

**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

Receiver's Report of Activities as of October 6, 2016

Filed October 12, 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

RECEIVER'S REPORT OF ACTIVITIES AS OF OCTOBER 6, 2016

The Receiver, Robb Evans and Robb Evans & Associates LLC ("Receiver") submits its Report of Activities as of October 6, 2016 ("Report") to provide a comprehensive overview of the progress of the receivership estate for the Court's information. The Report will provide: (a) the status of the liquidation of assets of the estate and assets which the Receiver was charged with liquidating pursuant to the Stipulated Order for Permanent Injunction and Monetary Relief ("Final Judgment") (Doc. No. 202) which was entered by the Court on May 9, 2014; (b) the current financial status of the receivership estate; (c) a summary of pertinent claims issues; and (d) a summary of the current status of the lawsuits against numerous highly compensated Independent Representatives ("IRs"), which constitute the remaining assets of the receivership estate.

I. ASSET RECOVERY AND LIQUIDATION

As detailed in the Receivership Administrative Expenses and Fund Balance from Inception (January 24, 2013) to August 31, 2016 (“Financial Summary”) attached as Exhibit 1 to the Declaration of Brick Kane which accompanies the Receiver’s motion for approval and authorization for payment of Receiver’s and professionals’ fees and expenses for the eight-month period ending August 31, 2016, filed concurrently herewith, the Receiver has brought a total of \$3,562,610.25 into the receivership estate, which is separate from and in addition to the \$3,541,000 collected by the Federal Trade Commission (“FTC”) pursuant to the Final Judgment. Of this \$3,562,610.25 sum, \$1,458,131.51 was brought into the estate from corporate bank accounts frozen at the outset of the case. In addition, the Receiver has successfully administered and liquidated numerous receivership assets and other assets which were turned over to the Receiver for liquidation pursuant to the Final Judgment, as described below.

Shortly after entry of the Final Judgment, the Receiver coordinated with Tom Mills to sell Tom Mills’ cattle, the proceeds of which were turned over to the Receiver pursuant to the Final Judgment. The cattle were liquidated promptly after entry of the Final Judgment in order to avoid the risk inherent in delaying the liquidation of livestock. The cattle sale generated net proceeds of \$155,550.81.

In October 2014, the Receiver conducted a successful auction sale of personal property assets turned over to the Receiver pursuant to the Final Judgment, as well as the remaining personal property of the Receivership Defendants located at the Danville, Kentucky warehouse. The warehouse formerly housed the Receivership Defendants’ inventory as well as certain computer equipment and other personal property. Net auction proceeds of \$103,824.48 were recovered from the auction sale.

In December 2014, the Receiver consummated the sale of the farm in Danville turned over to the Receiver under the Final Judgment after active marketing efforts. Net proceeds from the sale of the farm generated \$157,754.94 for the receivership estate.

Thereafter, in April 2015, the Receiver successfully completed the sale of the Danville warehouse. Prior to completing the sale, the Receiver had to complete certain repairs at the property and remove the computer equipment and a large quantity of paper records (over 700 boxes) which the Receiver continues to store and preserve. The receivership estate obtained net sale proceeds from the sale of the Danville warehouse of \$413,262.40.

The Receiver administered and maintained the Daniel Island, South Carolina residence turned over to the Receiver under the Final Judgment until the Receiver was able to complete a sale of the property in May 2015. This required the Receiver to coordinate certain repairs prior to being able to sell it. The Receiver obtained multiple offers for the property, extensively negotiated with prospective buyers and ultimately concluded a sale of the property, including a Crownline boat moored near the premises, which produced net proceeds for the estate of \$812,724.54.

The Receiver was also charged with selling a condominium in Florida turned over to it under the Final Judgment. The condominium posed special issues in its administration and disposition because it was subject to construction defect litigation. In May 2015, the Receiver completed a sale of the condominium, producing net proceeds for the receivership estate of \$288,091.88.

In addition, the Receiver successfully liquidated coins and bullion for \$27,460.30, inventory of the Receivership Defendants for a net recovery of \$25,789.93, and two trademarks

for an aggregate of \$20,000. There are no remaining tangible or intangible assets left to liquidate. The only remaining assets of the receivership estate are its litigation claims, described in detail below.

Net proceeds obtained by the Receiver from the sale of assets total \$2,004,459.28. Including miscellaneous recoveries and payments, and the bank accounts noted above, through August 31, 2016 the Receiver has brought into the estate a total of \$3,562,610.25 in cash.

II. CURRENT FINANCIAL CONDITION OF THE RECEIVERSHIP ESTATE

As itemized in the Financial Summary, net of all expenses paid through August 31, 2016 and net of all expenses accrued but not yet paid through that date, principally comprised of the fees and expenses of the Receiver and its professionals which are the subject of the concurrently filed fee motion, the Receiver has net funds on hand of \$1,168,879.57.

III. CLAIMS ISSUES

The Receiver has not sought to implement a claims payment and allowance procedure in this case for several reasons. First, under the Final Judgment, it is anticipated that the FTC will take ultimate responsibility for claims redress to the defrauded consumers. (Final Judgment, Section IV) Based on the Final Judgment, the claims of defrauded consumers are estimated to be \$169 million.

In addition, the Receiver has not completed its litigation against the highly compensated IRs, nor has it obtained any recoveries yet against the IRs. Because claims against the highly

compensated IRs exceed \$37 million, there is still a potential for significant additional recoveries to be brought into the receivership estate.¹

In addition to the defrauded consumers, there are non-consumer claims, including potential priority tax claims, of approximately \$1.4 million, including the claim of the law firm of Gardere Wynne of approximately \$238,000. This figure does not include the claims of the class action lawyers in the cases which were pending in this Court captioned Yvonne Day v. Fortune High Tech Marketing, Inc., et al., Case No. 5:10-cv-00302 GFVT (“Day Action”) and Wallace v. Fortune High Tech Marketing, Inc., Case No. 5:11-cv-00127-GFVT (“Wallace Action”), whose claims have been tentatively settled, as described below.

Gardere Wynne was a law firm that represented certain of the Receivership Defendants prior to the commencement of the FTC action. The Gardere firm contended, among other things, that it was entitled to be paid its pre-receivership claim ahead of other pre-receivership creditors and that the language of the Final Judgment supported this assertion. After extensive briefing and opposition by the Receiver and the FTC, the Court denied Gardere Wynne’s claim for payment.

Counsel in the Day Action and Wallace Action successfully intervened in the instant case for the purpose of seeking recovery on its claims for attorneys fees, including not more than \$403,796.24 for the Day counsel and \$585,690.44 for the Wallace counsel, in addition to an unspecified amount for incentive payments for Yvonne Day. Recently, the Receiver has reached an agreement in principal with counsel in the Day Action, counsel in the Wallace Action and Yvonne Day, which is in the process of being finalized and memorialized in a written settlement

¹ It should be noted that many of the IRs are asserting that they are impecunious while at the same time declining to provide financial statements to the Receiver to support this contention. In fact, none of the litigating IRs have submitted financial statements to the Receiver, hindering the Receiver’s ability to assess their financial condition and impeding efforts to settle.

agreement, subject to Court approval. Without disclosing the specific substance of the agreement until such time as the written request is executed, the Receiver can advise the Court that the agreement generally provides for a modest cash payment from the receivership estate and a contingent payment to the intervenors based on future collections from the pending litigation in this Court against highly compensated IRs discussed below, in full settlement of the intervening complaints. The Receiver is informed that the FTC supports the settlement that has been negotiated between the Receiver and counsel in the Day and Wallace Actions. If approved by the Court, there would be no further claims made by Yvonne Day or counsel in the Day and Wallace Actions against the funds currently held by the Receiver.

IV. LITIGATION AGAINST THE HIGHLY COMPENSATED IRs

In August 2014, the Receiver filed two lawsuits against 36 highly compensated representatives, seeking total damages in excess of \$37 million, *Robb Evans and Robb Evans & Associates LLC as Receiver, etc. v. Armenta*, Case No. 5:14-cv-00329 GFVT (“Armenta Action”) and *Robb Evans and Robb Evans & Associates LLC as Receiver, etc. v. Burrell*, Case No. 5:14-cv-00330 GFVT (“Burrell Action”). The lawsuits are lengthy and detailed, and involve numerous theories of liability including fraudulent transfer claims.

Seven of the defendants in the Armenta Action failed to timely respond to the summons and complaint. Defaults were entered against them in November 2014. Default judgments were entered against the seven defaulted defendants in May 2016. The judgment amounts total over \$4.6 million against the defaulted defendants.

The remaining defendants in the Armenta Action and Burrell Action have vigorously contested the Receiver’s lawsuits. Motions to dismiss were filed, which were denied by the

Court in September 2015. The defendants then filed motions seeking orders staying the litigation and certifying certain issues for interlocutory review. The Court certified the issue of the application of the *in pari dilecto* defense for interlocutory review. The Sixth Circuit ultimately denied Defendants' motion for a stay and for interlocutory review in April 2016.

Over the last several months, the parties have exchanged extensive written discovery. The defendants in the Armenta and Burrell Actions propounded interrogatories, requests for admissions and requests for production of documents on the Receiver. The Receiver propounded requests for production and interrogatories to each of the 28 litigating defendants. The Receiver's counsel prepared detailed written responses and objections and was required to perform a review of approximately 700 boxes of records as well as voluminous electronic records of the Receivership Defendants to respond to the discovery requests. It is estimated that paper and electronic records of the Receivership Defendants exceed 2 million documents.

Several of the defendants have not provided any written response to the Receiver's discovery, which will necessitate motions to compel. The Receiver is also dissatisfied with the substance of certain responses and objections to its written discovery, which also will require communications with opposing counsel to meet and confer and potential motions to compel further answers.

The Receiver has repeatedly encouraged defense counsel in the Armenta and Burrell Actions to make meaningful settlement offers on the Receiver's claims to try to avoid the burden, expense and delay of litigation. Only recently, after the extensive preliminary round of discovery and facing the prospective of significantly more discovery and expense, including completion of the document production by the Receiver, depositions taken by the Receiver and defendants, and motions to compel, the defendants have agreed with the Receiver to appear for

settlement conferences before Magistrate Judge Wier with financial statements to be submitted to the Magistrate Judge for *in camera* inspection in connection with those settlement conferences. The Court recently signed orders referring the Armenta and Burrell Actions to the Magistrate Judge for settlement conferences and other pre-trial proceedings.

The defendants and Receiver also requested by joint motion a three-month postponement of the trial date and all related pre-trial dates and deadlines, in order to enable the parties to attempt to exhaust settlement discussions before proceeding onto the next costly round of discovery. Trial in the Armenta and Burrell Actions is currently scheduled for July 2017. If the joint motion is granted, trial would be scheduled in October 2017 or the first available date thereafter convenient to the Court's schedule.

Todd Rowland, a defendant in the Armenta Action, filed a voluntary petition under Chapter 7 of the Bankruptcy Code in July 2016. The Receiver's claim against Todd Rowland is the second largest monetary claim asserted in the two lawsuits totaling over \$6.1 million. Todd Rowland was an important player in the pyramid scheme. Rowland became an IR not long after the Receivership Defendants' business commenced and was prominently featured by FHTM in visual and print media about the company. In October 2016, the Receiver commenced an action against Rowland in the Bankruptcy Court for the Northern District of Florida seeking to declare his debt to the Receiver nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A). Despite being in Chapter 7, he and his wife disclose substantial income being generated by another multi-level marketing scheme they became involved in after FHTM was shut down.

DATED: October 12, 2016

Respectfully submitted,

DIAMOND McCARTHY LLP

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