

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p>Plaintiff,</p> <p>vs.</p> <p>PINNACLE DEVELOPMENT PARTNERS, LLC, and GENE A. O'NEAL</p> <p>Defendants.</p>	<p>CIVIL ACTION NO. 06 CV 2431</p>
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**[PROPOSED] ORDER APPROVING SETTLEMENT WITH  
CHRISTOPHER M. KUNKEL, CHRISTOPHER M.  
KUNKEL, ATTORNEY AT LAW, P.C. AND  
WESTPORT INSURANCE CORPORATION**

S. Gregory Hays, the Receiver for Pinnacle Development Partners, LLC, filed a Motion for Approval of Settlement Agreement and Release with Christopher M. Kunkel, Christopher M. Kunkel, Attorney at Law, P.C., and Westport Insurance Corporation. Upon consideration of the motion and the relevant facts, the Court finds as follows:

**FINDINGS OF FACT**

1. The Receiver was appointed by the United States District Court for the Northern District of Georgia in a civil enforcement action styled *Securities and*

*Exchange Commission v. Pinnacle Development Partners, LLC, et al.*, Civil Action File No. 1:06-CV-2431-JTC (the “SEC Enforcement Action”).

2. Pursuant to an Order entered in the SEC Enforcement Action on October 11, 2006 (the “Receivership Order”), the Receiver was appointed to serve as receiver for Pinnacle Development Partners, LLC (“Pinnacle”) and its assets, including all assets of partnerships or other entities controlled by Pinnacle (the “Receiver Estate”).

3. The Receivership Order authorizes the Receiver, among other things, to “institute, defend, compromise or adjust such actions or proceedings . . . as may in his discretion be advisable or proper for the protection and administration of the Receivership Estate.” (Receivership Order at § VII(i) [Doc. No. 3].)

4. In the course of investigating claims and pursuing recoveries, the Receiver and the professionals working with him have obtained and analyzed documents, taken deposition testimony and reviewed deposition transcripts, and interviewed witnesses. Specifically, the Receiver reviewed information related to legal services rendered by Christopher M. Kunkel of Christopher M. Kunkel, Attorney at Law, P.C. (collectively “Kunkel”) to Pinnacle and the general partnerships formed by it as investment opportunities (the “Pinnacle Partnerships”).

5. Based upon the facts discovered during the course of his investigation, the Receiver made a monetary demand upon Kunkel asserting that Kunkel's legal services had not been rendered in accordance with the applicable standards of care.

6. Kunkel denies that he is liable to the Receiver Estate and has engaged counsel to defend the claims asserted by the Receiver.

7. Despite Kunkel's denial of any liability whatsoever, counsel for the Receiver and Kunkel have engaged in extensive negotiations regarding the settlement and compromise of the Receiver's claims.

8. The Receiver also obtained from Kunkel sworn financial statements disclosing Kunkel's financial condition. The Receiver determined that, with the exception of the proceeds of his professional liability insurance policy, Kunkel would not be able to satisfy any substantial judgment against him.

9. Kunkel's professional liability insurance policy, issued by Westport Insurance Corporation ("Westport"), has a per claim policy limit of \$1,000,000, with the term "claim" being broadly defined to include multiple claims by multiple claimants arising out of the same act or series of acts. This per claim limit is reduced by attorneys' fees and other expenses incurred by Kunkel in defense of any claims asserted against him.

10. As a result of the settlement discussions, effective February 4, 2008, the Receiver, Kunkel and Westport entered into a Settlement Agreement and Release (the "Settlement Agreement"). The Settlement Agreement represents a compromise of disputed claims asserted by the Receiver and is not an admission of liability by Kunkel or Westport.

11. The Receiver has determined that the terms of the Settlement Agreement are in the best interest of the Receiver Estate, allowing its creditors, including all persons who invested money in Pinnacle or the Pinnacle Partnerships, to recover money now, instead of waiting for a potential recovery at the end of protracted litigation.

12. Although the Receiver believes that Kunkel's potential liability to the Receiver Estate exceeds the settlement amount, the Receiver is concerned that litigation would deplete the proceeds of Kunkel's insurance policy with Westport, and that Kunkel would not be able to satisfy any judgment rendered against him.

13. Though Kunkel denies any liability to the Receiver, Kunkel and Westport wish to resolve the Receiver's claims if they can be assured that they will not be subject to further litigation related to Kunkel's provision of legal services to Pinnacle and the Pinnacle Partnerships.

14. Absent a settlement that precludes further litigation against Kunkel and Westport, it is evident that the proceeds of the insurance policy will be consumed in defending the Receiver's claims. Such a result would deprive any investor or other creditor of the benefit of those funds. Conversely, if the claims against Kunkel are settled and compromised in accordance with the terms of the Settlement Agreement, those proceeds will be available for distribution to investors and other creditors and/or to fund the administration of the Receiver Estate.

15. The Receiver has given written notice to all known investors of the filing of the Motion to Approve Settlement Agreement and Release with Christopher M. Kunkel, Christopher M. Kunkel, Attorney at Law, P.C. and Westport Insurance Corporation. Pursuant to the terms of the Notice of Motion, any investor objecting to the Settlement Agreement, including the injunction of claims by investors against Kunkel or Westport, was required to file a written objection with the Court.

16. No investor filed any written objections with the Court.

[OR, ALTERNATIVELY]

[Number] \_\_\_\_\_ investors filed written objections. The Court, after careful consideration of such objections, finds that none of the persons making objections should have greater rights than any other investor, and, thus, should be limited to

their prorated share of available proceeds from the Receiver Estate. None of the objectors have demonstrated to the Court any special circumstances that would entitle them to greater recovery than any other investors.

### **CONCLUSIONS OF LAW**

1. Because the Receiver's claims against Kunkel are ancillary to the receivership and the SEC Enforcement Action, this Court has jurisdiction over the subject matter of the claims and the Settlement Agreement. *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822 (6th Cir. 1981) (stating that actions initiated by a receiver in furtherance of a receiver's duties are ancillary to the primary action in which the receiver was appointed).

2. This Court's power to supervise an equity receivership and determine the appropriate action to be taken in the administration of the receivership is "extremely broad." *SEC v. Hardy*, 803 F.3d 1034, 1038-39 (9th Cir. 1986); *see also SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368 (5th Cir. 1982) (noting the broad powers inherent in a federal court supervising an equity receiver).

3. In reviewing the Settlement Agreement, this Court is hesitant to substitute its judgment for that of counsel. *In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991) ("A trial judge ought not try the case during a settlement hearing and should be hesitant to substitute his or her judgment for that of counsel.").

Furthermore, this Court “must guard against the temptation to become an advocate – either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not parties to the settlement.” *Id.* at 1029 (citing *Moore’s Federal Practice, Manual for Complex Litigation 2d* § 23.14, at 160 (1986)). Instead, in reviewing the Settlement Agreement, this Court is called upon to be impartial and neutral, favoring neither the proponents of the settlement nor those who are opposed or absent. *Id.*

4. Based on a variety of factors, the Receiver has determined that entering into the Settlement Agreement is in the best interests of the Receiver Estate. The Receiver’s willingness to enter into the Settlement Agreement is, in large part, based on his analysis of the costs of litigating his claims against Kunkel compared to his ability to recover substantially more through litigation than is being paid now, even if he were to obtain a judgment in a significantly higher amount.

5. The Court agrees the settlement is fair, adequate, and reasonable and is not the product of collusion between the parties. The settlement is in the best interest of the Receiver Estate and allows the Receiver Estate, and ultimately the investors and other creditors, to recover money now, instead of a potential recovery after years of protracted litigation.

6. Under the All Writs Act, “[t]he Supreme Court and all courts established by Congress may 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. This Court may grant a writ 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)).

7. Furthermore, such writs may be directed to not only the immediate parties to a proceeding, but to “persons who, though not parties to the original action . . . are in a position to frustrate the implementation of a court order or the proper administration of justice . . . .” *Id.* (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977)).

8. The Eleventh Circuit has ruled, for example, that a district court may issue an injunction under the All Writs Act to prevent prosecution of an action “that had already been settled under the terms of a federal settlement agreement” because proceedings in other courts “that involve the same facts as already issued judgments and orders . . . threaten the jurisdiction of the district court enough to warrant an

injunction.” *Klay*, 376 F.3d at 1104; *see also In re Baldwin-United Corporation*, 770 F.2d 328, 337 (2d Cir. 1985) (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).

9. As indicated above, it is this Court’s opinion that settlement of this litigation is necessary and appropriate to the orderly and efficient administration of the receivership and is in the best interest of the Receiver Estate. Kunkel and Westport, however, would have little incentive to pay \$600,000 to the Receiver Estate absent assurances that Kunkel and Westport will not be subject to further liability from investors seeking damages against Kunkel arising out of or in any way related to Kunkel’s rendering of legal services to Pinnacle and the Pinnacle Partnerships.

10. Investors have been provided an opportunity to object to the terms of the settlement. Further filing and prosecution by investors of claims against Kunkel

or Westport 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.

11. Nothing in the Settlement Agreement or this Order shall operate to in any way release, waive or limit the Receiver’s rights, if any, to pursue claims against other third parties.

In light of the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** as follows:

1. The Settlement Agreement and Release between the Receiver, Kunkel and Westport, dated February 4, 2008, is hereby approved, and the parties are directed to perform in accordance with its terms.

2. Any and all persons who invested in Pinnacle or any of the Pinnacle Partnerships are hereby enjoined from filing any claim against Kunkel or Westport that arises from or is in any way related to Kunkel’s legal representation of Pinnacle or the Pinnacle Partnerships.

3. Any person who acts in a manner contradictory to this Order shall be in contempt of this Order and subject to such remedies for contempt as the Court shall deem appropriate.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2008.

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Jack T. Camp  
United States District Court Judge  
Northern District of Georgia