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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>ART INTELLECT, INC., a Utah corporation, d/b/a MASON HILL and VIRTUAL MG, PATRICK MERRILL BRODY, LAURA A. ROSER, and GREGORY D. WOOD,</p> <p style="text-align: right;">Defendants.</p>	<p>RECEIVER’S MOTION AND MEMORANDUM IN SUPPORT TO CLOSE RECEIVERSHIP CASE, INCLUDING MOTION TO APPROVE INVESTOR DISTRIBUTION AND APPLICATION FOR FEES</p> <p>2:11-cv-00357 TC</p> <p>Judge Tena Campbell</p>
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The Receiver in the above-entitled matter, R. Wayne Klein (the “Receiver”), by and through counsel, moves this Court to authorize payment of a partial distribution to certain victims of the Art Intellect fraud, approve the payment of expenses and partial fees earned by the Receiver and his counsel, and terminate the Receivership. The Receiver respectfully requests that the Court enter the proposed order attached hereto as Exhibit A. This Motion is supported by the Memorandum in Support contained herein.

MEMORANDUM IN SUPPORT

I. Background

On April 18, 2011, the Court froze the assets of Art Intellect, Inc. and appointed Wayne Klein as Receiver for Art Intellect, Mason Hill, and the assets of Patrick Brody and Laura Roser.¹ The Receiver took control of the business of Art Intellect, closed its offices and bank accounts, and liquidated the Receivership's interest in several properties held in the name of Art Intellect and Roser.

Since that time, the Receiver has made diligent effort to recover assets belonging to the Receivership Estate and has managed assets in the estate. As described below, he has recently reached a settlement with the last remaining fraudulent transfer claim he believes should be asserted on behalf of the estate.

The SEC's enforcement case has also been concluded. On March 6, 2013, the Court issued an opinion finding that Roser and Brody engaged in fraud in violation of the federal securities laws and entered judgment against Roser and Brody.² Subsequently, Brody and Roser pleaded guilty to criminal charges.

The Receiver has now determined that it is unlikely that any more assets will be recovered for the Receivership Estate.³ All assets in the Receivership Estate have been reduced to cash. The Receiver knows of no good reason not to distribute the cash in the estate and to close the Receivership. This motion seeks the Court's permission to do so.

¹ Docket No. 5.

² Docket No. 279.

³ The Receiver believes there are other claims that he could assert, but he does not believe those claims would be cost effective to pursue.

II. Prior Status Reports

The Receiver has filed seven status reports with the Court covering the following time periods. Copies of these reports are and have been available on the Receivership website:

- Initial Status Report for period from April 18, 2011 to June 30, 2011;⁴
- Second Status Report for the period ending September 30, 2011;⁵
- Special Interim Status Report dated November 15, 2011;⁶
- Third Status Report for the period ending December 31, 2011;⁷
- Fourth Status Report for the period ending March 31, 2012;⁸
- Fifth Status Report for the period ending June 30, 2012;⁹
- Sixth Status Report for the period ending December 31, 2012.¹⁰

III. Developments Subsequent to the Most Recent Status Report

Notable developments in the Receivership matter since the date of the last status report include:

- May 20, 2013: The Court approved a settlement between the Receiver and Laura Roser by which Roser delivered to the Receiver title to her home, to vehicles, and to furnishings in the home. Although the home was encumbered by two mortgages and had no equity, the Receiver believed that control over the home would facilitate his efforts to seek a recovery from Chase Bank.

⁴ Docket No. 90, filed July 28, 2011.

⁵ Docket No. 129, filed October 6, 2011.

⁶ Docket No. 141, filed November 15, 2011.

⁷ Docket No. 168, filed January 23, 2012.

⁸ Docket No. 194, filed April 12, 2012.

⁹ Docket No. 248, filed August 21, 2012.

¹⁰ Docket No. 272, filed January 7, 2013. This report covered six months from July 1, 2012 to December 31, 2012.

- June 22, 2013: The Receiver held an auction at the Roser home at which two vehicles, artwork, and furniture were sold. Net proceeds from the auction were \$15,763.50.
- December 6, 2013: The Court approved a settlement agreement between the Receiver and Chase Bank.¹¹ Pursuant to the settlement, the Receiver has delivered to Chase Bank title to the Roser home and Chase has paid \$65,000.00 to the Receivership Estate.
- Receivership tax returns have been filed for 2011 and 2012. No taxes were due, but expenses were incurred for the tax preparation and tax filing fees.¹²

IV. Financial Report

Since creation of the Receivership, the Receiver has recovered \$228,354.48.¹³ The following table shows the sources of funds recovered for the Receivership Estate, the expenditures, and the current balance of the Receivership bank account:

SOURCES OF FUNDS	
Bank Accounts, Petty Cash	39,895.61
Sales of Assets	49,156.20
Sales of Real Estate, Rents	8,302.45
Settlement Agreements	131,000.00
Interest Earned	0.22
Total	228,354.48
EXPENDITURES	
Property Insurance, Repairs	13,356.45
Bank Fees	118.20
Taxes, Tax Preparation	4,866.20
Expenses of Asset Sales, Investigations	526.00
Maintenance of Roser Home	1,507.97
Professional Fees (Receiver & Counsel)	90,000.00
Total	110,374.82
Net	117,979.66

¹¹ Docket No. 301.

¹² Tax returns will need to be prepared for 2013 and 2014. Expenses relating to the preparation of these returns will be borne by the Receiver.

¹³ As of December 10, 2013.

V. Proposed Distribution

The Receiver seeks permission to distribute \$46,803.77 of Receivership funds to 37 victims of Art Intellect/Mason Hill. These victims sent money to Mason Hill, generally as reservation fees to obtain properties, but did not receive any properties. The distribution being proposed by the Receiver will result in these investors receiving amounts equal to 5% of their investment losses. A list of these investors and the amounts they will receive if the proposed distribution is approved is attached as Exhibit B.

More than 110 investors who sent money to Mason Hill were defrauded and lost money. Because the amount of money in the Receivership Estate is so limited, the costs of creating a claims process would eat up the funds available to make distributions. Therefore, the Receiver is recommending that the amount being set aside for distributions be allocated directly to a more limited group made up of investors who did not receive any properties.

If a claims process had been implemented, the Receiver would have solicited and evaluated claim forms from all these victims, along with claims expected to be submitted by vendors, contractors, former employees, utility companies, taxing authorities, business partners, and others. At the end of such a claims process, it is likely the SEC would have recommended a distribution plan through which funds available for distribution would be dedicated to investor victims, instead of vendor claims or satisfaction of operating debts. In urging that funds be targeted to investors, the SEC would be expected to recommend applying the “rising tide” distribution methodology.

Courts have held that the rising tide approach is equitable and the fairest approach. Earlier this year, the Southern District of California approved the use of the rising tide approach,

with an opinion that provided a detailed analysis of the merits of this approach. In *U.S. Commodity Futures Trading Commission v. Wilson*, 2013 WL 3776902 (S.D. CA, July 17, 2013), the court concluded that “consideration of prior withdrawals as a full or partial satisfaction results in a fair method for a majority of the defrauded customers.” *Id.* at * 5. The court reached this conclusion despite the fact that “twenty eight customers will not receive any distributions from the estate because of their previous withdrawals.” *Id.*¹⁴

Under a rising tide distribution plan, limited funds are distributed to those who have received little or no return on their investments. The distribution plan proposed by the Receiver herein achieves that objective—but without the delay and expense of conducting a claims process. This result is possible because the Receiver previously has identified the investor victims and identified those who did not receive properties or a return of their investments. This information was gathered from the records of Mason Hill and the reliability of that information has been verified in communications with investors and reconstruction of banking records of Mason Hill—without the need to conduct a formal claims process.

This recommendation does not mean that these 37 investors are the only victims of the fraud. Other investors, who did receive properties, still suffered significant losses because they received properties that were uninhabitable or were in poor condition, had rent guarantees that were not honored, had defects in the home that were not repaired as promised, and, in some cases, paid reservation fees without receiving properties corresponding to all of the reservation

¹⁴ Numerous receivership cases have also applied the “rising tide” approach: *SEC v. Huber*, 702 F.3d 903, 905 (7th Cir. 2012); *CFTC v. Lake Shore Asset Management, Ltd.*, NO. 07C3598, 2010 WL 960362, at *7-10 (N.D. Ill. Mar. 15, 2010); *CFTC v. Equity Financial Group, LLC*, No. Civ. 04-1512, 2005 WL 2143975, at *24-25 (D. NJ Sept. 2, 2005); *CFTC v. Hoffberg*, NO. 93C3106, 1993 WL 441984, at *2-3 (N.D. Ill. Oct. 28, 1993).

fees paid. However, an attempt to allocate compensation among all these losses would result in the small amount available for distribution being inadequate to allow any recovery.

The intended recipients of the proposed distribution plan collectively lost \$936,075.36. The proposed distribution payment of \$46,803.77 will give each of these victims compensation equal to 5% of their losses. This will result in all investors receiving a minimum 5% recovery through delivery of real estate by Mason Hill, payments from Mason Hill, or cash distributions from the Receivership Estate. The Receiver believes this proposed distribution is the best use of the limited funds available for distribution.

VI. Fee Application

The Receiver and his counsel filed an initial fee application on August 16, 2011, seeking payment of fees and expenses for work performed between April 18, 2011 and June 30, 2011.¹⁵ Those fees and expenses totaled \$106,556.43. Two partial fee awards, in the combined amount of \$90,000.00, were approved by the Court in orders dated December 15, 2011¹⁶ and February 3, 2012.¹⁷ No fee applications have been filed for work performed since July 1, 2011.

Between July 1, 2011 and October 31, 2013, the Receiver and his staff have performed 702.5 hours of work valued at \$94,942.50 and have incurred expenses totaling \$305.29, for a total of \$95,247.79.¹⁸ An additional \$20,802.42 of work performed by the Receiver before July

¹⁵ Docket No. 104.

¹⁶ Docket No. 159.

¹⁷ Docket No. 171.

¹⁸ This is as of September 30, 2013. Of the total hours, 89.9 hours were not billed. These hours were not billed because the time was spent performing administrative tasks or the Receiver believed it was appropriate not to bill the time to the Receivership Estate. At regular billing rates, this time would have been billed at \$9,754.50.

1, 2011, which was the subject of the initial fee application, has not yet been paid.¹⁹ This makes a total of \$116,050.21 in fees and expenses of the Receiver that are unpaid for this 28-month period.²⁰

Since inception of the Receivership, the Receiver's counsel (Clyde Snow) has performed 220.3 hours of work valued at \$48,439.00 and incurred expenses of \$1,181.37, for a total of \$49,620.37. Clyde Snow was paid \$19,511.43 from the initial fee award, leaving \$30,108.94 currently due to Clyde Snow in fees and expenses.²¹ The combined fees and expenses due to the Receiver and Clyde Snow is \$146,159.15.

After paying distributions of \$46,803.77 to investors, the Receivership Estate will have \$71,175.89 in remaining funds. The Receiver and Clyde Snow have agreed to take substantial additional discounts from the fees earned by them in order that a distribution to investors can be made. The Receiver requests that the Court enter an order allowing the funds remaining in the Receivership bank account to be distributed for payment of fees and expenses as follows:

- Clyde Snow & Sessions: \$21,000.00 in fees and expenses (representing a 30% discount).
- Wayne Klein: \$50,175.89 in fees and expenses (representing a 57% discount).

The Receiver has provided an advance copy of this fee application to the SEC. The SEC has informed the Receiver that the SEC has no objection to this application for fees and expenses. A summary of the fees and expenses is attached as Exhibit C. Invoices containing

¹⁹ The initial fee application requested payment of \$91,290.99 in expenses and fees of the Receiver. Of the \$90,000.00 authorized by the Court, \$70,488.57 was paid to the Receiver, leaving \$20,802.42 still owed the Receiver from the first fee application.

²⁰ Additional time has been spent by the Receiver and his counsel since October 31, 2013, including time spent preparing this motion, which will not be billed.

²¹ Clyde Snow's invoices reflect a discount of \$5,249.00 in work which was performed, but which is not being billed to the Receivership Estate.

detailed descriptions of the time worked and services provided by the Receiver and his counsel are attached as Exhibits D and E.

VII. Termination of the Receivership

The settlement with Chase Bank represents the last recovery expected by the Receiver. Accordingly, the Receivership Estate can be closed. The Receiver asks the Court to enter the attached proposed order that provides the following regarding closure of the Receivership Estate:

1. Any interested party that wishes to take custody and control of the documents currently in the possession of the Receiver, and who demonstrates a legitimate interest in the documents and an intent to protect confidential information contained in those documents, has 30 days after the entry of this Order to make arrangements with the Receiver, at its own expense, to take control of the documents. If no party makes a claim to the documents within 30 days of the entry of this Order, the Receiver is authorized to dispose of the documents;

2. After distribution of funds to Art Intellect investors, as requested in this Motion, the Receiver shall be discharged and the Receivership Estate shall be closed;

3. The Receiver and his agents, acting within the scope of such agency (“Retained Personnel”), are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith gross negligence, or in reckless disregard of their duties.

4. The stay of litigation previously entered by this Court (Docket # 5) shall remain in place to prevent further post-discharge expenses by the Receiver after entry of this Order.

5. This Court shall retain jurisdiction over any action filed against the Receiver, his staff and/or Retained Professionals based upon acts or omissions committed in their representative capacities. The Court shall also retain jurisdiction over this matter for future determination of the disposition of any future funds marshaled by the Receiver and any other matters in the above-captioned case.

6. The Receiver is allowed to take those ordinary actions that he deems advisable, in his discretion, in closing this matter, including filing final tax returns for the Receivership Entities, destroying records of the Receivership and Receivership Entities consistent with this Order, and closing bank accounts of the Receivership Estate.

VIII. Notice To Investors

Copies of this motion and report are being sent to all of the investors in Art Intellect via email or U.S. mail to allow them an opportunity to file any objections to the actions being proposed by the Receiver. The motion will also be posted on the website of the Receivership. The Receiver recommends that the Court wait until 30 days after the date of this motion before acting on this motion. If no objections are filed, the Receiver requests that the Court enter the attached proposed order. If there are objections, the Court can determine a mechanism for addressing the objections.

IX. Conclusion

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as Exhibit A, approving the partial distribution to investors,

approving the partial fee award to the Receiver and Clyde Snow, and terminating the Receivership Estate.

DATED this 16th day of December, 2013.

CLYDE SNOW & SESSIONS

/s/ Jennifer A. James

Jennifer A. James

Attorneys for Court-Appointed

Receiver R. Wayne Klein

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above was served via email on this 16th day of December, 2013 on the following:

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Copies of this motion were also sent via electronic mail to all persons identified on the attached list of investors in Art Intellect. Investors without email addresses were mailed copies of this motion.

/s/Jennifer A. James

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