

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SECURITIES AND EXCHANGE)	
COMISSION,)	
)	
Plaintiff,)	
)	No. 19-cv-08454
v.)	
)	Judge Andrea R. Wood
TODAY’S GROWTH CONSULTANT, INC.)	
et al.,)	
)	
Defendants.)	

**ORDER APPROVING SETTLEMENT AGREEMENT
BY AND BETWEEN MELANIE E. DAMIAN, AS RECEIVER
OF TODAY’S GROWTH CONSULTANT, INC., AND HEARTLAND
BANK AND TRUST COMPANY, AND BARRING CERTAIN CLAIMS**

THIS MATTER came before the Court on July 14, 2023, upon *Melanie Damian’s, as Receiver of Today’s Growth Consultant, Inc., Motion to Approve (i) Settlement Agreement, and (ii) Bar of Certain Claims* [ECF No. 256] (the “Motion”), seeking approval of the Settlement Agreement¹ by and between Melanie Damian, as Receiver (the “Receiver”) of Today’s Growth Consultant, Inc. (“TGC”), and Heartland Bank and Trust Company (the “Bank” or “Heartland,” and together with the Receiver, collectively, the “Parties”), fully resolving all claims.

The Court, having reviewed the Motion and the record in this case, having found that proper notice of the Motion and the Order Setting Hearing was provided to all interested parties as required pursuant to the Order Setting Hearing [ECF No. 274], having noted that no objections have been filed with the Court opposing the relief requested in the Motion prior to the June 30, 2023 Objection Deadline set forth in the Order Setting Hearing, having heard argument of counsel

¹ All capitalized terms shall have the same meaning as defined in the Motion unless otherwise defined herein.

in support of the relief sought by the Motion, having found that good and sufficient cause exists to approve the Settlement Agreement because the Agreement is made in good faith and is fair and equitable. *See Shapo v. Engle*, 98 C 7909, 1999 U.S. Dist. LEXIS 18221, *9 (N.D. Ill. Nov. 16, 1999); *Barash v. Morris*, 144 B.R. 401, 405 (Bankr. C.D. Ill. 1992).

Findings and Conclusions

The Court hereby finds and concludes as follows:

1. On December 30, 2019, this Court entered its Order Appointing Receiver (the “Appointment Order”). Under the Appointment Order, the Receiver was “authorized, empowered and directed to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in her discretion, and in consultation with SEC counsel, be advisable or proper to recover and/or conserve Receivership Property.” (Appointment Order, ¶ 42).

2. Under the Appointment Order, in relevant part, the Receiver was also “authorized, empowered and directed to investigate the manner in which the Receivership Defendant conducted its financial and business affairs and (after obtaining leave of this Court) to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate; the Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order.” (Appointment Order, ¶ 43).

3. The Appointment Order also imposed a stay of “(a)ll civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in her

capacity as Receiver; (b) any Receivership Property, wherever located; (c) the Receivership Defendant, including subsidiaries and partnerships; or, (d) any of the Receivership Defendant's past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise (such proceedings are hereinafter referred to as "Ancillary Proceedings")." (Appointment Order, ¶ 32).

4. The Appointment Order also provided that "(t)he parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process," and "(a)ll Ancillary Proceedings are stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any action until further Order of this Court." (Appointment Order, ¶¶ 33 and 34).

5. Pursuant to the Appointment Order, the Receiver commenced an action styled *Melanie E. Damian, as Receiver of Today's Growth Consultant, Inc. (dba The Income Store) v. Heartland Bank and Trust Company*, Case No. 1:20-cv-07819, pending in the United States District Court for the Northern District of Illinois (the "Receiver's Action"), alleging claims against Heartland for violations of the Illinois Fiduciary Obligations Act, aiding and abetting breach of fiduciary duty, fraudulent transfers, and unjust enrichment in connection with TGC and Kenneth Courtright (collectively, the "Receivership Defendants").

6. On February 12, 2020, certain plaintiffs (the "Class Plaintiffs") commenced an action styled *PLB Investments LLC, et al. v. Heartland Bank and Trust Company*, Case No. 1:20-cv-1023, pending in the United States District Court for the Northern District of Illinois (the "Class

Action”), alleging claims against Heartland for violations of the Illinois Fiduciary Obligations Act, and aiding and abetting breach of fiduciary duty.

7. The alleged claims, injuries, and harms in both the Receiver’s Action and Class Action arise from a singular alleged scheme, not isolated acts—that is, from a composite of conduct by TGC, Ken Courtright, and others taken over years, collectively establishing and perpetuating the alleged fraud. Additionally, the claims of the Class Plaintiffs and those of the Receiver seek recovery to address the same harms sustained by the same conduct and transactions in the same alleged scheme. *See, Zacarias v. Stanford International Bank Ltd.*, 945 F.3d 883, 899-902 (5th Cir., Dec. 19, 2019).

8. The claims asserted by the Class Plaintiffs are substantially identical to claims asserted by the Receiver because they involved “the same loss, from the same entities, related to the same conduct, and arising out of the same transactions and occurrences by the same actors.” *Id.* at 898, citing *SEC v. DeYoung*, 850 F.3d 1172, 1175 (10th Cir. 2017).

9. There is no evidence or allegation that Heartland communicated or interacted with Claimants (as defined below), made any representations to Claimants, or took any actions directly with Claimants.

10. The Receiver asserts additional claims in the Receiver’s Action that are not and cannot be asserted by the Class Plaintiffs in the Class Action.

11. By reason of the Appointment Order and applicable law concerning federal equity receiverships, the Receiver is the owner of, possesses, and has the sole and exclusive right to assert all alleged claims and potential causes of action against the Bank arising from TGC’s relationship with the Bank, including any alleged claims related to TGC’s Consulting Performance Agreements with its investors or similar agreements with TGC.

12. The Receiver's Action and the Class Action were consolidated for the purposes of discovery. Extensive consolidated discovery was conducted in the Receiver's Action and the Class Action, including the production and exchange of over four million documents and the taking of numerous depositions.

13. On February 1, 2023, the Receiver, the Class Plaintiffs, the Bank, and their respective counsel participated in a single mediation of the claims in the Receiver's Action and Class Action. Thereafter, the Receiver, the Class Plaintiffs, and the Bank reached an agreement on the terms of a proposed settlement of the Receiver's Action and Class Action, which such terms are set forth in certain settlement agreements in each case (collectively, the "Settlement Agreement").

14. The settlement contemplated in the Settlement Agreement is expressly conditioned on the entry of a bar order (the "Bar Order") that permanently bars and enjoins all persons, firms, and entities (collectively, "Claimants") from commencing, prosecuting, or asserting any judicial, administrative, arbitration, or other proceeding, either directly or in any other capacity, against the Bank, defined to include its parent or subsidiary companies, affiliates, past and present officers, employees, shareholders, beneficiaries, members, directors, attorneys, agents, partners (whether general or limited), successors or assigns, as to any and all liabilities, judgments, rights, claims, cross-claims, counterclaims, third party claims, demands, suits, matters, obligations, damages, debts, losses, costs, actions, and causes of action of every kind and description, arising under common law, rule, regulation, or statute, whether arising under state or federal law, whether presently known or unknown that any Claimant now has, ever had, or may claim to have in the future that is a direct, indirect, and/or derivative claim, whether known or unknown, that relates in any manner whatsoever to TGC. As used in the Settlement Agreement, the term "Claimant"

includes all such persons, firms, and entities, whether or not the Claimant filed a claim in the Receivership Action or elected to receive a distribution of one or more websites in the claims process in the Receivership Action.

15. Heartland has conditioned its willingness to enter the Settlement Agreement and make the Settlement Payment on a full and final resolution with respect to any and all claims instituted now or hereafter by any and all of the Barred Persons (as defined below) against any and all of the Heartland Released Parties (as defined below) that in any way relate to, are based upon, arise from, or are connected with Today's Growth Consultant, Inc. or to transactions and occurrences alleged in the Receiver's Action or the Class Action (the "Barred Claims," as more fully defined below). Under the Settlement Agreement, Heartland has no obligation to pay the Settlement Amounts unless the Bar Order is entered and fully effective on its terms, all objections to such Bar Order are overruled, and no appeal of any orders overruling such objections are timely filed or such appeal(s) are denied or dismissed.

16. The Court finds that the Bar Order is an essential requirement for the existence of the settlements under the Settlement Agreement, and without such Bar Order, such settlements will not be possible.

17. The Court also notes that the source of funds for payment of the Settlement Amounts under the Settlement Agreement is derived in part from the proceeds of certain insurance that may or may not provide coverage for the claims alleged against the Bank, and that the policy with respect to such insurance is a "wasting" policy under which the costs of the Bank's defense are depleting such insurance. Accordingly, the imposition of the Bar Order to enable the settlements under the Settlement Agreement at this time is in the best interests of the Receivership

estate and all Claimants, given the likelihood of depletion of such insurance if the Receiver's Action, the Class Action, or any other future action against the Bank are permitted to proceed.

18. The Court also notes that, because the settlements contemplated under the Settlement Agreement will not occur without the Bar Order, and because the settlements are important to the Receivership estate, the barring of other judicial proceedings is appropriate and necessary where they would undermine the receivership's operation. *Zacarias*, 945 F.3d at 902.

19. The Court has been apprised of the negotiations that preceded the Settlement Agreement and finds that the Settlement Agreement and the Motion and incorporated request for Bar Order are a result of arms'-length bargaining among the Parties. The Court has also been apprised that the Receiver and the Receiver's Action were substantially benefitted by extensive work of the Class Plaintiffs' counsel in the consolidated discovery, thereby justifying the settlement under the Settlement Agreement. There is no evidence that the settlement reached by and between the Parties is the result of collusion between the Parties or that there has been any intent to prejudice any other interested parties.

Order

For the reasons stated on the record, it is ORDERED as follows:

20. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

21. The form and means of the notice of the Motion, Bar Order, and Order Setting Hearing are determined to have been the best notice practicable under the circumstances and to be good and sufficient notice to all persons and entities whose interests would or could be affected by this Order.

22. The Court finds that entry of this Order is appropriate to achieve finality and repose that contemplated as a term of the proposed Settlement Agreement and that good cause exists for the entry of this Order and is fair and equitable. *In re Kmart Corp.*, 381 F.3d 709, 715 (7th Cir. 2004); *Stern v. Clearing, LLC*, 09 C 794, 2011 U.S. Dist. LEXIS 103156, *4 (N.D. Ill. Sept. 12, 2011).

23. “Pursuant to their jurisdiction under the securities laws, federal courts can make use of receiverships where “a troubled entity, bedeviled by their violation, will be unable to satisfy all of its liabilities to similarly situated investors in its securities.” *Zacarias* at 894-895. “In these instances, the district court can take possession of the troubled entity and its assets and vest control in an appointed receiver to ‘stand in the shoes’ of the troubled entity, who ‘is entitled to pursue the corporation’s claims ‘for the benefit not of [the wrongdoers] but of innocent investors.’ The receiver is therefore allowed to curb investors’ individual advantage-seeking in order to reach settlements for the aggregate benefit of investors under the court’s supervision ... [and] a receiver may systematically use ancillary litigation against third-party defendants to gather the entity’s assets ... [which] are distributed through a court-supervised administrative process.” *Id.* at 896.

24. Orders preventing interference with the administration of receivership property may include “stays of claim in other courts against the receivership and bar orders foreclosing suit against third-party-defendants with whom the receiver is also engaged in litigation.” *Id.* at 896-97. “(B)ar orders enjoining ... investors’ third-party claims fall well within the broad jurisdiction of the district court to protect the receivership res. The exercise of jurisdiction over a receivership is not an exercise of jurisdiction over other judicial proceedings. Rather, it permits the barring of such proceedings where they would undermine the receivership’s operation.” *Id.* at 902. In so doing, the court affords objecting investors “all the process due: notice and opportunity to be heard

on the proposed settlement and bar orders.” *Id.* at 903. “They (are) not deprived of any entitlement to recovery: the bar orders channel investors’ recovery ... through the receivership’s distribution process.” *Id.*

25. Courts have frequently used bar orders for these purposes in cases similar to the Receiver’s Action. *See e.g., SEC v. Quiros*, 1:16-cv-21301-DPG, Doc. 523-1 (S.D. Fla., Jan. 8, 2019); *SEC v. Adams*, 2021 WL 8016843, 3:18-cv-252 (S.D. Miss., Feb. 25, 2021); *SEC v. Alleca*, 2015 WL 11199076, 1:12-cv-3261-WSD (N.D. Ga., Oct. 15, 2015); *SEC v. Nadel*, 2012 WL 12910648, 8:09-cv-87-T-26TBM (M.D. Fla., Feb. 10, 2012); *SEC v. Parish*, 2010 WL 8347143, 2:07-cv-00919-DCN (D. S.C., Feb. 10, 2010); and *Harmelin v. Man Financial, Inc.*, 2007 WL 4571021, 06-1944, 05-2973 (E.D. Pa., Dec. 28, 2007).

26. A third-party defendant’s “incentives to settle are reduced—likely eliminated—if each ... investor retains an option to pursue full recovery in individual satellite litigation. Such resolution is no resolution. And the costs of undermining this settlement are potentially large. The receivership—and thus qualifying investor claimants—would be deprived of ... settlement proceeds.” *Id.* at 900.

27. As set forth above, the Court considered the factors set forth in *Digital Media Solutions, LLC v. S. U of Ohio, LLC*, 2023 WL 1794250 (6th Cir. Feb. 7, 2023) and *Zacarias v. Stanford International Bank Ltd.*, 945 F.3d 883, 899-902 (5th Cir., Dec. 13, 2019).

28. The Court does not find that the factors applied by the court in *Digital Media Solutions, LLC v. S. U. of Ohio, LLC*, 2023 WL 1794250 (6th Cir. Feb. 7, 2023) apply to the circumstances surrounding the alleged claims in the Receiver’s Action, the Class Action, or the potential claims of any other Claimants that may be asserted against the Bank.

29. The alleged claims, injuries, and harms in both the Receiver's Action and Class Action arise from a singular alleged scheme, not isolated acts—that is, from a composite of conduct by TGC, Ken Courtright, and others taken over years, collectively establishing and perpetuating the alleged fraud. Additionally, the claims of the Class Plaintiffs and those of the Receiver seek recovery to address the same harms sustained by the same conduct and transactions in the same alleged scheme. See, *Zacarias* at 899-902. All Receivership Claimants, if such claims were brought, seek recovery based on the same alleged losses or injuries, from the same entities, related to the same conduct, and arising out of the same transactions and occurrences, and by the same actors, as claims asserted by the Receiver. *Zacarias* at 899-902. *Contra, Digital Media Solutions, LLC v. S. U. of Ohio, LLC*, 2023 WL 1794250, *8-11 (6th Cir. Feb. 7, 2023).

30. The Receiver is not aware of any evidence or allegation that Heartland communicated or interacted with Claimants, or made any representations to Claimants, or took any actions directly with Claimants. As such, any claims that were or could have been asserted by Claimants against Heartland are not independent or non-derivative of the claims asserted by the Receiver against the Bank in the Receiver's Action, and any injuries or losses allegedly incurred by the Claimants were incurred indirectly as a result of any harm caused to TGC. *Contra, Digital Media Solutions*, 2023 WL 1794250, *8-11.

31. The Claimants are also the beneficiaries of any recoveries obtained by the Receiver in the Receiver's Action, and the Receiver has adequately represented and advocated for their interests in the Receiver's Action. All such Claimants had the ability to participate in the Receivership claims process, and their claims are derivative of and dependent on the Receiver's claims, and their claims directly affect the Receivership Estate's assets. *Contra, Digital Media Solutions*, 2023 WL 1794250, *8-11. *See also DeYoung* at 1182.

32. Accordingly, the Court finds that the entry of the Bar Order set forth below is necessary and appropriate.

33. The Motion is **GRANTED**, and the Settlement Agreement is **APPROVED**.

34. All objections, to the extent asserted, to the Motion and Settlement Agreement are hereby **OVERRULED**.

35. The terms of the Settlement Agreement are incorporated into this Order as if fully set forth herein, including the non-disturbance of the priority of the Bank's Mortgages as provided in the Settlement Agreement.

36. The Court approves the Receiver's attorney's fees as set forth in the Motion. Specifically, the Receiver requests the Court authorize and approve payment of \$2,970,000 to Damian Valori Culmo from the Settlement Amount, which represents 33% of the \$9 million Settlement Amount. To be applied as follows: (a) \$500,000 of the \$2,970,000 will be applied toward the payment of administrative fees previously incurred, which the Receiver has held back pursuant to the March 2, 2022 Stipulation and Order Concerning Receiver's Interim Fee Applications; (b) \$191,745 will reimburse the Receiver's expenses incurred in the Receiver's Action against the Bank; and (c) the remainder (\$2,278,255) will be applied as the contingency fee from the settlement amount.

37. **BAR ORDER AND INJUNCTION: THE BARRED PERSONS ARE PERMANENTLY BARRED, ENJOINED, AND RESTRAINED FROM ENGAGING IN THE BARRED CONDUCT AGAINST THE HEARTLAND RELEASED PARTIES WITH RESPECT TO THE BARRED CLAIMS,** as those terms are herein defined.

a. **The "Barred Persons":** Any non-governmental person or entity, including, without limitation, (i) all Claimants, as defined herein; (ii) any current or former owners,

officers and directors, limited and general partners, investors, and creditors of TGC; (iii) any persons or entities against whom the Receiver has asserted or may hereafter assert any claims, demands, or lawsuits involving TGC's Consulting Performance Agreements or that in any way relate to, are based upon, arise from, or are connected to the acts, practices, or course of conduct alleged in the SEC Enforcement Action, the Receiver's Action, or the Class Action; and (iv) any person, entity, or affiliate claiming by or through the persons or entities identified in (i), (ii), or (iii);

b. The "Barred Conduct": Instituting, reinstating, intervening in, initiating, commencing, maintaining, continuing, filing, encouraging, soliciting, supporting, participating in, collaborating in, otherwise prosecuting, or otherwise pursuing or litigating in any case or manner, whether pre-judgment or post-judgment, or enforcing, levying, employing legal process, attaching, garnishing, sequestering, bringing proceedings supplementary to execution, collecting or otherwise recovering, by any means or in any manner, based upon any liability or responsibility, or asserted or potential liability or responsibility, directly or indirectly, relating in any way to the Barred Claims;

c. The "Barred Claims": Any and all direct, indirect, and/or derivative claims, actions, lawsuits, causes of action, complaints, cross-claims, counterclaims, or third-party claims or proceedings of any nature, whether known or unknown, including, but not limited to, litigation, arbitration, or other proceeding, in any federal or state court, or in any other court, arbitration forum, administrative agency, or other forum in the United States, Canada or elsewhere, whether arising under local, state, federal or foreign law, that in any way relate to, are based upon, arise from, or are connected to

the acts, practices, or course of conduct alleged in the SEC Enforcement Action, the Receiver's Action, or the Class Action;

- d. **The "Heartland Released Parties"**: Heartland, its parent, affiliates, and subsidiary companies, all current, former and future employees, agents, attorneys, officers and directors, and consultants, and each of its shareholders, managers, principals, associates, representatives, attorneys, and each of their respective administrators, heirs, beneficiaries, assigns, predecessors, predecessors in interest, successors, and successors in interest;
- e. **"Claimants"**: Any and all investors, site partners, and customers of TGC, all persons and entities that entered into any contracts with TGC, and all persons and entities to whom the Receiver sent any notices concerning any right to file claims in the SEC Enforcement Action, whether or not such Claimants filed a claim in the SEC Enforcement Action or elected to receive a distribution of one or more websites in the claims process in the SEC Enforcement Action, and whether or not any such claim was allowed or disallowed.

38. Nothing in this Order or the Settlement Agreement, and no aspect of the Parties' settlement or negotiations thereof, is or shall be construed to be an admission or concession of any violation of any statute or law, of any fault, liability, or wrongdoing, or of any infirmity in the claims or defenses of the Parties with regard to the Receivers' Action, the Class Action, any proceeding therein, or any other case or proceeding.

39. Heartland shall have no duty or liability with respect to the administration of, management of, or other performance by the Receiver of her duties relating to the Receivership, including, without limitation, the process to be established by the Receiver for filing, adjudicating

and paying claims against the Receivership estate or the allocation, disbursement, or other use of the Settlement Amount.

40. Nothing in this Order or the Settlement Agreement, nor the performance of the Parties' obligations thereunder, shall in any way impair, limit, modify, or otherwise affect the rights of Heartland or the Receiver against any party not released in the Settlement Agreement.

41. Pursuant to Fed. R. Civ. P. 54(b), and the Court's authority in this equity receivership to issue ancillary relief, this Order is a final order for all purposes, including, without limitation, for purposes of the time to appeal or to seek rehearing or reconsideration. Other than by direct appeal of this Order, or motion for reconsideration or rehearing thereof, made in accordance with the Federal Rules of Civil Procedure, no appeal, challenge, decision, or other matter concerning any subject set forth in this paragraph shall operate to terminate or cancel the Settlement Agreement, or to impair, modify, or otherwise affect in any manner the Bar Order.

42. Without impairing or affecting the finality of this Order, the Court retains continuing and exclusive jurisdiction to construe, interpret, and enforce this Order, including, without limitation, the injunctions, bar orders, and releases herein or in the Settlement Agreement, or the implementation thereof.

IT IS SO ORDERED:

A handwritten signature in black ink, appearing to read "Andrea R. Wood", written over a horizontal line.

Andrea R. Wood
United States District Judge