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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

MERRILL SCOTT & ASSOCIATES, LTD.,  
MERRILL SCOTT & ASSOCIATES, INC.,  
PHOENIX OVERSEAS ADVISERS, LTD.,  
PATRICK M. BRODY, DAVID E. ROSS II,  
AND MICHAEL G. LICOPANTIS,

Defendants.

**OPPOSITION TO MOTION FOR  
APPROVAL OF RECEIVER'S THIRD  
INTERIM DISTRIBUTION FILED BY  
JOSEPH P. FIRMAGE**

Case No. 2:02-CV-0039

Judge Tena Campbell

Magistrate Judge David Nuffer

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**INTRODUCTION**

On September 28, 2009, the Court entered an order granting in part and denying in part Joseph P. Firmage's ("Mr. Firmage") Motion to Set Aside Order Denying Entry of Late Filed Claim and to Allow Late Claim (the "Order"). The Order allowed Mr. Firmage's claim in the amount of \$5,000,000, but held that Mr. Firmage could only take part in future distributions. As such, Mr. Firmage was not entitled to the approximately 64% return received by other creditors

in the First and Second Distributions, but was entitled to any future distributions on a pro rata basis.

The Receiver's Motion for Approval of Third Interim Distribution proposes to distribute \$3,684,277.22 to Class 3 Non-Insider Investor Claims on a pro rata basis, but incorrectly states that Mr. Firmage's claim is for \$1,800,000. The Court allowed Mr. Firmage's claim in the amount of \$5,000,000, and therefore his distribution amount should be approximately \$502,000 instead of the proposed \$198,000.

### FACTS

1. On June 26, 2009, Mr. Firmage filed a Motion to Set Aside Order Denying Entry of Late Filed Claim and to Allow Late Claim (the "Motion to Allow Late Claim"). [Docket No. 1292.]
2. Included with the memorandum in support his Motion to Allow Late Claim was Mr. Firmage's claim form, attached as Exhibit D. [Docket No. 1294.]
3. Exhibit D asserts a claim in the amount of \$5,000,000 for Mr. Firmage. [*Id.*]
4. After the matter was fully briefed by both sides and the Court heard oral argument, the Court entered an order granting in part and denying in part the Motion to Allow Late Claim. [Docket No. 1309.]
5. The Order held that "Firmage's claim, in the form attached to his Declaration dated June 26, 2009 as Exhibit "D," is by this Order deemed to have been filed." [*Id.*]
6. The Order further held that Mr. Firmage could not participate in distributions made prior to the Order, but that "[t]he Receiver shall distribute to Firmage his pro rata share of

all distributions made to Claimants after the date of this Order, consistent with the Plan of Distribution.” *[Id.]*

7. On November 20, 2009, the Receiver filed his Motion for Approval of Receiver’s Third Interim Distribution (the “Motion to Approve Third Distribution”). [Docket No. 1324.]

8. Schedule A, attached to the memorandum in support of the Motion to Approve Third Distribution, sets forth the proposed distribution amounts. [Docket No. 1325.]

9. The second column of Schedule A lists the amount of each claimant’s allowed claim. *[Id.]*

10. That column incorrectly states that Mr. Firmage’s allowed claim is \$1,800,000. *[Id.]*

11. Because Mr. Firmage’s allowed claim is incorrectly stated, his proposed distribution is for \$198,000 when it should be for approximately \$502,000.

### **ARGUMENT**

#### **I. Mr. Firmage Should Receive His Pro Rata Distribution of the Third Interim Distribution**

The Court, after careful consideration, made an equitable ruling that allowed Mr. Firmage’s late filed claim, but denied him the ability to partake in prior distributions. As such, Mr. Firmage did not receive approximately 64% of his investment, which percentage was received by the other Class 3 Claimants. Instead, Mr. Firmage was granted the opportunity to receive his pro rata share of all future distributions.

The Receiver appears to have accounted for the prior 64% by reducing Mr. Firmage’s claim by that amount, thereby reducing his claim to \$1,800,000. But this deduction essentially penalizes Mr. Firmage twice. Because such an additional penalty was not directed by the Court,

the Receiver should make a pro rata distribution to Mr. Firmage based upon his allowed claim of \$5,000,000.

The 11% return to claimants listed in Schedule A appears to be calculated by dividing the total amount to be distributed, \$3,684,277.22, by the total amount of allowed claims, listed as \$33,493,429.26. If the total amount of allowed claims is increased by \$3,200,000 to properly reflect Mr. Firmage's allowed claim in full, then the total amount of all allowed claims is really \$36,693,429.26. Dividing the total amount to be distributed by the new total amount of claims provides for a distribution to all Class 3 Claimants of approximately 10.04% of their allowed claims. Based upon this percentage, Mr. Firmage's distribution should be approximately \$502,000. A draft of the proposed changes to Schedule A is attached as Exhibit 1.

### CONCLUSION

The Court has ordered that Mr. Firmage's claim should be allowed in the full amount of \$5,000,000, but that he should only be permitted to partake in pro rata distributions made after the entry of the Order. As such, Mr. Firmage's pro rata share of the Third Interim Distribution should equal approximately \$502,000, instead of \$198,000. Mr. Firmage respectfully requests that the Court order the Receiver to make appropriate corrections to Schedule A and distribute the proper amount to him.

DATED this 25th day of November, 2009.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Tammy B. Georgelas  
David W. Slaughter  
Tammy B. Georgelas  
*Attorneys for Joseph P. Firmage*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25th day of November, 2009, I caused a true and correct copy of Joseph P. Firmage's **OPPOSITION TO MOTION FOR APPROVAL OF RECEIVER'S THIRD INTERIM DISTRIBUTION FILED BY JOSEPH P. FIRMAGE** to be served electronically via CM/ECF on the following:

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# EXHIBIT 1

**Proposed Changes to Schedule A**

Name of Claimant	Allowed Claim	Third Distribution Amount
Argenbright, Glenn	\$164,958.87	\$16,563.03
Asp, Duane and Geraldine, and related entities	\$833,320.95	\$83,671.26
Bermant, Jeffrey	\$2,000,000.00	\$200,814.00
Blegen, Darrell	\$2,600,416.36	\$261,100.01
Bliss, Erik D.	\$185,000.00	\$18,575.30
Bouchey, Reed M.	\$0.00	\$0.00
Bowen, Jeffrey and Lisa and Affiliates and The Jeffrey & Lisa Bowen Charitable Supporting Organization	\$1,440,000.00	\$144,586.08
Buddemeyer, Daryl	\$400,000.00	\$40,162.80
Cohon, Alan	\$1,670,576.00	\$167,737.52
Crosby, Mark	\$850,000.00	\$85,345.95
Delamarter, Dr. Rick	\$500,000.00	\$50,203.50
Dowd Foundation	\$800,000.00	\$80,325.60
Enterplex, LP/Ronald C. Malone, Insured	\$124,000.00	\$12,450.47
Erik Kooba, P.C.	\$176,000.00	\$17,671.63
Eylands, Val and Jana; Eylands Charitable Support Organization	\$694,839.00	\$69,766.70
Firmage, Joseph	\$5,000,000.00	\$502,035.00
Freeman, Henry J. III	\$1,000,000.00	\$100,407.00

**Proposed Changes to Schedule A**

Gerber, Richard	\$5,076,139.00	\$509,679.89
Harper, William	\$106,000.00	\$10,643.14
Harrison, Christopher and/or AntiGravity, Inc.	\$51,520.61	\$5,173.03
Haskins, Scott & Diana Support Organization	\$823,460.33	\$82,681.18
Hayes, Partick and Janet, Patrick and Janet Hayes Charitable Support Organization	\$1,198,750.00	\$120,362.89
Horwitz, Meton J. and Lorraine B.	\$135,000.00	\$13,554.95
Kang, Dan	\$710,000.00	\$71,288.97
Kelly, Robert and Elizabeth	\$362,000.00	\$36,347.33
Kyle, Scott & Deborah, and Kyle Support Organization	\$582,019.00	\$58,438.78
Mackinnon, Douglas	\$1,756,000.00	\$176,314.69
Mario C/ & Elva G. Rapanotti Charitable Support Organization	\$150,000.00	\$15,061.05
McBride, Jon	\$0.00	\$0.00
Mowrey, Jeffrey M.	\$310,000.00	\$31,126.17
Mynar, Thomas J., Individually and as Executor of the Estate of Helen F. Mynar as Assignee of Thomas S. Powers and Thomas S. Powers, M.D., Inc.	\$67,663.09	\$6,793.85

**Proposed Changes to Schedule A**

Nourse, Jeffrey	\$521,414.04	\$52,353.62
Pacific Coast Venture Corporation (Robert M. Yeakey)	\$459,000.00	\$46,086.81
Puetz, William J.	\$150,000.00	\$15,061.05
Rapanotti Partners, Ltd., LLP	\$32,500.00	\$3,263.23
Sharp, Jay	\$3,531,157.80	\$354,552.96
Sharp, Jay R. Jr.	\$290,000.00	\$29,118.03
Solla, Jeffrey	\$610,000.00	\$61,248.27
Stoner, Chyrel E.	\$0.00	\$0.00
Strokirk II, Ltd.	\$410,000.00	\$41,166.87
Tolman Construction Company	\$91,728.21	\$9,210.15
Valley Christian Schools (assignee of Richard Trevino claim)	\$100,000.00	\$10,040.70
Wells, Jack Jr.	\$175,000.00	\$17,571.23
Wendewell Construction, Inc. (Glen Wellborn)	\$210,000.00	\$21,085.47
Wheeler, Mark	\$130,116.00	\$13,064.56
Williams, Michael G & Cassandra and Support Organization	\$116,350.00	\$11,682.35
Yoakum, Vance	\$98,500.00	\$9,890.09
<b>TOTAL:</b>	<b>\$36,693,429.26</b>	<b>\$3,684,277.15</b>