

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,
Plaintiff,

Case No.: 51-2010-CA-2912-WS/G

v.

BOTFLY, LLC, DAVID R. LEWALSKI,
JON J. HAMMILL, and JON J. HAMMILL, P.A.,
Defendants.

**NOTICE OF OPPORTUNITY TO OBJECT
AND FOR HEARING**

The Court will consider this motion, objection, or other matter without further notice or hearing unless a party in interest files an objection within 14 days from the date this paper is entered on the docket. If you object to the relief requested in this paper, you must file your objection with the Clerk of Court at the West Pasco Judicial Center, 7530 Little Road, New Port Richey, Florida, 34654, and serve a copy on the movant's attorney, Anne-Leigh Gaylord Moe, Esq., Bush Ross, P.A., 1801 N. Highland Avenue, Tampa, FL 33602.

If you file and serve an objection within the time permitted, the Court may schedule a hearing and you will be notified. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the granting of the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

**RECEIVER'S MOTION TO APPROVE
SETTLEMENT WITH DEFENDANT IN SUPPLEMENTAL PROCEEDING**

Michael E. Moecker, the Receiver for Botfly L.L.C. ("**Botfly**"), David R. Lewalski, and Jon J. Hammill and all other entities operated, controlled or otherwise associated with the

Defendants' activities, by and through undersigned counsel (collectively, the "**Receivership Entities**"), moves for the entry of an order approving a Settlement Agreement reached with Defendant MARCIA POWERS (hereinafter "**Defendant**"). In support of this Motion, the Receiver states as follows:

A. Background

1. On April 1, 2010, the Office of the Attorney General, Department of Legal Affairs, State of Florida, initiated this action to halt the perpetration of an ongoing fraud perpetrated by Lewalski, Jon J. Hammill and others on investors and potential investors in Botfly, LLC.

2. That same day, the Court appointed Michael E. Moecker to be the Receiver.

3. Pursuant to the Order Appointing Receiver, the Receiver has the power and duty to marshal, preserve, protect, maintain, manage and safeguard the assets of the Receivership Entities in a reasonable, prudent, diligent, and efficient manner.

4. The Order Appointing Receiver requires the Receiver to collect and reduce to money the assets of the Receivership Entities either by suit, in any court of competent jurisdiction, or by public or private sale and specifically authorizes him to file suit to recover property of the Receivership Entities including, but not limited to, fraudulent conveyances and other claims and causes of actions of the Receivership Entities.

5. The Case Management Order further requires that all settlements in the Supplemental Proceedings are subject to Court approval. The Receiver must file in the Main Case a Motion to Approve the Settlement Agreement on negative notice to the parties in the Main Case. Further, the Receiver must post a copy of the Motion to Approve the Settlement Agreement to the Receivership website at www.botflyreceivership.com. The Settlement

Agreement is only enforceable upon approval of the Court. The funds subject to the Settlement Agreement must be held in trust until the Court enters an order approving the Settlement Agreement at issue.

B. The Dispute

6. Defendant's son is a Botfly investor who received significant funds in excess of his investment. Those funds were paid into a bank account jointly owned with Defendant from which Defendant received funds.

7. On December 12, 2011, the Receiver filed a Supplemental Proceeding against Defendant in the Pasco County Circuit Case No.: 51-2011-CA-6063-WS/G (the "**Supplemental Proceeding**") to collect the funds derived from the Ponzi scheme given to the Defendant that were in excess of the funds invested into Botfly LLC.

8. The Receiver has demanded a refund of the funds from the Defendant.

C. The Compromise

9. A Settlement Agreement has been reached between the Receiver and the Defendant resolving their disputes concerning whether all or any portion of the funds received from the Receivership Entities should be refunded to the Receivership. That settlement is embodied in a written agreement, a copy of which is attached hereto as Exhibit A (the "**Settlement Agreement**").

10. This Motion will be posted to the Receivership website www.botflyreceivership.com as required by this court's Case Management Order.

11. The funds subject to the Settlement Agreement are being held in trust until the Court enters an order approving the Settlement Agreement.

12. The Settlement Agreement generally provides that, subject to the approval of the Court, in return for payment of an agreed amount, the Receiver will dismiss the Supplemental Proceeding against Ms. Powers.

13. By this motion, the Receiver seeks entry of an Order approving the settlement and compromise and granting related relief, all in accordance with the terms of the Settlement Agreement.

D. Interests of the Estate

14. Resolution of the claim set forth in the Settlement Agreement is in the best interest of the Receivership, the Botfly investors, and the Defendant, and will avoid lengthy and expensive litigation to resolve the dispute, conserves the Receivership assets and judicial resources, and avoids the cost of litigation to the Defendant. Litigation of the claim would require an investment of time by the Receiver and his counsel, incurring additional legal fees, costs and other expenses.

WHEREFORE, the Receiver moves the Court to approve the settlement reflected by the attached Settlement Agreement and providing such other and further relief as the Court deems just and proper.

Dated: April 29, 2013

BUSH ROSS, P.A.
P.O. Box 3913
Tampa, FL 33601-3913
Telephone: (813) 224-9255
Facsimile: (813) 223-9620
Counsel for the Receiver

By: /s/ Karen Cox
Karen Cox, FBN: 456667
Primary email: kcox@bushross.com
Secondary email: mmedley@bushross.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Receiver's Motion to Approve Settlement with Defendant Marcia Powers in Supplemental Proceeding has been delivered via electronic transmission to Gregory S. Slemp, Esq. at Greg.Slemp@myfloridalegal.com and to W. Dale Gabbard, Esq. at wdglawyer@hotmail.com on this 29th day of April, 2013.

/s/ Karen Cox

Karen Cox

EXHIBIT A

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

MICHAEL E. MOECKER, as Receiver for
BOTFLY, LLC, DAVID R. LEWALSKI,
JON J. HAMMILL,

Plaintiff,

v.

Case No.: 51-2011-CA-006063-WS

Division: G

JEFFREY MORZELLA and
MARCIA POWERS,

Defendants.

SETTLEMENT AGREEMENT

COMES NOW, the Plaintiff, Michael E. Moecker, Receiver for Botfly, LLC; David R. Lewalski, and Jon J. Hammill, by and through his undersigned counsel, and Defendant MARCIA POWERS (the "Defendant") and hereby freely and voluntarily enters into this Settlement Agreement (the "Agreement") and agrees to his claims against Defendant, Marcia Powers, in this case as follows:

RECITALS

WHEREAS, the Receiver filed a complaint against Defendant and her son, Jeffrey Morzella, demanding the immediate return the money that they received from Botfly, LLC ("Botfly") that was in excess of the amount paid to Botfly.

WHEREAS, the Defendant and the Receiver have agreed to a settlement of the claims against the Defendant leaving the claims against Jeffery Morzella in dispute in the instant action.

WHEREAS, Defendant admits that she did not pay money to Botfly and that she received THREE THOUSAND FOUR HUNDRED THIRTY-FIVE DOLLARS AND ZERO CENTS (\$3,435.00) from an account into which \$407,500.00 from Botfly was deposited. ✓

WHEREAS, Defendant agrees that THREE THOUSAND FOUR HUNDRED THIRTY-FIVE DOLLARS AND ZERO CENTS (\$3,435.00) (the "Amount Due") is currently due and owing without deduction, defense or set off. ✓

WHEREAS, Defendant has requested that the Receiver accept a payment in the amount of THREE THOUSAND FOUR HUNDRED THIRTY-FIVE DOLLARS AND ZERO CENTS

(\$3,435.00) (the "Settlement Amount") in full satisfaction of all the Receiver's claims against her which the Receiver is agreeable to do upon the terms and conditions contained herein.

WHEREAS, the parties acknowledge that this Agreement is between the Receiver and Defendant Marcia Powers only, and that the Receiver has independent claims against Defendant Jeffrey Morzella that will remain pending and are not resolved by this Agreement.

WHEREAS the parties acknowledge that this Agreement is entered into subject to court approval pursuant to the Case Management Order entered in the case styled *Office of the Attorney General, Department of Legal Affairs, State of Florida vs. Botfly, LLC, David R. Lewalski, Jon J. Hammill, and Jon J. Hammill, P.A.*, Pasco County Circuit Case No.: 51-2010-CA-2912-WS/G (the "Main Case").¹

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and the covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Defendant hereby agrees as follows:

1. **Acknowledgments.** Defendant hereby acknowledges and agrees that: (a) each Recital set forth hereinabove is complete and accurate in all respects and not subject to dispute; (b) the Recitals set forth hereinabove are intended to be part of the terms of this Agreement; (c) Defendant has no grounds for disputing the validity, existence, and/or enforceability of the Amount Due as defined in the Recitals; and (d) Defendant affirms her obligation to pay the Amount Due to the Receiver. Further, Defendant acknowledges that the Amount Due constitutes a debt for money that was obtained by false pretenses, false representation, or actual fraud within the meaning of Title 11 U.S.C § 523(a)(2) which can not be discharged in bankruptcy.

2. **Settlement Payment.** Payments due under this section shall be made in the form of a certified check or money order payable to "BUSH ROSS, P.A. TRUST ACCOUNT" and be delivered to Anne-Leigh Gaylord Moe, BUSH ROSS, P.A., P.O. Box 3913, Tampa, Florida 33601-3913. Defendant shall pay to Receiver on or before March 22, 2013 the sum of THREE THOUSAND FOUR HUNDRED THIRTY-FIVE DOLLARS AND ZERO CENTS (\$3,435.00).

3. **Forbearance; Preservation of Rights and Remedies.** Commencing upon execution of this Agreement and continuing through the earlier to occur of: (a) a Default (as defined below); (b) payment of the full amount of the Settlement Amount, or (c) March 22, 2013; the Receiver shall refrain from prosecuting this lawsuit against Defendant Marcia Powers to recover the Amount Due. The Receiver will, however, continue to proceed on his claims against Defendant Jeffrey Morzella. Except as expressly provided herein, neither the execution, delivery, and effectiveness of this Agreement, nor the forbearance of Receiver set forth in the

¹ Paragraph ten of the Case Management Order states in pertinent part that "[a] Settlement Agreement will only be enforceable upon approval of the Court. Settlement funds shall be held in trust until the Court enters an order approving the Settlement Agreement at issue. Upon approval of the Settlement Agreement by the Court, settlement funds shall be transferred to the Receivership's Estate, and the Receiver shall file a motion to voluntarily dismiss the Supplemental Proceeding with prejudice."

preceding sentence, shall in any manner operate as a waiver of any right or remedy of Receiver under the Order Appointing Receiver or subsequently granted by the Court. Defendant acknowledges and agrees that Receiver is allowed to accept payments during the Forbearance Period or otherwise without prejudice to any rights or remedies including prosecution of this legal action to recover the Amount Due. Receiver hereby expressly reserves all rights, powers and remedies specifically given to it thereunder, now or hereafter existing at law or in equity or by statute.

4. **Default.** The occurrence of any of the following shall constitute a “**Default:**”
- (a) Defendant’s failure to make the Settlement Payment, Initial Forbearance Payment, an Installment Payment or any of them when due, including but not limited to the return of a check or money order from the issuing financial institution for insufficient funds;
 - (b) The occurrence of any of the following events: (i) any bankruptcy petition be filed by or against Defendant; (ii) Defendant becomes insolvent or makes an assignment for the benefit of any creditor or creditors, and/or (iii) a receiver or trustee be appointed for any of the assets of Defendant; and/or
 - (c) The breach of any representation, warranty, covenant, condition or other term of this Agreement.

In the event of a Default, Receiver shall be entitled to immediately submit an *ex parte* motion for final judgment for money damages to recover the Amount Due, less any payments made, without further hearings or motions on the matter. Receiver is not obligated to provide Defendant with notice of an event of Default.

5. **Representations and Warranties.** The Parties represent and warrant to each other that: (a) they have the legal capacity and authority to enter into this Agreement; (b) each has freely, voluntarily, and without duress or coercion of any kind whatsoever, entered into this Agreement under the advice of counsel or with the opportunity to seek the advice of counsel; and (c) this Agreement constitutes the voluntary, legal, valid and binding obligation of said party. Defendant hereby represents and warrants that: (a) prior to the execution of this Agreement, she was fully apprised of sufficient relative data, in order to intelligently exercise a judgment in deciding whether or not to execute this instrument and in deciding on the contents of the same; (b) the decision to execute this Agreement was not predicated on or influenced by any declarations or representations made by Receiver; and (c) this Agreement in all respects has been voluntarily and knowingly executed by Defendant with the express intention of effecting the legal consequences thereof.

6. **Release.** Immediately upon the execution of this Agreement, except as to the rights, liabilities and obligations arising out of this Agreement, Defendant hereby fully and forever compromises, settles, releases, acquit, and discharge the receivership estate, Receiver, Moecker & Associates, and their predecessors, successors, subsidiaries, assigns, affiliates, insurers and any and all present and former employees, attorneys, agents, officers, directors or persons, corporations, representatives and other entities connected therewith (the “Releasees”),

from any and all past, present or future claims, causes of action, suits, demands, losses, liabilities, costs or obligations of any nature whatsoever, whether based on tort, contract, or other theories of recovery, between Defendant and the Releasees, whether now known, unknown, asserted, unasserted, foreseen, unforeseen, contingent, actual, liquidated or unliquidated. The provisions of this section shall survive even in the event of a Default.

7. **Choice of Law.** This Agreement shall be governed by the laws of the State of Florida.

8. **Entire Understanding.** This Agreement sets forth the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior negotiations, agreements, and understandings, oral or written, with respect to the subject matter hereof. Each party declares and represents that no promise, inducement or agreement not herein expressed has been made to the other party and that this Agreement contains the entire terms of the settlement between the Parties, each party has had the opportunity to consult with an attorney of their choice and, further, each party has read the terms of this Agreement, understands them, and accepts them of such party's own free will.

9. **Severability.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law, or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to any of the Parties. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of this Agreement as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

10. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representative, legal representatives, successors and assigns and all of those holding title under either of them and the pronouns used herein shall include, where appropriate, either gender and both singular and plural.

11. **Attorneys' Fees and Costs.** Defendant agrees to bear her own attorney's fees and costs in this action herein. In the event that legal or other action is required to enforce a Party's rights under this Agreement, the non-prevailing party agrees to reimburse the prevailing party upon demand for its reasonable attorneys' fees and other related costs and expenses incurred in connection with the enforcement thereof.

12. **Modification.** This Agreement may not be amended, altered, modified or otherwise changed except in a writing signed by all Parties.

13. **No Waiver.** Failure to insist on compliance with any term, covenant or condition contained in this Agreement shall not be deemed a waiver of that term, covenant or condition, nor shall any waiver or relinquishment of any right or power contained in this Agreement at any

one time or more times be deemed a waiver or relinquishment of any right or power at any other time or times.

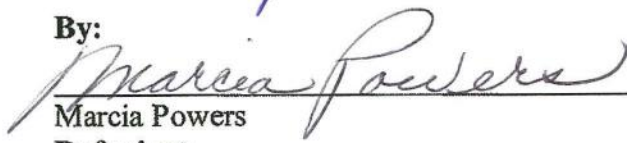
14. **Execution in Counterparts.** This Agreement may be executed in several counterparts and through the exchange of facsimile or PDF signature papers and, as executed, shall constitute one Agreement.

15. **Dismissal of Action.** Upon full and complete payment of the Amount Due or Settlement Amount according to the terms of this Settlement Agreement and the entry of the Order Approving the Settlement Agreement with Defendant Marcia Powers pursuant to the aforementioned Case Management Order, the Receiver will file a motion to voluntarily dismiss his claims against Defendant Marcia Powers with prejudice. The Receiver will proceed on his claims against Defendant Jeffrey Morzella.


16. **Jurisdiction.** The parties further stipulate and agree that this Court shall retain jurisdiction of the parties in this cause of action to enforce the Agreement, should the need arise.

15th IN WITNESS WHEREOF, the parties have executed this Agreement effective this day of ~~March~~, 2013.


By:



Marcia Powers
Defendant



~~Mike Phelan~~ for Michael E. Moecker
Plaintiff, Receiver for Botfly L.L.C., David R.
Lewalski, Jon J. Hammill



W. Dale Gabbard, Esquire
Counsel for the Defendant



Anne-Leigh Gaylord Moe, Esquire
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