

Motions

5:05-cv-04057-RDR-KGS Securities and Exchange Commission v. Tanner et al

U.S. District Court

District of Kansas

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Case Name: Securities and Exchange Commission v. Tanner et al

Case Number: 5:05-cv-4057

Filer: Larry E Cook

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Docket Text:

MOTION for Order for *Motion to Approve Plan for General Distribution to Investors* by Receiver Larry E Cook (Holland, Brian)

5:05-cv-4057 Notice has been electronically mailed to:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SECURITIES EXCHANGE COMMISSION)	
)	
Plaintiff,)	
)	
vs.)	
)	
DAVID TANNER, et al.,)	Civil Action No.: 05-4057-RDR
)	
Defendants,)	
)	
and)	
)	
MARGARET F. SPENCER, et al.,)	
)	
Relief Defendants.)	

**MOTION TO APPROVE PLAN
FOR GENERAL DISTRIBUTION TO INVESTORS**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE RICHARD D. ROGERS:

Receiver Larry E. Cook (the "Receiver"), by and through his undersigned counsel, and for his Motion to Approve Plan for General Distribution to Investors (the "Motion"), respectfully states as follows:

Introduction

1. The United States Securities and Exchange Commission (the "SEC") initiated this securities fraud enforcement action on May 4, 2005. At the request of the SEC and, based upon a preliminary showing of securities fraud, the Court established an asset freeze and appointed Larry E. Cook as Receiver.

2. Since his appointment, the Receiver has investigated the assets, liabilities and business operations of the defendants and relief defendants. Although the Receiver's recovery efforts are ongoing, to date he has recovered approximately \$3.3 million, net of

expenses and a reverse transfer of recovered funds back to the Seaforth Meridian receivership case (Case No. 06-4107) (the "Receivership Assets"). In addition, the Receiver has obtained turnover orders for the recovery of approximately \$3 million in investor funds at VEF Banka in Riga, Latvia, a freeze and on-going recovery effort of approximately \$1.5 million in VEF Banka in iPTS, Inc.'s accounts, two properties with an estimated gross value of \$400,000, a final settlement payment of \$50,000 from Bachner & Associates due April 27, 2007, and a settlement for the return of approximately \$40,000 from KrajaBanka in Riga, Latvia related to an account held by Anglo Far East Bullion Corporation. The Receiver has also initiated litigation in Scotland in the Seaforth Meridian case, any recovery of which will be split between the Seaforth case and this case.

3. The Receiver has also contacted the investors to request they complete a claim form and document the amount of their investment. The Receiver has reviewed the completed claims forms and filed a Motion to Allow and Disallow Investor Claims. On December 4, 2006, the Court entered its Order Allowing and Disallowing Claims (Doc. # 358).

4. The Commission has requested and obtained judgment against all defendants and relief defendants. Although the Commission has a pending Motion to Modify judgment against defendant David Tanner, the Receiver submits that the approval of a plan of distribution and prompt return of funds to the defrauded investors is appropriate at this time.

5. Accordingly, the Receiver has prepared and now proposes the adoption of a formal Plan for General Distribution to Investors (the "Distribution Plan"). A true and correct copy of the Receiver's proposed Distribution Plan is attached hereto as **Exhibit A**.

6. The proposed Distribution Plan sets forth procedures that the Receiver and his team intend to employ to distribute recovered funds to the Allowed Claims and the recovery of additional investor funds. In seeking to effect a return of the recovered Receivership Assets to the beneficial owners, the Receiver will make his best efforts to adhere to the procedures set forth in the Distribution Plan. Although this Distribution Plan is principally designed to provide direction to the Receiver, it also allows the Receiver to accurately provide explanation and direction to involved parties as to the wishes of the Court relative to disposition of Receivership Assets.

Authorities

7. Formulation of a distribution plan in an equitable receivership is entrusted to the Court's sound discretion. SEC v. Forex Asset Mgt., 242 F.3d 325, 331 (5th Cir. 2001).

8. A receiver has the power to adjust and compromise a matter in dispute when a claim is submitted, subject, however, to the Court's review of such a determination. II CLARK ON RECEIVERS § 655, at 1147 (Anderson 3d ed. 1959), citing Samuels v. E.F. Drew & Co., 7 F.2d 764 (S.D.N.Y. 1924) (op. by Learned Hand, J.).

9. Claims submitted by securities fraud victims should be approved for a distribution pro-rata from the recovered proceeds of the fraud, which proceeds are not the property, in equity, of the defendants and relief defendants, but instead constitute a portion of the corpus of a constructive trust, of which the fraud victims are the constructive beneficiaries. SEC v. Forex Asset Mgt., 242 F.3d 325, 331-32 (5th Cir.

2001); see also SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 88-89 (2d Cir. 2002) (and various subsequent decisions in that same receivership); CFTC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1115-16 (9th Cir. 1999); U.S. v. Real Property Located at 13328 and 13324 State Hwy., 89 F.3d 551, 553 (9th Cir. 1996); U.S. v. Vanguard Inv. Co., 6 F.3d 70, 73 (4th Cir. 1993).

Overview of the Distribution Plan

10. Consistent with these authorities, the Distribution Plan seeks to make a distribution of the Receivership Assets back to the victims based upon the net cash losses of those victims.

11. The Distribution Plan treats all Allowed Claims the same, with each holder of an Allowed Claim receiving periodic distribution of Receivership Assets on a *pro rata* basis.

12. The Distribution Plan contemplates that a distribution will be made immediately upon approval of the Distribution Plan. The Distribution Plan also provides procedures to reserve funds for the payment expenses incurred in the administration of the Receivership Estate, and subsequent distributions to Allowed Claims as additional Receivership Assets are recovered.

13. The Distribution Plan also addresses certain routine housekeeping matters including handling of reserves, collection of Receivership Assets, and parallel proceedings.

14. The Distribution Plan finally provides direction relative to potential additional efforts to recover receivership assets, generally favoring a conservative approach to be taken with respect to Receivership Assets.

15. In conjunction with receiving this Motion, the holders of Allowed Claims will receive an e-mail from the Receiver describing the relief requested in this Motion.

16. This Motion has been reviewed by counsel for the Commission who concurs in the relief sought in this Motion.

Conclusion

17. The Receiver submits that adoption of the proposed Distribution Plan will permit the efficient management of the claims determination and distribution process, as well as the wind up of the receivership, and therefore prays that the proposed Distribution Plan be approved.

Respectfully submitted,

Dated: April 13, 2007

Lathrop & Gage L.C.

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Attorneys for Larry E. Cook, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2007, I electronically filed the foregoing, with the Clerk of the Court for the District of Kansas, Topeka Division, by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants:

J. Kevin Edmundson, SEC

 /s/ Brian M. Holland
An attorney for Larry E, Cook, Receiver