UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **ALBERT E. PARISH, JR., PARISH ECONOMICS, LLC, and SUMMERVILLE HARD ASSETS, LLC,** **Defendants.**	**CIVIL ACTION NO. 2:07-cv-00919-DCN**

RECEIVER'S MOTION TO APPROVE SETTLEMENT AND FOR RELATED INJUNCTIVE RELIEF AND BRIEF IN SUPPORT THEREOF

The Receiver, S. Gregory Hays, files this motion asking this Court to: (1) approve his settlement with Battery Wealth Management, Inc. f/k/a Battery Investment Company, Inc. ("BWM") and Wayne Cassaday ("Cassaday"), and BWM's and Cassaday's professional liability insurer, Continental Casualty Company ("Continental") (collectively, the "Settling Parties") as set forth in the executed Settlement Agreement, a copy of which is attached hereto as Exhibit "A,"

and (2) enjoin the filing and/or continued prosecution of any third-party claims or causes of action against the Settling Parties, including any claims by investors with, or creditors of, Albert E. Parish, Jr. ("Parish") and claims by clients or former clients of BWM and Cassaday, arising out of or in any way connected with: (a) the investment-related activities of Parish, Parish Economics, and/or Summerville Hard Assets or any affiliated "investment pool"; (b) Parish's employment by and affiliation with BWM and Cassaday; (c) any investment made by any person or entity in or with Parish or any of the Receiver Entities; and/or, (d) any other affiliation with or support of Parish by BWM or any of its current and/or former employees, officers or principals. In support of this Motion, the Receiver shows this Court as follows:

Overview of Settlement

As more fully set forth below, the Receiver believes that, in addition to investors, he can assert claims against the Settling Parties arising out of the business relationships between Cassaday, BWM, Parish, Parish Economics, and related entities. Importantly, in agreeing to this arrangement, the Receiver is unaware of any facts that he or his counsel believe indicate that any of the Settling Parties were actually aware of or knowingly complicit in the perpetration of Parish's fraudulent investment scheme. While the Settling Parties adamantly deny any wrongdoing or

liability to the Receiver or anyone else, they desire to resolve all aspects of their involvement and relationship with Parish.

In addition, it is unclear at this point whether one of the Settling Parties, Continental, would be liable to pay any damage awards against BWM or Cassaday. Continental has filed a declaratory judgment action captioned Continental Casualty Company v. Battery Wealth, Inc. and Wayne Cassaday in the United States District Court for the District of South Carolina, Charleston Division, Case No. 2:09-CV-00605-DCN (the "Declaratory Judgment Action"). The Declaratory Judgment Action, inter alia, seeks a determination of whether coverage is available to BWM and/or Cassaday under Tax and Financial Services Professional Liability Policy Number TFS-253996244, issued to BWM for the periods May 1, 2006 to May 1, 2007 ("Policy No. 1") and May 1, 2007 to May 1, 2008 ("Policy No. 2") (collectively, "the Policies"). These are the only policies potentially applicable to potential claims by the Receiver and other investors, and therefore the only basis under which Continental may be liable for any damage awards obtained by the Receiver or investors against BWM and/or Cassaday.

Accordingly, as more fully described in the Settlement Agreement, the Receiver and the Settling Parties have agreed to resolve the above-referenced issues as follows:

- The Settling Parties will agree that all disputes regarding whether insurance coverage exists and, if so, in what amounts, with regard to the claims that are the subject of this Settlement Agreement, will be asserted and decided in the Declaratory Judgment Action.
- The Court's decision in the Declaratory Judgment Action will determine the amount of settlement funds, if any, to be made available for the benefit of the parties who have asserted claims against BWM and Cassaday, put BWM and Cassaday on notice of potential claims ("Active Claimants"), and other BWM clients who invested with Parish, up to, and not to exceed, $2,850,000 ("Settlement Funds"). Should the Court decide that no or less coverage is available, the Receiver will be barred from pursuing any additional recourse against any or all of the Settling Parties.
- The Receiver is not a party to the Declaratory Judgment Action and is not responsible for any fees or expenses associated with pursuing those claims. However, if the Settling Parties prevail, attorneys' fees and expenses may be paid from the Settlement Funds, subject to court approval.
- Should Continental seek an appeal from the decision of the Declaratory Judgment Action and not prevail, Continental will pay accrued interest into the Settlement Funds, in addition to the principal amount provided for under

the terms of the Settlement Agreement, not to exceed the lesser of the amount of the calculated interest or fifty thousand dollars ($50,000).

- Upon final resolution of the Declaratory Judgment Action, in the event that some amount of coverage is found to exist, the right to a claim against the Settlement Funds and a procedure for the allocation of the Settlement Funds ("Allocation Determination Procedure") will be established by an independent arbiter appointed by the Court ("Neutral") and shall be binding on all claimants asserting claims against the Settling Parties. The Neutral shall be authorized to decide how the Settlement Funds, if any, will be paid to those entitled to make a claim against such funds. The Receiver will distribute the Settlement Funds in accordance with the Neutral's decision.
- All interested investors will be provided with a reasonable opportunity to participate in the Allocation Determination Procedure. The Allocation Determination Procedure will be separate and distinct from the remainder of the assets recovered by the Receiver. However, the Settlement Funds, if any, will be paid into the Receiver Estate and will be distributed by the Receiver in accordance with the Allocation Determination Procedure and distribution decision by the Neutral.
- The Settling Parties have waived any potential or actual rights or entitlement to payment on any claim they may have against the assets of Defendants

Albert E. Parish, Jr., Parish Economics, LLC and/or Summerville Hard Assets, LLC (collectively the assets of the "Receivership Estate").

- The Receiver will release the Settling Parties from any and all claims related to or arising from (a) the investment-related activities of Parish, Parish Economics and/or Summerville Hard Assets or any affiliated "investment pool"; (b) Parish's employment by and affiliation with BWM or Cassaday; (c) any investment made by any person or entity in or with Parish or any of the Receiver Entities, (d) any other affiliation with or support of Parish by BWM or any of its current and/or former employees, officers or principals; and/or (e) any claim for insurance coverage from Continental, or for any claim involving or related to any claim handling by or on behalf of Continental.
- The payments and releases are conditioned upon this Court's entry of a "bar order" enjoining the filing of and/or continued prosecution of claims by all third-parties (including investors) against the Settling Parties arising out of or in any way connected with: (a) the investment-related activities of Parish, Parish Economics, and/or Summerville Hard Assets or any affiliated "investment pool"; (b) Parish's employment by and affiliation with BWM and Cassaday; (c) any investment made by any person or entity in or with Parish or any of the Receiver Entities; and/or, (d) any other affiliation with or

support of Parish by BWM or any of its current and/or former employees, officers or principals.

The Receiver and his counsel believe that this settlement is in the best interests of all concerned. First, this settlement provides the opportunity for a significant cash benefit to those investors who have claims against BWM and Cassaday, including the BWM clients who invested with Parish. Second, it avoids the delay and expense of protracted litigation and the Receiver's involvement in the Declaratory Judgment Action. Third, the settlement eliminates the risk to investors that the Settling Parties will successfully defeat any claims and, at the same time, eliminates the risk to the Settling Parties that the Receiver and/or investors will obtain judgments in amounts that would exceed their insurance coverage and bankrupt the Settling Parties. Finally, resolving these claims within the structure of the receivership benefits all investors with allowed claims against the Receivership Estate because, to the extent that any investor obtains funds from the Allocation Determination Procedure prior to a distribution from the Receiver Estate, the Receiver will consider those funds as a setoff against any subsequent distributions to that investor, thereby inuring to the benefit of the broader group of investors by increasing the amount that will be available for distribution to them.

Factual Background

The Receiver and his counsel have engaged in an extensive investigation of the subject investment offerings conducted by Parish, Parish Economics, and Summerville Hard Assets, LLC, which has included an examination of the relationship between Parish and BWM and its principal, Cassaday. This investigation has included formal and informal document productions, deposition testimony, forensic computer analysis, and interviews and less formal conversations with various individuals, including investors.

Based on their investigation, the Receiver and his counsel believe that the following allegations could be proven regarding the relationship between Parish and Cassaday:

1. Cassaday was the owner of BWM.

2. In 2000, Cassaday, Parish and three accountants started Battery Investment Company ("BIC"), an investment advisory firm.

3. In 2003, the three accountants decided to leave BIC. Cassaday bought the share of one of the accountants and the firm purchased the other two. At that time, Cassaday became the majority owner of BIC.

4. In 2005, BIC changed its name to Battery Wealth Management. The firm originally operated as an investment advisory/asset management firm. After the name was changed to BWM, the firm began to offer additional services including financial planning and tax preparation.

5. Both BIC and BWM were registered companies in South Carolina. In 2006, BWM registered with the Securities and Exchange Commission.

6. BWM was capitalized with funds from Cassaday and Parish. The funds were used to purchase assets and pay salaries and overhead costs.

7. Parish was a Vice President of BWM until approximately March 2007.

8. Cassaday was President and Chief Compliance Officer of BWM.

9. Beginning in 2002, BWM recommended to its clients that they participate in Parish's investment pools. BWM, through Cassaday and Parish, ultimately sold $6.5 million of these investments to 25 of BWM's clients.

10. BWM provided quarterly statements to investors that showed positive performance and ever increasing asset values. Before recommending that BWM's clients invest in the pools, Cassaday reviewed the quarterly account statements provided by Parish's LLC and discussed the investment pools with Parish. Cassaday also viewed Parish's website, which was provided as a direct link from BWM's website.

11. Cassaday ignored certain facts that strongly suggested that Parish was likely deceiving advisory clients.

12. Cassaday had reviewed Parish's personal financial statements, which showed that Parish's sources of reported income were disproportionately low in

comparison to the high level of personal expenses reflected by his lavish and flamboyant lifestyle.

13. Cassaday knew that Parish's Loan Pool consisted of Parish's personal notes, and that Parish had issued his notes to (and was thus borrowing money from) the IRA accounts of many of BWM's clients.

14. In the fall of 2006, Cassaday was told that Parish was experiencing personal cash flow problems. Cassaday subsequently learned that a property Parish owned might face foreclosure.

15. Cassaday also discovered that one of Parish's investment pools had been unable to comply with a redemption request from a BWM client within the requisite 5-day period and instead required six weeks to return the investor's money.

16. Parish admitted to Cassaday that he had deliberately delayed the investor's redemption in hopes of finding a replacement investor funds to avoid the liquidation of specific bonds.

17. Nevertheless, Cassaday never took any steps to follow up on these red flags or to inquire whether the pooled funds in which BWM advised its clients to invest were, in fact, investing consistent with the representations made to investors.

Importantly, the Settling Parties *do not admit that any of the Receiver's factual allegations are true and, in fact, vigorously deny that the Receiver's*

allegations and conclusions are correct. Significantly, of primary importance to the Receiver and his counsel in the context of a settlement, there are no facts known that in any way indicate that BWM or Cassaday were aware of or were knowingly complicit in the perpetration of the Defendant's fraudulent investment scheme.

Possible Causes of Action

Based upon these facts, the Receiver and his counsel believe that he could assert the following causes of action against the Settling Parties under South Carolina law:

- Professional negligence/malpractice. See Folkens v. Hunt, 290 S.C. 194, 200 (S.C. Ct. App. 1986);
- Negligent misrepresentation. See Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-324 (S.C. Ct. App. 1994);

The Settling Parties' Defenses and Other Factors

Although the Receiver previously indicated to the Court that he did not intend to pursue claims against BWM or Cassaday, the costs of doing so have significantly diminished and the potential benefit to investors under the proposed Allocation Determination Procedure set forth in the attached Settlement Agreement have caused the Receiver to reassess his position. Accordingly, in 2007, Receiver's counsel informed counsel for the Settling Parties of the results of the Receiver's investigation, including the possible claims that could be asserted. While the

Settling Parties have denied any liability to the Receiver, counsel for the Receiver and the Settling Parties have engaged in extensive settlement negotiations since that time.

Among other things, the Receiver and his counsel expect that, in response to any lawsuit filed by the Receiver, the Settling Parties would assert defenses that include, without limitation, the following:

- The Settling Parties did not know, and in the exercise of reasonable care, could not have known that Parish was perpetrating the fraudulent investment scheme;
- Other professionals and investors had knowledge of and access to the same facts that were available to the Settling Parties;
- Parish intentionally deceived BWM and Cassaday and the other Settling Parties as well as the investors in his fraudulent investment schemes;
- In conducting his scheme, Parish was acting outside his duties as a corporate officer; and, therefore, his actions cannot be imputed to the corporation;
- In setting up numerous accounts for Parish clients with qualified custodians, Cassaday and BWM acted as a mere pass-through submitting forms provided to investors by Parish directly or through his website. These forms were completed by the investors and/or Parish without any input from Cassaday

and BWM;

- Investors had long-standing relationships with Parish that preceded the formation of BWM, dealt directly with Parish, and/or had no direct contact with Cassaday or BWM and did not obtain investment advice from Cassaday or BWM; and
- Investors relied on Parish, not Cassaday or BWM, in making their investment decisions.

The Active Claimant Agreement

BWM and/or Cassaday have been named as defendants or third-party defendants in seven civil actions, six of which are filed in the South Carolina Court of Common Pleas and one of which is pending in the United States District Court for South Carolina, brought by various investors related to the investment scheme that is the subject of the Enforcement Action. These seven actions are as follows:

- Pearlman v. Battery Wealth Management f/k/a Battery Investment Company, Inc., et al, South Carolina Court of Common Pleas, Case No. 2007-CP-10-1419;
- Crosland v. Battery Wealth Management f/k/a Battery Investment Company, Inc., et al, South Carolina Court of Common Pleas, Case No. 2007-CP-10-1421;
- White v. Battery Wealth Management f/k/a Battery Investment Company, Inc., et al, South Carolina Court of Common Pleas, Case No. 2007-CP-10-1420;
- Beard v. Battery Wealth Management f/k/a Battery Investment Company, Inc.,

et al, South Carolina Court of Common Pleas, Case No. 2007-CP-10-4132;

- Woolen v. Battery Wealth Management f/k/a Battery Investment Company, Inc., et al, South Carolina Court of Common Pleas, Case No. 2008-CP-10-1605;

- Elrod, et al. v. Charleston Southern University. et al., South Carolina Court of Common Pleas, Case No. 07-CP-10-1465; and

- Brown, et al v. Charles Schwab & Co., Inc., United States District Court for the District of South Carolina, Civil Action No.: 2:07-CV-3852-DCN.

The Settling Parties are unaware of any other pending actions in which BWM and/or Cassaday have been named as defendants or third-party defendants.

With the exception of the plaintiffs in the Elrod case and the parties in the Brown case (these parties are discussed below), each of the plaintiffs who have asserted claims against BWM and/or Cassaday in the above-referenced actions or have put BWM and/or Cassaday on notice of potential claims have executed or expressly consented to a separate settlement agreement (the "Active Claimant Agreement") approving of the procedure set forth in the Settlement Agreement at issue in this motion. The Active Claimant Agreement requires the parties thereto to dismiss with prejudice their claims against BWM and/or Cassaday within ten days of the Receiver's filing of the instant motion.

With respect to the parties who did not consent to the Active Claimant Agreement, Charles Schwab & Co., Inc. ("Charles Schwab") is the only party with pending claims against BWM and Cassaday. The plaintiffs in Elrod named BWM as a defendant in their Complaint but never served BWM. The properly-joined parties to the action settled the case,

and the case was dismissed on March 19, 2009. The plaintiffs in Elrod therefore do not have pending claims against BWM or Cassaday. Similarly, the plaintiffs in Brown named BWM and Cassaday as defendants in an original suit that was dismissed for lack of subject matter jurisdiction. The plaintiffs re-filed the lawsuit following its dismissal, but have not named BWM or Cassaday in the new action and do not currently have pending claims against BWM or Cassaday. However, Charles Schwab has asserted third-party claims against BWM and Cassaday in Brown, which claims are still pending. Because Charles Schwab is the only party with pending claims against BWM and Cassaday that has not consented to the Active Claimant Agreement, after the claims discussed above have been dismissed pursuant to the Active Claimant agreement the only lawsuit identified above in which claims against BWM and/or Cassaday will still be pending is Brown.

The Receiver's Recommendation of the Settlement Agreement

Taking into account all of the factual circumstances, as well as the nature of the claims and defenses described above and the fact that all of the investors with pending claims against BWM and Cassaday except Charles Schwab have approved of the procedures in the Settlement Agreement, the Receiver and his counsel believe that the proposed settlement is in the best interest of the Receivership Estate and all investors who lost money as a result of Parish's fraudulent investment schemes. In light of the potential amount that may be paid into the Settlement Fund, the Receiver

and his counsel also believe that the entry of a "bar order" is both fair and appropriate.

In addition, the Receiver believes that the following facts weigh heavily in favor of the proposed settlement:

a. BWM and Cassaday have two insurance policies that could be available to respond to the types of claims that could be asserted based upon the facts set forth above. Policy 1 (2006-07) is a claims made and reported policy which contains a limit of liability of $500,000 per claim and $1 million in the aggregate. Policy 2 (2007-08) contains a limit of liability of $1 million per claim and $2 million in the aggregate. As set forth above, BWM and Cassaday's insurer, Continental, has filed a declaratory judgment action setting forth numerous factors which they allege exclude coverage under the Policies.

b. A very large percentage (95.0%) of the potential, though disputed, coverage under the Policies is being committed to this settlement, pending the outcome of the Declaratory Judgment Action. The Settling Parties have conceded liability for purposes

of the Allocation Determination Procedure in the event that coverage is found to exist under the Policies. It is highly unlikely (and, in the opinion of the Receiver and his counsel, improbable) that the Settling Parties would ever be willing or able to pay significantly more from the Policies to resolve the subject claims by agreement.

c. As a practical matter, the Settling Parties are agreeing to potentially pay as much as can ever be expected to be realized by agreement. Moreover, the amounts that could potentially be paid into the Settlement Fund effectively leave the Settling Parties unable to respond to any additional claims for damages potentially arising from or related to Parish's or the other defendants' fraudulent investment activities. Therefore, it is reasonable for the Settling Parties to impose a condition that the settlement is effective only upon the entry of a "bar order" enjoining the further prosecution of claims by all third-parties related to these matters, against any of the Settling Parties.

d. The Receiver is the only prospective plaintiff that can use the Settling Parties' waiver of claims against the Receiver Estate as "cash" for the benefit of all investors.

e. The settlement benefits all investors. Those investors with claims against BWM have the opportunity for a significant cash benefit if they awarded funds in the Allocation Determination Procedure, and any distributions from the Receiver Estate made after they receive such awarded funds will be reduced by the amount of the awarded funds, thereby increasing the amounts available to be distributed to other investors who are not awarded funds in the Allocation Determination Procedure.

f. When the cost of litigation (by either the Receiver or investors) is taken into account, it is difficult to imagine that any possible future recovery would net more to investors than the proposed settlement.

The Receiver and his counsel have many years of experience in prosecuting and defending litigation and well understand that a successful prosecution of alleged claims against the Settling Parties is by no means certain.

The "Bar Order"

Understandably, the Settling Parties are willing to enter into this settlement only if they are not exposed to further potential liability from investors or others as a result of their alleged relationship with, association with and/or involvement with

Parish and/or the other defendants. As such, a condition of the settlement is the entry of a bar order

> permanently enjoining prosecution of any pending lawsuits and the filing of any third party claims or causes of action, including, but not limited to, claims by investors in and creditors of the Defendants in the [the above-styled action], against their heirs, successors, agents or assigns arising out of or in any way connected with: (a) the investment-related activities of Parish, Parish Economics, and/or Summerville Hard Assets or any affiliated "investment pool"; (b) Parish's employment by and affiliation with BWM and Cassaday; (c) any investment made by any person or entity in or with Parish or any of the Receiver Entities; and/or, (d) any other affiliation with or support of Parish by BWM or any of its current and/or former employees, officers or principals.

(Settlement Agreement, ¶ 1(b), p. 3-4.) This is the same concept and structure used in effecting the Receiver's settlement with Charleston Southern University and Yolanda Yoder, Parish's wife as well as Legare & Bailey, LLC, et al. (See, Order And Final Judgment Approving Receiver's Settlement Agreement With Yolanda Yoder, January 11, 2008, Doc. No. 157; Order Granting the Receiver's Motion to Approve the Settlement Agreement with Charleston Southern University, May 12, 2008, Doc. No. 196; Order granting the Receiver's Agreement with Legare & Bailey, LLC, et al., March 23, 2009, Doc. No. 262.) Accordingly, this Court has already addressed and decided the fundamental issues raised below. There is no reason for a different result here.

The Receiver believes that the proposed settlement and related termination of all issues and claims regarding the Settling Parties' potential liability in connection with their alleged association with the Defendants and/or Parish's investment pools is fundamentally fair and in the best interest of all concerned. As discussed above, all investors will benefit from the proposed settlement. Not only does the proposed settlement resolve all allegations related to the Settling Parties, it provides for an orderly and effective way to administer the monies paid by the Settling Parties for the benefit of all investors and other creditors without interference by competing claimants. The reality is that the settlement with the Receiver is the best and, quite likely, the only way for all investors to benefit from a recovery against Settling Parties.

1. The Court Has Broad Equitable Power To Fashion The Appropriate Relief Tailored To The Specific Circumstances Of This Case

The "bar order" is ancillary relief in furtherance of this Court's equitable jurisdiction and, in particular, its jurisdiction over this Receivership. The Ninth Circuit dealt with a comparable situation - where a group of investors challenged the district court's injunction against the prosecution of claims against entities placed in receivership - and articulated this basic premise:

> The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws. This circuit has repeatedly approved imposition of a receivership in appropriate circumstances. The power

> of the district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief.

SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (emphasis added); see also, SEC v. Wencke, (Wencke II) 783 F.2d 829, 837 (9th Cir. 1986).

Not only is this Court's authority to fashion injunctive relief derivative of its inherent equitable power, that authority to administer this Receivership and to determine appropriate ancillary relief is extremely broad. "It is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." SEC v. Lincoln Thrift Ass'n, 577 F.2d 600, 606, 609 (9th Cir. 1978); Lundy v. Hochberg, 79 Fed. Appx. 503, 505 (3d Cir. 2003); U.S. v. Vanguard Inv. Co., 6 F.3d 222, 226 (4th Cir. 1993); SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992) ("This discretion derives from the inherent powers of an equity court to fashion relief.").

Understanding that receiverships are complex and factually specific and that multiple parties are involved in and affected by their administration, appellate courts have shown great deference to the district court's supervisory role. SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1144 (9th Cir. 1996); Vanguard, 6 F.3d at 226; Elliott, 953 F.2d at 1569-70; Wencke II, 783 F.2d at 837; SEC v. Hardy, 803 F.2d

1034, 1037 (9th Cir. 1986); SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 373 (5th Cir. 1982); SEC v. An-Car Oil Co., 604 F.2d 114, 119 (1st Cir. 1979).

Equally important, it is well recognized that "the primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." Hardy, 803 F.2d at 1038 (emphasis added); Vanguard, 6 F.3d at 226 (recognizing that a district court has broad discretionary authority to supervise an equity receivership and affirming the trial court's denial of otherwise appropriate remedies or claims in order to effect a more equitable result for the investors); Elliott, 953 F.2d at 1569-70 (affirming district court's denial of investors' otherwise appropriate claims for rescission where that remedy would allow an individual investor to elevate his position over that of other investors similarly "victimized" and "would create inequitable results, in that certain investors would recoup 100% of their investment while others would receive substantially less."); Wencke II, 783 F.2d 829, 837 n.9 (9th Cir. 1986); First Empire Bank-New York v. FDIC, 572 F.2d 1361, 1368 (9th Cir. 1978), cert. denied, 439 U.S. 919 (1978). The Receiver has no stake in this outcome. He is simply acting in his role as a court-appointed fiduciary endeavoring to achieve a result that is fair and in the best interest of all creditors of the Receiver Estate, which primarily consists of aggrieved investors.

In light of these equitable principles governing federal receiverships, it is clear that this Court has the power to enter the requested relief.

2. The All Writs Act Authorizes The "Bar Order"

The All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651; In re Consol. Welfare Fund "ERISA" Litig., 798 F. Supp. 125, 127 (D.N.Y. 1992). This Court may issue an injunction under this act whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it," and not only when it is "'necessary' in the sense that the court could not otherwise physically discharge its . . . duties." Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1100 (11th Cir. 2004) (quoting Adams v. United States, 317 U.S. 269, 273 (1942)); "ERISA" Litig., 798 F. Supp. at 127. The All Writs Act authorizes this Court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." Miller v. Brooks, 315 F.3d 417, 437 (4th Cir. 2003) (citing Penn. Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 40 (1985)). This authority includes enjoining prosecution of state court litigation that may frustrate the implementation of a court order (such as the Receivership Orders in this case), or the proper administration of justice or orderly resolution of litigation in federal court, or impair the federal

court's flexibility and authority to decide a case. In re: Inter-Op Hip Prosthesis Prod. Liab. Litig., 176 F. Supp. 2d 758, 763 (N.D. OH 2001) (*vacated in part,* on other grounds); "ERISA" Litig., 798 F. Supp. at 127; In re Asbestos Sch. Litig., 1991 U.S. Dist. LEXIS 5142, *3 (D. Pa. 1991); In re Baldwin-United Corp., 770 F.2d at 335.

"The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." United States v. New York Tel. Co., 434 U.S. 159, 173-174 (1977); "ERISA" Litig., 798 F. Supp. at 127. The Fourth Circuit has ruled, for example, that a district court may issue an injunction under the All Writs Act to prevent repeated attacks of matters resolved under the terms of a settlement agreement and to prevent "direct frustration of [a] district court's Settlement Approval Order." Miller, 314 F.3d at 438-439; Scardelletti v. Rinkwitz, 68 Fed. Appx. 472, 480 (4th Cir. 2003); see also Klay, 376 F.3d at 1104 (11th Cir. 2004); Baldwin-United Corp., 770 F.2d at 337 (affirming district court's issuance of post-settlement injunction barring "anyone else [from] seeking recovery of money to be paid to the plaintiffs"); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460-62 (2d Cir. 1982) (finding it permissible for a judgment on a settlement to

bar later claims based on "the identical factual predicate" as that under the settled claims); Horton v. Metro., Life Ins. Co., 459 F. Supp. 2d 1246, 1252 (M.D. Fla. 2006) (barring, under the All Writs Act, claims premised upon the same factual predicate as settled claims).

Investors will have an opportunity to review and object to the terms of the Settlement Agreement before it is approved. Attached hereto as Exhibit "B," is a Notice of Motion that will be sent to each known investor informing them of the proposed Settlement Agreement. However, if approved, it is obvious that the prosecution by investors and others of claims against the Settling Parties seeking damages already settled herein would frustrate the implementation of the Settlement Agreement and "threaten the jurisdiction of the district court enough to warrant an injunction." Klay, 376 F.3d at 1104 (11th Cir. 2004); see also Baldwin-United Corp., 770 F.2d at 337 (affirming district court's issuance of post-settlement injunction barring "anyone else [from] seeking recovery of money to be paid to the plaintiffs").

3. The Anti-Injunction Act Does Not Preclude The "Bar Order"

Pursuant to the Active Claimant Agreement discussed above, all of the state court cases in which claims are currently pending against the Settling Parties will be dismissed within ten days of the filing of this motion. Following the dismissal of those cases, there will not be any pending state court cases against the Settling

Parties. Accordingly, the Anti-Injunction Act is not applicable and does not preclude the bar order sought in this case.

The law is clear that the Anti-Injunction Act does not preclude injunctions of state court actions that have not yet been filed, but only addresses stays of lawsuits already filed. Dombrowski v. Pfister, 380 U.S. 479, 485, n.2 (1965) ("This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted."); BGW Assocs., Inc. v. Valley Broad. Co., 532 F. Supp. 1115, 1117 (D.N.Y. 1982) ("This limitation on federal judicial power relates only to actions already instituted in state courts.")

Even if it were applicable, the facts of this case clearly fall within the enumerated exceptions to this statute. Specifically, the exceptions apply and a district court may enjoin pending state court proceedings: (1) as expressly authorized by Congress, or (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments. 28 U.S.C. § 2283; see also, In re: Inter-Op, 176 F. Supp. 2d at 762.

In this case, the entry of an injunction against the state court litigation is necessary and appropriate to preserve and aid this Court's jurisdiction over the administration of the Receivership and the Receiver Estate.[1] See In re Wireless Tel.

[1] At least two jurisdictions have held that the Anti-Injunction Act is not applicable to cases such as this where a receiver has been appointed after a lawsuit was brought by

Fed. Cost Recovery Fees Litig., 2003 U.S. Dist. LEXIS 26070, *13-14 (D. Mo. 2003) ("This Court may rely on the Anti-Injunction Act's 'necessary in aid of its jurisdiction' exception to 'support the court's power to effectuate a final settlement.'") The "necessary to aid its jurisdiction" exception, means that an injunction may be issued where "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1201 (7th Cir. 1996) (quoting Atlantic Coastline R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970)). "The exception thus parallels the federal courts' power under the All Writs Act 'to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.'" Id. (quoting New York Tel., 434 U.S. at 173); Winkler, 101 F.3d at 1202 ("We agree that the 'necessary in aid of jurisdiction' exception should be construed 'to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court's jurisdiction nugatory.'").

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the Securities Exchange Commission seeking to enforce securities law. SEC v. Wencke, 622 F.2d 1363, 1368 (9th Cir. 1980) ("[S]ection 2283 does not apply to injunctions issued at the request of the United States or administrative agencies enforcing applicable federal law."); "ERISA" Litig., 798 F. Supp. at 127 (citing Wenke, 622 F.2d at 1368).

This Court took exclusive jurisdiction over the all aspects of the receivership when the SEC filed the above-styled, "Enforcement Action." (See April 5 Receivership Order at § VI; April 12 Receivership Order at § V.) Subsequently, through the Receivership Orders, the court authorized and directed the Receiver to engage in various activities for the ultimate benefit of investors and other creditors. Moreover, the Court enjoined third-parties from interfering with the Receiver and the administration of the Receiver Estate. (April 5 Receivership Order at §§ VII, XIX; April 12 Receivership Order at §§ VI, XVIII.) The prosecution of claims against the Settling Parties would interfere with this Court's exercise of jurisdiction over the Receiver Estate and impede the Receiver's efforts.

Conversely, allowing the Receiver to receive and distribute funds to certain investors in accordance with the awarded amounts in the Allocation Determination Procedure which, as shown above, will inure to the benefit of all investors, aids this Court's jurisdiction over the Receivership and further effectuates the provisions of the Receivership Orders. Approval of the terms of the Settlement Agreement also will enhance the Receiver's and, ultimately, the Court's, ability to implement the plan of distribution. See "ERISA" Litig., 798 F. Supp. at 128 (upholding an injunction of state court proceedings where the court found that it would be unable to develop an equitable plan for the distribution of the assets of a fund to protect the rights of all potential creditors if a "race to the courthouse" was permitted, depleting

some or all of the fund's remaining assets). Hence, the injunction sought here is not precluded by the Anti-Injunction Act.

Accordingly, as expressly authorized by the All-Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, this Court should enjoin any state court proceeding against the Settling Parties because if those possible future actions are not enjoined, such actions will so interfere with this Court's jurisdiction over the Receiver Estate as to seriously impair this Court's flexibility and authority in the administration of the Receiver Estate. Competing orders from different courts "would only serve to make ongoing federal oversight [of the Receiver Estate] unmanageable," and "threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." Winkler, 101 F.3d at 1202; Klay, 376 F. 3d at 1104 (finding an injunction appropriate where state court action would "threaten the jurisdiction of the district court enough to warrant injunction.").

Conclusion

Based on the facts and authority cited herein the Receiver respectfully requests that this Court grant this Motion for Approval of Settlement Agreement, approve the terms of the Settlement Agreement with Battery Wealth Management, Inc. f/k/a Battery Investment Company, Inc., Wayne Cassaday, and their professional liability insurer, Continental Casualty Company, and enter an order enjoining further prosecution of all claims against them.

Respectfully submitted, this 30th day of December, 2009.

[Signature on following page.]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **ALBERT E. PARISH, JR., PARISH ECONOMICS, LLC, and SUMMERVILLE HARD ASSETS, LLC,** **Defendants.**	**CIVIL ACTION NO. 2:07-cv-00919-DCN**

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2009, I electronically filed the foregoing document with the Clerk of this Court using the CM/ECF system, which will automatically send email notification of such filing to all case parties via email.

TROUTMAN SANDERS LLP

/s/ *Charles R. Burnett*
Charles R. Burnett