

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**KINETIC INVESTMENT GROUP, LLC and
MICHAEL SCOTT WILLIAMS,**

CASE NO.: 8:20-cv-394-MSS-SPF

Defendants, and

**KINETIC FUNDS I, LLC,
KCL SERVICES, LLC d/b/a LENDACY,
SCPIO, LLC, LF 42, LLC, EL MORRO
FINANCIAL GROUP, LLC, and KIH, INC.,
f/k/a KINETIC INTERNATIONAL, LLC,**

Relief Defendants.

**RECEIVER'S UNOPPOSED MOTION TO APPROVE
PRE-SUIT SETTLEMENT WITH TODD MERER**

Mark A. Kornfeld, Esq., through the undersigned counsel and solely in his capacity as the court-appointed Receiver (the "Receiver") for Defendant Kinetic Investment Group, LLC and Relief Defendants Kinetic Funds I, LLC, KCL Services, LLC d/b/a Lendacy, Scipio, LLC, LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the "Receivership Entities"), files this Unopposed Motion to Approve Pre-Suit Settlement With Todd Merer, pursuant to the Settlement Agreement attached hereto as **Exhibit A**. As discussed below, this settlement allows the Receiver to recover an additional \$15,000.00 for the benefit of the Receivership Estate while avoiding the uncertainty and cost associated with litigation.

I. RELEVANT BACKGROUND

1. On February 20, 2020, the Commission filed a complaint (the “Complaint”) (Doc. 1) in the United States District Court for the Middle District of Florida (the “Court”) against the Defendants Kinetic Investment Group and Williams and Relief Defendants, alleging that the Defendants violated the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 by making false or materially misleading representations to investors and that over \$6 million of investor funds was misappropriated to fund other business ventures and pay for other unauthorized expenses. Doc. 1 ¶¶ 4, 28-38. The Complaint alleged that the scheme involved securities offerings made on behalf of Kinetic Funds, a purported hedge fund with a sub-fund structure managed by Kinetic Investment Group and Williams. *Id.* ¶ 2.

2. On March 6, 2020, the Court entered the Order Appointing Receiver. Among other things, the Order Appointing Receiver directed the Receiver to “[t]o take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto” Doc. 34 at ¶ 7.B. The Order Appointing Receiver also authorized the Receiver to investigate, prosecute, and compromise any proceeding in his discretion which would be advisable to recover Receivership Property. *Id.* ¶ 36.

3. On February 10, 2021, the Receiver filed his Unopposed Motion to Approve Procedure to Pursue Potential Third-Party Claims (the “Third-Party Motion”) (Doc. 177). In that Motion, which the Court granted on February 24, 2021, the Receiver proposed sending a demand letter to any third-party who, in his discretion, may have received any impermissible or improper transfer of funds traceable to investor deposits. Doc. 181. Although the Third-Party Motion indicated that the Receiver would seek 90% of the identified transfer(s), the Receiver also reserved the right to evaluate claims of financial hardship upon provision of sufficient documentation. To the extent the Receiver reached a compromise or settlement with any such third-parties, the Receiver would then enter into a settlement agreement subject to for the Court’s approval.

4. As part of his investigation, the Receiver worked with his forensic accountants to identify any transfers from any of the Receivership Entities which may not have been in the ordinary course of business. During this investigation, the Receiver discovered that a bank account owned by Receivership Entity Kinetic Funds I, LLC (“Kinetic Funds”) made a transfer of \$75,000.00 on February 13, 2020, to Todd Merer (the “Transfer”). The Transfer, which came approximately one month before the Court’s entry of the Order Appointing Receiver, was traceable to investor funds.

5. Following the Court’s Order granting the Third-Party Motion, the Receiver’s counsel sent a demand letter to Mr. Merer seeking return of the transfer. The Receiver and Mr. Merer subsequently engaged in numerous discussions regarding the demand letter, and during those discussions Mr. Merer informed the Receiver that the funds represented payment to Mr. Merer for various legal and personal services that purportedly benefitted the

Receivership Entities. In his investigation, the Receiver did locate documents referencing that the purported purpose of the Transfer was for unspecified legal services. Mr. Merer also indicated that given his financial situation, he would not be able to repay the Transfer and requested that the Receiver consider his claims of financial hardship. The Receiver then requested that Mr. Merer provide documentation to support these claims, including a financial affidavit.

6. The information provided by Mr. Merer, including the financial affidavit, indicated that his only material assets were his residence and a retirement plan which was used to support him and his wife. Mr. Merer also indicated that he is retired and that he was scheduled to undergo several medical procedures as a result of his state of health.

II. THE PROPOSED SETTLEMENT

The Receiver and Mr. Merer have engaged in productive, transparent, and good-faith settlement discussions that have culminated in the mutually-agreeable settlement terms set forth in the attached Settlement Agreement. In sum, Mr. Merer has agreed to pay a total of \$15,000.00 within eighteen months from the date of the Court's Order granting this Motion. The settlement will be paid in a series of \$5,000.00 installments, which the Receiver understands Mr. Merer will fund by borrowing the necessary funds, and the Settlement Agreement provides for the entry of a judgment in the full amount of the Transfer in the event of default.¹ In agreeing to this compromise, the Receiver has exercised sound business judgment and has determined that a settlement is in the best interest of the Receivership

¹ The foregoing provisions of the Settlement Agreement are included here for summary purposes only and are not intended to constitute a full recitation of all of the terms.

Entities. The settlement avoids the inherent uncertainty, time and substantial anticipated expense of further litigation over these issues, which the Receiver notes could easily exceed the amount of the Transfer. The Settlement Agreement is subject to Court approval, necessitating this Motion.

The Receiver believes that the Settlement Agreement provides a cost-effective solution and practical decision that ultimately results in a benefit to the Receivership Estate. Further, the Receiver avers that the proposed settlement, as reflected by the Settlement Agreement, is in the best interests of the Receivership and aggrieved investors because the proposed resolution conserves Receivership Estate assets and judicial resources, avoids the significant fees, costs, and inherent uncertainty of any further proceedings or litigation, and results in the deposit of additional funds into the Receivership Estate. As noted above, and in addition to the inherent uncertainties of litigation, the potential attorney's fees that could be incurred in litigating the recovery of the Transfer could easily exceed any realizable benefit from litigation.

III. ARGUMENT

A. Legal Standard

“A district court has broad powers and wide discretion to determine relief in an equity receivership.” *SEC. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). In considering whether to approve a settlement brokered by an equity receiver, a district court will examine the parameters of the receivership order's mandate and has the power to approve a settlement that is fair, adequate and reasonable, and is the product of good faith after an adequate investigation by the receiver. *Sterling v. Steward*, 158 F.3d 1199 (11th Cir. 1998). “Determining the

fairness of the settlement is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion." *Id.* at 1202 (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (emphasis supplied); see also *SEC v. Credit Bancorp, Ltd.*, 2001 WL 1658200 at *2 (S.D.N.Y. 2001), (approving receiver's motion to approve a settlement with a creditor and holding that "[i]t is enough that the Receiver's request for settlement falls well within the broad discretion granted to him by the [order appointing receiver] and the ordinary powers of a receiver." The Receiver also notes, as indicated below, that no party opposes the relief requested in this Motion.

B. The Settlement Agreement Is Fair, Adequate, And Reasonable

To approve a settlement in an equity receivership, a district court must find the settlement is fair, adequate and reasonable, and not the product of collusion between the parties. *Sterling v. Stewart*, 158 F.2d 1199, 1203 (11th Cir. 1998). To determine whether the settlement is fair, the court should examine the following factors: "(1) the likelihood of success; (2) the range of possible [recovery]; (3) the point on or below the range of [recovery] 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." *Id.* at 1203 n.6 (citing *Bennett*, 737 F.2d at 986).

Upon due consideration of these governing factors, the Settlement Agreement should be approved as fair, adequate, and reasonable. The Settlement Agreement represents the culmination of arm's length negotiations conducted between the Receiver and Mr. Merer, who himself is an attorney. In considering whether to pursue litigation to recover the Transfer, the

Receiver not only considered the inherent risk of litigation but also the additional time, delay, and expense of litigating such claims. Considering the settlement amount, as well as the litigation uncertainty and potential costs of litigation, the Receiver believes that the Settlement Agreement is in the best interests of the Receivership Estate. As noted above, any litigation seeking to recover the Transfer would most likely incur legal fees well in excess of the amount of the Transfer.

In sum, the Settlement Agreement provides a benefit to, and is in the best interests of, the Receivership Entities and their investors and other creditors. Accordingly, because the Settlement Agreement is fair, equitable, and reasonable, the Receiver requests that the Court employ its equitable powers to grant the requested relief.

VI. CONCLUSION

The Receiver respectfully requests that the Court grant this Motion and enter an Order (i) approving the Settlement Agreement attached hereto as **Exhibit A** and finding it is fair, adequate, and reasonable; (ii) directing the Receiver and Todd Merer to comply with the Settlement Agreement; and (iii) any such further relief as deemed just and proper.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for the Receiver conferred with counsel for the Commission and counsel for Defendant Michael Williams prior to filing this Motion. Counsel for Defendant Williams indicates that Mr. Williams does not

take any position, and counsel for the Commission indicated that the Commission does not oppose the relief requested in this motion.

BUCHANAN INGERSOLL & ROONEY PC

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the following counsel of record:

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EXHIBIT "A"

SETTLEMENT AGREEMENT

WHEREAS, by order dated March 6, 2020, the Court in *SEC v. Kinetic Investment Group, LLC and Michael Scott Williams, and Defendants; and Kinetic Funds I, LLC; KCL Services, LLC d/b/a Lendacy; Scipio, LLC; LF42, LLC; El Morro Financial Group, LLC; and KIH, Inc. f/k/a Kinetic International, LLC, Relief Defendants*, Case No. 8:20-cv-00394 (M.D. Fla.) (the "**Receivership Action**"), appointed Mark A. Kornfeld as Receiver (the "**Receiver**") for Kinetic Investment Group, LLC, Kinetic Funds I, LLC; KCL Services, LLC d/b/a Lendacy; Scipio, LLC; LF42, LLC; El Morro Financial Group, LLC; and KIH, Inc. f/k/a Kinetic International, LLC (collectively, the "**Receivership Entities**");

WHEREAS, the Receiver has identified a transfer of \$75,000.00 received by Todd Merer ("**Mr. Merer**") and Todd Merer, LLC from or at the direction of Receivership Entity Kinetic Funds I, LLC in or around February 2020 (the "**Transfer**") and has informed Mr. Merer of his intention to file an action seeking to recover the Transfer (the "**Potential Action**"); and

WHEREAS, Mr. Merer, without admitting liability, wishes to resolve these matters amicably; and

WHEREAS, the Court presiding over the Receivership Action granted the Receiver's Unopposed Motion to Approve Procedure to Pursue Potential Third Party Claims (Doc. 181) which, in relevant part, approved a procedure for the Receiver to settle or compromise any potential third-party claims;

NOW, THEREFORE, subject to the approval of this Settlement Agreement by the Court presiding over the Receivership Action, Mr. Merer has agreed to cause the Receiver to be paid and the Receiver has agreed to accept a total of \$15,000.00 (the "**Settlement Amount**") in full settlement of the claims to be asserted in the Potential Action regarding the Transfer.

The Settlement amount shall be paid in full once Mr. Merer has satisfied the following terms:

- (1) Payment of \$5,000 within thirty (30) days after the date of the Court's Order approving the settlement;
- (2) Payment of a second \$5,000 within nine (9) months after the date of Court's Order approving of the settlement;
- (3) Payment of a third \$5,000 within eighteen (18) months after the date of the Court's order approving of the settlement.

The Settlement Amount shall be made payable to "Mark Kornfeld, as Receiver," and sent to Receiver's counsel (c/o Jordan Maglich, Esq.) at 401 E. Jackson Street, Suite 2400, Tampa, Florida 33602.

Following execution of this Agreement by the Receiver and Mr. Merer, the Receiver will then file a Motion with the Court presiding over the Receivership Action seeking the approval of this Agreement. If the Motion is approved by the Court, Receiver's counsel will provide Mr. Merer the Order approving the settlement. In the event that the Court denies or fails to approve the Motion, the Parties agree that this Agreement will be null and void.

Mr. Merer agrees that he will be in default of his obligations under this Settlement Agreement if (i) Mr. Merer fails to make any scheduled payment and such default shall continue for a period of seven (7) days beyond the payment deadline, or (ii) Mr. Merer fails to make all required payments within eighteen months of the date of the Court's Order approving settlement, and such default shall continue for a period of seven (7) days beyond the payment deadline. In the event of default on payment, Mr. Merer agrees to the immediate entry of a judgment against Mr. Merer and in favor of the Receiver (the "**Judgment**") for the full outstanding amount of **\$75,000.00** per this Settlement Agreement, less any payments made plus reasonable attorneys'

fees and interest at 6% from the date of this Settlement Agreement. Said Judgment will be enforceable upon the filing of an affidavit certifying failure of payment from the Receiver in the United States District Court for the Middle District of Florida, Tampa Division.

Upon receipt and clearing of the full Settlement Amount, the Receiver, on behalf of the Receivership Entities and their employees, agents, representatives, beneficiaries, and assigns, shall be deemed to have released and forever discharged Mr. Merer and Todd Merer, LLC of and from any liability for the claims which could have been asserted in the Potential Action regarding the Transfer.

In further consideration of the release of claims described above, Mr. Merer and Todd Merer, LLC agree to waive and does hereby waive any claim that he had, has, or hereafter may have against the Receiver and/or assets of the Receiverships Entities in connection with the Receivership Action.

The Receiver and Mr. Merer understand and mutually agree that the payment of the aforesaid total sum and waiver of claims is in full accordance and satisfaction of and in compromise of disputed claims regarding claims that could have been asserted in the Potential Action regarding the Transfer, and the payment and waiver are not an admission of liability, which is expressly denied, but are made for the purpose of terminating a dispute and avoiding litigation.

Mr. Merer understands and agrees that each party to this agreement shall bear his or her own individual costs and attorney's fees incurred in the resolution of this matter and further agrees to assist the Receiver should any additional steps be necessary to effectuate this agreement.

The Receiver and Mr. Merer agree that this agreement shall be governed by and be enforceable under Florida law through a summary proceeding in the United States District Court for the Middle District of Florida, Tampa Division.

If any legal action or other proceeding is brought regarding the enforcement of this Settlement Agreement or due to any default in connection with any terms herein, the successful or prevailing party shall be entitled to recover from the non-prevailing party, reasonable attorneys' fees, court costs, and all expenses incurred in that action or proceeding, in addition to any other relief to which such party may be entitled.

The Receiver and Mr. Merer also agree that electronically transmitted copies of signature pages will have the full force and effect of original signed pages.

IN WITNESS WHEREOF, EACH OF THE PARTIES HERETO HAS DULY EXECUTED THIS AGREEMENT ON THE DATE FIRST ABOVE WRITTEN.

By: Todd Merer
Todd Merer, individually and on
behalf of Todd Merer, LLC

By: Mark A. Kornfeld
Mark A. Kornfeld, as Receiver for the
Receivership Entities

Date: 2-1-22

Date: 2-1-22