

**BEFORE THE CREDIT UNION BOARD  
OF THE ALABAMA CREDIT UNION ADMINISTRATION**

ALABAMA ONE CREDIT UNION, )  
 )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 ALABAMA CREDIT UNION )  
 ADMINISTRATION and )  
 SARAH H. MOORE, )  
 )  
 Appellees. )

**ORDER TO CEASE  
AND DESIST 2015: 002**



**ALABAMA ONE CREDIT UNION'S MOTION TO STAY ENFORCEMENT  
OF CEASE AND DESIST ORDER AND FOR EXPEDITED HEARING**

Alabama Credit Union One ("Alabama One") hereby moves the Alabama Credit Union Administration ("ACUA") and Administrator Sarah H. Moore ("Moore") to stay enforcement of the April 2, 2015 cease and desist order issued by Moore (the "Order") and to hold an expedited hearing on its motion and issue a ruling on its motion by April 17, 2015.

**I. INTRODUCTION**

Moore's Order, signed April 2, 2015, requires a number of actions of Alabama One which would cause irreparable harm to the credit union, and its authorization is based on an incomplete and inaccurate factual record. Absent a stay of Moore's Order, the ACUA appeal process would be a sham because every action in the Order -- including the highly irregular requirement that Alabama One send all 60,000 of its members a copy or summary of the Order -- is set to be completed before the time that Alabama One's appeal would be required to be ruled on. Alabama One's appeal would be largely futile. This is particularly unwarranted because the allegations on which the Order is based are not related to the safety and soundness of the Credit Union, which has a capital ratio of over 10% and is stronger than ever financially.

Nor are the purported findings of noncompliance factual. Indeed, a number of the findings are simply not correct or are misleading. The following is a non-exhaustive list of examples:

- The ACUA declares Alabama One's Board of Director training to be not compliant because, apparently, the training is not recorded in the Board's minutes.<sup>1</sup> But Moore herself approved the training on October 18, 2014, stating that "[t]he very thorough training presented by Burr Forman on October 6 satisfies corporate governance training for credit union directors...I expect that when you satisfy item (c)(i), the overall training will accomplish the objectives in the LUA."<sup>2</sup>
- The Cease and Desist Order finds Alabama One not compliant with the requirement to hire a Chief Lending Officer.<sup>3</sup> But on the very next business day, April 6, 2015, Moore approved the hiring of Alabama One's CLO, writing "I approve Darren R. Davidson to serve as Chief Lending Officer at Alabama One Credit Union."<sup>4</sup> The request for approval to hire him had been submitted weeks before and could not be completed without the Administrator's approval - which was withheld until after she sought and obtained the Cease and Desist. The only reason for not having the Chief Lending Officer hired was due to the ACUA not acting - not Alabama One.
- The ACUA contends Alabama One has not been compliant in revising its MBL policies. But at a meeting with Sarah Moore and Lloyd Moore, a consultant for Alabama One -- RiskTek's Bill Wells -- offered to provide a copy of Alabama One's new MBL policies to Ms. Moore. Ms. Moore declined to accept the policies, and the ACUA is aware that the OREO policies, a component of the MBL policies, are also being revised.
- The ACUA states that Alabama One is not compliant with conducting a review of its senior managers because it has not received copies of the reviews. Alabama One has conducted reviews of all of its senior managers. The only review even

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<sup>1</sup> The LUA tracking document indicating areas of alleged non-compliance were provided to Alabama One on April 2, 2015, the same day the Order was issued. The document is titled "LUA Non- COMPLIANT ITEMS For the period ended: 3/18/2015."

<sup>2</sup> See emails attached as Ex. 1. The last remaining item of training was completed during the first quarter of 2015 and would be included in the report to the ACUA on April 10, 2015. Neither Moore nor anyone else at the ACUA ever inquired about the completion of training before issuance of the Cease and Desist Order.

<sup>3</sup> The DOR tracking document was also received April 2, 2015. The document is titled "Alabama One Credit Union Non-compliant DOR Items-ACUA Version For the Period Ending 3-10-15."

<sup>4</sup> See approval letter attached as Ex. 2.

asked for or required to be provided under the LUA was the CEO - which was timely provided. There is no requirement in the LUA for Alabama One to provide the reviews of its managers to the ACUA even though it is glad to do so - and they have been available at all times.

- The ACUA states that Alabama One has not complied with a requirement that it obtain a new appraisal of a property and write the property down to fair market value less costs of sale. But as the ACUA knows well, Alabama One has hired a fourth appraiser to conduct the appraisal after the first three backed out of conducting the appraisal due to actions of the ACUA.<sup>5</sup> Alabama One has kept the ACUA apprised of the situation throughout the process of trying to obtain an updated appraisal.

Alabama One has worked diligently to comply with the instructions of the ACUA and NCUA. Its Board of Directors has met repeatedly (more than a dozen meetings this year) to address the regulator's concerns, its management has busied itself implementing new policies and procedures required of the credit union, and its attorneys and other representatives have met regularly with Moore and others to discuss and implement requirements on Alabama One. Alabama One has done everything it could to ensure and monitor its progress and sent detailed monthly reports showing compliance. Neither the NCUA nor the ACUA has even one time asked questions or disputed the reports until the Cease and Desist Order.

Indeed, in the time since Alabama One began operating under an LUA, Alabama One has added three new members to its board of directors -- and nominated others for approval; has begun and completed extensive new training for its board of directors; has developed new tracking documents; has engaged Pritchett and Associates to complete a management study of Alabama One; has reviewed and revised its MBL policies and procedures; has modified its management organizational structures; has obtained a review and study of CEO/Manager John Dee Carruth's effectiveness; has hired a new Chief Credit Officer and obtained approval to hire a

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<sup>5</sup> Alabama One has been made aware that the first three appraisers declined to finish their appraisals after learning that Ms. Moore had reported to the person who did the original appraisal to the state appraisal board.

Chief Lending Officer; has expelled Danny Butler; has defined new performance metrics for 2015; has created a policy exception plan; has worked on policies to improve its internal controls; and has sent out RFPs for a new accounting firm. This list is not exhaustive, but it shows the hard work of the Credit Union.

Alabama One has also repeatedly sought feedback from the ACUA and NCUA about its compliance with the LUA and DOR, but it did not receive any guidance which would indicate problem areas until Moore's Order. For example, on December 18, 2014, Alabama One's Board and lawyers met via teleconference at Alabama One's urging with NCUA Officer Timothy J. Bankroff and Moore, and asked whether they could identify any LUA requirements with which Alabama One was not timely complying. Bankroff said he could not identify any item of noncompliance and Moore was silent and did not identify any issue, either. Later, in March 2015, counsel for Alabama One followed up, seeking information about any concerns about compliance, but neither the ACUA nor the NCUA identified areas of non-compliance.

The only criticism of Alabama One's compliance with the LUA that it had received before April 2, 2015, was of two loans made after Alabama One was ordered to do so by United States Bankruptcy Judge Benjamin Cohen. Alabama One had no choice but to make the loans ordered by Judge Cohen on October 8, 2014, after neither the ACUA nor the NCUA chose to participate in hearings related to the loans and neither allowed the Alabama One to explain the situation fully to the court. Judge Cohen wrote,

**[w]hat the regulators "have determined" without other explanation is neither helpful nor convincing....This Court has thoroughly reviewed the settlement. It has read the 20 parts to section 723. Without the regulators' assistance, the Court cannot find either that there is a violation or that if**

there may be one. Consequently, the Court finds that this argument does not prevent it from enforcing the settlement.<sup>6</sup>

Other than be held in contempt of court, Alabama One simply had no choice but to make the loans required by the settlement agreement and federal court order. Both the ACUA and Ms. Moore had the opportunity to appear and inform the Court of any objections. They elected not to do so. Counsel working with Ms. Moore from the State Banking Department asserted that if the judge enforced the settlement, the ACUA would intervene in the action; however, they never did so.

If Alabama One begins to attempt to comply with Moore's Order before this board has the opportunity to hear its appeal, irreparable damage could be done to the credit union, to the extent it even understands what is being ordered. For example, paragraph 17 of the Order requires that "[w]ithin 30 days from the effective date of this Order, the Credit Union will eliminate and/or correct all violations of laws, regulations, non-compliant LUA concerns and/or contraventions of statements of policy in the LUA..." Among the items identified as non-compliant in the LUA are the court-ordered loans. Presumably, Moore's Order would require Alabama One to call the loans at issue or otherwise dispose of them in 30 days. This would itself violate a federal court order and could result in additional litigation against Alabama One and possibly even the ACUA by the plaintiff borrowers (or even contempt of court). Similarly, paragraph 19 requires that Alabama One incur the expense of more than \$50,000 to notify the members of the credit union of Moore's Order before the credit union's appeal would even be heard. Even if the ACUA Board rules in Alabama One's favor in its entirety, the damage would

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<sup>6</sup> See October 8, 2014 order attached as Ex. 3. The order granted a motion by lawyers representing civil litigants suing Alabama One seeking to enforce a settlement agreement that the ACUA and NCUA refused to approve. Alabama One fought its enforcement in the Bankruptcy Court, but was not successful. Neither the ACUA nor the NCUA appeared during any hearing held by Judge Cohen. The settlement was a result of the agreement reached before Alabama One was under any LUA.

already be done. Such actions should not be ordered before the Credit Union even has an opportunity to have its appeal heard.

Third, many portions of Moore's Order are unclear. It requires, for example, that Alabama One "eliminate and/or correct all violations of laws, regulations, non-compliant LUA concerns and/or contraventions of statements of policy in the LUA, and all Reports of Examination, including DORs..." Order, ¶ 17. Alabama One does not know what this paragraph requires other than the efforts it was already engaged in and the other specific requirements in Moore's Order. If there are deficiencies other than those specifically set forth in the LUA and Cease and Desist Order, all Alabama One requests is notice of what they are so it can fairly respond. A vague "comply with all laws" order is not sufficient. These, and many other issues in Moore's Order are unclear.

## **II. ARGUMENT**

### **A. Absent a stay of enforcement, the ACUA appeal process will be futile.**

Moore's Order requires that Alabama One take nearly every single required action within 90 days or less of the effective date of the Order. Given those deadlines, any appeal of the Order would be largely an exercise in futility without a stay of enforcement because Alabama law allows a hearing within 60 days and a subsequent ruling within 30 days. *See ALA. CODE § 5-17-8*. By that time, Alabama One would have had to fully complete the requirements of the Order. Simply put, making the Order enforceable immediately allows it to evade any review.

The practice of staying enforcement of an order is common and often a necessity to allow a genuine appeal. The United States Supreme Court explained:

It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal...and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, ... that as part of its traditional equipment for the administration of justice, a federal court can stay the

enforcement of a judgment pending the outcome of an appeal." A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

*Nken v. Holder*, 556 U.S. 418, 421 (2009) (citations omitted). For this reason, courts have traditionally been empowered to stay the enforcement of judgments pending appeals. *See, e.g., Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922) ("Undoubtedly, after appeal the trial court may, if the purposes of Justice require, preserve the status quo until decision by the appellate court."). Here, this Board's ruling or any subsequent court ruling on Alabama One's appeal of Moore's Order may come too late if the enforcement of the Order is not stayed. For that reason, the enforcement of Moore's Order should be stayed pending a hearing and ruling on Alabama One's appeal.

**B. Enforcing the Order immediately would cause irreparable harm.**

Alabama One has consistently improved the soundness and strength of the credit union. Indeed, Alabama One was given a largely clean bill of health by the ACUA and NCUA after the December 31, 2013 examination of the credit union, received on February 5, 2014. The only corrective action in the report was the instruction to consult with counsel concerning ALA. CODE § 10A-2-8.50 regarding legal expenses and if applicable to adopt a written policy to comply with the statute.<sup>7</sup>

Enforcing Moore's Order could cause irreparable harm to the Credit Union. Among other problems absent a stay, Alabama One would be required by the Order to notify all 60,000 members of the credit union of the Order before the appeal process was complete; to add or redefine management before a complete analysis of the ACUA mandate was completed; to

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<sup>7</sup> Unfortunately, the report came less than a month before the ACUA issued orders suspending Mr. Carruth, Martie Patton, Tammy Ewing, and Celina Hood on February 28, 2014. While those orders were overturned, the ACUA's actions in February and March 2014 did great damage to Alabama One, damage it is still working to repair.

engage costly independent experts before an appeal of the need for such is examined; to deviate from GAAP accounting; to potentially violate a Federal Court Order; and to otherwise impair the financial strength of the credit union before an appeal is even heard. The sending of the notice to the 60,000 members would cause unjustified concern and a potential "run" on the credit union. This would itself cause harm - not avoid it. Furthermore, such general publication would be used by plaintiffs' lawyers to continue an unjustified media attack that could harm the credit union's reputation - all without any right to appeal.

These actions could damage Alabama One in ways that could not be repaired after the appeal has been heard and ruled on. Accordingly, enforcement of Moore's Order should be stayed pending appeal.

**C. Portions of the mandates of the Order are unclear.**

In addition to other concerns, the enforcement of Moore's Order should be stayed pending appeal because certain portions of it are unclear. Two portions in particular -- the requirement to remedy all violations of orders and the law and the requirement of undoing two MBLs to Jerry Griffin, or others, are terminally vague. Alabama One simply does not know what is required of it. It is unclear whether the ACUA expects Alabama One to call the Griffin loans, sell the Griffin loans, or simply account for them differently.

Moreover, the effective date and deadlines of Moore's Order are unclear. The effective date of Moore's Order is 10 days after its delivery -- April 3, 2015 -- but certain other portions of the order do not include the modifier "effective date."

These and other portions of Moore's Order are ambiguous. Accordingly, the enforcement of the Order should be stayed pending its appeal and a hearing held on the Order.

**D. Moore's Order does not deal with safety and soundness.**

Despite the fact that Alabama One is already implementing many of the directives of the Cease and Desist Order, no one would be endangered by a delay in the implementation of Moore's Order because the Order does not concern issues about the safety and soundness of Alabama One. An action affecting the safety and soundness of a financial institution is an "imprudent act" that "pose[s] an abnormal risk to the financial stability of the banking institution. This is the standard that the case law and legislative history indicates we should apply in judging whether an unsafe or unsound practice has occurred." *Matter of Seidman*, 37 F.3d 911, 928 (3d Cir. 1994) (finding conflict of interest and policy violations imprudent but not an unsafe or unsound business practice) (emphasis added); *see also First Nat. Bank of Bellaire v. Comptroller of Currency*, 697 F.2d 674, 681 (5th Cir. 1983) (describing safety and soundness as "limited to practices with a reasonably direct effect on a bank's financial stability."); *Hoffman v. Fed. Deposit Ins. Corp.*, 912 F.2d 1172, 1174 (9th Cir. 1990) (same).

Here, there is no indication that the actions or issues pose an abnormal risk to the financial stability of Alabama One. Sending a notice to 60,000 members is not a safety and soundness issue - nor are other items in the Cease and Desist Order such as obtaining a third party appraisal or filing a potential SAR. Alabama One is extremely strong financially, with a capital ratio over 10%. Its assets have increased by \$18 million in the first quarter, and its deposits have grown more than \$15 million during that same time period.

Moreover, there is no credible argument that making Moore's Order immediately effective pending an appeal is required to protect the safety and soundness of Alabama One. An appeal would add very little delay, as is shown by the fact that a stay pending appeal is the norm in the issuance of cease and desist orders. Given the financial strength of Alabama One, a delay could not possibly endanger it.

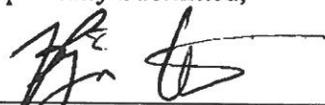
Alabama One asks the Board to consider what the impact would be on the institutions for which they are responsible. If your credit union was directed to do something based on incorrect facts - wouldn't you want the opportunity to appeal? Alabama One is not asking at this point for the ACUA Board to change the Cease and Desist Order, only to stay the effectiveness of the order to allow an appeal and to insure fairness in the process. The ACUA should desire to allow due process for all of its members - otherwise, all would be subject to arbitrary and capricious action.

### **III. REQUESTED RELIEF**

**WHEREFORE**, Alabama One respectfully requests that the ACUA Board stay the enforcement of the April 2, 2015 Order issued by Administrator Sarah Moore pending the appeal of that order. Alabama One further requests that the Board hold an expedited hearing and issue a ruling on its motion by April 17, 2015.

Dated: April 10, 2015

Respectfully Submitted,



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Victor Hayslip (HAY019)  
Benjamin B. Coulter (COU027)

*Attorneys for*  
Alabama One Credit Union

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing document by U.S. First Class Mail and email on April 10, 2015:

Sarah Moore, Administrator  
Alabama Credit Union Administration  
1789 Cong Wm L Dickenson Drive, Ste. 215  
Montgomery, Alabama 36109  
Sarah.Moore@acua.alabama.gov

I hereby certify that I have served a copy of the foregoing document by email on April 10, 2015:

Ralph Altice  
c/o ACUA

Charles Faulkner  
cfaulkner@jeffersoncreditunion.org

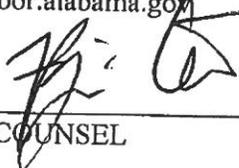
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\_\_\_\_\_  
OF COUNSEL

# EXHIBIT 1

**From:** Moore, Sarah [<mailto:Sarah.Moore@acua.alabama.gov>]  
**Sent:** Wednesday, October 08, 2014 3:16 PM  
**To:** Hayslip, Victor  
**Cc:** Moore, Lloyd; Jeff Russell ([AL09@ncua.gov](mailto:AL09@ncua.gov))  
**Subject:** RE: Alabama One Board Training Presentation2\_(21674433)\_1).pptx

The very thorough training presented by Burr Forman on October 6 satisfies corporate governance training for credit union directors. It does not go into specific training on the duties and responsibilities of the Board to ensure that the credit union operates in a safe and sound condition. I expect that when you satisfy Item (c)(i), the overall training will accomplish the objectives in the LUA.

Thank you for sending this to us.

Sarah H. Moore  
Administrator  
Alabama Credit Union Administration  
100 N. Union Street, Suite 650  
Montgomery, Alabama 36104  
(334) 353-5770

# EXHIBIT 2



ROBERT BENTLEY  
GOVERNOR

STATE OF ALABAMA  
ALABAMA CREDIT UNION ADMINISTRATION  
100 N. UNION STREET, SUITE 650, MONTGOMERY, ALABAMA 36104  
TELEPHONE: (334) 353-5770 • FAX (334) 353-5795  
www.acua.alabama.gov



SARAH H. MOORE  
ADMINISTRATOR

April 6, 2015

Edwin D. Harrell, Chairman  
Alabama One Credit Union  
1215 Veterans Memorial Parkway  
Tuscaloosa, AL 35404

Dear Mr. Harrell:

As Administrator of the Alabama Credit Union Administration and based on your Notice of Change in Official or Officer and Mr. Davidson's resume, I approve Darren R. Davidson to serve as Chief Lending Officer at Alabama One Credit Union.

Sincerely,

A handwritten signature in cursive script that reads "Sarah H. Moore".

Sarah H. Moore

SHM:jr

cc: Myra Toeppe  
Mark Canter  
Tim Bankroff  
Jeff Russell  
Lloyd Moore  
Vic Hayslip

# EXHIBIT 3

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION**

In re: )  
 )  
Brenda's Rentals, LLC, ) Case No.: 13-72305-BGC-11  
 )  
Debtor. )

**ORDER**

The immediate matters before the Court are:

1. The Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action filed September 19, 2014, Docket No. 404;
2. The Debtor's Amended Motion to Enforce Settlement Agreement and Motion for Expedited Hearing, filed September 24, 2014, Docket No. 417; and
3. The AOCU's Opposition to Debtor's Amended Motion to Enforce Settlement Agreement, filed October 1, 2014, Docket No. 423.

A hearing was held on October 2, 2014. Appearing were: Herbert M. Newell, III and Jillian Laura Guin White, attorneys for Brenda's Rentals; Mary Lane Falkner, Special Counsel; Joseph Bulgarella, attorney for the Bankruptcy Administrator; Robert Morgan and Jerry Oldshue, attorneys for Jerry and Brenda Griffin; Al Lewis, Special Counsel; Dan Brady, attorney for the potential buyer; Mike Hall, attorney for Alabama One Credit Union; and Robert Reynolds, attorney for Robertson Banking. The matters were submitted on the record in three jointly administered Chapter 11 cases, the pleadings, and arguments and representations of counsel.

**I. Background**

Brenda's Rentals, L.L.C., Case No. 13-72305-CMS11; Jerry Allen Griffin and Brenda Hunter Griffin, Case No. 13-72307-CMS11; and Jerry's Enterprises, Inc., Case No. 13-72306-CMS11, [all referred to herein as the "Debtors"] were filed on November 13, 2014. On November 2013, Alabama One Credit Union, (AOCU) the largest creditor for all Debtors, filed a motion to have the cases jointly administered. Docket No. 14. That motion was granted by order entered on December 20, 2013.

Docket No. 56.<sup>1</sup>

The parties had extensive financial relationships and strongly contested litigation. A state court action filed by the Debtors on July 16, 2013, was removed to this Court by Alabama One Credit Union on January 15, 2014. A.P. Docket No.1.<sup>2</sup>

During the course of this case and that related proceeding, the parties have with great effort and sacrifice made numerous attempts to resolve their differences. Several guarded reports were made to the Court that settlement appeared possible. All involved were encouraged, including the Court, that is, until the pending matters were filed. With those matters came the realization that whatever settlement that had been reached was in jeopardy.

At the hearing on the matters, the parties explained that it was not necessarily the substantive settlement that was now being rejected, but there were some procedural events that at worst derailed that settlement, or at best, switched it to another track. Those events concerned the relationships of AOCU to the Alabama Credit Union Administration (ACUA) and the National Credit Union Administration (NCUA) and whether those agencies should approve any settlement AOCU entered with the Debtors. The parties provided for certain contingencies in their settlement regarding those approvals. When both the ACUA and the NCUA refused to approve the parties' Settlement Agreement, AOCU took the position that this Court could not approve or enforce the agreement. That position led to the necessity of the instant order.

## II. The Settlement

The parties agree that the settlement resolves all of their substantive disagreements, and except for two specific procedural provisions, they agree that the settlement can move forward.<sup>3</sup>

The two procedural provisions at contest relate to AOCU's relationship with its regulatory agencies the ACUA and the NCUA. Through each provision, AOCU contends that both ACUA and NCUA must approve the Settlement Agreement AOCU entered with the Debtors. It argues that if those agencies do not approve the

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<sup>1</sup> All Docket Numbers are as assigned in the jointly administered lead case of Brenda's Rentals, 13-72305.

<sup>2</sup> That adversary proceeding, No. 14-70001 is pending in this Court along with a Motion to Remand filed by the Debtors on February 13, 2014. A.P. Docket No. 4.

<sup>3</sup> The pending matters raise other related issues. Those issues are addressed separately below.

settlement, this Court may not approve or enforce the agreement. The Debtors, of course, disagree.

The two provisions are:

1. **Additional loan.** We will advance new funds to you in an amount not to exceed 80 percent of the appraised value of the collateral securing your other business debts to us (less the Jupiter Bar). Assuming that the loan on Griffin's Cleaners is equal to 80 percent or less of the value of the collateral securing the loan, the amount of new funds can be as much as \$1,000,000, but if either our state or federal regulators object to increasing the total amount of your principal indebtedness to us on all of your loans with us, then the amount we can loan to you cannot exceed the total amount of your principal indebtedness to us as of the date you filed the Griffin Lawsuit, which by our calculations means that the additional loan will be no less than \$500,000. This loan will be based on a 30 year amortization at two (2%) percent interest with a 5 year balloon.

Settlement Agreement at 2, executed June 25, 2014, Exhibit C to the Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action filed September 19, 2014, Docket No. 404-1 at 14.

2. **Approval for Agreement.** The parties agree to promptly seek the approval for this Agreement from the Bankruptcy Court, or, in the alternative, and if all parties mutually agree, to seek the dismissal of the bankruptcy cases. We agree to promptly submit the provisions of this Agreement to our state and federal regulators for any approval that may be necessary. The parties agree that the approvals (or dismissal of the bankruptcy cases) contemplated by this paragraph are preconditions to the effectiveness of other terms in this Agreement.

Settlement Agreement at 3, executed June 25, 2014, Exhibit C to the Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action filed September 19, 2014, Docket No. 404-1 at 15.<sup>4</sup>

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<sup>4</sup> The next paragraph reads, "Dismissal of lawsuit. Upon obtaining the necessary approvals described in the paragraph above, the parties will jointly move for the dismissal with prejudice of the Griffin Lawsuit in the appropriate forum." *Id.* AOCU argues that the, "necessary approvals" referenced in the above "Approval of Agreement" indicates that the parties contemplated approvals by the regulatory agencies in addition to the Court's approval as this "Dismissal of lawsuit" paragraph specifically refers to more than one approval.

### III. Dispositive Issue

The dispositive issue, based on the above two provisions is: Must ACUA and NCUA approve the Settlement Agreement before the settlement may be enforced?

### IV. The Parties' Positions

The Debtors contend that neither regulatory agency is required to approve the settlement.

AOCU disagrees, and as discussed below, presents three specific arguments why the agreement should not be enforced. Those are: (1) that approval by its regulators is necessary for enforcement of the settlement; (2) the settlement violates certain credit union regulations and thus may not be enforced; and (3) Debtors' counsels are attempting to enhance their fees with approval of the settlement.

### V. Enforcement of the Settlement Agreement

The above two pertinent paragraphs from the settlement are dramatically different and have dramatically different effects on the issues before the Court. The first is self-contained and does not impact or relate to any of the other issues before the Court. The second is all encompassing and has everything to do with approval and/or enforcement of the parties' entire agreement. It is the make it or break it provision. Each is discussed below.

#### A. The "Additional Loan" Paragraph

No question associated with the "Additional Loan" paragraph has any bearing on whether this Court should or should not enforce the Settlement Agreement. The question in regard to the "Additional Loan" paragraph of the agreement is far simpler than any issue related to approval and/or enforcement of the entire Settlement Agreement as it is confined to that paragraph only. The pertinent part reads:

but if either our state or federal regulators object to increasing the total amount of your principal indebtedness to us on all of your loans with us, then the amount we can loan to you cannot exceed the total amount of your principal indebtedness to us as of the date you filed the Griffin Lawsuit....

Id. (emphasis added).

As compared to the "Approval for Agreement" provisions, the approval of any additional loan to the Debtors appears to be one-sided with approval required by the ACUA or the NCUA. If either of those agencies objects to a certain loan amount, that amount must be adjusted.

This provision is clear, but in the larger scheme of the pending matters, has no bearing on the dispositive issue.

## **B. The "Approval for Agreement" Paragraph**

The real answer to the dispositive issue lies in the "Approval of Agreement" paragraph which contains the requirements for ultimate approval and enforcement of the entire agreement, not the one single paragraph discussed above. Therefore, analysis of it is far more complicated than the above.

### **1. Procedural Issues**

The dispositive issue of "enforcement" needs to be address in two parts. Those are: (1) approval; and (2) enforcement. This distinction came up at the hearing when the Court was asked if it was suggesting that it could approve the settlement but not enforce it. The Court did not appreciate the difference at the time, but it does now and recognizes it to be a legitimate one.<sup>5</sup>

In the current context, for obvious reasons but contrary to their agreement, the parties have not technically asked the Court to approve the agreement. In contrast, the Debtors have asked the Court to enforce it. On the other hand, AOCU has asked its regulatory agencies to approve the agreement.<sup>6</sup> Both parts are discussed below.

#### **a. Approval of the Settlement Agreement**

##### **(1) By the Court?**

The pertinent part of the agreement reads, "The parties agree to promptly seek the approval for this Agreement from the Bankruptcy Court, or, in the alternative, and if all parties mutually agree, to seek the dismissal of the bankruptcy cases." *Id.* Therefore, this Court's consideration of approval of the settlement agreement is key as to whether the Court may consider any other issue raised by the pending pleadings. If this Court does not approve the agreement, its analysis must end. On the other hand, if it approves the agreement, it may then consider the other issues raised by the pending pleadings. Therefore, the immediate question becomes: Should the Court approve the settlement agreement?

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<sup>5</sup> In the same context, AOCU suggested that the Court could decide, after disapproving the settlement, that but for the regulatory nonapproval, the Court would have approved the settlement agreement.

<sup>6</sup> As everyone knows now, those agencies refused to approve the agreement. Those refusals created the instant conditions and generated the issues now before this Court.

This Court has had previous occasions to review settlement proposals in bankruptcy cases. See In re Tarrant, 349 B.R. 870 (Bankr. N.D. Ala. 2006); In re Golden Mane Acquisitions, Inc., 221 B.R. 963, (Bankr. N.D. Ala.1997) and In re Speir, 190 B.R. 657 (Bankr. N.D. Ala.1995). The standards this Court has applied in each case are those applied within this Circuit. As described by the court in In re Kay, 223 B.R. 816 (Bankr.M.D.Fla.1998) the process is:

In determining whether the December Settlement is fair and equitable, the Court must consider the following factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interests of the creditors and a proper deference to their reasonable views in the premises. In re Justice Oaks II, Ltd., 898 F.2d 1544, 1549 (11th Cir.1990), cert. denied, 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990).

Id. at 820. The Court has applied those standards here, as required by the decision of the Court of Appeals for the Eleventh Circuit in Wallis v. Justice Oaks II, Ltd., (In re Justice Oaks II, Ltd.), 898 F.2d 1544 (11th Cir.1990), cert. denied sub nom. Wallis v. Justice Oaks II, Ltd., 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990).

Based on the complexity of this case, the length it has been pending, the number of attorneys necessary to administer it, the number of consolidated cases, and the amount owed the main creditor, the Court finds that factors two, three, and four clearly weigh in favor of approving the settlement.<sup>7</sup> Consequently, the majority of factors weigh in favor of approval of the settlement agreement.

In addition, none of the other issues before this Court relate in any way to whether this Court should approve the settlement. But for the technical (not used in a derogatory manner) questions raised by the AOCU regarding approval by the regulatory agencies, the parties agree that the settlement is a good one. Similarly, this Court cannot find that whatever approval may be required by the regulatory agencies has any impact whatsoever on this Court's consideration of whether the settlement should be approved. There is absolutely no reason that approval or not by the agencies can, or may, bind this Court, or vice versa. Action by each is independent of the other two.

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<sup>7</sup> Factor one is difficult to break down. The Court has not ruled on the pending Motion to Remand or in the alternative Motion for Abstention which looms over the immediate situation. A.P. 14-70001, A.P. Docket No. 4.

## (2) By the ACUA and the NCUA?

As stated above, AOCU makes three arguments why the Court should not enforce the Settlement Agreement. The first relates directly to whether approval by the ACUA or the NCUA was a precondition for this Court to even consider whether to approve or enforce the agreement. AOCU argues that, "approval by the ACUA and the NCUA was a condition for completion of the terms of the Settlement Agreement. And without that approval, the settlement cannot be enforced." *Id.* From an evidentiary standpoint, it is clear that both the ACUA or the NCUA specifically refused to approve the settlement.<sup>8</sup>

Again, the "Approval for Agreement" paragraph reads:

**Approval for Agreement.** The parties agree to promptly seek the approval for this Agreement from the Bankruptcy Court, or, in the alternative, and if all parties mutually agree, to seek the dismissal of the bankruptcy cases. We agree to promptly submit the

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<sup>8</sup> The Court set the Debtor's pending motion to enforce the settlement agreement on very short notice and did not hold an evidentiary hearing. Writing for the Court of Appeals for the Eleventh Circuit in Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483 (11th Cir.1994), Senior Circuit Judge Lewis Render Morgan explains:

Murchison also contends that the district court erred by failing to hold an evidentiary hearing before enforcing the settlement agreement. A number of courts have recognized the authority of a trial court to summarily enforce a settlement agreement without an evidentiary hearing. However, the district court may enforce only complete settlement agreements. "Where material facts concerning the existence or terms of an agreement to settle are in dispute," Callie v. Near, 829 F.2d 888, 890 (9th Cir.1987) (emphasis in original), or where there is a material dispute about the authority of an attorney to enter a settlement agreement on behalf of his client, the parties must be allowed an evidentiary hearing. Millner v. Norfolk & W.R. Co. 643 F.2d 1005 (4th Cir.1981). "Whether the court may summarily enforce such an agreement or should conduct an evidentiary hearing on the disputed issues depends upon the nature of the dispute." Dankese v. Defense Logistics Agency, 693 F.2d 13, 15-16 (1st Cir.1982). Summary enforcement of an alleged settlement is improper when there is a substantial factual dispute as to the terms of the settlement. See Kukla v. Nat'l Distillers Products Co., 483 F.2d 619 (6th Cir.1973).

*Id.* at 1486. Aside from the fact that this Court asked the parties if they wanted to reschedule this matter for a later time, to which all politely said no, this Court finds that it met the standards described above. No evidentiary hearing was necessary. However, the evidence is clear. AOCU produced a letter at the hearing on October 2, 2014, from the ACUA stating that it would not approve the settlement. In addition, AOCU represented, which this Court accepts without hesitation, that NCUA also refused to approve the agreement.

provisions of this Agreement to our state and federal regulators **for any approval that may be necessary**. The parties agree that the approvals (or dismissal of the bankruptcy cases) contemplated by this paragraph are preconditions to the effectiveness of other terms in this Agreement.

Id. (emphasis added).

With the modifying condition of necessity specifically included in this part of the agreement, for clarity, the last sentence of that paragraph may be rewritten:

The parties agree that... [approval **that may be necessary** by ACUA or NCUA is a precondition]... to the effectiveness of other terms in this Agreement.

Id. (parentheticals added).<sup>9</sup>

What then is that may be necessary for approval? From a legal perspective it is, "essential." Bryan Garner, A Dictionary of Modern Legal Usage 583 (2d ed. 1995). From a common dictionary point it is "[a]bsolutely essential." The American Heritage Dictionary 834 (Second College Edition 1985). Similarly, it is "indispensable." Id.

For whatever reasons, the parties decided that the "approval" by the ACUA or the NCUA, unlike the approval by the Court which could be exercised without condition, was, "approval that may be necessary..." or in other words, approval that was essential or indispensable. The question then becomes was approval by the ACUA or the NCUA necessary, essential, or indispensable?

Based on the record in this case, there is no evidence that approval by either agency was necessary. In contrast, the Court finds that there is circumstantial evidence that such approval was permissive. Exhibit D to the Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action filed September 19, 2014, Docket No. 404-1 at 23-24, is a September 18, 2014, letter from Ms. Sarah H. Moore, Administrator of the State of Alabama, Alabama Credit Union Administration to Mr. Vic Hayslip, a partner in the law firm representing AOCU. The letter reads entirely:

Based upon my discussion with you, I am providing this letter to Alabama One Credit Union, plaintiffs counsel, Mr. Jay Smyth, and you to confirm ACUA's position regarding the proposed settlement with the Griffins, et al. The Alabama Credit Union Administration is not a party to the litigation or

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<sup>9</sup> What "other terms" that may be effected are not specified. The Court cannot know whether those are ones only related to regulatory approval or others.

settlement agreement between Alabama One Credit Union and Brenda and Jerry Griffin, et al. However, Alabama One Credit Union requested that ACUA approve the proposed settlement agreement with Brenda and Jerry Griffin and their related companies that increased funding for existing loans in the amounts of \$500,000 or \$1,000,000. ACUA denied Alabama One Credit Union's request to approve granting new loans to the Griffins.

Id.

Conspicuous in its absence is any mention, or even suggestion, from Ms. Moore that it was necessary for ACUA to approve the agreement. Ms. Moore even goes out of her way to insulate ACUA from the situation by stating that her agency was not a party to these proceedings. Similarly, Ms. Moore specifically states that the reason ACUA reviewed the Settlement Agreement was because AOCU requested ACUA's approval. The implication is that had that request not been made, ACUA would not have done so. And finally, as the last sentence states, "ACUA denied Alabama One Credit Union's request to approve granting new loans to the Griffins." Again the implication is that ACUA was not reviewing the agreement for any substantive reason, but because it was asked to. As such it denied, "Alabama One Credit Union's request to approve...."

As stated above, a follow-up letter was presented at the hearing on the pending matters. It was also from Ms. Moore to Mr. Hayslip. It contained one line which read, "As I advised you on August 20, Alabama Credit Union Administration will not approve the written settlement Alabama One reached with the Griffins." AOCU Unmarked Exhibit, October 2, 2014.

The Court cannot find any change in the evidence from this letter that approval of the Settlement Agreement by the ACUA or the NCUA was required.

Consequently, the Court finds that while ACUA's position is quite clear, that is it has not and will not approve the Settlement Agreement, there is no evidence that it was required to do so. The parties' settlement conditioned ACUA's (or NCUA's for that matter) as **any approval that may be necessary**, essential or indispensable. Therefore, whether the ACUA or the NCUA approved the Settlement Agreement or not is legally irrelevant to the matter of whether this Court should enforce the parties' Settlement Agreement.<sup>10</sup> Therefore, based on the above, the Court approves the Settlement Agreement.

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<sup>10</sup> The Debtors' counsel argued at the hearing on the pending matters that neither the ACUA nor the NCUA was in the business of settlement approval and had no legal authority to do so.

## **b. Enforcement of the Settlement Agreement**

The Court has approved the parties' settlement. The ACUA and the NCUA cannot override that approval because their approval of the agreement was not necessary. What remains then is for this Court to decide whether it should enforce the settlement.

### **(1) AOCU's Remaining Two Arguments Against Enforcement of the Settlement**

As stated above, AOCU presented three arguments why the Court should not enforce the Settlement Agreement. The first, that is approval of the regulatory agencies was a condition precedent, was discussed and rejected above. the remaining two arguments are discussed below.

#### **(a) 12 C.F.R. § 723.1, et. seq.**

AOCU's second argument is, "the Settlement Agreement is unenforceable because the regulators have determined that it violates 12 C.F.R. § 723.1, et. seq." AOCU's Opposition to Debtor's Amended Motion to Enforcement Settlement Agreement at 8, Docket No. 423 (emphasis added).

What the regulators "have determined" without other explanation is neither helpful nor convincing. Section 723 of the Code of Federal Regulations has 20 different parts. The parties' Settlement Agreement has five, single spaced, typed pages, excluding signatures and notary oaths. This Court has thoroughly reviewed the settlement. It has read the 20 parts to section 723. Without the regulators' assistance, the Court cannot find either that there is a violation or that if there may be one. Consequently, the Court finds that this argument does not prevent it from enforcing the settlement.

#### **(b) Opposing Counsel's Fee**

AOCU's third argument is, "The Debtors' attorneys are attempting to enforce the Settlement agreement to obtain an enhanced fee." Id. at 9. Even if they are, the Court finds this is no reason not to enforce the agreement. As is well known, all debtors' counsels' fees are subject to review and approval by this Court independently of any other matters which may come before the Court during the course of a case or proceeding. As such, the Court will consider this argument later, but not in the context of enforcement of the Settlement Agreement.

## (2) The Contract Law of the Forum State

In contrast to AOCU's positions, the Court finds that the Settlement Agreement should be enforced. The law in this Circuit, and particularly in Alabama, is simple and easy to apply.

The per curiam opinion of the Court of Appeals for the Eleventh Circuit in Berman v. Kafka, Case No. 12-12839, 2013 WL 1909021 (11th Cir. May 9, 2013) explains that, "The contract law of the forum state governs the construction and enforcement of settlement agreements. Wong v. Bailey, 752 F.2d 619, 621 (11th Cir.1985)." Id. at \*1.<sup>11</sup> In Alabama, the instant forum state, the law is clear. In Jowers v. State of Alabama, 551 Fed. Appx. 525, (11<sup>th</sup> Cir. 2014) the Court of Appeals for the Eleventh Circuit explains further:

We review the district court's decision to enforce a settlement agreement for an abuse of discretion. Resnick v. Uccello Immobilien GMBH, Inc., 227 F.3d 1347, 1350 (11th Cir.2000). A district court's findings of fact are reviewed for clear error. Wexler v. Anderson, 452 F.3d 1226, 1230 (11th Cir.2006). We may affirm on any basis that finds support in the record. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1256 (11th Cir.2001).

The enforcement of a settlement agreement is governed by contract law of the forum state. Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1254 (11th Cir.1999). A validly executed, written settlement agreement is binding on the parties and will not be set aside, absent proof of "fraud, collusion, accident, surprise or some ground of [similar] nature." Brocato v. Brocato, 332 So.2d 722, 724 (Ala.1976) (quotation omitted).

Id. at 526.<sup>12</sup>

Writing for the Alabama Supreme Court in Brocato, Justice Janie Shores, explained the solid history of enforcement of settlements in Alabama. She wrote, "We hold that the agreement and the judgment entered pursuant to it are binding on the appellants. This court has repeatedly held that agreements made in settlement of litigation are as binding on the parties thereto as any other contract. Ex parte Hayes, 92 Ala. 120, 9 So. 156 (1890)." Id. at 723. She continued later with a description of the circumstances of that case. They are interestingly similar to the current one. She wrote:

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<sup>11</sup> See Fed. Rule of Appellate Procedure 32.1 generally governing citation of unpublished judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2 and 36-3.

<sup>12</sup> See Note 11 above.

In the instant case, the appellants do not deny that they consented to the agreement nor that they knowingly signed the same. They simply assert that the agreement was repudiated 'before any of the provisions were carried out.' This, however, is not the criteria for avoiding such agreements set out in our cases. ' . . . Such agreements are as binding on the parties as any other contract into which they may enter, and will not be set aside except for fraud, collusion, accident, surprise or some ground of this nature.' Ex parte Hayes, supra; Wadsworth v. First National Bank of Montgomery, supra, 124 Ala. at 442, 27 So. at 461.

Id. at 724.

There is nothing in the record before this Court to suggest, or even to hint, that in reaching the settlement before this Court that there was, "fraud, collusion, accident, surprise or some ground of [similar] nature." Id.

Consequently, the Court finds that the Settlement Agreement, as entered by the parties on June 25, 2014, should be enforced, and the Debtors' motion to that effect should be granted.

#### **VI. Remaining Matters**

The Debtors' Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action, as noted in its title asks the Court to strike AOCU's proposed plan of reorganization and to stay any further hearings on these or any related matters.

There are at least nine matters scheduled in this case before this Court for October 22, 2014, at 2:30. Those are:

1. Creditor's Revised Chapter 11 Plan of Reorganization for Brenda's Rentals, LLC filed by Alabama One Credit Union, Docket No. 405;
2. Creditor's Revised Disclosure Statement for Plan of Reorganization for Brenda's Rentals, LLC filed by Alabama One Credit Union, Docket No. 406;
3. Creditor's Revised Chapter 11 Plan of Reorganization for Jerry Allen Griffin and Brenda Hunter Griffin filed by Alabama One Credit Union, Docket No. 407;
4. Creditor's Revised Disclosure Statement for Plan of Reorganization for Debtors Jerry Allen Griffin and Brenda Hunter Griffin filed by Alabama One Credit Union, Docket No. 408;

5. Creditor's Revised Chapter 11 Plan of Reorganization for Jerry's Enterprises, Inc filed by Alabama One Credit Union, Docket No. 409;
6. Creditor's Revised Disclosure Statement for Jerry's Enterprises, Inc filed by Alabama One Credit Union, Docket No. 410;
7. Joint Plan of Reorganization of Brenda's Rental, LLC and Jerry and Brenda Griffin filed by Debtor-In-Possession, Docket No. 413;
8. Joint Disclosure Statement of Brenda's Rentals, LLC and Jerry and Brenda Griffin filed by Debtor-In-Possession, Docket No. 414; and
9. Joint Plan of Reorganization of Brenda's Rental, LLC and Jerry and Brenda Griffin filed by Debtor-In-Possession, Docket No. 415.

Considering the impact of the instant order, before this Court rules on the Debtors' motion to strike and motion to stay, it believes the parties should have time to ingest this order and consider what their positions will be going forward. Consequently, the Court will not rule on any other pending matters at this time, but will allow them to come on for hearing as scheduled, unless told differently by the parties.

#### VII. Conclusions

Based on the above, the Court finds that:

1. The Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action filed September 19, 2014, Docket No. 404 is, to the extent that it relates to enforcement of the parties' Settlement Agreement, due to be granted. To the extent of any other requested relief, those matters will be heard as scheduled for 2:30 on October 22, 2014;
2. Similarly, the Debtor's Amended Motion to Enforce Settlement Agreement and Motion for Expedited Hearing, filed September 24, 2014, Docket No. 417 is due to be granted, as is the Motion for Expedited Hearing; and
3. The AOCU's Opposition to Debtor's Amended Motion to Enforce Settlement Agreement, filed October 1, 2014, Docket No. 423 is due to be overruled.

#### VIII. Order

1. The Debtors' Motion to Enforce Settlement Agreement; to Strike Creditor Alabama One's "Plan of Reorganization" and to Stay Further Proceedings in this Action, Docket No. 404 is, to the extent that it relates to

enforcement of the parties' Settlement Agreement, **GRANTED**. To the extent of any other requested relief, those matters will be heard as scheduled for 2:30 on October 22, 2014;

2. The Debtor's Amended Motion to Enforce Settlement Agreement and Motion for Expedited Hearing, Docket No. 417, is **GRANTED**, as is the Motion for Expedited Hearing; and
3. The AOCU's Opposition to Debtor's Amended Motion to Enforce Settlement Agreement, Docket No. 423, is **OVERRULED**.

Dated: October 8, 2014

/s/Benjamin Cohen  
BENJAMIN COHEN  
United States Bankruptcy Judge