

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:18-cv-61991-BB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

1 GLOBAL CAPITAL LLC, and
CARL RUDERMAN,

Defendants, and

1 WEST CAPITAL LLC,
BRIGHT SMILE FINANCING, LLC,
BRR BLOCK INC.,
DIGI SOUTH LLC,
GANADOR ENTERPRISES, LLC,
MEDIA PAY LLC
PAY NOW DIRECT LLC, and
RUDERMAN FAMILY TRUST,

Relief Defendants.

**RECEIVER'S MOTION FOR APPROVAL
OF SETTLEMENT AGREEMENT WITH BANK OF AMERICA, N.A.**

Jon A. Sale, not individually, but solely in his capacity as the Court-appointed receiver (the "Receiver") for Bright Smile Financing, LLC ("Bright Smile"); BRR Block Inc. ("BRR Block"); Digi South LLC ("Digi South"); Ganador Enterprises, LLC ("Ganador"); Media Pay LLC ("Media Pay"); Pay Now Direct LLC ("Pay Now"); the Ruderman Family Trust; and the Bright Smile Trust (the "Receivership Entities"), respectfully submits this Motion for Approval of Settlement Agreement with Bank of America, N.A. (the "Motion").

INTRODUCTION

On August 23, 2019, the Receiver filed a Complaint to Avoid and Recover Fraudulent Transfers against Bank of America, N.A. (“Defendant”), alleging four causes of action. That case is styled *Jon Sale, Receiver v. Bank of America, N.A.*, Case No. 19-cv-23559-RNS (the “Lawsuit”). In the Lawsuit, the Receiver alleges, based upon the bank records of the Receivership Entities and records produced in discovery, that Defendant received a total of approximately \$343,584.79 in fraudulent transfers from one or more Receivership Entities.

To avoid the expense and risk of litigating claims, the Receiver and Defendant have agreed to resolve the Lawsuit pursuant to the terms of a proposed settlement agreement (the "Settlement Agreement"), attached as **Exhibit A**. Pursuant to the Settlement Agreement, Defendant shall pay the Receiver \$189,000.00, which is a 55% recovery of the alleged fraudulent transfers.¹ The Receiver’s authority to both file and settle the Lawsuit is derived from the Receivership Order, entered by the Court in this action, Case No. 18-cv-61991 (the "SEC Action"). [D.E. 12, ¶6].

THE RECEIVERSHIP ORDER

On August 23, 2018, the Court entered an order appointing Mr. Sale as the Receiver. [D.E. 12]. The Receivership Order provides, among other things, that the assets and property of the Receivership Entities, whatsoever and wherever located, are to be placed in the Receiver’s control [*Id.* at ¶ 1] and the Receiver has sole title to the assets and property, including but not limited to all books, papers, codes, records, data, bank accounts, savings accounts, securities, supplies, equipment, and other real property [*Id.* at ¶¶ 1, 17].

¹ The Lawsuit was handled by the Receiver’s contingency counsel (“Special Counsel”). Special Counsel is entitled to 30% of the settlement amount, or \$56,700, pursuant to the retainer agreement approved by the Court on August 21, 2019. [D.E. 228]. As such, \$132,300.00 of the settlement amount is for the benefit of the Receivership Estate.

The Receivership Order also gives the Receiver power to “[d]efend, compromise or settle legal actions, including the instant proceeding in which these Relief Defendants or the Receiver are a party, commenced either prior to or subsequent to this Order.” [*Id.* at ¶ 6].

Finally, the Receivership Order further provides:

In the event the Receiver discovers that investor funds received by these Relief Defendants have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds and, if the Receiver deems it advisable, extending this receivership over any person or entity holding such investor funds[.]

[*Id.* at ¶ 24].

THE TRANSFERS

The Receiver contends that from May 20, 2015 through August 3, 2018, Pay Now Direct LLC, a Receivership Entity, transferred \$343,584.79 to Defendant (the "Transfers"). The Receiver contends that the records of the Receivership Entities demonstrate that these were fraudulent transfers and the funds rightfully belong to the Receivership Estate.

THE PROPOSED SETTLEMENT AGREEMENT

The proposed Settlement Agreement provides in pertinent part:

- Defendant will pay \$189,000.00 (the "Settlement Amount") to the Receiver within 30 days of the later of: (i) Defendant’s receipt of a properly-completed 2019 W-9 form from Plaintiff; (ii) Defendant’s receipt of a fully-executed Agreement; and (iii) the issuance of an Order approving the Agreement by the Court.
- The Receiver and Defendant agree to mutual general releases upon the Court's approval of the Settlement Agreement and the Receiver's receipt of the full Settlement Amount due under the terms of the Settlement Agreement.

See Ex. A.

JURISDICTION

The Receiver and Defendant request that the United States District Court for the Southern District of Florida retain jurisdiction to enforce the terms of the Settlement Agreement and decide any other issues arising from the Settlement Agreement. Defendant exclusively submits to the jurisdiction of this Court for such purposes and waives any right to challenge this Court's jurisdiction. The Receiver and Defendant agree that in the event an enforcement action or any other litigation arises from the Settlement Agreement, Defendant submits to the jurisdiction of this Court exclusively for such purposes and waives any right to challenge this Court's jurisdiction.

BEST INTERESTS OF THE RECEIVERSHIP ESTATE

The Receiver respectfully submits that the Court should approve the proposed Settlement Agreement because it is in the best interest of the Receivership Estate. The process of reaching the proposed settlement was fair, well-informed, and well-advised by the Receiver's retained professionals.

The ultimate inquiry in assessing a proposed receivership settlement is whether "the proposed settlement is fair." *Sterling v. Stewart*, 158 F. 3d 1199, 1203 (11th Cir. 1998); *see In re Consol. Pinnacle West Sec. Litig./Resolution Trust Corp.-Merabank Litig.*, 51 F. 3d 194, 196-97 (9th Cir. 1995) ("We see no reason to upset the court's conclusion that the settlement process and result were fair."). Determining the fairness of [a] settlement is left to the sound discretion of the trial court." *Sterling*, 158 F. 3d at 1202 (11th Cir. 1998). In determining fairness, the Court should examine the following broad array of factors: (1) the likelihood of success on the merits; (2) the range of possible discovery; (3) the point on or below the range of discovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which

the settlement was achieved. *Sterling*, 158 F. 3d at 1204. *See also SEC v. Princeton Economic Int'l*, 2002 WL 206990, *2 (S.D.N.Y. 2002) (receivership court should consider “various factors including, inter alia: (1) the probable validity of the claim; (2) the apparent difficulties attending its enforcement through the courts; (3) the collectability of the judgment thereafter; (4) the delay and expenses of the litigation to be incurred; and (5) the amount involved in the compromise”).

For example, the District Court in *Gordon v. Dadante* “analyze[d] the settlement as a whole, under the totality of the circumstances.” 2008 U.S. Dist. LEXIS 32281, *39, 48 (N.D. Ohio April 18, 2008). The Sixth Circuit affirmed, finding that the district court had fulfilled its responsibilities by engaging in an “independent analysis of the settlement,” as “the district court had extensive knowledge of the claims involved in the case, the valuation of those claims, and the nature of the settlement,” and thus “had more than sufficient information to assess the fairness of the settlement proposed.” 2009 U.S. App. LEXIS 15517 at **16, 23. As the district court noted in a later approval proceeding, “the courts must recognize that plans relating to settlement of a receivership are inherently imperfect, “because no proposal can be [perfect],” and the “task at hand, however, is to do justice to the extent possible.” *Gordon v. Dadante*, 2010 U.S. Dist. LEXIS 1979, *13-14 (N.D. Ohio Jan. 11, 2010).

Here, the Receiver respectfully submits that the Settlement Agreement is a fair, adequate, and reasonable resolution of the Receiver's causes of action against Defendant. The Settlement Agreements provides for a 55% recovery of funds transferred to Defendant. The Receiver believes that the outcome for the Receivership Entities will be better under the Settlement Agreement than it would be if the Receiver was forced to expend attorneys’ fees and costs proceeding with litigation.

Based on the Receiver's due diligence, the terms of the proposed Settlement Agreement are

fair and reasonable, representing a sensible means of assuring a beneficial outcome for the investors.

OBJECTION PROCEDURE

As noted above, the determination of the fairness of a settlement is left to the sound discretion of the trial court. *See Sterling*, 158 F. 3d at 1202. Because "the substance and amount of opposition to the settlement" is a factor for the Court's consideration pursuant to the *Sterling* test, the Receiver respectfully requests that the Court, in exercising its broad discretion, approve the Settlement Agreement with a limited objection procedure. The Receiver proposes posting this Motion and the Settlement Agreement on both the Receiver's website and 1 Global's website and allowing fourteen (14) days for any potential objections to be filed with the Court.

It is the Receiver's position that given the amount at stake in the Lawsuit, an expensive, elongated objection procedure would render the benefits of the settlement worthless to the Receivership Estate, and thus this limited objection procedure should be permitted.

CONCLUSION

For the foregoing reasons, Jon A. Sale, as Receiver, respectfully requests that this Court enter an Order approving the Settlement Agreement, subject to the limited objection procedure described above, and granting any further relief it deems just and proper.

Dated: March 6, 2020.

NELSON MULLINS BROAD AND CASSEL
Attorneys for Receiver
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400
Facsimile: 305.995.6449

By: s/Daniel S. Newman
Daniel S. Newman
Florida Bar No. 0962767
Gary Freedman
Florida Bar No. 727260
Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

s/Daniel S. Newman
Daniel Newman

SERVICE LIST

<p>SECURITIES AND EXCHANGE COMMISSION Miami Regional Office 801 Brickell Avenue, Suite 1800 Miami, Florida 33131 Robert K. Levenson Chris Martin Senior Trial Counsel levensonr@sec.gov martinc@sec.gov Telephone: 305.982.6300 Facsimile: 305.536.4154</p>	<p>MARCUS NEIMAN & RASHBAUM LLP 2 South Biscayne Boulevard Suite 1750 Miami, Florida 33131 Jeff Marcus jmarcus@mnrlawfirm.com Telephone: 305.400.4262 <i>Attorneys for Defendant Carl Ruderman</i></p>
<p>GREENBERG TRAUIG, LLP 333 S.E. 2nd Ave., Suite 4400 Miami, FL 33131 Paul J. Keenan Jr. keenanp@gtlaw.com Telephone: 305.579.0500 <i>Attorneys for Defendant 1 Global Capital, LLC and Relief Defendant 1 West Capital, LLC</i></p>	

SETTLEMENT AGREEMENT AND RELEASE

I. PARTIES

This Settlement Agreement and Release (“Agreement”) is entered into by and between Jon Sale, as Receiver for Pay Now Direct LLC, Bright Smile Financing, LLC, BRR Block, Inc., Digi South LLC, Ganador Enterprises, LLC, and Media Pay LLC (“Plaintiff”) and Bank of America, N.A. (“BANA”). Plaintiff and BANA may be referred to individually in this Agreement as the “Party” or collectively as “Parties.”

II. RECITALS

- A. Plaintiff is the Receiver for Pay Now Direct, LLC, *et al* by virtue of an Order dated August 23, 2018, in the United States District Court, Southern District of Florida, under Case No. 0:18-cv-61991 (the case herein referred to as the “Receivership Court” and the Order herein referred to as the “Receivership Order”).
- B. On August 23, 2019, Plaintiff filed a Complaint (the “Complaint”), entitled *Jon Sale, as Receiver for Pay Now Direct LLC v. Bank of America, N.A.* in the United States District Court Southern District of Florida (“Receivership Court”), Case No. 1:19-cv-23559-RNS
- C. The Complaint seeks to recover alleged fraudulent transfers to BANA (“Allegations”) in connection with BANA credit card account numbers ending in 7851 (previously ending in 7916, 3198, and 1457), 5879 (previously ending in 5431 and 4766), and 8410 (the “Accounts”).
- D. The Parties hereto wish to resolve all the disputes between them, asserted or unasserted, related to the Complaint, the Allegations, and the Accounts without any admission of any liability.

III. AGREEMENT

NOW, THEREFORE, in consideration of these promises and the mutual covenants set forth herein and for valuable and mutual consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows in order to avoid the costs and uncertainties of litigation:

- 1. Recitals. The foregoing recitals are confirmed as true and correct and are incorporated herein by reference. The recitals are a substantive and contractual part of this Agreement.

Jon Sale, as Receiver for Pay Now Direct LLC v. Bank of America, N.A.
United States District Court Southern District of Florida
Case No. 0:19-ca-23559-RNS

2. Settlement Procedures.

(a) Approval of Agreement By Receivership Court. The Parties agree that within ten (10) days of the fully-executed Agreement signed by all Parties, the Receiver will file a Motion to Approve the Agreement in the Receivership Court.

(b) Payment. BANA agrees to pay to Plaintiff in one lump sum the full amount of One Hundred and Eighty-Nine Thousand Dollars and Zero Cents (\$189,000.00) (the "Settlement Funds"). The Settlement Funds shall be provided in the form of a check made payable to Jon Sale, Receiver for Pay Now Direct, LLC, *et al*, to be delivered to Melissa Damian Visconti, Esq., Damian & Valori, LLP, 1000 Brickell Avenue, Suite 1020, Miami, FL, 33131 within thirty (30) days of the later of the following events: (i) BANA's receipt of a properly-completed 2019 W-9 form from Plaintiff; (ii) BANA's receipt of a fully-executed Agreement; and (iii) the issuance of an Order approving the Agreement by the Receivership Court.

(c) Dismissal of Complaint with Prejudice. In consideration for BANA's promises and covenants contained herein, within three (3) business days of receipt of an executed Agreement from BANA, the issuance of an Order approving this Agreement by the Receivership Court, as well as the payment identified in Section 2(b), Plaintiff shall provide counsel for BANA an executed dismissal with prejudice together with any other documents required to dismiss the Complaint with prejudice for BANA's approval, and Plaintiff's subsequent filing with the court if approved. From and after execution of this Agreement, Plaintiff agrees to take no further action to prosecute the Complaint against BANA.

3. Release by Plaintiff. Upon the issuance of an Order approving this Agreement by the Receivership Court, Plaintiff hereby releases and forever discharges, on Plaintiff's behalf and on behalf of Plaintiff's heirs, agents, and legal representatives, BANA and each of its respective current and former legal representatives, officers, attorneys, insurers, employees, agents, subsidiaries, parents, and related entities ("Released Parties") from any and all known or unknown claims, demands, and causes of action of any sort and all damages, in equity or contract, which Plaintiff now has or may have as of the Effective Date relating to or assertable in connection with the Complaint, the Allegations, and/or the Accounts ("Released Matters").

4. Release by BANA. Upon the issuance of an Order approving this Agreement by the Receivership Court, BANA hereby releases and forever discharges, on BANA's behalf and on behalf of BANA's heirs, agents, and legal representatives, Plaintiff and each of his respective current and former legal representatives, officers, attorneys, insurers, employees, agents, subsidiaries, parents, and related entities ("Released Parties") from any and all known or unknown claims, demands, and causes of action of any sort and all damages, in equity or contract, which BANA now or hereafter can, shall or may have relating to the Released Matters.

5. Settlement Not an Admission. This Agreement, and any negotiations or proceedings connected with it, shall not in any event constitute or be construed as, or be deemed to be evidence of, an admission of or concession of any wrongdoing by BANA.

6. Representations. Plaintiff represents and warrants that Plaintiff has not sold, transferred, conveyed, assigned, or otherwise disposed of any right, title, or interest in any of the matters released herein to any person or entity, and that Plaintiff is not aware of any other person or entity who may have or who has asserted or can assert a right, title, or interest in any of the matters released in this Agreement. Plaintiff further affirms that Plaintiff is fully capable of executing this Agreement and understands its contents and further, that Plaintiff has legal counsel of Plaintiff's own choice or had an opportunity to obtain such legal counsel to explain the legal effect of signing this Agreement.

7. Entire Agreement. This Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter hereof and may not be modified or amended except in a writing signed by the Parties.

8. Confidentiality. Subject to the exceptions set forth in Paragraph 10 of this Agreement, the terms of this Agreement and any and all facts related to the Released Matters, and the negotiations leading hereto (collectively the "Information") are to be kept strictly confidential by the Parties. The Parties agree not to publicize or disclose the Information, directly or indirectly, to any person or entity except as may be necessary for the preparation of financial statements or tax returns, as may be required by law, or by a valid order of a court with competent jurisdiction. If any party or person acting on behalf of the Parties hereto receives an inquiry about this Agreement, such party will respond only that "the matter has been resolved." Furthermore, the Parties and their counsel shall not post or otherwise disclose or reveal to any person or entity any Information on the Internet or any other media outlet, including but not limited to websites or newspapers, email, Facebook, MySpace, and Twitter. Nothing in this Agreement shall, however, be deemed to interfere with Plaintiff's obligation to provide the Agreement and/or the details thereof to the Receivership Court for approval nor with each Party's obligation to report transactions with appropriate governmental, taxing and/or registering agencies or Court Order. Confidentiality is a material provision of this Agreement and the matters to be held confidential hereunder are to be held strictly confidential by the Parties subject to the terms and limitations of this Agreement. This paragraph constitutes a material provision of this Agreement.

9. Non-Disparagement. Plaintiff and Plaintiff's attorneys will not, directly or indirectly, make any negative or disparaging statements against BANA maligning, ridiculing, defaming, or otherwise speaking ill of BANA, and its business affairs, practices or policies, standards, or reputation (including but not limited to statements or postings harmful to BANA's business interests, reputation or good will) in any form (including but not limited to orally, in writing, on any social media, blogs, Internet, to the media, persons and entities engaged in radio, television or Internet broadcasting, or to

persons and entities that gather or report information on trade and business practices or reliability) that relate to this Agreement, the Complaint and the allegations regarding the Account and Released Matters. Nothing in the Agreement shall, however, be deemed to interfere with each Party's obligation to report transactions with appropriate governmental, taxing, or registering agencies.

10. Exceptions. Plaintiff understands and acknowledges that nothing in this Agreement prohibits or limits Plaintiff or Plaintiff's counsel from initiating communications directly with, responding to any inquiry from, volunteering information to, or providing testimony before, the Securities and Exchange Commission, the Department of Justice, FINRA, any other self-regulatory organization or any other governmental, law enforcement, or regulatory authority), regarding this settlement and its underlying facts and circumstances, or any reporting of, investigation into, or proceeding regarding suspected violations of law, and that Plaintiff is not required to advise or seek permission from BANA before engaging in any such activity. Further, it is expressly understood and agreed that Plaintiff shall file a copy of this Agreement with the Receivership Court and shall be authorized to take any other actions that in the Receiver's sole discretion are necessary to fulfill his obligations and duties regardless of whether they may call for disclosure or discussion of the terms of this Agreement or facts related to the Related Matters. Plaintiff recognizes that, in connection with any such activity, Plaintiff must inform such authority that the information being provided is otherwise confidential.

11. Validity of Agreement. Should any clause, sentence, paragraph, or other part of this Agreement be finally adjudged by any court of competent jurisdiction to be unconstitutional, invalid or in any way unenforceable, such adjudication shall not affect, impair, invalidate, or nullify the remainder of the Agreement, but shall affect only the clause, sentence, paragraph, or other parts so adjudged.

12. Signing in Counterparts. This Agreement may be signed in Counterparts, each of which shall be deemed an original, but all of which together constitute one and the same Agreement.

13. Agreement Pertains Only to the Released Matters. This Agreement pertains only to the matters released herein and nothing in this Agreement shall be deemed or construed as a modification of or a release of or from any other accounts, agreements, debts, loans, promissory notes, mortgages, security agreements, contracts, liabilities, or obligations the Parties now have or may have in the future (or any one of them, or any combination of them) that are not specifically and expressly described in detail in this Agreement.

14. Costs and Fees. Each Party agrees to bear the expense of its own costs and attorney's fees in connection with the Complaint.

15. Release of Unknown Claims. Plaintiff and BANA hereby acknowledge that the parties may hereafter discover facts different from, or in addition to, those which the Parties now claim or believe to be true with respect to the claims released herein, and agree that this Agreement shall be and remain effective in all respects notwithstanding the discovery of such different or additional facts with respect to the claims released herein. The Parties acknowledge that this release is intended to include in its scope all claims by and against the Released Parties arising from the present dispute which the parties do not know or suspect to exist in the Parties' favor at the time of execution of this Agreement, and that this release contemplates the extinguishment of any such claim or claims. The Parties expressly waive any right to assert hereafter any claims which were excluded from this Agreement through ignorance, oversight, error or otherwise.

16. Tax Consequences. Plaintiff acknowledges that Plaintiff has not sought, received, or relied on BANA, BANA's counsel or any agent of BANA for any tax advice of any kind with respect to the effects of this Agreement, the Release, or the delivery of any consideration identified herein and BANA may be required to file certain 1099 or other information reports with the United States Internal Revenue Service or other government agencies as required indicating payment to Plaintiff as set forth in this Agreement. Plaintiff has been advised to consult with tax counsel of Plaintiff's choice to seek legal and tax advice regarding the taxability or non-taxability of consideration provided herein.

17. Construction. In construing this Agreement, none of the Parties hereto shall have any term or provision, or any uncertainty or ambiguity as to any term or provision herein, construed against such Party solely by reason of such Party having drafted the same, as a result of the manner of the preparation of the Agreement, or otherwise.

18. Successors and Assigns. The Parties agree that the terms of this Agreement shall be binding on each of their respective heirs, successors, and assigns.

19. Choice of Law. This Agreement shall be deemed to be made under and shall be interpreted in accordance with the laws of the State of Florida. Further, should any dispute arise out of the Agreement, the parties agree that the exclusive jurisdiction for any such dispute shall be in the United States District Court for the Southern District of Florida.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Parties hereto evidence their agreement and have executed this Agreement as of the day and year first below written.

Date Executed: 2/25/20

Jon a. Sale, Receiver
Jon Sale, as Receiver for Pay Now Direct LLC, et al

State of (Florida)

County of (Miami-Dade)

On this, the 25th day of February, 2020, before me, personally appeared **Jon Sale**, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and that s/he executed the same for the purposes therein contained. In witness hereof, I hereunto set my hand and official seal.

CJD
Notary Public



CLAUDIA OROZCO DUNN
Commission # GG 233423
Expires June 28, 2022
Bonded Thru Budget Notary Services


My Commission Expires: _____

[Remainder of page intentionally left blank]

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Date Executed: 2/25/2020

Bank of America, N.A.

By: 
Printed Name: TOM R JORDAN
Title: AVP