UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP, CORP. and TCA GLOBAL CREDIT FUND, LTD.,

Defendants, and

TCA GLOBAL CREDIT FUND, LP; TCA GLOBAL CREDIT FUND, LTD.; TCA GLOBAL CREDIT MASTER FUND, LP,

Relief Defendants.
_____/

CERTAIN CREDITORS' RESPONSE TO
RECEIVER'S MOTION FOR APPROVAL OF CREDITOR DISTRIBUTION PLAN

AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman (the "Kaufman Creditors") object to the Receiver's proposed Creditor Distribution Plan in two respects: (1) the Receiver seeks to limit creditor claims to the same Rising Tide payout percentage as equity investors; and (2) the plan unnecessarily delays resolution of undisputed amounts on known creditor claims.

1.
Background

1. The Kaufman Creditors are judgment creditors under a September 8, 2020 Australian costs judgment in the amount of AUD$425,575.92 plus post-judgment interest accruing at the statutory rate of 6.1 per cent, per annum or AUD$ 71.12 per day until paid in full. The Plaintiffs in the Australian action against the Kaufman Creditors obtained litigation funding from

TCA Global Credit Fund, LP ("TCA Fund") pursuant to the terms of a Funding Deed dated 31 May 2016 and an undated Litigation Funding Deed, according to which the TCA Fund agreed to indemnify any costs liabilities arising as a result of the Australian action. Accordingly, the TCA Fund is the party liable to indemnify the Kaufman Creditors for the amount of their claim.

2. On May 11, 2020, this Court entered an Order appointing Jonathan E. Perlman (the "Receiver") as a Receiver for the assets of certain entities. [Doc. No. 5, ¶ 2] On May 18, 2020, the Court granted an Order expanding the entities to include TCA Global Lending Corp. [Doc. No. 16]

3. This Court tasked the Receiver with exercising all authority of the management, shareholders, and constituent partners of the Receivership Entities. [Doc. No. 5, ¶ 4] The Receiver was further instructed to martial, take custody, and preserve all of the assets of the Receivership Entities pending further Order of this Court. [Doc. No. 5, ¶ 7] To assist the Receiver in preserving the assets of the Receivership Entities and the smooth administration of the receivership, this Court also stayed all actions against the Receiver, in his capacity as Receiver, regarding any Receivership Property. [Doc. No. 5, ¶ 26] By implication, the stay assures creditors that their claims will be dealt with in an efficient and equitable manner as part of the receivership process. In this case, the Receiver has simply failed to uphold that bargain.

4. The Court also ordered the Receiver to report quarterly on, among other things, a list of all known creditors with addresses and amounts claimed as well as any Creditor Claims Proceedings (once commenced). [Doc. No. 5, ¶ 49(F, G)]

5. A review of the first eight quarterly reports filed by the Receiver failed to disclose a list of all known creditors or any Creditor Claims Proceedings. That failure is indicative of the fact that Receiver has spent scant time considering the creditor claims. The Receiver also

previously suggested that trade creditor claims can linger because doing so affords the opportunity for "[t]he Receiver [to] endeavor to negotiate trade creditor claims independently…." [Doc. No. 208 at 33] There is nothing equitable about delaying payment of undisputed amounts as leverage to negotiate discounts on those amounts.

6. On February 28, 2022, the Receiver, however, did provide a schedule of all known trade creditors in Exhibit F to the Receiver's [Proposed] Distribution Plan and First Interim Distribution ("Interim Distribution Plan") seeking a partial, preliminary distribution to certain equity holders. [Doc. No. 208-6 at 5] The Receiver reported that there are 27 trade creditors who claim a total of $2,163,765.83.[1] [Doc. No. 208-6 at 10]

7. In that proposed distribution plan, the Receiver reports that he is currently holding over $65,000,000 in assets. [Doc. No. 206 at 21] The trade creditor claims amount to less than 4 per cent of the assets held by the Receiver.

8. At the time of the Receiver's appointment, the Receiver took possession of U.S. bank accounts totaling $287,682.11 and repatriated another $13,209,233.31 held in an offshore account at Butterfield Bank. [Doc. No. 48 at 1, ¶ 5; Doc. No. 48-1 at 2] Since that time, the Receiver has succeeded in martialing a sizeable sum of money. The Receiver has also devoted substantial time to determining and briefing how to repay sums to defrauded investors.

9. As a result of the Receiver's preference for equity investors who were defrauded and apparent disregard for the plight of trade creditors, the Kaufman Creditors objected to the Interim Distribution Plan and appeared before the Court to argue its position. At the argument, counsel for the Kaufman Creditors specifically argued that, after two years, the Receiver should

[1] Subsequently the receiver reported that the trade creditor claims total less than $2,207,235, if valid. [Doc. 263 at 15] The Kaufman Creditors suspect that the Receiver actually overstates the total amounts by failing to consider exchange rates for foreign currency claims.

be required to identify which of the pending trade creditor claims that it disputes, either in whole or in part, and to seek leave to pay undisputed amounts.

10. During the July 11, 2022 hearing, the Kaufman Creditors argued that while after the proposed initial distribution, the Receiver may possess sufficient cash to make whole on the trade creditor's claims ultimately, the trade creditors are entitled to have their claims resolved expeditiously. Otherwise, in addition to the loss of the use of money that they are entitled to recover while waiting, the creditors also risk the loss of access to sources of proof for their claims with the passage of time (memories fade, witnesses relocate, documents are lost, etc.).

11. This Court suggested that the Receiver address the Kaufman Creditors' concerns and inquired how much time the Receiver would need. The Court asked whether 30 days would be acceptable to the Kaufman Creditors' counsel. And, the Kaufman Creditors' counsel indicated that the Receiver should use that 30 days to determine whether the 27 trade creditor claims were objectionable, in whole or in part, and if objectionable to pose a dispute resolution process to resolve those matters while paying undisputed amounts.

12. On August 4, 2022, this Court entered a 36-page Order resolving all pending objections to the Interim Distribution Plan. On page 33, the Court noted that the Kaufman Creditors' objection was moot because "Receiver's counsel offered to produce a dispute resolution process within 30 days." [Doc. No. 284 at 33-34] The Court ordered the dispute resolution process to be filed by August 22, 2022.

13. On August 22, 2022, the Receiver filed a proposed Creditor Distribution Plan. The proposed Creditor Distribution Plan is objectionable in two respects:

First, the Receiver proposes that, instead of paying undisputed trade creditor claims in full, those creditors be paid on a Rising Tide basis on equal footing with defrauded investors.

Second, instead of immediately notifying the 27 trade creditors that their respective claims are objectionable (either in whole or in part) and seeking court approval to pay unobjectionable claims immediately, the Receiver proposes a 105-day period in which to consider claims, negotiate claims, attempt to settle claims, and then report to the Court on the status of claims.

2.
In Determining the Distribution of the Assets of a Receivership This Court Is Guided by the Principles of Equity

This Court has "broad powers and wide discretion to determine relief in an equity receivership." SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992) (citations omitted). That discretion "derives from the inherent powers of an equity court to fashion relief." 953 F.2d at 1566 (citation omitted). Consequently, any "action by a trial court in supervising an equity receivership is committed to [her] sound discretion and will not be disturbed unless there is a clear showing of abuse." Bendall v. Lancer Mgmt. Grp., LLC, 523 F.App'x 554, 557 (11th Cir. 2013) (alteration added; citations and quotation marks omitted).

In receivership cases, courts need only determine that a proposed distribution plan is "fair and reasonable" under the circumstances. CFTC v. Walsh, 712 F.3d 735, 754 (2d Cir. 2013); *see also* SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). The plan must be crafted "equitably and fairly, with similarly-situated investors or customers treated alike." SEC v. Credit Bancorp, Ltd., 99 Civ. 11395, 2000 WL 1752979, at *13 (S.D.N.Y. Nov. 29, 2000), aff'd, 290 F.3d 80 (2d Cir. 2002). This Court has broad authority to review a distribution plan; "it need not follow a particular plan

simply because prior courts sitting in equity found such plans 'fair and reasonable' under *completely different circumstances*." SEC v. Harris, No. 3:09-CV-01809, 2015 U.S. Dist. LEXIS 11975, at *9 (N.D. Tex. Feb. 2, 2015) (emphasis supplied).

Thus, the starting point in the analysis of the Receiver's proposed Creditor Distribution Plan is what is equitable. Ordinarily, trade creditors are treated more favorably than equity investors in business enterprises. Indeed, Congress has determined under the Bankruptcy Code that creditors are paid in full before any funds can be returned to a bankrupt entity for the benefit of the entity's shareholder or /members.[2] *See* 11 U.S.C. § 507(a). Similarly, the State of Florida, like most (if not all) states, has determined that in any liquidation of a corporation or limited liability company creditors are entitled to a preference over distributions to shareholders or members. *See, e.g.,* FLA.STAT.ANN. § 605.070(1) (Florida Revised LLC Act); FLA.STAT.ANN. § 607.1406 (Florida Business Corporation Act). The creditor accepts the risk of non-payment of its claim in exchange for the benefit of the preference. The equity investor accepts the risk of the loss of its investment in exchange for the unlimited potential reward if the entity is successful. This is the baseline for an equitable distribution plan. (While the Kaufman Creditors accept the Receiver's characterization of them as trade creditors, it should be noted that the Kaufman Creditors did not willingly enter into a commercial relationship with the TCA Fund and are simply innocent defendants seeking to collect costs awarded by an Australian court from the indemnitor of those costs, *i.e.*, the Kaufman Creditors are far less blameworthy here than creditors that chose to do business with the TCA Fund or its investors that sought outsize returns and tax advantages.)

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[2] The standards applicable in bankruptcy court, while not determinative in a federal court equity receivership, are instructive in determining the equities. SEC v Wells Fargo Bank, NA, 848 F.3d 1339, 1344 (11th Cir. 2017).

The Receiver suggests that Courts have held that a "fair and reasonable" distribution plan may afford defrauded investors a preference over trade creditors in federal court equity receiverships and cites CFTC v. CapitalStreet Financial, LLC., No. 3:09-cv-387-RJC-DCK, 2010 WL 2572349 (W.D.N.C. Jun. 18, 2010) and SEC v. HKW Trading, LLC., No. 8:050-cv-1076-T-24-TBM 2009 WL 2499146 *3 (M.D.Fla. Aug. 14, 2009), in support of that position.[3] But as the federal district court in CFTC v Rust Rare Coin, Inc., Case No. 2:18-cv-00892, 2020 U.S. Dist. LEXIS 152245, *8 (D. Utah 2020) recognized:

> Neither case [CapitalStreet or HKW] includes any legal analysis or explanation regarding the relationship between investors and creditors. Instead, it appears that in each instance, the receivers in those cases proposed plans that prioritized investors over creditors, for unknown reasons, and the court accepted those plans because no one objected.

The Receiver never deigns to explain in his motion why this Court should disregard the typical equity that a creditor is preferred over an investor. Instead, the Receiver simply states that "[c]ourts have held that a fair and reasonable distribution plan may treat unsecured general creditors and investor creditors the same." [Doc. No. 294 at 7, ¶ 15] The Receiver fails to even consider the equities at play in those cases that so held.

The equities here favor no deviation from the standard rule that creditors are favored over investors:

- **Subjecting Trade Creditors to the Rising Tide Provides No Meaningful Benefit to the Investors**. Application of the Rising Tide to the trade creditors here would not meaningfully change the recovery for the net losers under the Interim Distribution Plan.

[3] The Receiver also purports to "quote" a 1959 treatise that the HKW decision cited as somehow supporting this proposition, but an examination of the cited pages of the treatise discloses an absence of the quoted language and, in any event, that the support for the proposition in HKW is, at best, debatable.

Assuming for present purposes that each of the trade creditors has a valid claim and that, as reported by the Receiver, those claims total $2,163,765.83, the initial payout to trade creditors would be $498,748.02 (23.05%) and $1,665,017 (76.95%) would be available to be distributed to the net losers and the trade creditors in a future distribution. If a distribution of $55,452,651 results in a payout of 23.05% to the net losers, then adding another $1,665,017 to the distribution pool would increase that percentage by approximately 0.69%.[4] For illustrative purposes, for every investment of $100,000, an investor would recover another $690. Of course, if the amount due to creditors is reduced either because of currency fluctuations or disallowed claims, the impact on the net losers will also be reduced.

- **The Creditors Received No Significant Benefit from the Receivership.** According to the Receiver, the trade creditors are due $2,163,765.83. Less than 90 days into the receivership, the Receiver had transferred bank balances in excess of $13,000,000 for the estate to the Receiver's control. [Doc. No. 48-1 at 2] While the Receiver has worked hard over the years to increase that sum, the increased sum had no real benefit to the trade creditors. Moreover, but for the stay of collection efforts, it is quite likely that one or more of the trade creditors could have pursued collection and seized assets to satisfy their claims at less expense *pro rata* than the Receiver has incurred throughout this matter. The trade creditors should not bear the expense of a receivership which provided little if any benefit to the trade creditors.

[4] This percentage was calculated as follows: $1,665,017 ÷ ($55,452.651 ÷ 23.05%) = 0.69%.

- **The Trade Creditors Were Also Victims Here.** The trade creditors here were victims. While those trade creditors may not have been expressly defrauded, but for the fraud the trade creditors would have suffered no injury. *See* CFTC v Rust Rare Coin, 2020 U.S.Dist. LEXIS 152245, *9 (unsecured creditors were less blameworthy than defrauded investors in risky investments). Indeed, in the Kaufman Creditors' case, they never even intended to do business with TCA who was foisted on them by way of the indemnity given by the TCA Fund in the Australian courts. Moreover, had TCA disclosed its true finances to the Australian court, it is very unlikely that the Kaufman Creditors would be in this position now.

While the Receiver makes no attempt in his motion to demonstrate how the equities justify the application of the Rising Tide to the creditor claims,[5] the Receiver does cite the CFTC v Rust Rare Coin decision making an examination of that court's reasoning appropriate.

In Rust, the Receiver recommended treating the unsecured creditors and the investors the same according to Rising Tide principles. The unsecured creditors objected that they should have priority over the investors and the investors argued that they should have priority over the unsecured creditors. Ultimately, the district court decided that while there was some validity to the unsecured creditors' position, affording the unsecured creditors priority would allow them to benefit from the Receiver's efforts in recovering funds to distribute without paying for those efforts.

> [T]he only reason any funds are available to pay the unsecured creditors is because of the unlawful investments Rust Rare Coin obtained. If Rust Rare Coin had simply been a normal enterprise that had gone out of business, ***the unsecured creditors likely would have had no recovery at all***. A recovery is possible here because this was

[5] This Court should be alert to and reject any attempt by the Receiver to argue such equities in a reply brief.

> a Ponzi scheme and the Receiver was empowered to claw back distributions made to earlier investors.

2020 U.S. Dist. LEXIS 152245, *9-10 (emphasis supplied). In contrast, as noted above, the trade creditors here did not require the Receiver's services to make assets available for the creditors to recover as the TCA Fund had more than five times the amount of the creditors' claims banked when the Receiver was appointed.

While the equities in Rust made for a "fair and reasonable" distribution plan where the unsecured creditors and the investors shared distributions *pro rata,* those same equities are not present here.

3.
This Court Should Order the Receiver to Seek Leave to Distribute All Unobjected Amounts to the 27 Known Trade Creditors Within 30 Days

The Kaufman Creditors first demanded that undisputed amounts be paid imminently and prior to any creditor distribution on April 29, 2022, when they filed their objection to the Receiver's Interim Distribution Plan.[6] [Doc. No. 242] The Kaufman Creditors renewed their objection orally before the Court on July 11, 2022, and, their counsel believed that the Receiver had committed to disclosing objections within 30 days. Nonetheless, to date, the Receiver has not disclosed whether it has any objections to the 27 trade creditor claims. Instead, the Receiver has filed a Proposed Creditor Plan that would provide for a 105-day delay from this Court's eventual approval of a creditor distribution plan, before the Receiver even reports the status of undisputed claims to the Court. [Doc. No. 294 at 4-5]

[6] The Receiver did not expressly reply in writing to this objection, other to generally note that the receiver had reserved sufficient funds to satisfy trade creditor claims in full. [Doc. No. 263 at 15]

Under the Receiver's proposed plan, the 27 trade creditors would not know whether their claims were disputed until December 2022 and no report on that status would be made to this Court until 2023! This continued delay is neither equitable nor excusable.

For example, the Receiver has been well aware of the Kaufman Creditors' claim here since at least August 4, 2020, when the Receiver reported:

> • ***AW Exports Pty Ltd. & Ors ats Australian Worldwide Pty Ltd (in liq) & Anor Supreme Court of New South Wales, Proceedings 2017/00040926….***
>
> The Master Fund loaned monies to two entities in Australia, Australian Worldwide (a grocery exporter) and Pieface (a fast food pie chain). Both of those entities are currently in liquidation. In Australian Worldwide, the Master Fund retained a receiver/liquidator under Australian procedure to pursue an adversary proceeding against the officer and directors of the debtor, for fraudulent transfers. The Master Fund did not prevail in that proceeding, and the court entered an award of fees and costs in defendants' favor. Defendants now seek to recover approx. $400,000 (AUS) from the liquidator in that proceeding. Pursuant to the liquidator's contract with the Master Fund, the Master Fund is required to indemnify the liquidator for that cost and fee award. Defendants have contacted local counsel the Receiver's counsel [sic] to seek payment of the costs. The Receiver's counsel has been in discussions with local counsel with regard to the Receiver's options in Australia to prevent any accrual of liability.

[Doc. No. 48 at 77-78]

On November 5, 2020, the Receiver reported "[t]he Receiver's counsel is in discussions with the Master Fund's liquidator's local counsel with regard to staying the proceedings in Australia to prevent any accrual of liability." [Doc. No. 70 at 67] On February 3, 2021, "[t]he Receiver's counsel [was] in discussions with the Master Fund's liquidator's local counsel to represent the Receiver." [Doc. No. 108 at 71] Three months later, the Receiver dropped any mention of being in contact with local counsel to represent the Receiver. [Doc. No. 148 at 75]

The Receiver has had more than enough time to investigate and dispute some or all of the 27 separate trade creditor claims in this matter. The Receiver has certainly known about all 27

claims since at least February 28, 2022, when it filed the first schedule of those trade creditors. If the Receiver has failed to investigate those claims before now, it can only be the result of a dereliction of the Receiver's duties.

The Court appointed the Receiver in May 2020. The Receiver failed to comply with its obligations under the Court's Order to report quarterly on Creditor Claims as to a list of all known creditors or any Creditor Claims Proceedings until February 28, 2022. [*See* Doc. No. 5, ¶ 49(F, G)] There is no excuse for the Receiver's failure other than his apparent disregard for the claims of creditors. While there is nothing wrong with the Receiver's desire to publish notice for unknown claimants and to set a bar date for future claims, there is no reason to delay the payment of undisputed amounts to known creditors.

WHEREFORE this Court should order the Receiver, within 30 days, to:

a. review and determine which of the pending trade creditor claims are disputed, in whole or in part;

b. file a motion with the Court seeking authorization for the immediate payment of all undisputed amounts; and

c. discuss potential settlement or other resolution of amounts and, if no agreement is reached as to settlement or how to resolve a disputed amount bring the matter to the Court's attention within another 30 days.

The Kaufman Creditors have no objection to the adoption of the Receiver's proposed Creditor Distribution Plan for unknown creditor claims.

[*signature page follows*]

AW EXPORTS PTY LTD, WARWICK BROXOM, AND JONATHAN JAMES KAUFMAN

/s/ Charles A. Valente
By: _____

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