

**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

**Notice of Filing of Motion for Approval of Settlement with
Day Counsel, Yvonne Day and Wallace Counsel**

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

**NOTICE OF FILING OF MOTION FOR APPROVAL OF SETTLEMENT WITH DAY
COUNSEL, YVONNE DAY AND WALLACE COUNSEL**

PLEASE TAKE NOTICE that 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”), has filed the Motion for Approval of Settlement With Day Counsel, Yvonne Day and Wallace Counsel (“Motion”) concurrently herewith. Pursuant to the Motion, the Receiver 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 filed in support of the 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

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.

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 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 the Motion as sufficient based on (a) service of the Motion and all supporting papers on the parties to this action; (b) service of this 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.

The 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 this separate Notice of Filing of the Motion, the 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.

PLEASE TAKE FURTHER NOTICE that any interested party may request a complete copy of the Motion and all supporting pleadings and papers in writing directed to the Receiver as follows: Robb Evans & Associates LLC, Attn.: Imelda Perez, 11450 Sheldon Street, Sun Valley, CA 91352.

DATED: October 27, 2016

Respectfully submitted,

DIAMOND McCARTHY LLP

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