

William D. Brown (“Receiver”), the court-appointed Receiver for AmeriFirst Funding, Inc. aka Ameri-First Funding, Inc. aka AmeriFirst Funding, Inc., AmeriFirst Acceptance Corp., Jeffrey C. Bruteyn, Dennis W. Bowden (“Defendants”), American Eagle Acceptance Corp., and Hess Financial Corp. (“Relief Defendants”), and InterFinancial Holdings Corp., Hess International Properties, LLC, Hess International Investments, S.A., United Financial Markets, Inc. and Gerald Kingston (“Additional Relief Defendants”), requests that the Court grant this Partially Unopposed Fourth Application for Payment of Fees and Expenses and in support thereof would show the following:

Background

On July 2, 2007, the Securities and Exchange Commission (“SEC”) filed this action against Defendants and Relief Defendants alleging that they had perpetrated a \$55 million securities fraud, and seeking temporary, preliminary, and permanent injunctive relief, as well as disgorgement and other monetary sanctions. On the same date, the Court entered an order appointing William D. Brown, of Weaver & Tidwell, L.L.P., as Receiver (the “Receivership Order”).

On July 31, 2007, the Court entered an Order granting the Preliminary Injunction against the Defendants and Relief Defendants and providing for other equitable relief. A few days later, the Court amended the Receivership Order, adding the Additional Relief Defendants.¹ In the Receivership Order and Amended Receivership Order, the Court authorized and directed the Receiver to, among other things, do the following:

¹ On August 28 and 29, 2007, the Court entered default judgments against Defendants Jeffrey Bruteyn, Dennis Bowden and Relief Defendants American Eagle Acceptance Corp., Hess Financial Corp., Hess International Properties, LLC, Hess International Investments, S.A., and InterFinancial Holdings Corp. Docket Nos. 94-97 and 99-101. The Court also entered default judgments against Defendants AmeriFirst Funding, Inc. and AmeriFirst Acceptance Corp. on September 7, 2007. Docket Nos. 113-114. Only Defendant Bowden has had the entry of default judgment withdrawn. Docket No. 166. Recently, the Court entered final judgment against Defendants Bruteyn and Hess Financial Corp.

- take custody, control, and possession of all records, assets, and other property of the Receivership Estate (the "Estate");
- administer the assets of the Estate; and
- investigate any matters that the Receiver deems appropriate in connection with the Estate.

The Receivership Order authorizes the Receiver "to employ such employees, accountants, attorneys, and others as are necessary and proper for the collection, preservation, maintenance, and operation of the Receivership Assets and Receivership Records." The Receivership Order also directs the Receiver to seek and obtain the approval of the Court for disbursements for professional fees and expenses to himself and others. The Receiver previously filed an initial application for payment of fees and expenses for services rendered through August 31, 2007 ("Receiver's First Application") (Docket no. 119), which was approved by the Court on November 19, 2007 (Docket No. 162). The Receiver filed a second application on November 26, 2007 ("Receiver's Second Application") (Docket No. 163) for the payment of fees and expenses rendered from September 1, 2007 through October 31, 2007; it was approved by the Court on January 16, 2008 (Docket No. 210). A third application for the payment of fees and expenses from November 1, 2007 through December 31, 2007 was filed by the Receiver on February 29, 2008 (Docket No. 259) and remains pending. The Receiver also submitted an application to recover the professional fees and expenses incurred in connection with the Motion to Show Cause, approximately \$170,000, as directed by the Court's February 1, 2008 Memorandum Opinion and Order on February 29, 2008 (Docket No. 261), which remains pending.

The Receiver has continued to marshal assets of the Estate. Through March 31, 2008, the Estate had total assets of \$13,303,452, which includes liquid assets of \$6,675,816, real estate of \$4,094,077 and net car note receivables of \$2,531,718. These balances takes into account the

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Receiver's disbursement of \$25,000,000 to investors on March 28, 2008, pursuant to the Court's approval of the First Interim Partial Distribution. The Receiver has closed on the sale of the property at 633 Division in Arlington, Texas and anticipates closing in the coming days on the other five west Dallas properties as authorized by the Court's order dated April 22, 2008. The proceeds from these sales are not reflected in the above balances. The Receiver also has continued collecting car note payments, selling collateral on defaulted notes, pursuing the sale of real property, and prosecuting legal claims belonging to the Estate.

Application for Professional Fees

This Application seeks approval from the Court to allow the Receiver to pay from the Receivership Assets (as that term is defined in the Receivership Order) the fees and expenses for the Receiver and his counsel, Andrews Kurth LLP, and certain other local counsel employed by the Receiver for the period January 1, 2008 through February 29, 2008.

During the period covered by this Application, the Receiver has incurred fees and expenses in connection with these proceedings and with respect to his activities as Receiver totaling \$283,006.51 in fees and \$78.54 in expenses. App. 004; App. 006-045. This includes the Receiver's fees, along with the fees of his accounting firm, Weaver & Tidwell (in which the Receiver is a partner) and their expenses. Further, the Receiver has retained the legal services of Andrews Kurth LLP for purposes of this Receivership. Andrews Kurth LLP has incurred fees of \$281,391.00 and expenses of \$21,821.67 during the period covered from January 1, 2008 through February 29, 2008. App. 066; App. 069-121.

Certain fees and expenses contained in the January 2008 invoices from Weaver & Tidwell and Andrews Kurth are sought by the Receiver's application to recover fees and expenses incurred in connection with the Motion to Show Cause (Docket No. 261), pursuant to

the Court's February 1, 2008 Memorandum Opinion and Order. Any fees or expenses paid under this application that are recovered from Lois Whitcraft, Phil Offill or Jeffrey Bruteyn under the Court's finding of contempt will be credited back to the Receivership Estate.

The Receiver also retained local counsel to assist with matters related to the Receivership in other jurisdictions. The firm of Schnader, Harrison, Segal & Lewis LLP assisted with filings in the Eastern District of Pennsylvania and aided Andrews Kurth LLP in connection with the lawsuit against the Whitcrafts. Schnader, Harrison has submitted invoice numbers 2226226 and 2231124, and its unpaid fees and expenses through February 29, 2008 total \$1,011.94. App. 067; App. 138-143. The firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP assisted with filings in the Northern, Southern, and Middle Districts of Florida. Wilson, Elser has submitted invoice number 1443202, and its unpaid fees and expenses through February 20, 2008 total \$168.00. App. 067; App. 144-145. The firm of Jameson and Dunagan, P.C. assisted the Receiver with issues related to operating the used car lots, repossessing collateral, and selling automobiles. Jameson & Dunagan submitted invoice numbers 977329, 977612, and 977756, and its fees and expenses through February 29, 2008 are \$4,590.53. App. 067; App. 146-161.

The professional fees and expenses requested in this Application are governed by the lodestar method of calculation. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319 (5th Cir. 1995); *Sec. & Exch. Comm'n v. Tyler*, No. 3:02-CV-282-P, 2003 WL 21517879 (N.D. Tex. June 30, 2003) (Solis, J.). The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. In evaluating the reasonableness of the number of hours expended, the Court must "determine whether the total hours claimed are reasonable [and] also whether particular hours claimed were reasonably expended." *Kellstrom*, 50 F.3d at 325. Reasonable

hourly rates may be determined by considering the applicant's regular rates and the prevailing rates in the community. *Id.* at 328. After multiplication of the two amounts, the Court may adjust the lodestar result upward or downward as it sees fit based on consideration of the twelve factors enumerated originally in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); *Kellstrom*, 50 F.3d at 329. The factors include: (i) time and labor required; (ii) novelty and difficulty of issues; (iii) the skill required to perform the legal services properly; (iv) preclusion from other employment; (v) customary fees; (vi) fixed or contingent fees; (vii) time limitations imposed by client or other circumstances; (viii) results achieved; (ix) experience, reputation and ability; (x) the undesirability of the case; (xi) the nature and length of professional relationship with client; and (xii) awards in similar cases. *Id.*

In support of this Application, the Receiver submits the following:

- invoices for the professional fees and expenses covered by this Application showing (a) the date the services were rendered; (b) the nature of the services rendered; (c) the time required for the performance of such services; and (d) the fees charged for each service rendered App. 006-045; App. 069-121; App. 138-161;² and
- Declarations of William Brown and Spencer Barasch stating the reasonableness of the rates charged and hours billed by professionals at Weaver & Tidwell, Andrews Kurth and the local counsel, respectively. App. 001-005; App. 061-068.

Both Weaver & Tidwell and Andrews Kurth have charged at or below the standard billing rates for the professionals working on this matter and those fees are at or below customary fees charged by like professionals in Dallas/Fort Worth. App. 003-004; App. 065-

² The invoices of Weaver & Tidwell and Andrews Kurth have been partially redacted to preserve the attorney-client and work product privileges. App. 003; App. 064.

066. In accordance with its standard practice, Andrews Kurth introduced new billing rates for its professionals in 2008. App. 064-065. In an effort best serve the Receivership Estate, Andrews Kurth did not raise the billing rates of its partners to the 2008 standard rates, providing discounts of more than 25% on partners' rates to the Receivership Estate. App. 064-065. Andrews Kurth associate billing rates were adjusted based on the 2008 standard rates beginning with the February 2008 invoice. App. 064-065. The Andrews Kurth associate rates continue to be discounted by amounts ranging from 10%-20%. App. 064-065.

Further, both Weaver & Tidwell and Andrews Kurth have charged expenses for transportation, parking & tolls, postage/overnight delivery, long distance telephone charges, telecopy and research at actual cost. App. 004; App. 066. In-house copying charges are billed at the firms' standard rates. No request is made for overhead charges. The fees and expenses sought in this Application are reasonable and were necessary for proper administration of the duties and responsibilities charged to the Receiver by the Court. App. 004-005; App. 066-067.

A. Application of *Johnson* Factors

Application of the relevant *Johnson* factors to the professional services provided in this case demonstrates that the fees and expenses should not be adjusted, either upward or downward.

1. *Time and Labor Required.* The time and labor required for this receivership are set forth in (a) the submitted invoices, (b) in the Receiver's Reports filed with the Court on July 23, 2007, August 23, 2007, and most recently on April 15, 2008 and (c) in the Receiver's First, Second Third, and Contempt Fees Applications.

Since this case was instituted, the Receiver and many of his employees have devoted a substantial amount of time to managing the Receivership Assets. Substantial assistance from legal counsel has been necessary to review and evaluate records, investigate leads of

misappropriated funds and assets and to secure those assets, to ensure that the Receivership could legally conduct operations, to prosecute litigation on behalf of the Receivership Estate, and for numerous other legal services.

One particularly time consuming and labor intensive task undertaken by the Receiver is the management of the car note business. Since the inception of the Receivership, the Receiver has consolidated five car lots into one location, conserving the assets of the Receivership Estate by streamlining the business and eliminating inefficiencies. The car notes continue to be collected by the Receiver, and defaulted notes are the subject of repossession efforts, insurance claims or other legal action.

The Receiver and his counsel have also devoted substantial time and effort in tracing and recovering assets of the Estate diverted by Defendant Bruteyn and his cohorts. In January, the Receiver and his counsel participated in a two-day hearing on his and the SEC's Motion to Show Cause why Jeffrey Bruteyn, Lois Whitcraft, Ronald Whitcraft and Phillip Offill should not be held in contempt of court for misappropriating estate funds and failing to surrender estate assets after the entry of the Court's freeze order. On February 1, 2008, the Court found Jeffrey Bruteyn, Lois Whitcraft and Phillip Offill in contempt of the Court's Order and ordered the return of \$431,000 and a BMW sedan to the Estate. As discussed below, the Receiver has recovered the cash and the BMW, and has filed his application to recover his costs and fees.

The Receiver is also pursuing claims held by the Estate. The Receiver recently received a \$1,300,000 summary judgment award against Randy Bacon. The Receiver also filed a claim against Ronald and Lois Whitcraft in order to recover title to the Lakewood residence used by Bruteyn. Claims against Cooley Enterprises, Inc. related to the car notes are also being pursued by the Receiver. Finally, the Receiver has filed a claim with Lloyd's of London under the Single

Interest Insurance Policy referenced in the promotional materials provided to the investors. Lloyd's has denied the claim, and the Receiver is challenging the denial.

2. *The Novelty and Difficulty of the Issues.* By its very nature, a receivership is unique and complex. This receivership is especially complex due to the size of the estate, the poor and/or fraudulent record keeping of the relevant companies by Defendants, the complexity of managing historically poorly-run, cash-based used car businesses, and interference with the Receiver's work by Jeffrey Bruteyn, his mother Lois Whitcraft, his former attorney Phil Offill, Dennis Bowden, and others.

For example, the Receiver has been required to seek a restraining order against Tom Leath regarding the 58 acres in Roatan, Honduras, which is a Receivership Asset. Leath previously listed the Roatan property for sale for \$3,380,000 without the authority or knowledge of the Receiver. The Court granted the temporary restraining order and has extended that order against Leath. This is yet another example of the interference the Receiver has faced at continued expense to the Estate.

3. *The Skill Required to Perform the Services.* The services performed in this matter required professionals who have specialized knowledge and experience, including on such topics as (a) substantive and procedural law applicable to receiverships; (b) accounting; (c) forensic financial analysis and fund tracing; (d) electronic data recovery; (e) assets administration and liquidation; and (f) tax. The Receiver, his team and Andrews Kurth have considerable experience in such areas.

4. *The Preclusion of Other Employment Due to Acceptance of the Case.* The Receiver and Weaver & Tidwell have not declined any representations solely because of the Receiver's work, but the Receiver and many of his employees have devoted a substantial amount of time to

this case and will continue to do so for as long as required. Andrews Kurth has not declined any representation solely because of its services to Receiver, but because of the magnitude of the effort required, individual Andrews Kurth professionals working on this case have been precluded from working on other matters.

5. *The Customary Fee.* As set forth in the Declarations of William Brown and Spencer Barasch filed in connection with this Application, the hourly rates charged in this matter are commensurate with the rates charged by other professionals of similar experience in Dallas/Fort Worth. App. 003-004; App. 065-066.

6. *Whether the Fee is Fixed or Contingent.* The fees of the Receiver and Andrews Kurth are fixed insofar as they are fixed upon hourly rates. But, payment of any fees and expenses is contingent upon the Court's discretion and sufficient Estate funds.

7. *Time Limitations.* Time is of the essence in a receivership. The efforts undertaken in this case related to the recovery of Receivership Assets and analysis of records to locate Receivership Assets were necessarily conducted on an expedited basis.

8. *The Amount Involved and the Results Obtained.* This case involves investments from more than 540 people totaling more than \$60 million. Through March 31, 2008, the Estate had total assets of \$13,303,452, after the \$25,000,000 first partial distribution to investors on March 28, 2008.

As of March 31, 2008, the Receivership Estate held 486 car notes valued at approximately \$4,730,000. 202 of those notes were current, and 94 notes were less than 30 days past due. The Receiver and his staff are actively pursuing collections on the past due notes. The Receiver and his staff are also pursuing the remaining approximately 190 non-performing car

notes through repossession, legal proceedings and insurance claims. The Receiver has sold approximately 800 cars, bringing \$3,668,787 into the Receivership Estate.

Additionally, the Receiver recovered \$435,000 and a BMW sedan for the Estate from Defendant Jeffrey Bruteyn, Phil Offill (Bruteyn's counsel), and Lois Whitcraft (Bruteyn's mother) under the Court's February 1, 2008 Memorandum Opinion and Order finding Bruteyn, Offill and Lois Whitcraft in contempt.³ Pursuant to the Court's award of fees and costs, the Receiver has filed an application to recover approximately \$170,000 in fees and costs incurred in connection with the Show Cause proceeding from Bruteyn, Offill and Whitcraft. This application is pending with the Court.

On April 22, 2008, the Court authorized the Receiver to close the sales of six properties with an aggregate purchase price of \$2,550,000. As previously stated, one of these properties has closed with the remaining five expected to close in the very near future. The Receiver is pursuing additional sales of other Estate properties by obtaining appraisals and marketing properties, including the 58-acre property in Roatan, Honduras, the Shelby Avenue condominium, the former office space of United Financial Markets, and the 34-acre ranch property in the Tyler, Texas area. Additionally, the Receiver is taking the necessary steps to secure title to one of the two Chantilly lots previously held by a joint venture and will place that lot on the market as well.

Conclusion

For the reasons stated herein, Receiver requests the Court enter an Order approving this Application.

³ The \$435,000 included \$150,000 returned from Martin LeNoir, \$50,000 from Offill and \$235,000 from Lois Whitcraft, which included the amounts owed by her and by Bruteyn, as well as \$4,000 in penalties.

Respectfully submitted:

/s/ Spencer C. Barasch

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CERTIFICATE OF CONFERENCE

I hereby certify that on May 8, 2008 I conferred with Mr. Jeffrey B. Norris, Senior Trial Counsel at the U.S. Securities & Exchange Commission, and the Commission does not oppose the relief requested in this application.

/s/ Spencer C. Barasch

Spencer C. Barasch

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2008, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by Electronic means:

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I hereby certify that I have served the foregoing document by mailing a copy to the following individuals:

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