

United States v. Northwest Trustee Services, Inc. (W.D. Wash.), Civil No. 2:17-cv-1686-JLR

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, NORTHWEST TRUSTEE SERVICES, INC., AND ELLIOTT BAY ASSET SOLUTIONS, LLC AS COURT APPOINTED GENERAL RECEIVER FOR NORTHWEST TRUSTEE SERVICES, INC.

I. INTRODUCTION

1. This Settlement Agreement (“Agreement”) is entered into between Plaintiff, the United States of America (“the United States”), through the Department of Justice, Defendant Northwest Trustee Services, Inc. (“NWTS”), through the Court Appointed General Receiver, and Elliott Bay Asset Solutions, LLC as Court Appointed General Receiver (the “General Receiver”). The United States, NWTS, and the General Receiver are referred to herein as the “Parties.”

II. RECITALS

2. This Agreement resolves the allegations contained in the United States’ lawsuit, *United States v. Northwest Trustee Services, Inc.*, Civil No. 2:17-cv-1686-JLR, filed in the United States District Court for the Western District of Washington against NWTS on November 9, 2017 (hereinafter “Civil Action”).
3. The Civil Action alleges that NWTS engaged in a pattern or practice of violating the Servicemembers Civil Relief Act (“SCRA”), 50 U.S.C. §§ 3901-4043, by conducting foreclosures, without court orders, of real property owned by SCRA-protected servicemembers.
4. The United States alleges in the Civil Action that, since January 1, 2010, NWTS initiated and completed 28 foreclosures, without court orders, of real property owned by SCRA-protected servicemembers. The United States further alleges in the Civil Action that, at the time of the foreclosures, the individuals who owned the foreclosed properties were servicemembers who were in military service, as defined by 50 U.S.C. § 3911(1) and (2), had completed a period of military service within the past year (or nine months for foreclosures before February 2, 2013), *see* 50 U.S.C. § 3953(c), or were members of a reserve

component who had been ordered to report for military service, as defined by 50 U.S.C § 3917(a).

5. NWTS is a Washington corporation and its principal place of business was located at 13555 SE 36th St., Bellevue, Washington, in the Western District of Washington. On March 28, 2018, NWTS was placed into a General Receivership under Chapter 7.60 of the Revised Code of Washington, in *In re Receivership of Northwest Trustee Services, Inc. & RCO Legal, P.S.*, Case No. 18-2-08146-7 SEA (King County Superior Court) (the “Receivership Action”). Elliott Bay Asset Solutions, LLC was appointed as General Receiver over NWTS. As provided by Chapter 7.60 of the Revised Code of Washington, the General Receiver has the duty to preserve and protect all assets belonging to NWTS and RCO Legal, P.S. (the “Receivership Property”). As further provided by Chapter 7.60 of the Revised Code of Washington, and the Order Appointing General Receiver, the General Receiver has limited liability, immunities, and other protections.
6. This Agreement covers all non-judicial foreclosures initiated or completed by NWTS, or any subsidiaries, predecessors, acquired companies, or successor entities, from January 1, 2010 through July 31, 2017.
7. The Parties agree, and the United States believes that it is in the public’s best interest, that the Civil Action should be resolved amicably and without further litigation. Nothing in this agreement is to be construed as an admission of liability by NWTS for any of the allegations made in the Complaint filed in the Civil Action.
8. To avoid the delay, uncertainty, inconvenience and expense of protracted litigation of the United States’ claims, and in consideration of the mutual promises and obligations set forth below, the Parties agree and covenant to the following material terms and conditions:

III. STATEMENT OF CONSIDERATION

9. This Agreement constitutes full resolution of the United States’ claims against NWTS related to foreclosures allegedly conducted in violation

of Section 3953 of the SCRA between January 1, 2010, and July 31, 2017.

10. In consideration of, and consistent with, the terms of this Agreement, the Parties will move for dismissal of the lawsuit entitled *United States v. Northwest Trustee Services, Inc.*, Civil No. 2:17-cv-1686-JLR, as set forth in Paragraph 27, and the United States will release the writs of garnishment that pertain to NWTS as set forth in Paragraph 28. The parties agree and acknowledge that this consideration is adequate and sufficient.

IV. TERMS AND CONDITIONS

A. SCRA POLICIES AND TRAINING

11. NWTS is no longer in the business of conducting mortgage foreclosures. In the event that NWTS reenters the business of conducting mortgage foreclosures, it shall notify the United States sixty (60) days before it intends to reenter this line of business. Prior to implementing such reentry, NWTS shall also implement policies, procedures, and training designed to prevent and detect potential SCRA violations in the conduct of mortgage foreclosures. NWTS shall provide counsel for the United States¹ the details of the policies, procedures, and training forty-five (45) days prior to implementation of such reentry. The United States shall have thirty (30) days to review and agree or object to the proposed policies, procedures, and training.

¹ All materials required by this Agreement to be sent to counsel for the United States shall be sent by private business carrier (non-USPS) delivery service addressed as follows: Chief, Housing & Civil Enforcement Section, Civil Rights Division, United States Department of Justice, 1800 G Street, N.W., Suite 7002, Washington, DC 20006, Attn: DJ 216-82-7. A copy of the materials should also be sent to: Civil Rights Coordinator, Civil Division, United States Attorney's Office, 700 Stewart Street, Suite 5220, Seattle, WA 98101-1271. Correspondence may also be sent via electronic mail to the U.S. Department of Justice, care of the undersigned counsel for the United States. Any notice required to be given to NWTS under this agreement should be sent to counsel for NWTS by private business carrier (non-USPS) delivery serviced addressed as follows: Jeffrey Bilanko, Carroll, Biddle, & Bilanko, PLLC, 801 2nd Avenue, Suite 800, Seattle, WA 98104; and to Stuart Heath, Elliott Bay Asset Solutions, LLC, 2535 152nd Avenue NE, Suite B-2, Redmond, WA 98052.

B. COMPENSATION

12. The General Receiver shall in good faith use commercially reasonable efforts to fulfill its duty to preserve and protect the Receivership Property for the benefit of all of NWTS's creditors. After payment of reasonable administrative expenses as may be approved by the King County Superior Court pursuant to RCW 7.60.180(4), and after establishment of an operating reserve account, the General Receiver shall pay from NWTS's accounts receivable collected as compensation to aggrieved persons under this Agreement, and in accordance with the provisions of RCW 7.60.230, as follows:
 - a. 100% (up to \$250,000) of the first \$250,000 that is to be distributed to creditors;
 - b. 30% (up to \$300,000) of funds that are to be distributed to creditors after the first \$250,000, up to \$1,250,000; and
 - c. 20% (up to \$200,000) of funds that are to be distributed to creditors after the first \$1,250,000, up to \$2,250,000.

The Parties understand and agree that the General Receiver must maintain sufficient working capital to pursue recovery of assets for all other claimants and to otherwise administer the Receivership Estate. As a result, the distributions identified in paragraphs 12(a), 12(b), and 12(c) above, shall be made at a time when it is prudent to do so. *See* RCW 7.60.060. Such determination is in the discretion of the General Receiver, subject to review for abuse of discretion by the court in which the Receivership Action is pending.

13. Within 90 days of the effective date of this Agreement, and every three months thereafter until the full \$750,000 is distributed to aggrieved persons, the General Receiver shall provide a report to the United States with an accounting of receivership assets and expenses.
14. Within 210 days of the effective date of this Agreement, the United States shall make a determination of the aggrieved persons who shall receive compensation pursuant to this Agreement and the appropriate percentage of funds to be paid by the General Receiver under this

Agreement that is to be distributed to each aggrieved person. No aggrieved person shall be permitted to receive more than \$125,000.

15. At such time as the General Receiver determines that it is prudent to make the distributions called for in paragraphs 12(a), 12(b), and 12(c) above, the General Receiver shall issue and deliver to counsel for the United States checks payable to aggrieved persons pursuant to the terms of the Agreement. The check amounts for each aggrieved person shall be based on the following formula:

(funds to be distributed to aggrieved persons in accordance with Paragraph 12, as of the date the check is issued) x (aggrieved person's percentage pursuant to Paragraph 14)

16. The United States shall not deliver payment to an aggrieved person pursuant to this Agreement before the aggrieved person has executed and provided to counsel for the United States a written Release in the form of Appendix A.
17. When counsel for the United States has received the first check from the General Receiver payable to an aggrieved person and a signed Release from the aggrieved person, counsel for the United States shall deliver the check to the aggrieved person and the original, signed Release to the General Receiver.
18. Aggrieved persons shall have 180 days after issuance to cash or deposit their compensation checks. During the term of this Agreement, the General Receiver shall, upon the request of the United States stop payment and reissue any checks that are not cashed or deposited prior to their expiration two times per aggrieved person. However, any such reissued check must be cashed within sixty (60) days.
19. No individual may obtain review by the Parties of the identifications made, and amount of payments disbursed, pursuant to Paragraphs 12-18.

C. OTHER RELIEF

20. NWTS represents that it did not submit reports to credit bureaus related to the services it provided as a foreclosure trustee. In the event that the

General Receiver discovers that NWTS did make a negative entry for any servicemember the United States identifies as aggrieved pursuant to Paragraph 14, NWTS will promptly notify the United States and take appropriate steps to remove the tradeline.

D. ADDITIONAL REPORTING AND RECORD-KEEPING REQUIREMENTS

21. Within 60 days of the execution of this Agreement, NWTS, by and through its General Receiver, will provide to counsel for the United States electronic copies of all known records with respect to the 28 foreclosures the United States alleges were conducted in violation of the SCRA. The parties agree and understand that the General Receiver does not have custody or control of any such records. If the General Receiver subsequently discovers additional records with respect to any of those 28 foreclosures, it will provide electronic copies of those records to counsel for the United States, or make those records available for the United States to review and copy at its sole expense upon reasonable request during the term of this Agreement. Until such time as the payments required in paragraph 12(a)-(c) have been made or until the General Receiver has disbursed all of the Receivership Property and the Receivership Action is finally closed, whichever occurs first, NWTS, by and through its General Receiver, shall in good faith use commercially reasonable efforts to retain all records relating to compliance activities under this Agreement. In the event that the General Receiver ceases to be the receiver, then such obligation is imposed upon any subsequent receiver for NWTS. The United States shall have the right to review and copy any such records, including electronic data, at the sole expense of the United States, upon reasonable request during the term of this Agreement.

V. SCOPE OF SETTLEMENT AGREEMENT

22. The provisions of this Agreement shall apply to NWTS and any subsidiaries, predecessors, acquired companies, or successor entities. It shall also apply to any current and future officers, employees, agents, representatives, assigns, successors-in-interest, and all persons and entities in active concert or participation with all of those entities, including with respect to any foreclosures conducted between January 1, 2010 and July 31, 2017.

23. In the event that NWTS is acquired by or merges with another entity, NWTS shall, as a condition of such acquisition or merger, obtain the written agreement of the acquiring or surviving entity to be bound by any obligations remaining under this Agreement for the remaining term of this Agreement.
24. This Agreement releases only the claims for violations of Section 3953 of the SCRA addressed in the Complaint or identified in this Agreement. This Agreement does not release any other claims that may be held or are currently under investigation by any federal agency against NWTS or any of its affiliated entities.
25. Nothing in this Agreement will excuse NWTS's noncompliance with any currently or subsequently effective provision of law or order of a regulator with authority over NWTS that imposes additional obligations on it.

VI. IMPLEMENTATION AND ENFORCEMENT

26. The United States may review compliance with this Agreement at any time. NWTS and the General Receiver agree to cooperate with the United States in any review of compliance with this Agreement. Upon reasonable notice, NWTS and the General Receiver shall permit counsel for the United States to inspect and copy, at the sole expense of the United States, all non-privileged records pertinent to this Agreement.
27. Within fourteen (14) days after the King County Superior Court's approval of the disbursement plan in Paragraph 12 of this Agreement, the Parties shall jointly move the District Court for dismissal of the underlying Civil Action, subject to reinstatement as set forth in Paragraph 29.
28. Within fourteen (14) days after the King County Superior Court's approval of the disbursement plan in Paragraph 12 of this Agreement, the United States shall move the District Court to terminate all writs of garnishment that it has obtained against NWTS, including without limitation, those writs of garnishment in the following cases: 2:17-mc-156; 2:17-mc-157; 2:17-mc-158; 2:17-mc-159; 2:17-mc-161; 2:17-mc-

162; 2:17-mc-163; 2:17-mc-164; 2:17-mc-165; 2:17-mc-166; 2:18-mc-2.

29. Should NWTS materially breach any provision of this Agreement, the Parties agree that upon any such claim of breach as made by the United States, the United States may move to restore the Civil Action to the active docket of the District Court for purposes of resolving any such claim of breach. In the event such a claim of breach is made by the United States, NWTS consents to and agrees not to contest the United States' motion to restore the Civil Action to the Court's active docket. Alternatively, the United States may bring a civil action for breach of this Agreement or any provision thereof, in the United States District Court for the Western District of Washington. The United States may in such action seek to have the Court impose any remedy authorized at law or equity. The Western District of Washington shall serve as the exclusive jurisdiction and venue for any dispute concerning this Agreement. NWTS consents to and agrees not to contest the exercise of personal jurisdiction over NWTS by the United States District Court for the Western District of Washington. The Parties further acknowledge that venue in the Western District of Washington is appropriate and agree not to raise any challenge on this basis. Notwithstanding anything else herein to the contrary, the General Receiver shall at all times and under all circumstances continue to have the immunities, protections and liability limitations contained in RCW 7.60.170 and/or the Order Appointing General Receiver.
30. Before taking the steps outlined in Paragraph 29, the United States shall first provide NWTS and the General Receiver notice of any breach in writing and shall afford the breaching party thirty (30) days from the date of mailing to cure the default.
31. The Parties shall endeavor in good faith to resolve informally any differences regarding interpretation of, or compliance with, this Agreement prior to initiating any court action.
32. In the event the United States reinstates the Civil Action as contemplated by Paragraph 29, above, or any other civil action is commenced to remedy breach of this Agreement, the United States may seek the following: (1) an order mandating specific performance of any term or provision in this Agreement, without regard to whether

monetary relief would be adequate; (2) an award of reasonable attorneys' fees and costs incurred in bringing an action to remedy breach of this Agreement; and (3) any additional relief that may be authorized by law or equity. If the Civil Action is reinstated or any other such civil action is filed, NWTS expressly agrees not to count the time during which this Agreement is in place, or use the terms or existence of this Agreement, to plead, argue or otherwise raise any defenses under theories of claim preclusion, issue preclusion, statute of limitations, estoppel, laches, or similar defenses. Notwithstanding anything else herein to the contrary, the General Receiver shall only be liable for breach of this Agreement if it knowingly and intentionally distributes NWTS account receivable funds collected to other claimants (excluding distributions for administrative costs and/or for the General Receiver's fees and costs) without paying the amounts called for in Paragraph 12 and in violation of RCW 7.60.230.

33. Failure by the United States to enforce any provision of this Agreement shall not operate as a waiver of the United States' right or ability to enforce any other provision of this Agreement.

VII. TERMINATION OF LITIGATION HOLD

34. The Parties agree that, as of the date of the dismissal of the Civil Action, litigation is not anticipated concerning the matters described in the United States' Complaint. To the extent that any Party previously implemented a litigation hold to preserve documents, electronically stored information (ESI), or things related to the matters described above, the Party is no longer required to maintain such litigation hold. Nothing in this paragraph relieves any Party of any other obligations imposed by this Agreement.

VIII. DURATION, EXECUTION, AND OTHER TERMS

35. This Agreement is effective on the date of signature of the last signatory to the Agreement. The Agreement may be executed in multiple counterparts, each of which together shall be considered an original but all of which shall constitute one agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

36. The duration of this Agreement shall be until the General Receiver has paid all compensation provided for in Paragraph 12, or until the General Receiver has disbursed all of the Receivership Property to creditors and the Receivership Action is finally closed, whichever occurs first. In addition, the General Receiver is immediately released from performing any further obligations under this Agreement when and if the General Receiver ceases to be the General Receiver for NWTs. But the General Receiver shall not be released from liabilities the General Receiver incurred related to obligations under Paragraphs 12, 15, and 21 herein that the General Receiver incurred while acting as the General Receiver for NWTs.
37. Each Party shall bear its own legal and other costs incurred in connection with this litigation, including the preparation and performance of this Agreement, except as set forth in Paragraph 32.
38. This Agreement, including the Appendix, constitutes the complete agreement between the Parties. No prior or contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provision herein or in any other proceeding.
39. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion. The Parties agree that each Party and its representatives have acted consistent with the duty of good faith and fair dealing.
40. The undersigned represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below. The signature of the Court Appointed General Receiver on this Agreement is subject to approval of the King County Superior Court.
41. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.
42. Except where this Agreement expressly conditions or predicates performance of a duty or obligation upon the performance of a duty or

obligation by another party, the performance of one party's duties or obligations under this Agreement shall not be discharged or excused by the actual or alleged breach of the duties and obligations by another party.

43. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.
44. The disbursement plan in Paragraph 12 of this Agreement is subject to the approval of the King County Superior Court, which is overseeing NWTS's General Receivership. Wash. Rev. Code § 7.60.055. If the King County Superior Court fails to approve the disbursement plan in Paragraph 12 of this Agreement, the parties will confer to negotiate a revised disbursement plan.
45. The Parties agree that they will not, individually or in combination with another, seek to have any court declare or determine that any provision of this Agreement is illegal or invalid.
46. This Agreement may be modified only with the written consent of the parties. Any modifications must be in writing and signed by the parties through their authorized representatives.
47. This Agreement is a public document. Both Parties consent to the disclosure of this Agreement, and information about this Agreement, to the public.
48. This Agreement is binding on the Parties and their transferees, heirs, and assigns.

49. This Agreement is governed by and shall be interpreted under the laws of the United States.

For the United States of America:

DATE: 9/24/18

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For Northwest Trustee Services, Inc. & Elliott Bay Asset Solutions, LLC:

DATE: 09.26.18

Stuart Heath

Stuart Heath, Member

Elliott Bay Asset Solutions, LLC

Court Appointed General Receiver for Northwest Trustee Services, Inc.

APPENDIX A

RELEASE

In consideration for the parties' agreement to the terms of the Settlement Agreement resolving United States v. Northwest Trustee Services, Inc., Case No. 2:17-cv-1686-JLR (W.D. Wash.), and Northwest Trustee Services, Inc.'s payment to me of \$ _____ and any additional distributions made pursuant to the Settlement Agreement, I hereby release and forever discharge all claims, arising prior to the date of this Release, related to the facts at issue in the litigation referenced above and related to the alleged violations of Section 3953 of the Servicemembers Civil Relief Act, that I may have against Northwest Trustee Services, Inc. and Elliott Bay Asset Solutions, Inc. as the Court Appointed General Receiver for Northwest Trustee Services, Inc. all related entities, parents, predecessors, successors, subsidiaries, and affiliates, and all of its past and present directors, officers, agents, managers, supervisors, shareholders, and employees and its heirs, executors, administrators, successors or assigns.

Executed this ____ day of _____, 20__.

[PRINT NAME]

[SIGNATURE]