

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>
--	------------------------------------

**RECEIVER'S BRIEF IN SUPPORT OF HIS  
MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT  
AND RELEASE OF CHRISTOPHER M. KUNKEL,  
CHRISTOPHER M. KUNKEL, ATTORNEY AT LAW, P.C. AND  
WESTPORT INSURANCE CORPORATION**

S. Gregory Hays, the Court-appointed Receiver for Pinnacle Development Partners LLC, files this Brief in Support of his Motion for Approval of Settlement Agreement and Release of Christopher M. Kunkel, Christopher M. Kunkel Attorney at Law, P.C., and Westport Insurance Corporation.

**I. INTRODUCTION**

The Settlement Agreement now before the Court will enable the Receiver to recover \$600,000 from Christopher M. Kunkel, Christopher M. Kunkel, P.C.

(collectively “Kunkel”), and Westport Insurance Corporation. By settling this matter, the Receiver is able to obtain a significant recovery now, for the benefit all Pinnacle creditors, including persons who invested in the offerings sold by Pinnacle – primarily via interests in general partnerships (“the Pinnacle Partnerships”) – instead of depleting through protracted litigation the assets of the Receiver Estate and the proceeds of Kunkel’s insurance policy with Westport. As discussed below, even if the Receiver were to obtain a substantial judgment against Kunkel, it is highly unlikely that there would be sufficient funds or assets available to satisfy the judgment. In exchange, the Receiver is releasing all claims that Pinnacle or the Pinnacle Partnerships may have against Kunkel or Westport, and investors will be enjoined from filing any claim against Kunkel or Westport that arises from the same facts or relates to the underlying claims settled herein, including but not limited to, claims that in any way relate to or arise from Kunkel’s representation of Pinnacle and the Pinnacle Partnerships. The Settlement Agreement is subject to certain contingencies, and will be binding upon the Receiver, Kunkel and Westport only after notice to investors, providing them with an opportunity to object, and approval by this Court.<sup>1</sup>

---

<sup>1</sup> Because the Receiver’s claims against Kunkel are ancillary to the receivership and

The Receiver believes that the settlement amount represents a significant recovery for the Receiver Estate and its creditors. Accordingly, the Receiver respectfully requests that the Court approve the Settlement Agreement and enter an order enjoining the filing and prosecution of claims by investors against Kunkel or Westport.

## II. FACTUAL BACKGROUND

This case was filed by the SEC seeking damages, as well as injunctive and other equitable relief, from the Defendants as a result of a fraudulent offering of unregistered securities – sold in the form of interests in the Pinnacle Partnerships – that raised in excess of \$60 million from approximately 2000 individual investors. Pursuant to this Court’s Order of October 11, 2006 (the “Receivership Order”), the Court appointed S. Gregory Hays to serve as Receiver for Pinnacle and its assets, including all assets of partnerships or other entities controlled by Pinnacle (collectively the “Receiver Estate”). Among other things, the Receivership Order authorizes and directs the Receiver to “administer and manage the Receiver

---

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).

Estate.” (Receivership Order at § VII.) The authority granted to the Receiver includes the discretion to “to institute, defend, compromise or adjust such actions . . . as may [] be advisable or proper for the protection and administration of the Receivership Estate.” (*Id.*)

**A. Kunkel’s Representation of Pinnacle and the Pinnacle Partnerships**

Christopher M. Kunkel is the principal of Christopher M. Kunkel, Attorney at Law, P.C., a Georgia professional corporation. During 2005 and 2006, Kunkel provided a variety of legal services to Pinnacle and the Pinnacle Partnerships, including drafting the Pinnacle Partnership form agreements, rendering advice regarding compliance with federal and state securities laws, and effecting transfers of real property to and between Pinnacle and the Pinnacle Partnerships.

**B. The Receiver’s Investigation and Subsequent Settlement Negotiations**

In the course of investigating claims against third parties, the Receiver and professionals working with him have obtained and analyzed Pinnacle’s files and Kunkel’s files, and have participated in the deposition of Kunkel taken in this action. Based upon the facts discovered during the course of his investigation, the Receiver determined that Pinnacle and the Pinnacle Partnerships had viable claims for professional negligence and breach of fiduciary duty that could be asserted by

the Receiver against Kunkel. Importantly, the Receiver did not conclude that Kunkel was a knowing participant in the underlying fraudulent scheme.

Through his counsel, the Receiver sent a demand letter to Kunkel's counsel setting forth the Receiver's claims that the legal services rendered by Kunkel had not been performed in accordance with the applicable standards of care. While Kunkel denied any liability whatsoever, counsel for the Receiver, Kunkel and Westport engaged in extensive arms-length settlement negotiations. In addition to the merits of the respective claims and defenses, the Receiver was particularly concerned as to whether Kunkel would have sufficient cash or other assets to satisfy any judgment entered against him on the Receiver's claims. Essentially, the Receiver was concerned that Kunkel would deplete the proceeds of his insurance policy with Westport (the "Policy") in defending the Receiver's claims, which would leave little or nothing for the Receiver to recover and distribute to Pinnacle investors.

Kunkel and Westport expressed an interest in settling the Receiver's claims against Kunkel, but only if Pinnacle investors were barred from asserting or maintaining claims against Kunkel related to Kunkel's representation of Pinnacle and the Pinnacle Partnerships. In sum, Kunkel and Westport were unwilling to use

Policy proceeds to settle the Receiver's claims if Kunkel faced the possibility of litigation initiated by individual investors.

Based on sworn financial statements provided to the Receiver by Kunkel, the Receiver has determined that, with the exception of the Policy, Kunkel has no readily available unencumbered assets with which to satisfy a substantial judgment.

Kunkel's Policy has a per "claim" limit of \$1,000,000. This limit has already been lessened by the work performed to date by Kunkel's counsel and would be eroded further as attorneys' fees and expenses are incurred in the defense of any claims against Kunkel, including claims asserted by the Receiver.<sup>2</sup> Moreover, the assets of the Receiver Estate also would be reduced by the attorneys' fees and expenses incurred by the Receiver in maintaining his action against Kunkel.

---

<sup>2</sup> The Policy has an aggregate limit of \$2,000,000. Westport maintains, and for purposes of this settlement the Receiver does not dispute, that the \$1,000,000 per claim limit is the applicable limit because the Policy provides that, "[t]wo or more CLAIMS arising of a single WRONGFUL ACT . . . or a series of related and continuing WRONGFUL ACTS, shall be a single CLAIM . . . subject to one "Per Claim Limit of Liability and deductible." (Policy, General Terms and Conditions, § X.)

Rather than having both the Policy proceeds and the assets of the Receiver Estate eroded by the expenses of litigation, the Receiver has determined that it is in the best interest of the Receiver Estate, and, ultimately, Pinnacle's creditors, for the Receiver to maximize the amounts available for distribution to investors and other creditors by entering into an all encompassing settlement with Kunkel.

**C. The Settlement Agreement**

Based upon the Receiver's assessment, the Receiver, Kunkel and Westport have entered into a Settlement Agreement and Mutual Release, dated February 4, 2008, a copy of which is attached hereto as Exhibit A to the Receiver's Motion. In sum, the Settlement Agreement provides:

- Kunkel and/or Westport shall pay the Receiver \$600,000;
- The Receiver releases Kunkel and Westport from all causes of action that may arise from Kunkel's rendering of legal services to Pinnacle and the Pinnacle Partnerships;
- Kunkel and Westport release the Receiver from all causes of action that may arise from same subject matter; and
- Upon approval of the Settlement Agreement, the Receiver will indemnify Kunkel and Westport, up to \$600,000, from any claims asserted by individual investors related to Kunkel's legal

representation of or relationship or other involvement with Pinnacle and the Pinnacle Partnerships.

The Settlement Agreement is expressly conditioned upon the Court's approval and the Court's entry of a "bar order" enjoining the further filing or prosecution of private rights of action brought by investors against Kunkel or Westport, which arise from the same facts or relate to the underlying claims settled herein, including but not limited to, claims that in any way relate to, or arise because of, Kunkel's representation Pinnacle and the Pinnacle Partnerships.

### III. ARGUMENT

#### A. **The Court Should Approve the Settlement Agreement**

There is an "overriding public interest" favoring settlements, especially in "complex litigation . . . [that] can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting further that the Federal Rules of Civil Procedure authorize district courts to facilitate settlement in all types of litigation, not just class actions); *see also In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources."). This public

policy is informed by the “realization that compromise is the essence of settlement.” *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

Here, the volume and substance of the Receiver’s knowledge of his claims against Kunkel are adequate to support the Settlement Agreement. As described above, the Receiver and his counsel have analyzed the factual and legal merits of his claims against Kunkel.

Equally important, the Receiver has focused on the potential to collect on any judgment ultimately obtained against Kunkel. It is this consideration that weighs most heavily in favor of settlement. Despite the Receiver’s belief that the value of his claims against Kunkel is well in excess of \$600,000, settlement for this amount is the best result for the Receiver Estate and investors. Simply stated, it is better to recover \$600,000, than to deplete the Policy proceeds and the assets of the Receiver Estate to obtain a larger, but uncollectible, judgment.

Having considered all pertinent factors, the Receiver believes that the resolution of all matters regarding Kunkel’s potential liability in connection with Pinnacle and the Pinnacle Partnerships, in accordance with the terms of the Settlement Agreement, is fundamentally fair and in the best interest of all concerned, including investors and other creditors. This arrangement allows for the Policy proceeds to be used for the benefit of the Receiver Estate rather than

funding Kunkel's defense of the Receiver's claims. Moreover, settling now will allow the Receiver to avoid significant expenses in pursuing his claims against Kunkel. Finally, all investors and other creditors will share in any benefits derived from the Policy proceeds, rather than having individual investors "compete" for those assets.

The reality is that the Receiver's settlement with Kunkel is the best and, quite likely, the only way for all investors to benefit from the Policy proceeds. As discussed below, these benefits can be realized only if further litigation against Kunkel is enjoined.

**B. This Court Is Authorized Under the All Writs Act To Enter an Order Barring Investors From Asserting Claims Against Kunkel and Westport**

In addition to Court approval, a condition underlying the Settlement Agreement is that this Court enjoin all investors from filing a lawsuit or in any way asserting claims against Kunkel or Westport that arise from the same facts or relate to the underlying claims settled herein, including but not limited to, claims that in any way relate to or arise from Kunkel's representation of Pinnacle and the Pinnacle Partnerships. Within five days of the filing of the Receiver's Motion, notice of the filing of the motion will be provided to all known investors, allowing them an opportunity to object. A copy of the Receiver's Notice of Motion is attached as Exhibit B to the Receiver's Motion.

As recognized by the Eleventh Circuit, “[d]efendants buy little peace through settlement unless they are assured that they will be protected against . . . other causes [of action] related to the underlying litigation.” *U.S. Oil*, 967 F.2d at 494. In the present case, Kunkel and Westport are unwilling to pay \$600,000 to the Receiver Estate, for the benefit of Pinnacle investors and other creditors, absent assurances that they will not be subject to further liability from Pinnacle investors and creditors seeking essentially the same damages being settled herein, including, but not limited to, Pinnacle’s unpaid obligations to them.

This Court is authorized to enjoin future litigation under the All Writs Act, 28 U.S.C. § 1651, which states, “[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.” A 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)). Such writs may be directed not only to 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)).<sup>3</sup>

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 Corp.*, 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).

---

<sup>3</sup> The Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits certain injunctions against pending state court proceedings, is not applicable here because no actions are currently pending. *Dombrowski v. Pfister*, 380 U.S. 479, 485, n.2 (1965) (Anti-injunction act applies only to already filed state court actions).

This Court (Judge Hunt) issued a similar injunction in connection with a similar settlement between the Receiver and an Ohio accounting firm that provided audit services to an entity engaged in a Ponzi scheme. In approving the settlement, the Court relied on the All Writs Act and issued an order enjoining “[a]ny and all persons who purchased investments from [the] Receiver Entities . . . from filing and/or further prosecution of claims against [the accounting firm] or any of its principals and employees . . . that in any way relate to, arise because of, or are in connection with, the Audits.” *SEC v. Mobile Billboards, et al.*, Civil Action File No. 1:04-CV-2763-WBH, May 1, 2006 Order [Doc. No. 109].

The Receiver believes that the same type of injunction is appropriate here. By virtue of this settlement, the Receiver effectively will recover from Kunkel everything that he has – namely the Policy proceeds – that might be available to satisfy any judgment entered against him. The proceeds of the settlement will become part of the Receiver Estate and inure to the ultimate benefit of all Pinnacle investors and creditors. Moreover, investors will have an opportunity to object to the terms of the settlement. The filing and prosecution of claims against Kunkel seeking to recover for individual investors damages already recovered for the benefit of all investors by the settlement would further deplete the amount collectible from Kunkel and would frustrate the implementation of the settlement

and “threaten the jurisdiction of the district court enough to warrant an injunction.”  
*Klay*, 376 F.3d at 1104.

#### IV. CONCLUSION

For the above reasons, the Receiver respectfully requests that this Court enter an order approving the Settlement Agreement and enjoining investors from filing suit or asserting any claim against Kunkel or Wesport that arise under the same facts or relate to the underlying claims settled herein, including any claim in any way related to Kunkel’s representation of Pinnacle or the Pinnacle Partnerships. A proposed order for the Court’s Consideration is attached as Exhibit C to the Motion.

This 14<sup>th</sup> day of February, 2008.

By: /s/ J. David Dantzler, Jr.  
J. David Dantzler, Jr.  
Georgia Bar No. 205125  
Thomas B. Bosch  
Georgia Bar No. 068740  
Attorneys for S. Gregory Hays,  
Receiver for Defendant Pinnacle  
Development Partners, LLC

Troutman Sanders LLP  
Bank of America Plaza, Suite 5200  
600 Peachtree Street, N.E.  
Atlanta, Georgia 30308-2216

**Local Rule 7.1D Certificate of Compliance**

The undersigned certifies that this brief has been prepared with on of the font and point selections approved by the Court in Local Rule 5.1B.

By: /s/ J. David Dantzler, Jr.  
J. David Dantzler, Jr.

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>
--	------------------------------------

**CERTIFICATE OF SERVICE**

This is to certify that on February 14, 2008, I electronically filed this Receiver's Brief in Support of His Motion for Approval of Settlement Agreement and Release of Christopher M. Kunkel, Christopher M. Kunkel, Attorney at Law, P.C. and Westport Insurance Corporation with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

James Alexander Rue

William P. Hicks

Michael D. Watson

John Gerald Westrick

I further certify that, on February 14, 2008, the foregoing has been served to counsel for Christopher Kunkel by United States Mail, postage pre-paid:

Michael S. Reeves  
Friend, Hudak & Harris, LLP  
3 Ravinia Drive, Suite 1450  
Atlanta, Georgia 30346

This 14<sup>th</sup> day of February, 2008.

By: /s/ J. David Dantzler, Jr.  
J. David Dantzler, Jr.  
Georgia Bar No. 205125  
Attorney for S. Gregory Hays,  
Receiver For Defendant Pinnacle  
Development Partners LLC

Troutman Sanders LLP  
Bank of America Plaza, Suite 5200  
600 Peachtree Street, N.E.  
Atlanta, Georgia 30308-2216