

**ROBB EVANS &
ROBB EVANS & ASSOCIATES, LLC**

Receiver of

Fortune Hi-Tech Marketing, Inc., et al.

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**Federal Trade Commission, State of Illinois,
Commonwealth of Kentucky and State of North Carolina**

v.

Fortune Hi-Tech Marketing, Inc., et al.

CASE No. 5:13-CV-123 GFVT-REW

**Motion for Approval of Settlement with
Day Counsel, Yvonne Day and Wallace Counsel
Memorandum of Points and Authorities in Support Thereof
Declaration of Brick Kane in Support Thereof**

Filed October 27, 2016

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

FEDERAL TRADE COMMISSION,
STATE OF ILLINOIS,
COMMONWEALTH OF KENTUCKY, and
STATE OF NORTH CAROLINA,

Plaintiffs

v.

FORTUNE HI-TECH MARKETING, INC.,
a Kentucky corporation, *et al.*,

Defendants.

No. 5:13-cv-123-GFVT-REW

**MOTION FOR APPROVAL OF SETTLEMENT WITH DAY COUNSEL, YVONNE
DAY AND WALLACE COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Robb Evans and Robb Evans & Associates LLC appointed herein as Permanent Receiver for Fortune Hi-Tech Marketing, Inc. and other related and affiliated entities (“Receiver”), hereby moves the Court for an order approving the Settlement Agreement dated as of August 16, 2016 among Dinsmore & Shohl LLP, as counsel to Yvonne Day, Leonard Haslag, James McCormick, and John W. Turner (“Day Counsel”); the Law Offices of Alexander M. Schack, as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo (“Wallace Counsel”); Yvonne Day; and the Receiver on behalf of the receivership estate (the “Day/Wallace Counsel Settlement”), a true and correct copy of which is attached as Exhibit 1 to the Declaration of Brick Kane in support of this motion. The Receiver seeks an order approving the Day/Wallace Counsel Settlement and an order authorizing the Receiver to take all steps necessary or reasonable to implement and perform under the Day/Wallace Counsel Settlement.

The Day/Wallace Counsel Settlement resolves two complaints in intervention filed by the Day Counsel and the Wallace Counsel in which the Day Counsel sought recovery of as much as

\$403,796.24 in attorneys' fees and unspecified incentive fees for Yvonne Day, and the Wallace Counsel sought \$585,690.44 in attorneys' fees in connection with lawsuits they filed against Fortune Hi-Tech Marketing, Inc. ("FHTM") pre-receivership. The Day/Wallace Counsel Settlement provides for the Receiver to pay to the Day Counsel, Yvonne Day and Wallace Counsel the sum of \$50,000 within seven days of the approval of the settlement and 14% of the funds the Receiver actually recovers from defendants in the Receiver's two clawback lawsuits¹ to the Day Counsel and Wallace Counsel, up to a maximum of \$989,486.68 ("Full Payment"), which is the total of the Day payment request and the Wallace payment request. In addition, if the Day Counsel and the Wallace Counsel have not received the Full Payment amount when the Receiver files a motion to wind up and close the receivership estate, the Day Counsel, Yvonne Day and the Wallace Counsel reserve their right to seek funds from the Federal Trade Commission ("FTC") up to the Full Payment amount, but may only recover funds from the \$3,541,000 paid to the FTC by the defendants in this action to settle their claims with the FTC and the other plaintiffs to the extent those funds have not already been disbursed for consumer redress.

The Receiver contends the Day/Wallace Counsel Settlement is fair and equitable and within the sound business judgment of the Receiver in that (a) the settlement resolves disputed claims by the Day Counsel, Yvonne Day and the Wallace Counsel (the "Settling Parties") without the delay, expense, risks and uncertainty of litigation in which the Day Counsel, Yvonne Day and the Wallace Counsel sought an immediate cash payment from the estate of almost \$1 million; (b) the settlement avoids the estate incurring expenses litigating claims through a modest cash payment of \$50,000, representing approximately 5% of the Full Payment amount, from the estate funds, with any other recovery on the Day and Wallace Counsel Claims to be made as a percentage of recoveries from the Receiver's litigation; and (c) the settlement avoids the burden and expense of any litigation between the receivership estate and the Settling Parties regarding

¹ *Evans v. Armenta, et al.*, U.S.D.C., E.D. Ky. Case No. 5:14-cv-00329 GFVT-REW and *Evans v. Burrell, et al.*, U.S.D.C., E.D. Ky. Case No. 5:14-cv-00330 GFVT-REW.

the allocation of recoveries under the settlement, which allocation is left to the Settling Parties to determine. The Day/Wallace Settlement protects the estate from any significant invasion of existing estate funds, preserving those funds for defrauded consumers and ongoing receivership expenses, including the litigation of the two clawback suits, and only compensates the Settling Parties above the \$50,000 initial payment if there are recoveries in the Receiver's actions. The alternative to settlement would be uncertain litigation over the Settling Parties' claims in their complaints in intervention and a potential immediate depletion of most of the remaining estate assets if they prevailed on their demand for an immediate payment of the Full Payment amount. The FTC is aware of the proposed Day/Wallace Counsel Settlement and has indicated to the Receiver that it does not object to the proposed settlement.

The Receiver further moves the Court for an order approving notice of this Motion as sufficient based on (a) service of the Motion and all supporting papers on the parties to this action; (b) service of a Notice of Filing of the Motion on all known non-consumer, non-employee creditors of the receivership estate with the Receiver offering to provide a complete copy of the Motion to any interested party upon written request; and (c) posting of the Motion and supporting pleadings on the Receiver's web site for this case.

This Motion is made pursuant to Local Civil Rule 7.1, the Stipulated Preliminary Injunction filed May 28, 2013 (Doc. No. 134) and the Stipulated Order for Permanent Injunction and Monetary Judgment entered on May 9, 2014 (Doc. No. 202) and is made and based on the separate Notice of Filing of the Motion, this Motion, the memorandum of points and authorities and declaration of Brick Kane and proposed order granting the Motion filed concurrently herewith, the other pleadings, records and files of the Court in this case of which the Receiver

requests the Court take judicial notice, and on such further oral and documentary evidence and arguments of counsel as may be presented at any hearing on the Motion.

DATED: October 27, 2016

Respectfully submitted,

DIAMOND McCARTHY LLP

By: /s/ Gary Owen Caris
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action (the "FTC Action") is a civil enforcement action commenced by the Federal Trade Commission ("FTC"), the State of Illinois, the Commonwealth of Kentucky and the State of North Carolina (collectively "Plaintiffs") against defendants Fortune Hi-Tech Marketing, Inc., FHTM, Inc., Alan Clark Holdings, LLC, FHTM Canada, Inc., Fortune Network Marketing (UK) Limited, Paul C. Orberson and Thomas A. Mills (collectively "Defendants"). The FTC Action was originally filed in the United States District Court for the Northern District of Illinois ("Illinois District Court"). On January 24, 2013, the Illinois District Court issued a Temporary Restraining Order (Doc. No. 23) appointing the Receiver as Temporary Receiver over Fortune Hi-Tech Marketing, Inc., FHTM, Inc., Alan Clark Holdings, LLC, FHTM Canada, Inc., Fortune Network Marketing (UK) Limited "and their successors and assigns, as well as any subsidiaries, and any fictitious business entities or business names created or used by these entities" ("Receivership Defendants"). By stipulation of the parties, on February 7, 2013, the Court extended and made certain modifications to the Temporary Restraining Order and postponed the hearing on the Order to Show Cause Why A Preliminary Injunction Should Not Issue to March 13, 2013 (Doc. No. 28). At a hearing conducted on February 26, 2013, the Temporary Restraining Order was further extended and the preliminary injunction hearing postponed to May 1, 2013.

On motion by the Defendants to transfer venue of the FTC Action to this Court, the Illinois District Court issued an order transferring venue of the action and further extended the Temporary Restraining Order to provide an opportunity for the motion for the issuance of the Preliminary Injunction to be determined by this Court after the case was transferred. The Plaintiffs and Defendants subsequently stipulated to the Preliminary Injunction entered by this Court on May 28, 2013.

Under the Preliminary Injunction, the Receiver was appointed as permanent receiver over the Receivership Defendants. The Defendants entered into extensive settlement negotiations

with the Plaintiffs resulting in the filing and entry of judgment against the Defendants under the Stipulated Order for Permanent Injunction and Monetary Relief ("Final Judgment") (Doc. No. 202) which was entered by the Court on May 9, 2014. The Final Judgment continued the permanent receivership over the Receivership Defendants and, among other things, authorized the Receiver to liquidate assets turned over to the Receiver pursuant to the Final Judgment without further order of the Court.

II. THE SETTLEMENT AGREEMENT RESOLVES DISPUTED CLAIMS REASONABLY AND COST-EFFECTIVELY FOR THE ESTATE

In 2010, the firm of Dinsmore & Shohl LLP ("Day Counsel") filed a lawsuit on behalf of Yvonne Day, Leonard Haslag, James McCormick and John W. Turner against FHTM and its principals, as well as other former independent representatives of FHTM. The Law Offices of Alexander M. Schack ("Wallace Counsel"), as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo, also filed suit against FHTM, its principals and others. The lawsuits alleged that FHTM operated an illegal pyramid scheme and asserted various theories of recovery by the plaintiffs.

With Court approval, the Day Counsel and the Wallace Counsel filed complaints in intervention in this action, seeking the recovery of attorneys' fees in this action.² They claim that they are entitled to recover their attorneys' fees in full from the "common fund" their services in the Day Lawsuit and the Wallace Lawsuit helped create, and they have asserted rights in the funds held by the Receiver in the receivership estate as well as funds paid directly to the FTC in the sum of \$3,541,000 ("FTC Recovery") in settlement of the FTC's claims against the principals of FHTM and its related and affiliated companies under the Final Judgment. The Day Counsel and Wallace Counsel contend they conferred significant benefits to the consumer victims who are the beneficiaries of the FTC Recovery and the assets in the receivership estate

² See Day Counsel complaint in intervention, Doc. No. 271 and Wallace Counsel complaint in intervention, Doc. No. 272, and the amended complaints in intervention filed by the Day Counsel as Doc. No. 302 and the Wallace Counsel as Doc. No. 303, of which the Receiver requests the Court take judicial notice.

through their vigorous prosecution of claims against the Receivership Defendants, their principals and others and that they are partly responsible for the events that led to the ending of the illegal pyramid scheme operated by the Receivership Defendants and the recovery of funds for the benefit of consumers by the FTC and the Receiver. In their complaint in intervention filed by the Day Counsel, the Day Counsel seeks to recover an amount not to exceed \$403,796.24 as well as an unspecified amount for incentive payments to Yvonne Day as the purported class representative of former independent representatives of FHTM (the claims of the Day Counsel and Yvonne Day are collectively referred to as the “Day Payment Request”). In its complaint in intervention, the Wallace Counsel sought to recover \$585,690.44 in attorneys’ fees (“Wallace Payment Request”).

The FTC is presently in the process of disbursing funds for consumer redress from the FTC Recovery. In addition to the funds and assets turned over to the Receiver pursuant to the Final Judgment, the Receiver is in possession and control of other funds and assets, including proceeds from the liquidation of various assets of the Receivership Defendants and from liquidation of assets turned over to the Receiver under the Final Judgment. The Receiver is seeking to collect additional funds from parties the Receiver has sued in the clawback lawsuits pending against former independent representatives of FHTM referenced above.

The Day/Wallace Counsel Settlement provides for a cash payment of \$50,000 to the Day Counsel, Yvonne Day, and the Wallace Counsel (“Settling Parties”) within seven days after approval of the settlement by the Court. The initial cash payment is approximately 5% of the Full Payment amount claimed by the Day Counsel, Yvonne Day and the Wallace Counsel in their respective demands. The Settling Parties are also entitled to recover 14% of any recoveries made by the Receiver in its two lawsuits pending in this Court against the former independent representatives of FHTM and its related and affiliated entities for fraudulent transfer and other claims for relief, such that the Settling Parties will only obtain additional recoveries if the receivership estate obtains additional recoveries and their recovery will be limited to a relatively small percentage of those recoveries, leaving 86% of the recoveries for payment of the claims of

the consumer victims. The allocation of the payments received under the settlement payment is to be made by the Settling Parties among themselves, relieving the Receiver of any involvement in the allocation and therefore the estate of any expense associated with it. The Day/Wallace Counsel Settlement also preserves the \$3,541,000 in funds held by the FTC for consumer redress, allowing the FTC to distribute those funds to injured consumers. While the Settling Parties may still assert a claim to the FTC Recovery, they may only do so after the Receiver has completed the pending litigation against the independent representatives and filed a motion to wind up the estate, a point in time when the parties anticipate most if not all of the FTC Recovery already will have been disbursed to consumer victims.

III. THE SETTLEMENT SHOULD BE APPROVED UNDER APPLICABLE LEGAL STANDARDS

The leading treatise on receivership law states:

The only justification for the compromise of claims is that it is done for the best interests of the receivership and the estate under the control and possession of the court.

3 *Clark on Receivers* § 655 (3d ed. 1992)

The court appointing a receiver must use its discretion in determining whether it is for the best interests of the estate that the receiver be authorized to compromise a claim, and when the appointing court has not abused its discretion in giving instructions to the receiver, its orders will not be disturbed or reviewed in the appellate court.

3 *Clark on Receivers* § 770 (3d ed. 1992).

The court in a federal equity receivership has broad authority to approve proposed settlements by a receiver and approval of a proposed settlement will be reviewed only for abuse of discretion. *Liberte Capital Group, LLC v. Capwill*, 462 F. 3d 543, 551 (6th Cir. 2006); *Gordon v. Dadante*, 336 Fed. Appx. 540, 549 (6th Cir. 2009) (settlement by receiver in a federal

equity receivership within the receiver's discretion and not subject to the standard for approval of a class action settlement); *Securities and Exchange Commission v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395, 2002 WL 1792053 at *4-5 (S.D.N.Y. Aug. 2, 2002); *Securities and Exchange Commission v. Princeton Economic International, Inc.*, No. 99 Civ. 9667, 2002 WL 206990 at *1 (S.D.N.Y. Feb. 8, 2002). "[R]eceptors benefit from the general presumption that district courts favor settlements." *Sterling v. Stewart*, 158 F. 3d 1199, 1202 (11th Cir. 1998). Further:

[N]o federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate.

Gordon v. Dadante, 336 Fed. Appx. at 549 (citing *Liberte Capital Group, LLC v. Capwill*, 462 F. 3d at 551).

The District Court's determination of the fairness of a settlement by the Receiver is subject to the sound discretion of the Court and will only be overturned based on a clear showing of abuse of discretion. *Gordon v. Dadante*, 336 Fed. Appx. at 545 (holding that district court did not abuse its discretion in approving settlement agreement entered into by a receiver); *Sterling v. Stewart*, 158 F. 3d at 1202 (quoting *Bennett v. Behring*, 737 F. 2d 982, 986 (11th Cir. 1984)); *Securities and Exchange Commission v. Arkansas Loan and Thrift Corp.*, 427 F. 2d 1171, 1172 (8th Cir. 1970) (court finds no abuse of discretion in trial court's approval of receiver's settlement on fidelity bond claim).

Courts in receivership proceedings often look to bankruptcy for analogous authority addressing administrative issues. Under Rule 9019 of the Federal Rules of Bankruptcy Procedure, the court in a bankruptcy case may approve a proposed compromise of controversies after notice and an opportunity for hearing. Decisions addressing the approval of compromises in bankruptcy often focus on four factors cited in the Ninth Circuit decisions in *In re A & C Properties*, 784 F. 2d 1377 (9th Cir. 1986) and *In re Woodson*, 839 F. 2d 610 (9th Cir. 1988):

“(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.”

In re A & C Properties, 784 F. 2d at 1381. *See also In re Woodson*, 839 F. 2d at 620.

The Day/Wallace Counsel Settlement meets these standards for approval. The Day Payment Request and the Wallace Payment Request collectively sought almost \$1 million in immediate cash payment from the assets of the receivership estate through their complaints in intervention. The Receiver has reviewed the claims and the Day Counsel and Wallace Counsel’s services performed. The immediate cash payments demanded, if awarded based on their intervening complaints, could have interfered with the FTC’s disbursement of the FTC Recovery to consumer victims and could have significantly impaired the Receiver’s ability to prosecute its lawsuits for potential additional recoveries for the consumer victims by depleting the receivership assets. Further, the litigation of the complaints in intervention would have depleted estate resources through litigation expenses and fees, to the detriment of the estate.

The immediate amount to be paid to the Settling Parties is modest compared to the amounts claimed, approximately 5%, yet nevertheless acknowledges that the Settling Parties made some contribution to the efforts to halt the FHTM pyramid scheme and enable the FTC Recovery to be realized. In the Day Lawsuit, the Settling Parties also took depositions of several defendants being sued by the Receiver in its clawback litigation that may provide assistance to the Receiver in litigating its claims. This settlement avoids the drain of estate resources in litigation over the amount of the asserted claims, the Settling Parties’ right to immediate payment and the source of any payment. Under the circumstances, for these reasons, the Day/Wallace Counsel Settlement is fair, is within the broad discretion granted to the Receiver in an equity receivership and should be approved.

IV. CONCLUSION

Based on this Motion, on the supporting declaration of Brick Kane filed and served concurrently herewith, and on the pleadings, records and files of the Court of which the Receiver requests the Court take judicial notice pursuant to Rule 201 of the Federal Rules of Evidence, the Receiver respectfully requests that the Court grant relief as requested in the Motion.

DATED: October 27, 2016

Respectfully submitted,

DIAMOND McCARTHY LLP

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

FEDERAL TRADE COMMISSION,
STATE OF ILLINOIS,
COMMONWEALTH OF KENTUCKY, and
STATE OF NORTH CAROLINA,

Plaintiffs

v.

FORTUNE HI-TECH MARKETING, INC.,
a Kentucky corporation, *et al.*,

Defendants.

No. 5:13-cv-123-GFVT-REW

**DECLARATION OF BRICK KANE IN SUPPORT OF MOTION FOR APPROVAL OF
SETTLEMENT WITH DAY COUNSEL, YVONNE DAY AND WALLACE COUNSEL**

I, Brick Kane, declare:

1. I am the President and Chief Operating Officer of Robb Evans & Associates LLC, and I make this declaration on behalf of the Permanent Receiver Robb Evans and Robb Evans & Associates LLC (“Receiver”) appointed pursuant to the Stipulated Preliminary Injunction filed May 28, 2013 (Doc. No. 134) (“Preliminary Injunction”). If called upon to testify as to the facts set forth in this declaration, I could and would testify competently thereto as the facts are personally known to me to be true.

2. The Federal Trade Commission, the State of Illinois, the Commonwealth of Kentucky and the State of North Carolina brought this action against defendants Fortune Hi-Tech Marketing, Inc., FHTM, Inc., Alan Clark Holdings, LLC, FHTM Canada, Inc., Fortune Network Marketing (UK) Limited, Paul C. Orberson and Thomas A. Mills (“FTC Action”). The FTC Action was originally filed in the United States District Court for the Northern District of Illinois (“Illinois District Court”). On January 24, 2013, the Illinois District Court issued the

Temporary Restraining Order appointing the Temporary Receiver as Temporary Receiver over Fortune Hi-Tech Marketing, Inc., FHTM, Inc., Alan Clark Holdings, LLC, FHTM Canada, Inc., Fortune Network Marketing (UK) Limited “and their successors and assigns, as well as any subsidiaries, and any fictitious business entities or business names created or used by these entities” (“Receivership Defendants”). The Temporary Restraining Order was extended from time to time by stipulation of the parties. The Illinois District Court granted the defendants' motion to transfer venue of the case to this Court, entering an order that further extended the Temporary Restraining Order to allow this Court to rule on the Plaintiffs' motion for a preliminary injunction. On May 28, 2013, this Court entered the Preliminary Injunction Order making the Receiver the permanent receiver of the Receivership Defendants. I understand that the Defendants entered into extensive settlement negotiations with the Plaintiffs resulting in the filing and entry of judgment against the Defendants under the Stipulated Order for Permanent Injunction and Monetary Relief ("Final Judgment") which was entered by the Court on May 9, 2014. The Final Judgment continued the permanent receivership over the Receivership Defendants and, among other things, authorized the Receiver to liquidate assets turned over to the Receiver pursuant to the Final Judgment without further order of the Court.

3. I have been primarily responsible for the supervision and administration of the receivership estate and for the Receiver's review and investigation of assets and analysis of financial and business records relevant to the receivership and the Receiver's exercise of its powers and duties under the Temporary Restraining Order and the Preliminary Injunction. I personally participated in the Receiver's initial entry into the Receivership Defendants' offices in Lexington, Kentucky, helped secure the business records and physical assets of the Receivership Defendants, conducted meetings with and interviewed the Receivership Defendants' personnel and principals, and was involved in the Receiver's extensive review and detailed analysis of the Receivership Defendants' financial records and other business records and files.

4. This declaration is submitted in support of the Receiver's motion for approval of the Settlement Agreement dated as of August 16, 2016 among Dinsmore & Shohl LLP, as

counsel to Yvonne Day, Leonard Haslag, James McCormick and John W. Turner (“Day Counsel”); the Law Offices of Alexander M. Schack, as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo (“Wallace Counsel”); Yvonne Day; and the Receiver on behalf of the receivership estate (the “Day/Wallace Counsel Settlement”). A true and correct copy of the Day/Wallace Counsel Settlement is attached hereto as Exhibit 1.

5. In 2010, the firm of Dinsmore & Shohl LLP (“Day Counsel”) filed a lawsuit on behalf of Yvonne Day, Leonard Haslag, James McCormick and John W. Turner against FHTM and its principals, as well as other former independent representatives of FHTM. The Law Offices of Alexander M. Schack (“Wallace Counsel”), as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo, also filed suit against FHTM, its principals and others. The lawsuits alleged that FHTM operated an illegal pyramid scheme and asserted various theories of recovery by the plaintiffs.

6. With Court approval, the Day Counsel and the Wallace Counsel filed complaints in intervention in this action, seeking the recovery of attorneys’ fees in this action. I have reviewed the Day payment request and the Wallace payment request and the complaints in intervention, including billing records reflecting the services rendered by the Day Counsel and Wallace Counsel in connection with the lawsuits they filed against FHTM and others.

7. The Day Counsel, Yvonne Day and Wallace Counsel (“Settling Parties”) claim that they are entitled to recover their attorneys’ fees in full from the “common fund” their services in the Day Lawsuit and the Wallace Lawsuit helped create. The Day Counsel sought recovery of as much as \$403,796.24 in attorneys’ fees and unspecified incentive fees for Yvonne Day (“Day Payment Request”, and the Wallace Counsel sought \$585,690.44 in attorneys’ fees (“Wallace Payment Request”) for services they rendered in connection with lawsuits they filed against Fortune Hi-Tech Marketing, Inc. (“FHTM”) and others pre-receivership, including several highly compensated representatives that are the subject of the Receiver’s lawsuits described below. The complaints in intervention sought immediate payment of the Day Payment Request and the Wallace Payment Request from the receivership estate and/or from funds paid

directly to the Federal Trade Commission (“FTC”) by the individual defendants in the amount of \$3,541,000 as part of the Final Judgment (“FTC Recovery”). The Day Counsel and Wallace Counsel contend they conferred significant benefits to the consumer victims who are the beneficiaries of the FTC Recovery and the assets in the receivership estate through their vigorous prosecution of claims against the Receivership Defendants, their principals and others and that they are partly responsible for the events that led to the ending of the illegal pyramid scheme operated by the Receivership Defendants and the recovery of funds for the benefit of consumers by the FTC and the Receiver.

8. The Receiver has two pending lawsuits against 36 former independent representatives of FHTM seeking an aggregate of over \$37 million in recoveries from the defendants (*Evans v. Armenta, et al.*, U.S.D.C., E.D. Ky. Case No. 5:14-cv-00329 GFVT-REW and *Evans v. Burrell, et al.*, U.S.D.C., E.D. Ky. Case No. 5:14-cv-00330 GFVT-REW). The Receiver has already obtained over \$4.6 million in default judgments against seven defendants and is pursuing a non-dischargeability judgment in an adversary complaint filed in the Chapter 7 bankruptcy of another defendant, Todd Rowland. Some receivership funds are needed to continue the litigation against the remaining defendants in all of those actions to bring value to the estate from the liquidation of those claims. Further, the FTC is presently in the process of disbursing funds for consumer redress from the FTC Recovery. In addition to the funds and assets turned over to the Receiver pursuant to the Final Judgment, the Receiver is in possession and control of other funds and assets, including proceeds from the liquidation of various assets of the Receivership Defendants and from the liquidation of assets turned over to the Receiver under the Final Judgment.

9. If the Day Counsel, Yvonne Day and the Wallace Counsel had successfully pursued their claims in the complaints in intervention, the receivership estate would have been potentially significantly reduced through an immediate payment of the Day Payment Request and Wallace Payment Request, interfering with the Receiver’s ability to continue to administer the receivership estate and litigate the Receiver’s actions against the independent representatives

and/or the FTC's ability to disburse the FTC Recovery for consumer redress would have been potentially hindered. Responding to the complaints in intervention would also have depleted the estate through those litigation expenses.

10. The Day/Wallace Counsel Settlement fully resolves the two complaints in intervention. The Day/Wallace Counsel Settlement provides for the Receiver to pay to the Day Counsel, Yvonne Day and Wallace Counsel the sum of \$50,000 within seven days of the approval of the settlement and 14% of the funds the Receiver actually recovers from defendants in the Receiver's two pending lawsuits in the Court to the Day Counsel and Wallace Counsel, up to a maximum of \$989,486.68 ("Full Payment"), which is the total of the Day Payment Request and the Wallace Payment Request. In addition, if the Day Counsel and the Wallace Counsel have not received the Full Payment amount when the Receiver files a motion to wind up and close the receivership estate, the Day Counsel, Yvonne Day and the Wallace Counsel reserve their right to seek funds from the Federal Trade Commission ("FTC") up to the Full Payment amount but may only recover funds from the \$3,541,000 paid to the FTC by the defendants in this action to settle their claims with the FTC and the other plaintiffs to the extent those funds have not already been disbursed for consumer redress.

11. The Receiver believes the Day/Wallace Counsel Settlement is fair and equitable and recommends approval of the settlement by the Court. The initial cash payment to the Settling Parties of \$50,000 is approximately 5% of the Full Payment amount claimed by the Day Counsel, Yvonne Day and the Wallace Counsel in their respective demands. The Settling Parties are also entitled to recover 14% of any recoveries made by the Receiver in its two lawsuits pending in this Court against the former independent representatives of FHTM and its related and affiliated entities for fraudulent transfer and other claims for relief, such that the Settling Parties will only obtain additional recoveries if the receivership estate obtains additional recoveries and their recovery will be limited to a small percentage of those recoveries, leaving 86% of the recoveries for payment of the claims of the consumer victims. The allocation of the payments received under the settlement payment is to be made by the Settling Parties among

themselves, relieving the Receiver of any involvement in the allocation and therefore the estate of any expense associated with it. The Day/Wallace Counsel Settlement also preserves the \$3,541,000 in funds held by the FTC for consumer redress, allowing the FTC to distribute those funds to injured consumers. While the Settling Parties may still assert a claim to the FTC Recovery, they may only do so after the Receiver has completed the pending litigation against the independent representatives and filed a motion to wind up the estate, a point in time when the parties anticipate most if not all of the FTC Recovery already will have been disbursed to consumer victims.

12. The amounts to be paid to the Settling Parties are modest compared to the amounts claimed. The payment amount nevertheless acknowledges that the Settling Parties made some contribution to the efforts to halt the FHTM pyramid scheme and enable the FTC Recovery to be realized. In the Day Lawsuit, the Settling Parties also took depositions of several defendants being sued by the Receiver in its clawback litigation that may provide assistance in litigating the Receiver's claims. This settlement avoids the drain of estate resources in litigation over the amount of the asserted claims, the Settling Parties' right to immediate payment and the source of any payment. The Receiver therefore requests Court approval of the proposed settlement.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 26 day of October 2016 at Sun Valley, California.



BRICK KANE

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of August 15, 2016 by and between Dinsmore & Shohl LLP, as counsel to Yvonne Day, Leonard Haslag, James McCormick, and John W. Turner ("Day Counsel"); the Law Offices of Alexander M. Schack, as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo ("Wallace Counsel"); Yvonne Day; and Robb Evans and Robb Evans & Associates LLC, in their capacity as the Permanent Receiver ("Receiver") appointed by the United States District Court for the Eastern District of Kentucky in *Federal Trade Commission v. Fortune Hi-Tech Marketing, Inc., et al.*, Case 5:13-cv-00123 ("FTC Action") (Day Counsel, Wallace Counsel, Yvonne Day and the Receiver shall be referred to collectively as the "Parties").

This Agreement is made with reference to the following facts:

- A. **WHEREAS**, the Day Counsel and the Wallace Counsel have filed intervening complaints seeking the recovery of attorneys' fees in the FTC Action. In the intervening complaint filed by the Day Counsel, the Day Counsel seeks to recover an amount not to exceed \$403,796.24. As part of the intervening complaint filed by the Day Counsel, Yvonne Day also seeks an unspecified amount for incentive payments (the requests made by the Day Counsel and Yvonne Day are collectively referred to herein as the "Day Payment Request"). In the intervening complaint filed by the Wallace Counsel, the Wallace Counsel seeks to recover \$585,690.44 ("Wallace Payment Request"); and
- B. **WHEREAS**, the Day Payment Request seeks the recovery of attorneys' fees, costs and incentive payments from funds or assets recovered by and turned over to the Federal Trade Commission ("FTC") and/or the Receiver pursuant to the Stipulated Order for Permanent Injunction and Monetary Judgment ("Stipulated Order") entered in the FTC Action, and the Wallace Payment Request seeks the recovery of attorneys' fees and costs from funds or assets recovered by and turned over to the FTC and/or the Receiver pursuant to the Stipulated Order. A total of \$3,541,000 was ordered to be paid over to the FTC and was paid over directly to the FTC pursuant to the Stipulated Order ("FTC Recovery"); and
- C. **WHEREAS**, the FTC is in the process of disbursing funds for consumer redress from the FTC Recovery; and
- D. **WHEREAS**, in addition to the funds and assets turned over to the Receiver pursuant to the Stipulated Order, the Receiver is in possession and control of other funds and assets in their capacity as the receiver in the FTC Action (all the funds and assets turned over to the Receiver pursuant to the Stipulated Order and all other funds and assets now held or hereafter acquired by the Receiver in their capacity as receiver in the FTC Action are referred to herein as the "Receivership Estate Assets"); and
- E. **WHEREAS**, the Receiver is seeking to collect additional funds from parties the Receiver has sued in certain lawsuits pending against former independent representatives of Fortune Hi-Tech Marketing, Inc. ("Fortune"). These lawsuits are *Robb Evans, etc. v. Ramiro Armenta, et al.*, United States District Court for the Eastern District of Kentucky, Case No. 5:14-cv-00329-GFVT and *Robb Evans, etc. v. Anna Burrell, et al.*, United States District Court for the

Eastern District of Kentucky, Case No. 5:14-cv-00330-GFVT (collectively, the "Evans Actions"); and

- F. **WHEREAS**, the Receiver has not yet recovered any funds as a result of the Evans Actions; and
- G. **WHEREAS**, the Parties wish to settle the Day Payment Request and Wallace Payment Request as set forth below;

NOW THEREFORE, in consideration of the covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, in full settlement and discharge of any and all disputes between them the Parties stipulate and agree as follows:

1. **Recitals:** The Parties acknowledge that the "WHEREAS" clauses preceding Paragraph 1 are true and correct, and are incorporated herein as material parts to this Agreement.
2. **Settlement:** The Day Payment Request and the Wallace Payment Request will be fully satisfied and settled in exchange for all of the consideration set forth at Paragraphs 3 and 4, below. Without limiting the generality of the foregoing sentence, the Day Counsel, Yvonne Day and the Wallace Counsel waive and release any and all claims to the Receivership Estate Assets and waive and release any and all claims to funds obtained by the FTC from the Receiver after the date of this Settlement Agreement pursuant to the Stipulated Order or otherwise.
3. **Consideration:** The Receiver will pay the aggregate sum of \$50,000 to the Day Counsel, Yvonne Day and Wallace Counsel within seven days of the approval of this Settlement Agreement by the Court in the FTC Action, by check made payable to the Dinsmore & Shohl LLP escrow account care of Kenyon Meyer, 101 South Fifth Street, Suite 2500, Louisville, Kentucky 40202. The Receiver also will pay the aggregate sum of 14% of the funds it actually recovers from defendants in the Evans Actions to the Day Counsel and Wallace Counsel by one or more checks made payable to the the Dinsmore & Shohl LLP escrow account care of Kenyon Meyer, 101 South Fifth Street, Suite 2500, Louisville, Kentucky 40202. Notwithstanding the foregoing, the aggregate maximum amount to be received under this Settlement Agreement by the Day Counsel, Yvonne Day and the Wallace Counsel is \$989,486.68 ("Full Payment"). The consideration to be paid by the Receiver shall be allocated between the Day Counsel, Yvonne Day, and the Wallace Counsel as they shall agree in their sole and absolute discretion.
4. **Contingent and Delayed Claim Against Funds Constituting the FTC Recovery:** In the event that Full Payment has not been received by the Day Counsel and the Wallace Counsel at or prior to the time that the Receiver files a motion seeking an order winding up and closing the receivership estate in the FTC Action, the Day Counsel, Yvonne Day and the Wallace Counsel reserve their rights to seek to thereafter obtain funds from the FTC necessary to make up the shortfall, provided that in such event they may only seek to recover funds constituting the FTC Recovery and only to the extent that funds constituting the FTC Recovery have not been disbursed for consumer redress prior to the time the Day Counsel, Yvonne Day and the Wallace Counsel seek such funds. No claim for funds constituting the FTC Recovery may be made by the Day Counsel, Yvonne Day and the Wallace Counsel prior to the time the Receiver files a motion seeking an order winding up and closing the receivership estate in the FTC Action. Nothing in

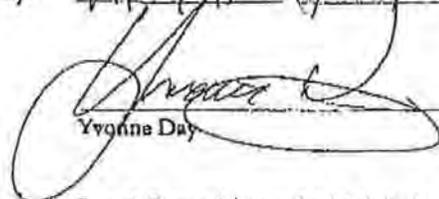
this Settlement Agreement shall be construed to require the FTC to delay distribution of any funds or assets constituting the FTC Recovery for consumer redress.

- 5. Consultation with Counsel: Yvonne Day acknowledges and agrees that she has consulted with counsel of her choice with respect to this Agreement and whether to enter into this Agreement and has determined to enter into this Agreement after such consultation.
- 6. Entire Agreement of the Parties: This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof, and supersedes all other agreements, oral or written, between the Parties hereto with respect to the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any Party hereto, except as specifically set forth in this Agreement. No claim of waiver, modification, consent, or acquiescence with respect to any provision of this Agreement shall be made against any Party hereto, except upon the basis of a written instrument executed by or on behalf of such Party.
- 7. Settlement Agreement is effective only upon Court approval: The Parties agree that this Settlement Agreement shall become effective upon entry of an order approving it by the Court in the FTC Action.

ACCEPTED AND AGREED:

Dinsmore & Shohl LLP, as counsel to Yvonne Day, Leonard Haslag, James McCormick, and John W. Turner ("Day Counsel")

By:  10/10/2016
Date

 10-12-16
Yvonne Day Date

Law Offices of Alexander M. Schack, as counsel to Rebecca Wallace, Barbara Wright and Madalyn Suozzo ("Wallace Counsel")

By:  10-12-16
Date

Robb Evans and Robb Evans & Associates LLC, in their capacity as the Permanent Receiver appointed by the United States District Court for the Eastern District of Kentucky in *Federal Trade Commission v. Fortuna Hi-Tech Marketing, Inc.*, Case 5:13-cv-00123 ("Receiver")

By: _____ Date

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this Settlement Agreement shall be construed to require the FTC to delay distribution of any funds or assets constituting the FTC Recovery for consumer redress.

- 5. Consultation with Counsel: Yvonne Day acknowledges and agrees that she has consulted with counsel of her choice with respect to this Agreement and whether to enter into this Agreement and has determined to enter into this Agreement after such consultation.
- 6. Entire Agreement of the Parties: This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof, and supersedes all other agreements, oral or written, between the Parties hereto with respect to the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any Party hereto, except as specifically set forth in this Agreement. No claim of waiver, modification, consent, or acquiescence with respect to any provision of this Agreement shall be made against any Party hereto, except upon the basis of a written instrument executed by or on behalf of such Party.
- 7. Settlement Agreement is effective only upon Court approval: The Parties agree that this Settlement Agreement shall become effective upon entry of an order approving it by the Court in the FTC Action.

ACCEPTED AND AGREED:

Dinsmore & Shohl LLP, as counsel to Yvonne Day, Leonard Haslag, James McCormick, and John W. Turner ("Day Counsel")

By: Rebecca Mayer Partner Date: 10/10/2016

Yvonne Day Date: 10-12-16

Law Offices of Alexander M. Schack, as counsel to Rebecca Wallace, Barbara Wight and Madalyn Suozzo ("Wallace Counsel")

By: Alex M. Schack Date: 10-12-16

Robb Evans and Robb Evans & Associates LLC, in their capacity as the Permanent Receiver appointed by the United States District Court for the Eastern District of Kentucky in *Federal Trade Commission v. Fortune Hi-Tech Marketing, Inc.*, Case 5:13-cv-00123 ("Receiver")

By: Robb Evans Date: 10-17-16