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Securities and Exchange Commission v. High Park Investment Group, Inc., et al.
CASE No. SACV 05-1090 CJC (MLGx)

Receiver's: (A) Response to "Certain Creditors' Proposed Plan Regarding Initiation of Bankruptcy Proceeding – Response to Receiver"; and (B) Consolidated Reply to Oppositions to Receiver's Motion for Approval of Pre-Bankruptcy Reports and Approval and Payment of Receiver's and Professionals' Pre-Bankruptcy Fees and Expenses

Dated July 13, 2006

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

HIGH PARK INVESTMENT GROUP, INC., a Nevada corporation, HARBOR FINANCIAL INVESTMENT GROUP, INC., a Nevada corporation, EDWARD R. SHOWALTER,

Defendants.

CASE NO. SACV 05-1090 CJC (MLGx)

RECEIVER'S (A) RESPONSE TO "CERTAIN CREDITORS' PROPOSED PLAN REGARDING INITIATION OF BANKRUPTCY PROCEEDING – RESPONSE TO RECEIVER"; AND (B) CONSOLIDATED REPLY TO OPPOSITIONS TO RECEIVER'S MOTION FOR APPROVAL OF PRE-BANKRUPTCY REPORTS AND APPROVAL AND PAYMENT OF RECEIVER'S AND PROFESSIONALS' PRE-BANKRUPTCY FEES AND EXPENSES

DATE: JULY 17, 2006

TIME: 1:30 P.M.

PLACE: COURTROOM 9B

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Robb Evans & Associates LLC as Permanent Receiver ("Receiver") of High Park Investment Group, Inc., Harbor Financial Investment Group, Inc. and their subsidiaries and affiliates ("Receivership Entities") hereby responds to the "Certain Creditors' Proposed Plan Regarding Initiation of Bankruptcy Proceeding – Response to Receiver" ("Creditors' Plan") filed by the "Proposed Creditors Board of Directors of High Park Investment Group, Inc." and submits its consolidated reply to the various oppositions to the Receiver's motion for approval of its pre-bankruptcy Receiver's Reports and for approval and payment of the Receiver's and professionals' pre-bankruptcy fees and expenses as follows.

I. PROPOSED CREDITORS BANKRUPTCY PLAN

The Receiver does not oppose the attempt by the Proposed Creditors' Board to take control of the Receivership Entities by obtaining control over the Board of Directors of the Receivership Entities and initiating bankruptcy cases on their behalf, as set forth as one of the alternatives in the Receiver's plan for the commencement of bankruptcy proceedings for these entities. Given the Court's direction in its June 19, 2006 order, the Receiver's interest is in ensuring that bankruptcy cases are validly filed by or for the Receivership Entities consistent with, among other things, the terms and conditions set by Showalter on his agreement to assign his stock interests in the entities, California law regarding assignments for the benefit of creditors, and any other applicable bankruptcy and non-bankruptcy law.

The Receiver does not oppose the Proposed Creditors' Board creating a reconstituted Board of Directors to govern the entities and cause them to file bankruptcy. The Receiver is concerned that the assignment of the stock interests, the assignment for the benefit of creditors and the appointment of the new Board of Directors proposed by the Proposed Creditors' Board in its Creditors' Plan be in compliance with applicable law so that the bankruptcy cases are validly filed as intended by the Court. For that reason, the Receiver has pointed out the provisions

of California law requiring that a general assignment for the benefit of creditors cover all of the defendants' assets that are transferable and non-exempt. Cal. Code of Civ. Pro. § 493.010(a). The Receiver is also concerned that such a proposed assignment and the election of the new Board be approved by Court order, as required by Showalter's counsel in Exhibit B to the Creditors' Plan. The Receiver is concerned that the Proposed Creditors' Board has not taken the proper procedural and substantive steps to obtain the relief it seeks in connection with the Creditors' Plan, seeking substantive relief by way of a response to the Receiver's proposed plan served on limited parties with an interest in the receivership and the case.

The Receiver believes that the posture and antagonism of the Proposed Creditors' Board and those creditors whom it purports to represent makes one of the Receiver's three proposed alternatives, namely the filing of the Chapter 11 petition with the Receiver to act as debtor-in-possession, untenable, leaving the only alternatives a Chapter 7 case to be filed by the Receiver for the two Receivership Entities or a Chapter 11 case to be filed by the Proposed Creditors' Board if the Proposed Creditors' Board obtains appropriate orders of the Court and complies with applicable law to implement its proposed Creditors' Plan. While the Receiver disputes that the Receiver as federal equity receiver and representative of the Receivership Entities is subject to the "disinterestedness" provisions of the Bankruptcy Code which apply to professionals employed by the debtor, the Receiver does not believe it can effectively perform its duties, and it is unwilling to continue to perform its duties, as a debtor-in-possession under Chapter 11 of the Bankruptcy Code in the face of the positions taken by the Proposed Creditors' Board, through its counsel Bruce Douthit, in particular based on the unceasing threats, charges, personal assaults and baseless accusations made by Mr. Douthit for the last eight months.

II. REPLY TO OPPOSITIONS TO APPROVAL AND PAYMENT OF FEES OF THE RECEIVER AND ITS PROFESSIONALS

The sweeping objections to payment of the Receiver's and counsel's fees and expenses by the Proposed Creditors' Board, the Coleman Group and William Bame (individually and collectively, the "Objecting Creditors") raise important equitable and public policy considerations. The mean spirited nature of the objections is evident from certain of the objections to the payment of all fees and expenses of any kind, including fees and expenses incurred to third party vendors to secure and weatherproof the properties, to obtain valuations of the properties and to obtain title reports for the properties from third parties. Mr. Douthit even makes the outlandish assertion that the Receiver "should pay the estate" based on the unfounded claim that the Receiver neglected to secure the properties against vandalism and waste. This is not only demonstrably false, but leads to the ironic assertion that the Receiver should be punished for failing to incur more debt to secure properties when it is being simultaneously criticized for incurring debt to protect those properties in the first instance.

A. The Objecting Parties Cite No Applicable Legal or Equitable Basis for This Court Not to Determine the Fees and Expenses of the Receiver Which It Appointed

The Objecting Creditors seek an order denying payment for eight months of services and expenses of the Receiver, its counsel and its third party vendors incurred specifically in accordance with the Court's order appointing the Receiver in this matter. The Objecting Creditors argue that Bankruptcy Code § 543(c) warrants the Bankruptcy Court determining the fees and expenses incurred in the administration of the receivership before this Court. The argument is completely disingenuous and legally without merit.

First, the argument that the Bankruptcy Court should determine the Receiver's fees and expenses incurred in this District Court receivership since § 543(c) allows the Bankruptcy Court to do so ignores:

1. The fact that this section of the Bankruptcy Code is designed to deal with proceedings in which bankruptcy is filed unilaterally by the debtor before fees and expenses of the pre-bankruptcy receivership can be determined and paid;

2. The fact that a federal equity receivership in a governmental police or regulatory powers action, such as this SEC civil enforcement proceeding, continues post-bankruptcy unaffected by the bankruptcy filing under Bankruptcy Code § 362(b)(4) and applicable case law[1] with this Court retaining control over the Receiver and the receivership assets until further order and until the Receiver is discharged; and

3. The fact that this Court's order of appointment expressly provides for this Court to approve and authorize payment of fees and expenses of the Receiver and its professionals, consistent with applicable receivership law.

Second, the position that it is preferable for the Bankruptcy Court to review the services rendered and expenses incurred during the eight months of the District Court receivership is a tactical ploy and gamesmanship by the Objecting Parties because in fact, the Objecting Parties' position is that no fees or expenses incurred in the administration of this case by the Receiver should be paid at all. The Objecting Creditors are simply seeking another forum to re-assert their position that all administrative expenses of the receivership should be denied and remain unpaid, notwithstanding the potential availability of almost $1 million from the DC Action

[1] See 11 U.S.C. § 362(b)(4); Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981).

that may become available through the Receiver's efforts.[2]

Third, it is this Court that is responsible for the interpretation and application of its own order that appointed the Receiver, designated the Receiver's powers and duties, provided for the Receiver's authority to engage counsel and provided for this Court to review and approve the Receiver's fees, expenses and activities, and those of its professionals. As set forth in the leading treatise on receiverships, Clark on Receivers:

> The costs and expenses of a receivership are primarily those incurred by the court in performing its duty of preserving the assets of the defendant so that those assets or their proceeds if sold will be available to meet the valid demands of the litigants and other creditors of the defendant. The costs and expenses of preserving, administering and realizing the property or fund must be paid out of the property or fund.
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> The obligations and expenses which the court creates in its administration of the property are necessarily burdens on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the

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[2] The Objecting Parties raise yet another red herring argument against allowance and payment of the Receiver's fees and expenses based on alleged delay in the Receiver filing the motion in the DC Action to recover the funds from that case. First, the accountant at the SEC performing the tracing of the funds did not complete his activities until after April 14, 2006, when he continued his review of the High Park general ledger at the Receiver's offices, as set forth in paragraph 18 of the Declaration of James C. Bullard in Support of Receiver's Motion for Turnover of Funds Paid by Defendant Showalter on the Judgment to the Receivership Estate of High Park Investment Group, Inc. The motion to recover the funds was filed by the Receiver after it was determined that the SEC could not cause the funds to be turned over without such a motion, even as to funds which it is holding outside the Court registry, and that the SEC itself was not presently ready to file the motion.

> receivership. The appointing court pledges its good faith that all duly authorized obligations incurred during the receivership shall be paid.
>
> . . .
>
> When a fund is realized or produced or brought into court for distribution among claimants, those who by their exertions and activities have brought the fund into court are entitled to be paid out of the fund before it is distributed. [Emphasis added.]

2 Clark on Receivers § 637, pp. 1052-1053 (3rd ed. 1959). See also Local Rule 66-7(f).

B. The Objecting Parties Misstate the Applicable Standard for Approval of the Fees and Expenses of the Receiver and Its Counsel and Ignore the Substantial and Beneficial Administrative Services Performed by the Receiver and Counsel over the Eight Months of the Receivership

Under applicable receivership authorities, the allowance of fees and expenses of a Receiver and its counsel must take into account the facts and circumstances of each case. The determination of "benefit" is not based on increase or even preservation of the monetary value of assets in the Receiver's charge.[3] As noted by the Seventh Circuit in a receivership in which the Receiver engaged in litigation in part sorting out the liens against certain encumbered receivership property:

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[3] The Objecting Creditors incorrectly state that the standards governing allowance and payment of the fees and expenses of a pre-bankruptcy custodian would be governed by Bankruptcy Code § 330(a)(3), a statute which on its face applies to officers or others employed post-bankruptcy by the debtor or trustee in connection with the administration of the bankruptcy estate. That statute and its standards are simply inapplicable in these circumstances or to any person employed by the debtor prior to bankruptcy.

> The district court's award of a receiver's compensation is, of course, firmly within its discretion [citations omitted], and the court may consider all of the factors involved in a particular receivership in determining an appropriate fee. [Citations omitted.] Moreover, "a benefit to a secured party may take more subtle forms than a bare increase in monetary value. Even though a receiver may not have increased, or prevented a decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation."

Gaskill v.Gordon, 27 F. 3d 248, 253 (7th Cir. 1994), quoting Securities and Exchange Commission v. Elliott, 953 F. 2d 1560, 1577 (11th Cir. 1992), and in which the Court noted that the receiver benefited the receivership property by straightening out the receivership entities records, conducting exhaustive title searches on receivership assets and creating a database for properties owned by the entity, thereby allowing the secured creditor to "take control of properties in better order." Gaskill v. Gordon, 27 F. 3d at 252.

The Receiver similarly was faced with incomplete financial and business records in utter disarray, with no way to determine the recorded versus unrecorded liens, the investors and other creditors and other essential administrative information when it assumed control of the Receivership Entities. The Receiver organized the investor and property records of the entities, and the Receiver and its counsel made an exhaustive analysis of those records and the voluminous escrow files turned over by Chapman Escrow in order to determine the liens against the properties, the amount and nature of investment and other claims against the receivership, and the documentation concerning the investments. None of these records allowed the Receiver to conclusively determine the liens that were actually recorded against the properties and the order of their recorded priority. The

Receiver therefore ordered, on credit, title reports for each of the properties, which were analyzed in conjunction with the other investor records and allowed the Receiver and its counsel to prepare the detailed, property-by-property analysis of the real estate assets, the liens encumbering them and the potential equity that would be created for all investor creditors if the deeds of trust securing the invalid, illegal investment contracts were eradicated.

The Receiver also spent substantial time and resources, including obtaining the cooperation of third parties to perform services on credit, to physically protect, preserve, secure and weatherproof the properties to minimize the deterioration of the condition of the structures. The Receiver also obtained valuations of the properties that were and will be essential to a determination of the future course of the properties, potential equity and strategies for liquidation in Chapter 11 or Chapter 7. Based on the work of the Receiver and its counsel, a bankruptcy trustee would be in a position to continue the litigation commenced by the Receiver in bankruptcy to invalidate the investor liens, allow for the sale of the properties without those encumbrances and provide a distribution to investors. Far from being deficient or negligent, the Receiver's work and the work of its counsel was consistently outstanding in the face of a contentious, divided group of investors, an aggressive group of lawyers representing them, and the unending barrage of vitriolic attacks from Mr. Douthit which continued uninterrupted during the Receiver's entire tenure.

C. Public Policy Supports This Court Awarding the Receiver's Fees and Costs as Requested in the Motion

The Receiver was appointed to act as an arm of the Court and to investigate the assets of the estate, take possession and control of the assets, protect the assets, investigate and pursue claims, and liquidate the assets based on the Receiver's evaluation of the appropriate methods and procedures for such liquidation, subject to Court approval. The Receiver assumed these duties and performed them in a

diligent, excellent and professional manner in a case with no cash whatsoever available for administration of the estate and with the timing and payment of administrative expenses uncertain. Through its contacts and good relationships with its vendors, it was able to obtain essential services, goods and information necessary to plot a course of administration that the Receiver believed would lead to an equitable distribution of funds to all of the defrauded investors.

The Receiver filed a complex, detailed motion for instructions setting out that proposed course of action. The District Court in response to the request for instructions concluded the proposed relief sought by the Receiver and liquidation of the assets should be pursued in the forum of a bankruptcy court rather than the District Court. This Court did not rule adversely on the Receiver's legal theories or the substantial factual record the Receiver developed in support of those theories, only that the matter was better off proceeding in bankruptcy. This does not make the Receiver's work wasted, incorrect or fruitless. In fact, the legal theories, facts and evidence harnessed by the Receiver and its counsel can be used in bankruptcy to pursue recovery of the equity in the properties for the benefit of all defrauded investors based on the invalidation of the unlawful investment contracts and the related notes and deeds of trust.

The Receiver's services, and those of its counsel and the vendors who provided goods and services to the estate, have in fact significantly benefited the creditors. These services in particular must be evaluated in the context of the absence of cash resources for the last eight months and the complex, time-consuming and acrimonious nature of this case, ironically made more difficult and acrimonious as a result of the conduct of Mr. Douthit.

Fiduciaries render their services as an arm of the Court based in good faith reliance on the payment of their fees and expenses when receivership assets become available. See 2 Clark on Receivers § 637, p. 1052. Fiduciaries must be protected for the time and expenses incurred in their administration and must be able to rely

on payment to be willing to be engaged to assume control of and administer receiverships under these circumstances. Indeed, the rates charged by the Receiver and its counsel are substantially lower than hourly rates customarily charged by bankruptcy practitioners in the region with similar levels of experience and expertise in part based on the reliability of the payment of their fees and expenses in administering receiverships.[4] Unlike panel trustees under Chapter 7 and Chapter 13 of the Bankruptcy Code, whose fees are statutorily set, there is no mandate for individuals and entities to accept appointment as a receiver in civil enforcement actions regardless of the availability of assets or prospects for payment of administrative expenses. Where assets may become available, as in this case through the funds in the DC Action, those assets are required to be applied to payment of administrative expenses of the Receiver and its counsel before assets are turned over to creditors. See 2 Clark on Receivers § 637, pp. 1052-1053; Gaskill v.Gordon, 27 F. 3d 248, 253 (7th Cir. 1994); Securities and Exchange Commission v. Elliott, 953 F. 2d 1560, 1577 (11th Cir. 1992).[5]

D. Payment of the Receiver's Fees and Expenses, Which Is Not Likely to Occur Until After the Bankruptcies Are Filed, Would Not Result in An Avoidable Preference

Bame, as one of the Objecting Parties, asserts that an award of fees and expenses to the Receiver would result in an avoidable preference under Bankruptcy Code § 547. This assertion is factually and legally meritless. First, as the parties all seem to concede, it is unlikely that funds will be paid to the Receiver until after

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[4] The Receiver has served based on a 20% discount off its customary rates. The rates charged by Receiver's counsel are substantially discounted from its standard rates and, on top of this, provided an additional 10% discount off its already discounted rate.

[5] While the Receiver would be entitled to seek payment from real estate upon its liquidation, the Receiver does not seek payment from these assets at this time. Therefore, Adli need not be concerned that the Receiver is seeking to surcharge his purported collateral in this motion.

the bankruptcy petitions are filed, in that the Receiver has indicated it will file petitions within three days after the Court's ruling on the pending motion. Second, even if the payments were made prior to the petition date, the payments would not be an avoidable preference as they would not meet the statutory standards for avoidance. First, the payment would not be a payment or transfer of funds by the debtor. Second, the payment would not allow the Receiver and related parties to recover more than they would in a Chapter 7 liquidation, as these claims are administrative claims of the federal receivership that must be satisfied under § 362(b)(4) and applicable law before any funds can be paid to the bankruptcy estate. See 11 U.S.C. § 362(b)(4) and SEC v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981); 2 Clark on Receivers § 637, pp. 1052-1053. See also 11 U.S.C. § 543(c)(3) (disbursements by a pre-bankruptcy custodian approved by the court prior to bankruptcy cannot be challenged in bankruptcy). Further, given that the "debtor" is an entity in a federal equity receivership, the payment of the fees and expenses of the receivership pursuant to court order constitute payment in the ordinary course and made according to applicable law.

E. The Criticisms of the Coleman Group Regarding Alleged Duplication or Excessiveness of Certain Services Are Unwarranted

The Coleman Group cites a few examples of entries from the Receiver's and counsel's time records where, for example, both of the Receiver's principal attorneys appeared at the May 15, 2006 hearing on the motion for instructions, both counsel participated in certain telephone calls, or both of the Receiver's principal deputies attended investor meetings. Again, these criticisms ignore the circumstances presented in this case, the hundreds of pages of pleadings generated in connection with the hearings, both in terms of pleadings prepared and filed by the Receiver and pleadings opposing the Receiver's motions, the numerous attorneys involved on behalf of the investors, and the complexity of the issues and therefore the necessity of more than one representative of the Receiver and of the

Receiver's counsel to deal with the hearings and meetings. Further, conference calls, if not excessive, promote efficiency so that all persons involved in the preparation of pleadings and development of strategies are involved simultaneously and have the same information to proceed with the independent tasks each is required to perform.

Another issue raised by the Coleman Group is the inability to determine the billing rates for the attorneys. The billing rates for the Receiver's lead attorneys, Gary Caris and Lesley Hawes, have remained unchanged from the rates at Frandzel of $346.50 and $310.50, respectively, rates that represent a 10% discount from the rates charged on other governmental enforcement matters and rates that are significantly lower than the ordinary hourly rates charged by each of those attorneys in other matters of $470.00 and $400 per hour, respectively.[6] The rate charged for Johnny Traboulsi is $283.50 per hour, a rate that is 20% less than his 2006 hourly rate charged to other clients of $355 per hour. Mr. Traboulsi is a six year litigation attorney and a graduate of Georgetown University and U.C.L.A. Law School.

F. The Coleman Group's Argument That The Properties Should Have Been Sold Ignores The Economic Reality Of The Properties If The Investor Liens Are Not Invalidated

After complaining about what the Receiver did do, the Coleman Group criticizes the Receiver for not taking steps (and incurring additional expenses) to sell the properties. This argument fails to recognize the Receiver would be unable to sell the properties without a court order that it could do so free and clear of liens, which would have been a waste of estate resources until such time as the Court determined the validity of the investor liens. If the investor liens are valid and

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[6] This means Caris is billing at a 26.3% discount over his customary rate and Hawes is billing at a 22.4% discount over her customary rate.

cannot be removed from the properties, then the properties should be abandoned to the secured creditors so that they may be foreclosed upon.

III. CONCLUSION

This has been an extraordinarily difficult, contentious, time-consuming case. The Receiver took its charge to administer the estate and seek to liquidate estate assets seriously and acted diligently for the benefit of all defrauded investors. The Receiver was faced with a group of investors who had divergent interests, an aggressive group of lawyers representing those interests and one lawyer in particular who acted in a manner that was, quite simply, beyond the pale. But the Receiver and its counsel stayed the course and attempted to do the right thing legally and equitably pursuant to the Court's express order. The fees and expenses sought are fair and reasonable. The Receiver respectfully requests that the Court grant relief as requested in its Motion.

Dated: July 13, 2006

McKenna Long & Aldridge LLP
Gary Owen Caris
Lesley Anne Hawes

By: _____
Gary Owen Caris
Attorneys for Permanent Receiver,
ROBB EVANS & ASSOCIATES LLC

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **444 South Flower Street, Los Angeles, California 90071**.

On July 14, 2006, I served the **RECEIVER'S (A) RESPONSE TO "CERTAIN CREDITORS' PROPOSED PLAN REGARDING INITIATION OF BANKRUPTCY PROCEEDING – RESPONSE TO RECEIVER"; AND (B) CONSOLIDATED REPLY TO OPPOSITIONS TO RECEIVER'S MOTION FOR APPROVAL OF PRE-BANKRUPTCY REPORTS AND APPROAL AND PAYMENT OF RECEIVER'S AND PROFESSIONALS' PRE-BANKRUPTCY FEES AND EXPENSES** on the interested parties in this action by placing the **true copy**/original thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

SEE ATTACHED MAILING LIST.

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service.

The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

☐ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 14, 2006 at Los Angeles, California.

Pamela A Coates
Signature

Pamela A. Coates
Print Name

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