

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 SECURITIES AND EXCHANGE
5 COMMISSION,

6
7 **Plaintiff,**

8
9 **v.**

10 **Civil File No.**
11 **1:08-cv-3097-BBM**

12 **JONATHAN W. MIKULA,**
13 **JOHN B. CRADDOCK, JW&P**
14 **CONSULTING, LLC and**
15 **NATIONS WARRANTY GROUP,**
16 **INC.**

17 **Defendants.**

18 **DEFENDANTS' JONATHAN W. MIKULA**
19 **AND JW&P CONSULTING, LLC NOTICE OF**
20 **OBJECTIONS TO REQUEST FOR**
21 **PAYMENTS TO RECEIVER AND COUNSEL**

22 Defendants, Jonathan W. Mikula and JW&P Consulting, LLC (“Mikula
23 Defendants”), by and through their counsel, Gregory Bartko, Esq., of the Law
24 Office of Gregory Bartko, LLC, hereby object to the amount of compensation
25 payments requested in the "Receiver’s First Interim Application For Compensation
26 And Reimbursement of Expenses” (“Receiver’s Petition”) heretofore filed in this
27 action on January 16, 2009 [Doc. No. 42 through 42-7]. The Mikula Defendants

1 make the following objections (“Objections”), not due to any animosity or negative
2 agenda with respect to the Receiver or his legal counsel, but rather due to the
3 unfairness, unreasonableness and negative impact that diverting Receiver
4 compensation at the magnitude sought from the assets of the Receiver Estate will
5 have. In furtherance of these Objections, the Mikula Defendants state the
6 following:
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11 1. The Mikula Defendants have standing in this action to object to
12 unreasonable amounts of compensation sought by the Receiver and his counsel
13 appointed as such by the Court on October 2, 2008. The primary objection to the
14 Receiver’s Petition is based not only upon the amount of compensation sought by
15 the Receiver and counsel as being totally disproportionate to the value of the work
16 described in the exhibits to the Receiver’s Petition, but because of the questionable
17 need for the magnitude of the forensic staff that has been engaged by the Receiver
18 in this matter. It seems clear that the Receiver’s Petition is just the beginning of
19 “month-over-month” of Receiver compensation requests that will unnecessarily
20 drain any and all assets of the Receiver Estate.
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27 2. No payments to the Receiver, his counsel or the Receiver’s affiliated
28 forensic business, Investors Watchdog, should be authorized until the Receiver
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1 provides an estimate to the Court and the parties of all fees that he and his law firm
2 and affiliated entities have expended from November 1, 2008 through at least
3 January 31, 2009; and until the Receiver commits to a monthly budget cap for his
4 ongoing professional services in this matter.
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8 3. Although the Receiver's Petition appears to establish that the services
9 being provided to the Receiver Entities are being provided at an overall collective,
10 reasonable rate of approximately \$130.00 per hour—the more relevant question
11 becomes whether the services provided, the sheer number of staff assigned to the
12 Receiver's duties and the cross ownership and control between the Receiver's law
13 firm and Investor's Watchdog, have unnecessarily expanded the scope and quantity
14 of services giving rise to the Receiver's request for compensation.
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19 4. As the Court and counsel is aware, every dollar paid out of the
20 Receiver Estate is a dollar that is not ever going to be used to retire the principal
21 and interest due to Nations Warranty note holders.
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24 5. In further objection to the amount of compensation sought by the
25 Receiver as described in the Receiver's Petition, the Mikula Defendants file
26 contemporaneous herewith their Memorandum in Support of these Objections.
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
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**SECURITIES AND EXCHANGE
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Plaintiff,

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**JONATHAN W. MIKULA,
JOHN B. CRADDOCK, JW&P
CONSULTING, LLC and
NATIONS WARRANTY GROUP,
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Defendants.

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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of February, 2009, I hereby served a complete copy of the foregoing DEFENDANTS' JONATHAN W. MIKULA AND JW&P CONSULTING, LLC NOTICE OF OBJECTIONS TO REQUEST FOR PAYMENTS TO RECEIVER AND COUNSEL AND MEMORANDUM IN SUPPORT, with the Clerk of Court using the Court's CM/ECF system, in no less than 14 point Times New Roman font with no more than 10 characters per inch, to the following attorneys of record at the addresses set forth below, via the Court's

"The Securities Regulation Law Firm"
3475 Lenox Road, Suite 400 • Atlanta, GA 30326 • Phone (404) 238-0550 • Fax (866) 342-4092
Email: gbartko@securitieslawcounsel.com • www.securitieslawcounsel.com

1 CM/ECF system which automatically delivers copies of the aforesaid documents
2
3 filed in this action to counsel of record set forth below via email transmission:

4 Robert K. Gordon, Esq.
5 Securities & Exchange Commission-GA
6 3475 Lenox Road, N.E. Suite 500
7 Atlanta, GA 30326-1232
8 Email: gordonr@sec.gov

9 William P. Hicks, Esq.
10 Securities & Exchange Commission-GA
11 3475 Lenox Road, N.E. Suite 500
12 Atlanta, GA 30326-1232
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14 John Da Grosa Smith, Esq.
15 11320 Ellsworth Industrial Blvd.
16 Suite A1000
17 Atlanta, GA 30318

18 Jason L. Nohr, Esq.
19 Cauthorn, Nohr & O'Dell, P.C.
20 201 Cherokee Street
21 Marietta, GA 30060

22
23 This 9th day of February, 2009.

24 By: /s/ Gregory Bartko, Esq.
25 Gregory Bartko, Esq.
26 Law Office of Gregory Bartko, LLC
27 Georgia Bar No. 040476
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29 Atlanta, Georgia 30326
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32 *Attorney for Defendants Jonathan W.
Mikula and JW&P Consulting, LLC*

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12 Defendants.

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13 DEFENDANTS' JONATHAN W. MIKULA
14 AND JW&P CONSULTING, LLC MEMORANDUM
15 IN SUPPORT OF OBJECTIONS TO REQUEST FOR
PAYMENTS TO RECEIVER AND COUNSEL

16 *A. Applicable Law*

17 A receiver appointed by a court who reasonably and diligently discharges his
18 duties is entitled to be fairly compensated for services rendered and expenses
19 incurred. See generally 65 Am. Jur. 2d, Receivers § 219 (2d ed. 2008); Jeffrey
20 F. Ghent, Annotation, "Measure and Amount of Compensation of Receiver
21 Appointed By Federal Court," 6 A.L.R. Fed. 817, §§ 3-9 (1971 & Supp. 2008).
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1 The amount of the compensation is determined by the court in the exercise of its
2 reasonable discretion. *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994);
3 *United States v. Code Prods. Corp.*, 362 F.2d 669, 673 (3d Cir. 1966). In setting a
4 reasonable fee, the court should consider "all of the factors involved in a particular
5 receivership." *Gaskill*, 27 F.3d at 253. These factors include, *inter alia*, "the
6 complexity of problems faced, the benefits to the receivership estate, the quality of
7 the work performed, and the time records presented." *SEC v. Fifth Ave. Coach*
8 *Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973); accord *Code Prods. Corp.*,
9 362 F.2d at 673 ("In allowing fees 'the considerations are the time, labor and skill
10 required, **but not necessarily that actually expended**, in the proper performance
11 of the duties imposed by the court upon the receiver, the fair value of such time,
12 labor and skill measured by conservative business standards, the degree of activity,
13 integrity and dispatch with which the work is conducted and the result obtained.")
14 (quoting *Coskery v. Roberts & Mander Corp.*, 200 F.2d 150, 154 (3d Cir. 1952);
15 see also 6 A.L.R. Fed. 817, at §§ 7-12 (discussing factors).

16 While the results obtained by a receiver clearly are important, the benefits to
17 a receivership estate may take "more subtle forms than a bare increase in monetary
18 value." *Gaskill*, 27 F.3d at 253 (quoting *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th
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1 Cir. 1992). Typically, “[In] a securities receivership, opposition or acquiescence by
2 the SEC to the fee application will be given great weight.” *Fifth Ave. Coach Lines*,
3 364 F. Supp. at 1222.

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5 Courts typically determine reasonable attorneys' fees based on: (i) the
6 percentage of recovery method; or (ii) the “lodestar method.” *SEC v. Goren*, 272 F.
7 Supp. 2d 202, 206 (E.D.N.Y. 2003) (citing *Goldberger v. Integrated Resources*,
8 *Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)). In the case of the Receiver Entities here,
9 Nations Warranty and JWP, since the benefits to the Receiver Estate are not yet
10 fully known, it makes sense only to apply the lodestar method. Under the lodestar
11 method, the Court must ascertain the number of **hours reasonably billed** and then
12 multiply that figure by the appropriate hourly rates to reach the lodestar amount.
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14 See *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 518 (S.D.N.Y.
15 2002) (citing *Blum v. Stenson*, 465 U.S. 886 (1984)). "Hours that are excessive,
16 redundant, or *otherwise unnecessary* (emphasis added) are not 'reasonably
17 expended' and should be excluded from the initial fee calculation." *Goren*, 272 F.
18 Supp. 2d at 208-09 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). In
19 making a fee request, counsel should exercise billing judgment to eliminate hours
20 not reasonably expended; counsel "must act as he would under the ethical and
21 market restraints that constrain a private sector attorney's behavior in billing his
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1 avoid even the appearance of a windfall." *Goren*, 272 F. Supp. 2d at 206 (citing
2 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974); see also *id.* at
3 213 (in substantially reducing fee application, court noted that it was "especially
4 concerned by the threatened appearance of a windfall, an important public
5 policy concern"). As a policy matter, the rule of moderation makes particular sense
6 in circumstances such as those here, where over 100 Nations Warranty note
7 holders and creditors, virtually all of whom were satisfied with their participation
8 in the Nations Warranty business, are seeing firsthand the diversion of assets in the
9 Receiver Estate that would otherwise be available to meet the obligations to those
10 note holders. According to indications received by the Mikula Defendants, what
11 the note holders are seeing in this receivership is a classic "transfer of wealth."

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15 ***B. Discussion of the Mikula Defendants' Opposition to the Receiver's***
16 ***Petition***

17 The first of the Mikula Defendants' objections concerns the piecemeal
18 nature of the Receiver's request, which prevents the Court and the parties from
19 assessing the requested payments in the context of the overall professional services
20 burden being placed on the Receiver Estate. This concern is particularly worrisome
21 given the fact that the Receiver's Petition covers less than a full month following
22 the Receiver's appointment on October 2, 2009. The Receiver, who is a member of
23 an Atlanta-based law firm and the separate law firm he has employed, one of his
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1 former law partners, Jason Nohr, Esq., request that the Court authorize payments
2 totaling over \$78,000 for only the first 28 days' worth of work ramping up for this
3 matter. The Receiver's Petition may at first blush seem insignificant in
4 comparison with other, larger and more encompassing SEC receiverships, but
5 when viewed through the prism of the size of this Receiver Estate, in this case
6 \$75,000 to \$80,000 per month incurred in maintaining the Receiver, his affiliated
7 company, Investor Watchdog and his former law partner, will seriously erode the
8 corpus of the Receiver Estate. Despite the fact that over three months have passed
9 since the end of the period for which the Receiver seeks compensation, the
10 Receiver's Petition provides no estimates or any information to the Court, the
11 partiers (or to the Nations Warranty note holders) as to how large the Receiver's
12 bills have since grown. Nor does the Receiver give any information as to how long
13 like billings are likely to continue.¹

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Given the fees that the Receiver caused the Receiver Estate to incur with his own law firm and his affiliated company in just 28 days, it is reasonable for the Mikula Defendants and Nations Warranty note holders to fear a professional services field day, in which a large portion of the estate's remaining assets are

¹ It is the Defendants' belief, based upon reliable information volunteered by note holders, that the recent emergency motions filed in this case by the Receiver, seeking to control the process by which note holders have sought charge backs against their credit card issuers, exemplifies the disconnected communications between the note holders and the Receiver.

1 consumed by the very receivership meant to protect and preserve those assets. In
2 fact, even if the fees only remained constant after October 31, 2008 rather than
3 increase, the total fees and expenses for the Receiver and vendors engaged by the
4 Receiver would, to date, amount to approximately \$320,000.00--with no tangible
5 indication of any end in sight. The Court would be prudent not to approve
6 Receivership compensation without budgets, estimates, and some assurances that
7 the remaining assets of the estate will not be consumed for professional services
8 while the note holders watch, powerless and without a voice in how their money is
9 being spent.
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12 The second principal objection to the Receiver's Petition is the
13 disproportionate amount of compensation proposed to be paid to the Receiver as
14 contrasted with the dimensions and involvement of JWP and Mikula in this case.
15 For example, as shown by the Receiver's Standardized Fund Accounting Report
16 attached to the Receiver's Petition as Doc. No. 42-2, the total balance of funds on
17 hand at October 31, 2008 for JWP was \$6,073.14, which appears to be the balance
18 of a money market bank account in the name of JWP. On the other hand, that same
19 exhibit reflects that for the same period, Nations Warranty had total funds on hand
20 of \$483,932.91. Assuming that the Receiver's appetite for monthly compensation
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1 hovers around \$75,000 per month, the funds available at October 31, 2008 for the
2 Receiver Entities should by now be nearly depleted.

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4 The Receiver in part emphasizes that immediately upon being appointed by
5 the Court, a decision was made to continue the Nations Warranty business rather
6 than shutter the business. In doing so, the Receiver claims that he has reduced
7 Nations Warranty's monthly fixed overhead expense from \$58,080 to \$29,241, and
8 he has continued operations [Doc. No. 42, page 13]. It is unclear, however,
9 whether this reduction in overhead includes or excludes the \$78,000 that the
10 Receiver seeks to be paid, for if it excludes such compensation—then the
11 Receiver's conclusions hold very little merit.

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14 The Receiver supports his request for compensation by highlighting that he
15 has known his selection of the Receiver's legal counsel, Jason L. Nohr of
16 Cauthorn, Nohr & O'Dell, P.C. for almost 10 years and "has witnessed his
17 impressive representation of investors in securities litigation." [Doc. No. 42, page
18 19]. The current description of Mr. Nohr's practice area in Martindale Hubble
20 reflects that Mr. Nohr's law practice consists of cases for "personal injury,
21 wrongful death, medical malpractice, nursing home negligence and civil
22 litigation." Even perhaps more questionable is the Receiver's involvement of his
23 wholly-owned affiliated business, Investor's Watchdog ("IW"), which according to
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1 the Receiver's Petition, "was formed in August 2006 to protect investors who
2 might otherwise fall into the hands of brokers or investment promoters likely to do
3 serious damage to the customer's nest egg. IW provides background investigation
4 on prospective brokers and investment advisers and independent review of
5 prospective non-registered investments, all with the goal of preventing investor
6 losses before they happen. IW employs a chartered financial analyst, a certified
7 public accountant (who is also a certified fraud examiner), with experience in
8 receivership work, in business valuation and operation, and in using database
9 technology to uncover financial fraud, trace assets, and account for all monies
10 expended" [Doc. No. 42, page 19]. On balance, the Receiver may very well have
11 put together an impressive coterie of professional service providers to root out
12 financial fraud likely to harm investors and brokerage customers, but there is
13 nothing contained in the Receiver's 124-page filing that makes a case that such
14 expertise is needed with respect to the Receiver Estate.² After all, JWP had
15 \$6,073.14 on hand at October 31, 2008.

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20 Moreover, there is certainly nothing patently wrong with the Receiver
21 retaining a former law partner as his counsel on behalf of the Receiver. The
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24 ² The Receiver does not "represent" any investors or creditors of the Receiver Entities. It seems
25 that IW is comprised of service providers that assist investors and brokerage customers—
services certainly not needed in this case in terms of the Receiver's duties.

1 disclosure that Mr. Nohr, formerly of Huddleston & Nohr, 707 Whitlock Avenue,
2 SW, Suite B-21, Marietta, GA, practiced law with the Receiver apparently as
3 recently as 2006 is a material fact that should have been disclosed in the Receiver's
4 Initial Interim Report—especially considering the nature of Mr. Nohr's law
5 practice. In a different setting, this non-disclosure would be deemed to be a
6 material misrepresentation or omission. Here, it would have been better practice to
7 make it known of the prior affiliation of Messrs. Huddleston and Nohr.
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10 Notwithstanding the puffed up nature of the allegations in the SEC's
11 Complaint, this case has far less to do with rooting out investor fraud, tracking
12 down hard to find assets hidden from view and far more to do with two individuals
13 who prudently sought out expert legal advice and services in the securities
14 regulatory field; apparently followed that advice quite carefully; used documents
15 prepared by their legal counsel; and, believed in good faith they were following
16 competent legal advice. According to the Receiver and the SEC, both agree that it
17 is likely that the Defendants relied upon poor advice that most likely rises to the
18 level of professional malpractice. The point is—the Receiver has not established
19 any support for the need to call in fraud examiners and chartered financial analysts
20 in the rather simple death of what the Defendants had hoped was the beginning of a
21 fast growing financial niche they wished to successfully capture. An examination
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1 of the Receiver's law firm invoice and the invoice submitted by IW for October
2 2008 suggests that there are many staff personnel that have been assigned to this
3 receivership and that time entries appear to "cross-over" or replicate services done
4 by others.

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6 The cycle of overkill gleaned from the Receiver's Petition should be
7 scrutinized by the Court, with the Receiver and his affiliated business, IW brought
8 down to reality and limited to fair compensation in exchange for the "particular
9 needs of the Receiver Estate." This Court should take great care to prevent this
10 receivership from turning into nothing more than a professional services field day,
11 contrary to a fiduciary's representations and obligations.

12
13 The Plaintiff, SEC has approved (or, more accurately has no objections) to
14 the amount of compensation sought in the Receiver's Petition. This fact should not
15 overshadow the Court's analysis of what is and what is not necessary by the
16 Receiver and what is a reasonable amount of compensation for such necessary
17 services.

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19 Dated this 9th day of February, 2009.

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22 Respectfully Submitted,

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24 By: /s/ Gregory Bartko, Esq.
25 Gregory Bartko, Esq.
26 Law Office of Gregory Bartko, LLC

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