

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Robert L. Brace, SBN 122240
1807 Santa Barbara Street
Santa Barbara, CA 93101
Telephone: (805) 845-8211
Cell: (805) 886-8458
rlbrace@rusty.lawyer
Attorney for Thomas A. Dillon, as Court-Appointed
Receiver for Vesta Strategies, LLC and Excalibur Group, LLC

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

UNITED STATES FIRE INSURANCE
COMPANY, a corporation,

Plaintiff

v.

VESTA STRATEGIES, LLC

Defendant

Case No.: 5:09-02388 EJD
Related cases 5:10-cv-05238 EJD and 5:14-cv-01908 BLF

ORDER AUHORIZING DISTRIBUTION OF FUNDS, APPROVING FINAL ACCOUNTING AND DIRECTING THE CLOSURE OF THE RECEIVERSHIP ESTATE

As set out in Docket No. 123, Thomas A. Dillon is the Court-Appointed Receiver for Vesta Strategies, LLC (“Vesta”) and Excalibur 1031 Group, LLC (“Excalibur”) (collectively, “Dillon”).

On April 4, 2019, Dillon appeared before the court with his counsel Robert L. Brace (“Brace”) to present Dillon’s motion asking the court to authorize him to make various payments of fees and costs to himself and his lawyers, to distribute the remaining funds held in trust to the IRC § 1031 Exchange creditors of Vesta, to approve of Dillon’s final accounting, to approve of Dillon’s prior settlements and distributions, and to terminate the Receivership.

1 Having thoroughly reviewed the submissions, on April 4, 2019 the Court directed Dillon
2 to submit a revised Order which: (i) deleted \$1,894 in litigations expenses from Brace's cost bill;
3 (ii) recalculated Brace's 25% net contingency fee based on reduced costs; (iii) deleted \$1,020 in
4 fees from Dillon's fee application; (iv) set forth the proposed use of funds to be retained by Dillon
5 to wind up the affairs of the Receivership; and (v) recalculated the amounts to be distributed to the
6 Exchangers based upon the Courts directed revisions which increased their collective Wave V
7 distribution by \$2,440 from \$2,105,000 to \$2,107,440.

8 NOW THEREFORE, the Court GRANTS Dillon's Motion. The Court ORDERS that
9 Dillon is authorized and directed to distribute the **\$3,679,708.78** remaining in the Qualified
10 Settlement Fund to himself, his legal professionals and the §1031 Exchange creditors as follows:

- 11 1) \$109,175 to Dillon for payment of the Receiver's unpaid fees;
- 12 2) \$2,275 to Dillon for payment of the Receiver's unreimbursed costs;
- 13 3) \$23,532 to Robert L. Brace for payment of unreimbursed litigation costs;
- 14 4) \$869,117 to Robert L. Brace for payment of a 25% net contingency fee on the \$3.5
15 million settlement with the confidential insurer;
- 16 5) \$21,842 to Gilbert LLP for payment of unreimbursed appellate costs;
- 17 6) \$525,107 to Gilbert LLP for payment of appellate fees;
- 18 7) \$21,220.78 to Dillon as incurred for fees and costs to close the estate; and
- 19 8) \$2,107,440 to the §1031 Exchange creditors of Vesta.

20 **Total: \$ 3,679,708.78**

21 Dillon is ORDERED to make the following payments to the §1031 Exchange creditors of
22 Vesta in a Wave V distribution of \$2,107,440:
23
24
25
26
27
28

Alonso	\$ 80,850
Bunya	\$ 54,143
Chaffee	\$ 51,073
Chen	\$ 59,271
Farhadi	\$ 33,328
Henka	\$ 147,778
Kao	\$ 258,678
Kendrick	\$ 23,054
Pappas	\$ 416,742
Sakai	\$ 54,145
Schultz (Carteret)	\$ 153,535
Simmons	\$ 296,102
Simpson 1 Darren	\$ 8,232
Simpson 2 Peggy	\$ 93,407
Spagnola	\$ 7,050
Tate	\$ 28,792
Tezel (Supra Color)	\$ 44,322
Walsh	\$ 296,938
Totals TOTAL:	\$2,107,440

The Court APPROVES Dillon’s final accounting as the Receiver. Dillon was appointed Receiver on December 16, 2009 (Dkt. 123). At the inception of his appointment, the estate contained no cash but owned numerous choses in action against insurers and third party tortfeasors. Dillon has monetized Vesta’s assets and recovered over \$14.8 million to pay approximately \$12.6 million in damages arising out of the theft of trust assets. The money collected by Dillon was used by Dillon and will be used by Dillon to recharge the Vesta trust account and pay the beneficiaries of the IRC § 1031 trusts. After the payment of expenses, the payout to trust fund creditors will be over 80% of the trust debts owed by Vesta.

Dillon previously distributed \$8,195,088.04 to the Vesta and Excalibur exchangers (“Exchangers” or “§1031 Exchangers”), or approximately 65% of their losses. Currently, the estate owes \$4,454,763 in trust liabilities. Dillon retains \$3,679,708.78 in the Qualified Settlement Fund (“QSF”) on deposit at Northern Trust. After Dillon distributes \$2,107,440 to the §1031 Exchangers as ORDERED above, the estate will still owe the trust beneficiaries \$2,347,323.

The total attorney and Receiver fees and costs incurred (approximately \$4.6 million) represents 31% of the total amount recovered by Dillon which was \$14,887,164.73. The

1 Receivership has been successful, and Dillon has faithfully discharged his duties to the Court
2 pursuant to the charges in his appointment.

3 Dillon retained Robert L. Brace and Hollister & Brace, APC on July 22, 2010
4 pursuant to a 25% contingency fee agreement which was approved by the Court (Dkts. 185 and
5 188). Dillon paid \$2,668,539.45 to Hollister & Brace, APC (“H&B”) pursuant to the court
6 approved 25% contingency fee and \$187,459.83 to reimburse H&B for litigation costs the firm
7 incurred in the prosecution of the various actions.

8 Robert L. Brace (“Brace”) left his employment at H&B in October 2014. Dillon transferred
9 representation from H & B to Robert L. Brace and thereafter continued to use Robert Brace as the
10 attorney for the Receivership estate. Dillon paid Robert L. Brace \$96,489.67 in fees and
11 \$14,923.10 in costs on a \$412,500 confidential legal malpractice settlement. Dillon’s prior
12 payments to H & B and Robert L. Brace are approved.

13 The estate still owes Robert L. Brace \$869,117 in contingency fees and \$23,532 in costs
14 arising out of a \$3.5 million confidential settlement with an insurer who executed a \$5 million
15 fidelity bond to Vesta. The Court approves the payment of Robert L. Brace’s fees and expenses
16 incurred in the insurance coverage action and directs Dillon to make the payments from the QSF.

17 Dillon retained Richard Shore of Gilbert LLP on June 3, 2014 to prosecute the appeal of
18 an adverse judgment entered in favor of Continental Casualty Company. The fee agreement
19 (attached as Exhibit 4 to Dillon’s Declaration) provided that Dillon would pay Gilbert LLP two
20 times the firm’s hourly rate because there were insufficient assets in the estate to pay professional
21 fees and costs as they were incurred. Gilbert LLP has agreed to waive the multiplier, therefore
22 Dillon owes Gilbert LLP \$525,107 in hourly fees and \$21,842 in costs prosecuting the successful
23 appeal against Continental Casualty to the Ninth Circuit in Dillon v. Continental, Case No.14-
24 15802. The Court approves the payment of Gilbert LLP’s fees and expenses and directs Dillon to
25 pay Gilbert LLP from the QSF.

26 The total amount of Dillon’s fees to date is \$149,175 at \$300 per hour as set out in Exhibit
27 6 to Dillon’s Declaration with the \$1,020 deduction ordered by the court at the hearing. Dillon
28 paid himself \$40,000 in Receiver fees and is therefore owed \$109,175, plus \$2,275 in
unreimbursed costs. The Court approves the payment of Dillon’s fees and costs and grants him
permission to retain \$21,220.78 in the QSF to pay for fees and costs to close the estate without a
further accounting.

1 The \$21,220.78 held back by Dillon will be used to pay for his time dedicated to
 2 communicating with and paying the 1031 Exchangers their final distributions as ordered by this
 3 court, paying document storage fees of approximately \$3,200 per year for three more years, paying
 4 for the destruction of the documents of approximately \$3,000, paying the fees incurred by Dillon
 5 in monitoring the document destruction and other ancillary matters that naturally arise from
 closing a Receivership.

6 An accounting prior to any requested distributions of the money remaining in trust
 7 (\$3,679,708.78) is set forth below. Copies of the bank records from Northern Trust showing the
 8 debits and credits for the accounting below are attached to Dillon's Declaration as Exhibit 1 and
 9 are before this Court. The Court APPROVES Dillon's accounting as follows:

10 **Income**

Misc. Asset Recovery	\$18,235.17
Litigation Settlements	\$14,862,500.00
Terzakis Payments	<u>\$6,429.56</u>
Total Income	\$14,887,164.73

14 **Expenses**

Exchanger Payments in 4 Waves	\$8,195,088.04
H&B Fees paid	\$2,668,539.45
H&B Expenses paid	\$187,459.83
Brace Fees paid	\$96,489.67
Brace Expenses paid	\$14,923.10
Dillon Fees paid	\$40,000.00
Dillon Expenses paid	\$2,542.95
Bank fees, insurance, misc.	\$2,412.91
Money in QSF Trust	<u>\$3,679,708.78</u>
Total Expenses	\$14,887,164.73

21 The court approves the following recoveries obtained by Dillon as the Receiver:

Settling Party	Settlement Amount
Large Chicago Law Firm (confidential)	\$7,050,000
U.S. Fire (surety bond)	\$ 750,000
Merrill Lynch	\$1,900,000
Chicago Bank (confidential)	\$1,250,000
Small Chicago law firm (confidential)	\$ 412,500
Insurer (surety bond) (confidential)	\$3,500,000
Total	\$14,862,500

1 Dillon calculated the §1031 Exchangers claims based on the financial information
 2 produced to him by the 1031 Exchangers, the Vesta bank records, interviews of John Terzakis and
 3 Peter Ye by Dillon’s lawyers and Terzakis’ sworn declaration which admitted the debt owed by
 4 Vesta to the Exchangers. The Court APPROVES of Dillon’s claims adjudication process
 5 identifying the debt owed by Vesta to the Exchange trust to be paid to the §1031 Exchangers, as
 6 ascertainable beneficiaries of the trust. The adjudicated gross trust claims payable by Dillon are
 7 APPROVED as follows:

Approved Claim Amt.	Exchanger Name
\$485,300.45	Alonso
\$325,000.00	Bunya
\$306,564.82	Chaffee
\$355,778.24	Chen
\$200,056.70	Farhadi
\$887,035.00	Henka
\$1,552,712.95	Kao
\$138,390.43	Kendrick
\$2,501,487.01	Pappas
\$325,000.00	Sakai
\$921,557.27	Schultz (Carteret)
\$1,777,350.60	Simmons
\$49,410.93	Simpson 1 Darren
\$560,677.97	Simpson 2 Peggy
\$42,291.19	Spagnola
\$172,825.04	Tate
\$266,045.75	Tezel (Supra Color)
\$1,782,366.61	Walsh
\$12,649,851.00	TOTAL

21 The \$12,649,851.00 in Court approved claims does not include \$6.5 million in subrogation
 22 claims submitted to Dillon by Arch Insurance and the law firm, Ansell Zaro Grimm & Aaron.
 23 These two subrogation claims are general creditor debts owed by Vesta. General creditor claims
 24 will not be paid by the Receiver because Vesta has no assets of its own to pay the claims of general
 25 creditors. The Court approves of Dillon’s decision that the Exchangers’ trust claims must be paid
 26 in full before the payment of general creditors’ claims and there are insufficient assets to pay all
 27 the trust claims at the close of the Receivership.

1 From the recoveries obtained by Dillon, the Court APPROVES of the prior 4 “Waves” of
 2 distributions Dillon made to the 1031 Exchangers totaling **\$8,195,088** as follows:

Exchanger Name	Payment Amt. Issued on 08/10/12 Wave I	Payment Amt. Issued on 12/14/12 Wave II	Payment Amt. Issued on 1/14/13 Wave III	Payment Amt. Issued 12/20/2016 Wave IV
Alonso	\$213,400.44	\$54,154.00	\$35,737.72	\$11,105.20
Bunya	\$142,911.76	\$36,266.30	\$23,933.13	\$7,437.04
Chaffee	\$134,805.29	\$34,209.10	\$22,575.55	\$7,015.18
Chen	\$156,445.83	\$39,700.80	\$26,199.65	\$8,141.34
Farhadi	\$87,970.63	\$22,324.00	\$14,732.25	\$4,577.94
Henka	\$390,054.57	\$98,983.00	\$65,321.61	\$20,298.20
Kao	\$682,772.14	\$173,265.00	\$114,342.39	\$35,531.04
Kendrick	\$60,854.22	\$15,442.80	\$10,191.13	\$3,166.82
Pappas	\$1,099,975.13	\$279,137.40	\$184,210.49	\$57,242.03
Sakai	\$142,911.76	\$36,266.30	\$23,933.13	\$7,437.04
Schultz (Carteret)	\$405,235.00	\$102,835.30	\$67,863.84	\$31,088.18
Simmons	\$781,551.72	\$198,332.00	\$130,884.80	\$40,671.47
Simpson, Darren	\$21,727.39	\$5,513.70	\$3,638.64	\$1,130.68
Simpson, Peggy	\$246,546.08	\$62,565.30	\$41,288.55	\$12,830.11
Spagnola	\$18,596.64	\$4,719.20	\$3,114.34	\$967.76
Tate	\$75,996.10	\$19,285.30	\$12,726.00	\$3,954.79
Tezel (Supra Color)	\$116,987.90	\$29,687.70	\$19,591.71	\$6,087.98
Walsh	\$783,757.40	\$198,891.80	\$131,254.18	\$40,786.25
TOTALS	\$5,562,500.00	\$1,411,579.00	\$931,539.11	\$289,469.05

15
 16 Dillon obtained voluminous documents to prosecute the litigation and the claims asserted
 17 against others. The Court ORDERS Dillon to retain the hard copy documents held in storage for
 18 three years from the date of this order terminating the Receivership. Dillon shall destroy the stored
 19 documents in three years after entry of the order.

20 Dillon collected \$14,862,500 from adverse third parties to pay \$12,649,851.00 in
 21 stolen trust funds. Dillon has not identified any other potential defendants to sue to pay the
 22 remaining \$2,347,323 debt owed by Vesta to the trust beneficiaries. The \$2,347,323 debt will
 23 remain unpaid. The Court ORDERS Dillon to comply with the mandates of this ORDER and close
 24 the estate. The Receivership is hereby terminated.

25 **IT IS SO ORDERED.**

26 DATED: April 9, 2019



27 **EDWARD J. DAVILA**
 28 United States District Judge