

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 08-81565-CV-HURLEY/HOPKINS**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**CREATIVE CAPITAL CONSORTIUM,  
LLC, et al.,**

**Defendants.**

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**ORDER APPROVING RECEIVER’S UNOPPOSED MOTION FOR APPROVAL OF  
SETTLEMENT ARBITRATION MATTER AND APPROVAL  
OF CONTINGENCY FEE PAYMENT**

**THIS CAUSE** comes before the Court upon the Unopposed Motion for Approval of Settlement Arbitration Matter and Approval of Contingency Fee Payment [ECF No. 281], filed by Jonathan E. Perlman, Esq., the Court-appointed Receiver for the George Theodule Receivership Entities. Under his appointment, Receiver may “make . . . such agreements as may be reasonable, necessary, and advisable in discharging [his] duties.” Order Appointing Receiver, ¶ 8 [ECF No. 8]. Receiver is privy to a Court-approved Litigation Coordination Agreement (LCA). Under the LCA, Counsel for Receiver may seek 33.33% of any recovery “as a reasonable attorneys’ fee[.]” LCA, ¶ 6 [ECF No. 252-1].

In performance of his duties, Receiver filed a FINRA claim against TD Ameritrade, Inc. (the “TD Arbitration”). Receiver claimed negligence, breach of fiduciary duty, breach of contract, and avoidance under the Florida Uniform Fraudulent Transfer Act (FUFTA). *See*

Claimant's 2d Am. Statement of Claim, ¶ 80, *In re Perlman v. TD Ameritrade, Inc.*, FINRA Case No. 11-01693. To settle Receiver's claim, TD Ameritrade agreed to pay Receiver \$1,250,000 (the "Settlement"). Settlement, § 2.2. To aid settlement, Counsel for Receiver agreed to reduce their contingency fee to 28% of the Settlement amount. Accordingly, Receiver seeks the Court's approval of the Settlement and the reduced contingency fee.

### **DISCUSSION**

To approve the Settlement, the Court "must find that [it] is fair, adequate, and reasonable." *Sterling v. Stewart*, 158 F.3d 1199, 1203 (11th Cir. 1998) (evaluating a receiver's settlement). In making this finding, the Court should examine the following six-factors:

(1) the likelihood of success; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a 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.

*Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), *cited in Sterling*, 158 F.3d at 1203). The Court's finding of fairness is reviewed for an "abuse of discretion." *See Bennett*, 737 F.2d at 982.

In its FINRA claim, Receiver sought \$5,863,960.80 from TD Ameritrade. *See* Claimant's 2d Am. Statement of Claim, ¶ 80(a)–(b), *In re Perlman v. TD Ameritrade, Inc.*, FINRA Case No. 11-01693. Receiver has settled the TD Arbitration for \$1,250,000, or 21% of the amount it sought. Although Receiver's recovery has been substantially reduced, such a reduction is not *per se* unfair. *See Sterling*, 158 F.3d at 1204 n.7 (affirming the district court's finding that, if a receiver's settlement above 15% of the maximum recovery would be fair, then a settlement for approximately 25% of that amount would also be fair). In defending the

Settlement, Receiver asserts that the TD Arbitration had a limited likelihood of success. This is especially due to the uncertainty that would arise from prosecuting a FUFTA claim before an arbitration panel unfamiliar with Florida law. Furthermore, Receiver's dedication of resources to the TD Arbitration would have diverted his focus from another ongoing FINRA claim, as well as from two matters currently awaiting trial before this Court. Receiver admits it could not simultaneously have prosecuted all of these claims, for it would have lacked the funds necessary to pay reasonable attorney's fees or to retain experts for the TD Arbitration. Receiver calculated that the risk of an adverse judgment in the TD Arbitration, from which it would have little meaningful review, was simply too high to chance. Given TD Ameritrade's "vigorous[] contest[ation]" of Receiver's FINRA claim, Receiver believes its settlement to be fair, adequate, and reasonable. Upon review, the Court agrees.

The Court will also approve Receiver's reduced contingency fee agreement. Under the proposed reduction, Counsel for Receiver will receive 28% of \$1,250,000, or \$350,000. Although Counsel could have sought 33.33%, or \$416,625, they have instead agreed to provide the additional \$66,625 in proceeds to the Receivership estate. Receiver calculates that based on the 1,900 hours spent on the TD Arbitration, Counsel for Receiver will effectively recover no more than \$184 an hour. Upon review of the factors enumerated in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (cited in *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011)), the Court finds this arrangement reasonable.

### **CONCLUSION**

For the aforementioned reasons, it is hereby

**ORDERED** and **ADJUDGED** that:

1. The Receiver's Unopposed Motion for Approval of Settlement Arbitration Matter and Approval of Contingency Fee Payment [ECF No. 281] is **GRANTED**.

**DONE** and **SIGNED** in Chambers at West Palm Beach, Florida this 30th day of December, 2014.

A handwritten signature in black ink, reading "Daniel T. K. Hurley". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

Daniel T. K. Hurley  
United States District Judge

*Copies provided to counsel of record*