v. Durham*, 86 F.3d 70, 72-3 (5th Cir.1996); *SEC v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992).

For all of the reasons stated herein, the Receiver respectfully requests that the Court grant the Receiver's motion to make a Seventh Interim Distribution of the PFG Proceeds with $1,001,000.00 in checks and $59.72 in credits to claimants identified in the Third Amended Final Claims List.

B. Proposed Payment to Contingent Fee Counsel

On October 19, 2011, the Receiver moved the Court to approve the retention of special counsel for pursuing claims against various third parties, including PFG. (SEC Dkt. No. 893.) Due to the Receivership's finite and limited resources, the Receiver negotiated a structure whereby special counsel would pursue the claims in exchange for a fair and reasonable contingency fee to be paid from the proceeds of a judgment or settlement. (*Id*.) At the hearing on the motion, the Receiver presented the law firm of Reid, Collins & Tsai ("Reid Collins") as proposed special counsel for the PFG case. The Reid Collins firm agreed to compensation in the form of 30% of any recoveries obtained through a settlement, judgment or other resolution of a claim after commencement of formal litigation proceedings on the Receiver's behalf. (Norgard Decl., ¶ 3.) The Reid Collins firm further agreed to pay all out-of-pocket expenses in pursuing the matter, without reimbursement from the Receiver. (*Id*.) After conducting an extensive inquiry on the public record of Reid Collins' experience and credentials, as well as the terms of the proposed engagement, the Court granted the Receiver's motion to retain the Reid

Collins firm. (SEC Dkt. No. 900.) The Reid Collins firm immediately began working with the Receiver to investigate and prepare the case against PFG.

From the onset of their engagement on the PFG matter, through its many unexpected twists and turns, the Reid Collins firm has been a tenacious advocate and steadfast partner in advancing the Receivership's interests and ensuring the best possible result for the victims of this fraud. Reid Collins worked extensively with the Receiver to thoroughly investigate, analyze and bring the nine-count complaint against PFG and defeat PFG's subsequent motion to transfer the case to the Northern District of Illinois. (*Zayed v. PFG*, 12-cv-269, Dkt. Nos. 1, 21-24, 29-30 (D. Minn. Feb. 1, 2012). When PFG went into bankruptcy, the Reid Collins firm prepared 12 proofs of claim on the Receiver's behalf and monitored developments in the PFG bankruptcy. (Reid Decl., Dkt. No. 1140, at ¶ 12.) Reid Collins then led year-long negotiations with the PFG bankruptcy trustee, which culminated in a $10,000,000 allowed claim. (*Id*. at ¶ 13.) Reid Collins went on to organize, market and execute an auction that produced $1,430,000.00 for the Receivership. (*Id*. at ¶¶ 15-20; Declaration of Angela J. Somers, October 1, 2014, Dkt. No. 1151, at ¶¶ 8-12.)

Reid Collins' legal talent and deep experience in matters involving fraud and Ponzi schemes, as well as bankruptcy, was critical to the Receiver's ability to navigate an extraordinary result from what many thought would be nothing at all. They were fully committed to bring the best possible result to the victims of this fraud and they saw that commitment through to the end. Thus, the Receiver respectfully requests that the Court approve distribution of the agreed upon 30% contingent fee to the Reid Collins firm from the PFG matter, in the amount of $429,000.00.

CONCLUSION

For all the foregoing reasons, the Receiver respectfully requests that the Court enter an Order approving (1) the Receiver's plan to make a Seventh Interim Distribution of the PFG Proceeds with $1,001,000.00 in checks and $59.72 in credits to claimants identified in the Third Amended Final Claims List and the (2) Receiver's motion to pay the Reid Collins firm their 30% contingent fee, or $429,000.00, from the PFG Proceeds.

Dated: December 9, 2014

Respectfully submitted,

s/ Tara C. Norgard

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