

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 OF LAW IN SUPPORT OF RECEIVER'S MOTION TO
APPROVE THE NINTH INTERIM DISTRIBUTION TO VICTIMS
AND PAYMENT OF CONTINGENT FEE COUNSEL**

The Receiver in the above-captioned actions respectfully moves the Court for an Order approving (1) the Receiver's plan for the Ninth Interim Distribution of funds to the victims of this fraud, and (2) payment due to the law firms of Keith A. Vogt, Esq., Flachsbart & Greenspoon, LLC, and McVey & Parsky, LLC (collectively "Contingent Fee Counsel"), for their work representing the Receiver in litigation against Associated Bank, which has now been concluded by settlement. Specifically, in this motion the Receiver seeks to make a Ninth Interim Distribution to the victims of this fraud in the amount of \$750,000.00, and to pay the Contingent Fee Counsel the approved contingent fee of \$487,500.00 for their work litigating the Associated Bank matter to a settled conclusion.

BACKGROUND

A. The Associated Bank Receivership

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 Dkt."), Dkt. No. 1; 09-cv-3332 ("CFTC Dkt."), 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 January 29, 2013, the Receiver filed a lawsuit against Associated Bank in the United States District Court for the District of Minnesota, alleging claims for aiding and abetting fraud, breach of fiduciary duty, conversion, and false representations and omissions. The Receiver was represented by contingency fee counsel in this matter.¹

United States District Court Judge David S. Doty presided over the case in the United States District Court for the District of Minnesota.

On September 30, 2013, the District Court granted Associated Bank's Motion to Dismiss the Receiver's Complaint under Federal Rule of Civil Procedure 12(b)(6). The Receiver appealed this decision to the United States Court of Appeals for the Eighth Circuit. On March 2, 2015, the Eighth Circuit reversed the dismissal of the Receiver's Complaint and remanded the case to the District Court for further proceedings. *Zayed v. Associated Bank*, 779 F.3d 727 (8th Cir. 2015). When the case returned to the District Court, Associated Bank refiled its Motion to Dismiss as to the affirmative defenses of *res judicata*, *in pari delicto* and prudential standing. The District Court denied Associated Bank's Motion on August 4, 2015. The parties then engaged in extensive fact and expert discovery, followed by dispositive motion practice.

¹ On April 3, 2013, Chief Judge Davis granted RJ Zayed's request for leave to recuse himself as Receiver in the Associated Bank matter and appoint Tara Norgard, Brian Hayes, and Russell Rigby to act collectively as Receivers in that matter. This recusal was made to avoid any potential conflict of interest in conjunction with Mr. Zayed's move to the law firm of Dorsey & Whitney. In October 2016, Mr. Rigby moved from the District of Minnesota and left the Carlson Caspers firm. As such, he is no longer serving as a Receiver or counsel in this matter.

On January 31, 2017, the District Court entered summary judgment in Associated Bank's favor, finding no genuine issue of material fact concerning the bank's lack of knowledge about and substantial assistance to the Ponzi Scheme. The Receiver filed an appeal to the Eighth Circuit the same day ("Second Appeal").

While the Second Appeal was pending, the Receiver and Associated Bank negotiated a settlement to bring the Associated Bank matter to a close after the Eighth Circuit issued a ruling on the Second Appeal. This Court approved the settlement agreement on January 23, 2018. (SEC Dkt. No. 1423.) Due to the structure of the agreement, under which the amount of Associated Bank's payment to the Receiver depended on the outcome of the pending Second Appeal, the fact and content of the settlement agreement were filed under seal and maintained as confidential until the Eighth Circuit's ruling. (SEC Dkt. Nos. 1418-1421.) Pursuant to the Court's Order approving the settlement, that Order and the associated motion papers filed by the Receiver are no longer sealed. (SEC Dkt. No. 1423 at 3.)

On January 10, 2019, the Eighth Circuit issued an opinion with two judges affirming the district court's opinion and one judge issuing a ten-page dissenting opinion. Pursuant to the parties' settlement agreement, the parties filed a voluntary dismissal of the action in the District Court, Associated Bank filed a renunciation of costs, and Associated Bank wired a settlement payment of \$1,625,000.00 to the Receivership account.

ARGUMENT

A. Proposed Ninth Interim Distribution

The Receiver proposes to make a *pro rata* distribution of \$750,000.00 from the Associated Bank settlement 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 distribution is approximately 0.5%, which would bring the total distribution rate to-date to approximately 7.7%, or approximately eight cents for every dollar lost to the fraud. The Receiver's proposed payments to victims in the distribution range from \$37.50 to \$29,804,80, with an average distribution amount of \$1,041.67. (Declaration of Tara C. Norgard, April 4, 2019 ("Norgard Decl."), ¶ 2.) With this proposed Ninth Interim Distribution, the Receiver's total distributions to victims of the fraud to-date would be \$11,297,992.51. (*Id.*)

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 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 Ninth Interim Distribution of funds in the amount of \$750,000.00 on a *pro rata* basis to claimants identified in the Third Amended Final Claims List.

B. Proposed Payment to Contingent Fee Counsel

On April 11, 2013, the Court granted the Receiver's motion to approve the retention of special outside for pursuing Receivership claims against various third parties. (SEC Dkt. No. 1066.) 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. (Norgard Decl., ¶ 3.) The law firms of Keith A. Vogt, Esq., Flachsbart & Greenspoon, LLC, and McVey & Parsky, LLC (collectively "Contingent Fee Counsel") were approved by the Court as outside counsel for the Receiver's case against Associated Bank. (SEC Dkt. 1066.) Contingent Fee Counsel agreed to compensation in the form of thirty percent (30%) of all 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.) Contingent Fee Counsel 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 Contingent Fee Counsel's experience and credentials, as well as the terms of the proposed engagement, the Court granted the Receiver's motion to retain

Contingent Fee Counsel. (SEC Dkt. No. 1066.) Contingent Fee Counsel immediately began working with the Receiver on the case against Associated Bank.

From the onset of their engagement, Contingent Fee Counsel have been strong advocates and steadfast partners in advancing the Receivership's interests and ensuring the best possible result for the victims of this fraud. They were fully committed to the case, and they saw that commitment through to the end. Thus, the Receiver respectfully requests that the Court approve distribution of the previously agreed-upon contingent fee to Contingent Fee Counsel. That amount is 30% of the \$1,625,000.00 settlement payment, which totals \$487,500.00.

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 Ninth Interim Distribution of \$750,000.00 on a *pro rata* basis to the claimants identified in the Third Amended Final Claims List and the (2) Receiver's motion to pay Contingent Fee Counsel \$487,500.00, which represents 30% of the settlement payment from Associated Bank.

Dated: April 5, 2019

Respectfully submitted,

s/ Tara C. Norgard
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