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., *et al.*,

Defendants.
_____/

RECEIVER'S REPLY IN SUPPORT OF RECEIVER'S MOTION FOR APPROVAL OF THE CREDITOR DISTRIBUTION PLAN

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Jonathan E. Perlman, court-appointed Receiver over TCA Fund Management Group Corp. ("FMGC"), TCA Global Credit Fund GP, Ltd. ("GP"),TCA Global Credit Fund, LP ("Feeder Fund LP"), TCA Global Credit Fund, Ltd. ("Feeder Fund Ltd."), TCA Global Credit Master Fund, LP ("Master Fund") and TCA Global Lending Corp. ("Lending Corp") (collectively, the "Receivership Entities"), submits this Reply in support of his Motion for Approval of the Creditor Distribution Plan and Interim Distribution to Creditors ("Creditor Plan") [E.C.F. No. 294].

I. INTRODUCTION

It is undisputed a "district court has broad powers and wide discretion to determine relief in an equity receivership." *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). "In equity receiverships resulting from SEC enforcement actions, district courts have very broad powers and wide discretion to fashion remedies." *S.E.C. v. Homeland Commc'ns Corp.*, Case No. 07-80802 CIV, 2010 WL 2035326 *1-2 (S.D. Fla. May 24, 2010). The "fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike" to decide what claims should be recognized and in what amounts. *S.E.C. v. Credit Bancorp, Ltd.*, 99 Civ. 11395, 2000 WL 1752979 *13 (S.D.N.Y. Nov. 29, 2000), *aff'd*, 290 F.3d 80 (2d Cir. 2002).

Here, in his Creditor Plan, the Receiver provides identical treatment to investors and creditors under the pro rata Rising Tide methodology previously approved by this Court for distributions to investors. In other words, the Creditor Plan, as this Court found for the distribution plan for investors, clearly satisfies the fair and reasonable standard in that it treats creditors and investors the same. As the Supreme Court has long recognized, equality is equity. *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924).

Out of the 27 known creditors, only one creditor (the "Kaufman Creditors") filed an

objection to the Creditor Plan. [ECF No. 302]. In violation of the aforementioned legal tenets, the Kaufman Creditors seek preferential treatment, to the prejudice of similar situated creditors and investors. The Kaufman Creditors seek immediate 100% payment of its purported claim instead of the proposed 23.05% payment that would mirror the court-approved distribution to investors. If this Court or the Receiver were to adopt the suggestions of the Kaufman Creditors, then such a plan would treat similarly situated stakeholders differently. In other words, that plan would be unfair, unreasonable, and unsupported by controlling legal authority.

These objectors also argue that this Court should ignore the numerous federal equity decisions holding that, in the interest of fairness and equity, investors should be treated the same, **or even better**, than unsecured creditors. The Kaufman Creditors instead request the Court to follow the bankruptcy code's priority scheme for bankruptcy cases. This request has been rejected by other courts.

The Kaufman Creditors remarkably argue paying them in full on their alleged claim will not hurt investors. To the contrary, in addition to being inequitable, this will certainly reduce the amount of funds available to pay investors currently and in any future distribution.

The Receiver respectfully submits that such a scheme contravenes well-settled precedent that distribution plans should provide recovery to the greatest possible number of victimized investors and not discriminate between similarly situated parties. The Receiver believes his proposed Creditor Plan satisfies these principles, is fair and reasonable, and, accordingly, should be approved.

II. ARGUMENT

The Kaufman Creditors argue that the Receiver should pay them in full because "there is no reason to delay payment of undisputed amounts to known creditors." [E.C.F. 302 at 13]. At the

outset, the Kaufman Creditors incorrectly assume that the Receiver does not object to their claim. That is not the case. The Kaufman Creditors' unsecured claim arises from an undomesticated, foreign judgment for attorneys' fees and costs entered by an Australian court in violation of the stay entered by this Court.

A. The Kaufman Creditors should not receive a priority over investors

In fact, the law cited by the Kaufman Creditors rejects the very arguments they advance. The Kaufman Creditors cite to *Bancorp,* 2000 WL 1752979 *13, whose holding would prohibit the prioritization they seek. *Bancorp* holds that an equitable and fair plan treats similarly situated investors and creditors alike. Yet, the Kaufman Creditors seek preference over investors and unknown creditors, whether secured or unsecured, solely on the arbitrary basis that the Receiver has identified them and not yet identified others.

In *CFTC v. Rust Rare Coin, Inc.*, Case No. 2:18-cv-00892, 2020 WL 4904165 *3 (D. Utah August 20, 2020), the court approved "the Receiver's view that equity is best served by treating the unsecured creditors and defrauded investors as being part of the same class."[1] *Id*. In *Rust*, the receiver combined "claims from unsecured creditors and defrauded investors." *Id.* Unsecured creditors included, "for example, individuals who sold items to Rust Rare Coin but never received payments; employees of Rust Rare Coin who never received their last paychecks or other benefits; and vendors who provided services to Rust Rare Coin but were never paid." *Id.* "Meanwhile, the defrauded investor category includes all those who invested in the Rust Rare Coin silver pool." *Id.* "Investments are inherently risky and that the investors should have known that there was a possibility that they would lose their investments," two objectors argued. *Id*. "Employees and

[1] *See also S.E.C. v. Alleca*, No. 1:12-cv-3261-WSD, 2017 WL 5494434 *5 (N.D. Ga. Nov. 16, 2017) (court approved receiver's distribution plan providing that unsecured creditor with pre-receivership promissory note receives the same rising tide percentage recovery as investors.).

vendors, by contrast, simply entered normal, non-risky contracts with what appeared to be a typical business. Because of this difference in risk, the unsecured creditors contend that their claims should take priority over the investors' claims." *Id*. The district court agreed with the receiver because "in some sense, the defrauded investors are subsidizing the recovery of the unsecured creditors." *Id*. at * 4.

The Kaufman Creditors mischaracterize *Rust* by arguing that the receiver's efforts or services stood at the fulcrum of the holding. Rather, the *Rust* court based its holding on the simple fact that the *Rust* receiver was, like here, returning to investors their own capital, not because "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." [E.C.F. 302 at 9]. Thus, the distinction made by the objectors that they "did not require the Receiver's services to make assets available for the creditors as the TCA Fund had more than five times the amount of the creditors' claims banked when the receiver was appointed"[2] – is irrelevant.

The identical reasoning is also the basis for prioritizing investors *over* trade creditors. *See Quilling v. Trade Partners, Inc.*, Case No. 1:03-CV-236, 2006 WL 3694629 *1 (W.D. Mich. Dec. 14, 2006).[3] In *Quilling*, a law firm creditor filed an objection to the receiver's distribution plan for unpaid legal expenses. *Id*. The court, as in *Rust*, found the "funds available for distribution are the result of investments by the investors." *Id*. and added in denying the objection:

> "As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud. The equitable doctrine of constructive trusts gives 'the party injured by the unlawful diversion a priority of right over the

[2] *Id*.

[3] *See also C.F.T.C. v. RFF GP, LLC*, Case No.: 4:13–cv–382, Case No.: 4:13–cv–383, 2014 WL 491639 *2 (E.D. Tex. Feb. 4, 2014) (citing *Quilling* in denying an unsecured creditor's objection to the receiver's distribution plan, the court noted that "courts regularly grant defrauded investors a higher priority than defrauded creditors").

other creditors of the possessor'" (citations omitted). *Id*.

Here, the Receiver also intends to distribute funds that come from investors victimized by the fraud. None of the funds available for distribution derives from the Kaufman Creditors (or any of the trade creditors). Although they claim to be victims of the fraud, the objectors' claim amounts to the legal fees associated with defending a lawsuit (and pursued in violation of this Court's stay). Despite no obligation to do so, the Receiver seeks to treat them, and the other known and unknown creditors, on equal footing with investors. Accordingly, this Court should deny the objection.

B. The Kaufman Creditors should not receive a priority over unknown creditors

In addition, the Kaufman Creditors also seek preferential treatment in the form of immediate payment in full regardless of whether there may be unknown creditors. A known creditor is one whose identity is either known or "reasonably ascertainable by the debtor." *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988). An unknown creditor is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Known creditors are entitled to actual notice of the bar date, and unknown creditors are generally entitled to notice by publication. *See DePippo v. Kmart Corp.*, 335 B.R. 290, 295–96 (S.D.N.Y. 2005) ("While actual notice is required if the creditor is a 'known' creditor, constructive notice is sufficient where a creditor is 'unknown.'"); *In re BGI, Inc.*, 476 B.R. 812, 820 (Bankr. S.D.N.Y. 2013) ("For unknown creditors, constructive notice, such as notice by publication, will suffice."). An unknown creditor is entitled to receive constructive notice of the claims bar date. *See In re Chemtura Corp.*, Case No. 09-11233 (JLG), 2016 WL 11651714 *12 (Bankr. S.D.N.Y. Nov. 23, 2016).

To date, the Receiver has identified twenty-seven creditors. The Creditor Plan provides for

actual notice of the claims bar date to all known creditors. The Creditor Plan also provides for notice to potential unknown creditors, including through publication in the internationally regarded Wall Street Journal.[4] Thereafter, the Creditor Plan provides for sufficient time for all creditors to retain counsel and assert a claim prior to the claims bar date.[5] The Kaufman Creditors self-servingly seek to bypass these due process requirements to the detriment of similarly situated, unknown creditors.

By seeking prioritization over unknown creditors, the objectors request the Receiver risk paying unsecured, general creditors before the claims bar date determining the actual total of creditor claims. Because this obviously benefits the Kaufman Creditors to the detriment of all others, they "have no objection to the adoption of the Receiver's proposed Creditor Distribution Plan for unknown creditor claims." [E.C.F. 302 at 12]. More importantly, there is no basis in law or fact for such disparate treatment in favor of the Kaufman Creditors. Accordingly, this Court should deny the objection.

C. No TCA stakeholder is receiving a significant benefit from the Receivership

"When a district court creates a receivership, its focus is to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *S.E.C. v. Vecor Cap. Corp.*, 599 F. 3d 1189, 194 (10th Cir. 2010)

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[4] Such notice satisfies due process requirements for unknown creditors. *See In re Motors Liquidation Co.*, 576 B.R. 761, 778 (Bankr. S.D.N.Y. 2017), *aff'd*, 599 B.R. 706 (S.D.N.Y. 2019) (unknown creditor was provided with constructive notice of the claims bar date through publication in global, national, and local newspapers); *In re XO Commc'n, Inc.*, 301 B.R. 782, 795 (Bankr. S.D.N.Y. 2003) (finding that "Telligent was an unknown' creditor at the time the Debtor filed its Schedules and, therefore, Telligent's due process rights were satisfied with publication notice in The Wall Street Journal.");

[5] *In re Best Prod. Co., Inc.,* 140 B.R. 353, 358 (Bankr. S.D.N.Y. 1992) (holding that "publication of the Bar Date notice was reasonably calculated to apprise unknown creditors of the necessity to file proofs of claim" before the deadline.).

(quoting *Libertie Cap. Group, LLC v. Capwill*, 462 F. 3d 543, 551 (6th Cir. 2006)).

The Kaufman Creditors assert they are entitled to more than other stakeholders because they received no "significant benefit from the Receivership." [E.C.F. 302 at 8]. In addition, they state that subjecting them to the Rising Tide provides no meaningful benefit to investors. *Id*. at 7. Finally, the objectors believe they should take more than investors and similar situated creditors because they are also victims. *Id*. at 9. As discussed earlier, these positions, if adopted, would violate controlling case law addressing how the Creditor Plan must treat stakeholders.

The Kaufman Creditors ignore the obvious harm of diluting the amount available to victims due to the 100% payment on general, unsecured claims over the proposed 23.05% to victims. The more money creditors are paid, the less money is available for future distribution to investors. It is that simple.

Remarkably, the Kaufman Creditors claim that "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 incurred throughout this matter." *Id*. The Kaufman Creditors offer no analysis on how they could have accomplished even a fraction of what the Receiver has completed so far.

D. The Receivership cannot distribute funds to creditors within 30 days

The Kaufman Creditors object to the Receiver's attempt to adhere to well established due process requirements. Rather, they demand the Receiver "distribute all unobjected amounts to the 27 known trade creditors within 30 days." *Id*. at 10. Here, the Creditor Plan provides a framework for conducting a bona fide calculation for each claim. It provides each trade creditor with notice, the opportunity to seek counsel, gather documents and settle any dispute, if one arises, amicably. The Receiver must provide sufficient notice to determine the exact size of the universe of creditor

claims. Doing so ensures an equitable level of participation for all possible stakeholders and allows for the equal treatment among similarly situated stakeholders. Foregoing the due process requirements is not proper, equitable or logical.

It is simply not lawful to treat these twenty-seven differently than all other stakeholders, but even if it were, it would not make sense to do so. Fifteen of the known creditors are located in jurisdictions throughout the U.S.: Florida, New York, New Jersey, Pennsylvania, Illinois, Missouri, Georgia, Texas and Utah. Eight additional known creditors reside throughout the United Kingdom. Three reside in Australia. One resides in Switzerland. On its face, the operational challenge and risk of error (and harm to victims) associated with contacting, negotiating, analyzing legal claims and, if necessary, the filing of objections to global claims for the sake of an arbitrary 30-day deadline is unnecessarily high.

E. The Bankruptcy Code does not control federal equity receivership distributions

Federal equity receivership courts are not required to exercise bankruptcy powers nor to strictly apply bankruptcy law. *C.F.T.C. v. Eustace*, 2008 WL 471574 at *6 (E.D. Pa. 2008) (citing *C.F.T.C. v. Topworth Int'l, Ltd.,* 205 F.3d 1107 (9th Cir. 1999); *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325 (5th Cir. 2001); *S.E.C. v. Elliott*, 953 F. 2d at 1560. "The Court finds no support for the objecting parties' assertion that this Court must follow the priority scheme applied in bankruptcy cases or that equity requires that unsecured claims be favored over the claims of victimized investors in this case." *S.E.C. v. Sunwest Management, Inc.*, Case No. 09-6056-HO, 2009 WL 3245879 *8 (D. Or. Feb. 29, 2016) (citing *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 176 (S.D. N.Y. 2009)).

Citing to *S.E.C. v Wells Fargo Bank, NA*, 848 F.3d 1339 (11th Cir. 2017), however, the Kaufman Creditors seek strict adherence to the bankruptcy code's prioritization scheme. The bankruptcy code, the objectors argue, is "instructive in determining the equities." *Wells Fargo*,

848 F. 3d at 1344. Their reliance on *Wells Fargo* is misplaced.

In *Wells Fargo*, the receiver attempted to "extinguish a creditor's pre-existing state law security interest." *Id*. The receiver argued that the "cases cited by Wells Fargo 'are a creature of, and unique to, the federal bankruptcy code itself.'" *Id*. at n. 4. Noting the importance of a secured interest, the *Wells Fargo* court held that "a federal district court cannot order a secured creditor to either file a proof of claim and submit its claim for determination by the receivership court, or lose its secured state-law property right that existed prior to the receivership." *Id*. at 1345. Here, the Receiver is not attempting to extinguish any lien rights in his Creditor Plan but only to distribute funds in a fair and reasonable manner while treating similarly situated stakeholders alike.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Receiver's Motion to Approve the Creditor Distribution Plan and First Interim Distribution.

Dated: October 3, 2022
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via CM/ECF Notification and/or U.S. Mail to all parties and notification of such filing to all CM/ECF participants in this case on the 3d day of October 2022. In addition, proper, timely, adequate, and sufficient notice of the Motion was provided via email to the investors, stakeholders, and/or interested parties' email addresses listed in Exhibit G of the Motion [E.C.F. No. 208-7] and via email and/or U.S. mail to all known non-investor creditors listed in Exhibit H to the Motion [E.C.F. No. 208-8].

/s/ *Jean-Pierre Bado*
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