

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

STANLEY J. KOWALEWSKI and
SJK INVESTMENT MANAGEMENT,
LLC,

Defendants.

CIVIL ACTION NO.
1:11-cv-0056-TCB

**MEMORANDUM OF LAW IN SUPPORT OF RECEIVER’S MOTION FOR
APPROVAL OF SUPPLEMENTAL PLAN FOR ADMINISTRATION OF
RECEIVER ESTATE AND DISTRIBUTION OF PROCEEDS**

S. Gregory Hays (“Receiver”), the court-appointed Receiver for SJK Investment Management, LLC (“SJK”), and the SJK Special Opportunities Fund (the “Special Opportunities Fund”) (collectively the “Receiver Estate”) files this Memorandum of Law in Support of Receiver’s Motion for Approval of Supplemental Plan for Administration of Receiver Estate and Distribution of Proceeds (the “Supplemental Plan”).

BACKGROUND

Consistent with his responsibilities for administering the assets of the Receiver Estate, the Receiver has developed the Supplemental Plan to address the disposition of all claims submitted in the receivership against Stanley J. Kowalewski, SJK, and the Special Opportunities Fund. The Supplemental Plan is the second, and final, step in establishing the rights of: (1) investors in the funds managed by SJK (the “SJK Funds”)¹ and the Special Opportunities Fund; and (2) creditors of the Receiver Estate. The first step in the process was the Receiver’s Investor Distribution Plan [ECF No. 102-1], which the Court approved on July 21, 2011 [ECF No. 108].

The Investor Distribution Plan dealt solely with the assets of the SJK Funds and addressed issues related to the administration of the SJK Funds, including the allocation of ownership interests between investors and making distributions from the SJK Funds. The Investor Distribution Plan left open various issues related to the administration of the Receiver Estate, including (a) the resolution of claims asserted by creditors of the Receiver Estate; (b) the allocation of assets between the entities in the Receiver Estate – i.e., specifying which assets will be available to

¹ The SJK Funds are the SJK Absolute Return Fund, Ltd.; the SJK Absolute Return Fund, LLC; the SJK Long/Short Equity Fund, Ltd.; and the SJK Long/Short Equity Fund, LLC.

satisfy claims against SJK and the Special Opportunities Fund; (c) the Receiver's actions to bring SJK into compliance with the Employee Retirement Income Security Act; and (d) federal and state tax issues. As addressed in more detail in the Supplemental Plan, the Receiver and the team of professionals working with him have analyzed all of these issues and the Supplemental Plan sets forth the Receiver's proposed resolution of each. In order to move forward with the administration of the Receiver Estate, therefore, the Receiver requests that the Court approve the Supplemental Distribution Plan.

ARGUMENT AND CITATION OF AUTHORITY

This Court has "extremely broad" powers and "wide discretion" to administer this equity receivership and in the fashioning of appropriate forms of relief. *See e.g., S.E.C. v. Capital Consultants, LLC*, 397 F. 3d 733, 738 (9th Cir. 2005); *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F. 3d 657, 668 (6th Cir. 2001); *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992), *rev'd in part on other grounds*, 998 F. 2d 922 (11th Cir. 1993); *S.E.C. v. Hardy*, 803 F.2d 1034 (9th Cir. 1986). The processes approved by a court and used in the administration of claims and distribution of proceeds in an equitable receivership are given great deference and may be disturbed on appeal only upon the showing of an abuse of discretion. *See Elliott*, 953 F.2d at 1567, 1569-70; *Hardy*, 803 F. 2d at 1037-38.

In cases such as this, where the cumulative amount of the loss exceeds the funds available for distribution, the Court is obligated to devise an equitable system of distribution with the goal of treating each victim of the investment fairly and as nearly equal as is possible. *See U.S. v. Cabe*, 311 F. Supp. 2d 501, 504 (D.S.C. 2003). “In deciding how receivership assets should be distributed to defrauded investors, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly-situated investors or customers treated alike.” *S.E.C. v. Funding Res. Group*, 2002 U.S. Dist. LEXIS 1666, *12 (N.D. Tex. Jan. 31, 2002) (quotations omitted).

The Supplemental Plan includes the Receiver’s proposed treatment of all claims submitted to the Receiver against Kowalewski, SJK, and the Special Opportunities Fund. (Supplemental Plan, ¶¶ 12 - 57.) Generally, the Supplemental Plan seeks equal treatment for all similarly situated creditors – *e.g.*, all creditors with approved unsecured claims against SJK will receive an equal pro rata percentage of their approved claims. (*Id.*, ¶¶ 59 - 75.)

In the event that any disputes arise regarding the Receiver’s proposed treatment of particular claims, the Receiver has proposed that those disputes be resolved by summary proceedings. (Supplemental Plan, ¶ 58.) The use of summary proceedings furthers the receivership’s primary purpose of promoting the orderly and

efficient administration of the estate for the benefit of investors and other creditors. *See, e.g., Hardy*, 803 F.2d at 1037-40. Specifically, summary proceedings reduce litigation costs, and in turn, preserve a greater amount of the receivership assets for distribution. *Id.* Summary proceedings, which provide notice and a meaningful opportunity to be heard, but require an evidentiary hearing only if there are disputed issues of fact, are appropriate in receiverships and may be used to allow or disallow claims against the Receiver Estate. *See id.*

In connection with the administration of claims, the Supplemental Plan also sets forth and seeks the Courts approval regarding various issues related to taxes (Supplement Plan, ¶¶ 50 - 56) and employee benefits (*Id.*, ¶¶ 83 - 91), and seeks certain protections for the Receiver and the team of professionals working with him for the acts taken by them in furtherance of the Plan (*Id.*, ¶¶ 78 -82). Each of these issues is integral to the Receiver's continued administration of the Receiver Estate.

WHEREFORE, for the reasons set forth above and in the Supplemental Plan, the Receiver respectfully requests that this Court approve the Supplemental Plan.

This 15th day of June, 2012.

/s/ J. David Dantzler, Jr.

J. David Dantzler, Jr.

Georgia Bar No. 205125

david.dantzler@troutmansanders.com

Thomas B. Bosch

Georgia Bar No. 068740

tom.bosch@troutmansanders.com

Natalie D. Sacha

Georgia Bar No. 558276

natalie.sacha@troutmansanders.com

TROUTMAN SANDERS LLP

5200 Bank of America Plaza

600 Peachtree Street, N.E.

Atlanta, GA 30308-2216

(404) 885-3000 (phone)

(404) 885-3900 (fax)

Attorneys for S. Gregory Hays, Receiver

Local Rule 7.1D Certificate of Compliance

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

/s/ J. David Dantzler, Jr.

J. David Dantzler, Jr.

Georgia Bar No. 205125

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S MOTION FOR APPROVAL OF SUPPLEMENTAL PLAN FOR ADMINISTRATION OF RECEIVER ESTATE AND DISTRIBUTION OF PROCEEDS** was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record.

This 15th day of June, 2012.

/s/ J. David Dantzler, Jr. _____

J. David Dantzler, Jr.

Georgia Bar No. 205125