UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

RECEIVER'S REPLY TO NON-PARTY MERCHANTS' RESPONSE IN OPPOSITION TO MOTION (1) TO APPROVE PROPOSED TREATMENT OF CLAIMS AND (2) FOR DETERMINATION OF PONZI SCHEME

Ryan K. Stumphauzer, Esq., Court-Appointed Receiver ("Receiver") of the Receivership Entities, by and through his undersigned counsel, hereby files his Reply to Non-Parties Radiant Images, Inc., Giane Wolfe, Tourmappers North America, LLC, Julie Paula Katz, Kara DiPietro, HMC Inc., Fleetwood Services, LLC, Robert Fleetwood, Pamela Fleetwood, Gex Management, Inc., Carl Dorvil, MH Marketing Solutions Group, Inc., Michael Heller, Sunrooms Group, Inc., Michael Foti, Petropangea, Inc., Johnny Harrison, Volunteer Pharmacy, LLC, Chad Frost, Sean Whalen, and Yngyin Iris's (collectively, the "Merchants") Response [ECF No. 1887] (the "Response") in Opposition to the Receiver's Motion (1) To Approve Proposed Treatment of Claims And (2) For Determination of Ponzi Scheme [ECF No. 1843] (the "Motion"), and states:

INTRODUCTION

Stripped of its factual and legal misrepresentations, the Response is part of the Merchants' campaign to subvert this Court's inherent authority over these receivership proceedings and drain money from the Receivership Estate. Their efforts to disrupt the Receiver's proposed distribution plan and derail this receivership should be rejected. Incredibly, the Merchants – individuals and entities that have repeatedly asserted that they are not subject to the jurisdiction of this Court, despite multiple Court appearances and having filed claims against the Receivership Estate – ask this Court to undo its prior decisions and dissolve the litigation injunction so that they can proceed with meritless claims against the Receivership Entities, rather than continue to participate in the claims process administered by this Court. Their stance that they are not subject to jurisdiction in the Receivership Court is belied by their multiple filings in this action, ranging from Proofs of Claim that they argue they were "ordered" to file, to serial motions seeking to obstruct the Receiver in the performance of his court-appointed obligations. The arguments raised in Response are without merit and should be denied in their entirety.

ARGUMENT

Federal district courts have wide discretion in granting relief in an equity receivership and may use summary proceedings in fashioning such relief. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1037, 1040 (9th Cir. 1986); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984). Summary proceedings allow for the consolidation of all litigation concerning the receivership before a single district court and the efficient resolution of disputes. *SEC v. Wencke*, 783 F.2d 829, 837 n. 9 (9th Cir. 1986). Receivership courts can employ summary procedures in allowing, disallowing and subordinating claims of creditors. *Hardy*, 803 F.2d at 1040; *Arizona Fuels Corp.*, 739 F.2d at 458. Indeed, the use of these summary

proceedings "promotes judicial efficiency and reduces litigation costs to the receivership, thereby preserving receivership assets for the benefit of [claimants]." *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. Jan. 10, 1992). The Court may approve the Receiver's proposed treatment of claims and distribution of the assets of a receivership estate in a manner that it deems fair and equitable. *See Elliot*, at 1569-70.

I. The Merchants' pending claims against the Receivership Estate are meritless and should be denied.

Merchants' first argument is twofold. First, they contend that each merchant cash advance ("MCA") agreement is a loan rather than the sale of accounts receivable. Secondly, that, as loans, the MCA agreements violate applicable usury laws and are, therefore, RICO elements. (Response, p. 11-14). This argument should be dismissed as it ignores the plain language of the MCA agreements and seeks to change controlling Pennsylvania law.

A. *CBSG's MCA Agreements are bona fide sales of accounts receivable.*

CBSG's MCA agreements are bona fide sales governed by Pennsylvania law. Sales agreements are not subject to usury restrictions under Pennsylvania law. *See Equip. Fin., Inc. v. Grannas*, 218 A.2d 81, 82 (Pa. Super. Ct. 1966) ("Courts in this jurisdiction have consistently said that this act does not apply to a bona fide sale of goods on credit" and that usury does not apply when "there is no loan or use of money on the part of the buyer"). The Merchants' conclusion that the MCA agreements are "usurious loans" fails as a matter of law.

A Pennsylvania state court previously interpreted one of CBSG's MCA agreements and concluded "that the transaction between the parties was not a loan." *Complete Business Solutions Group, Inc. v. Boreal Water Collection Inc.*, 2017 WL 5652572 at *4 (Pa. Com. Pl. Nov. 02, 2017). Thus, usury defenses did not apply. *Id*. The *Boreal* court added that, even if the MCA agreement were a loan, a foreign law such as New York would not apply based on (i) the unambiguous

Pennsylvania choice of law provision, and (ii) Boreal's decision to secure funding from a business operating in Pennsylvania. *Id*.

Other Pennsylvania courts have denied similar arguments following *Boreal*'s holding and affirmed CBSG's use of confession of judgment provisions in its MCA agreements. *See Complete Business Solutions Group, Inc. v. Thomas Alan Seuss*, 2019 WL 2637731 (E.D. Pa. 2019) (denying petition to strike/open judgment against entity and individuals on the basis of usurious loans); *Ryan K. Stumphauzer as Court-Appointed Receiver for Complete Business Solutions Group, Inc. v. D19 Liquor Inc.*, Case 210902829 (Pa. Com. Pl. Feb. 10, 2022) (denying equitable arguments to strike and/or open Receiver's confessed judgment with respect to merchant); *Complete Business Solutions Group, Inc.by-and through its Court-Appointed Receiver Ryan K. Stumphauzer v. The Ansell Group LLC and Charles Ansell*, Case 220301247 (Pa. Com. Pl. July 6, 2022) (same).

Because the MCA agreements are bona fide sales agreements not subject to usury restrictions under Pennsylvania law, the Merchants' pre-Receivership claims against CBSG and other Receivership Entities have no merit and are subject to the Court's Claims Administration Order [ECF No. 1471].

B. *Even if construed as loans, the MCA agreements do not violate applicable usury laws or RICO standards.*

Even if the MCA agreements are determined to be loans, Merchants still cannot satisfy the elements for usury or RICO under controlling Pennsylvania law. Pennsylvania statutorily exempts "business loans of any principal amount" from maximum interest rate requirements. *See* 41 P.S § 201(b)(3). Pennsylvania also prohibits corporations or individuals guaranteeing a corporate loan from asserting usury as a defense to action. *See* 15 Pa. C.S.§ 1510(a); *see also All Purpose Fin. Corp. v. D'Andrea*, 235 A.2d 808, 811 (Pa. 1967) (prohibiting individual guarantor of corporate loan from asserting usury defense). Very simply stated, the MCA agreements are not subject to

usury limitations. *See Contract Financing Solutions Inc. by and through its Receiver Ryan K. Stumphauzer v. Maryland Performance Diesel Inc.* No. 23034595 (Pa. Com. Pl. July. 14, 2023) (denying petition to open a confessed judgment given that usury analysis is not "germane" because of § 201(b)(3)); *Complete Business Solutions Group Inc. d/b/a Par Funding by and through its Court Appointed Receiver Ryan K. Stumphauzer v. B and H Underground LLC No*. 23035379 (Pa. Com. Pl. October. 10, 2023) (denying petition to open confessed judgment based on interest rate given that parties are sophisticated business entities).

Because Merchants' RICO claims hinge on construing the MCA agreements as business loans—which are exempt from Pennsylvania usury restrictions—Merchants' RICO claims face the same failure. The Pennsylvania Superior Court denied RICO claims between two sophisticated entities identical to those advanced by the Merchants. In *Gur v. Nadav*, 178 A.3d 851, 854 (Pa. Super. Ct. 2018), commercial parties executed a business loan with a 50% rate of interest. After default, the lender confessed judgment against the borrower. *Id*. The borrower subsequently petitioned to strike or open the confession of judgment, alleging among other arguments that the high interest rate constituted a "Racketeering Activity" in violation of 18 Pa.C.S. § 911(b). *Id.* at 855. The appellate court rejected the argument, given that § 201(b)(3) exempts business loans from the limitations on interest rates. *Id.* at 857. Merchants' pre-Receivership claims warrant the same rejection.

In fact, Pennsylvania courts have previously denied similar civil RICO claims against CBSG. *See Complete Business Solutions Group, Inc. v. La Rosa Greenhouse, LLP*, No. 01672, 2016 WL 3857179, at *2 (Pa. Com. Pl. July 13, 2016) (denying RICO claim and providing that "while the transaction at issue may be, in retrospect, a bad deal, it is still a deal to which the defendants agreed without any apparent coercion."); *Ryan K. Stumphauzer, Esq. as the Court-*

Appointed Receiver for Complete Business Solutions Group, Inc. d/b/a Par Funding v. D19 Liquor, Inc. et al., No. 210802829 (Pa. Com. Pl. Feb. 10, 2022) (denying RICO claim, stating that reliance on the "Corrupt Organizations Act is thus improper").

C. *Merchants' RICO and usury claims rely on inapplicable law.*

Recognizing that their usury and RICO claims fail to pass muster under Pennsylvania law, Merchants' primary argument seeks to rewrite foreign law into the MCA Agreements. In other words, Merchants' claims rest entirely on their effort to attack the MCA agreement's choice of law provisions and unilaterally change the controlling law. As support, Merchants rely on cases entering judgment against factoring companies under RICO considerations; yet not one decided case involves CBSG. Nor do any implicate Pennsylvania law. Instead, Merchants' legal authority derives largely from New York cases, citing to New York law, against non-CBSG parties. (Response, p. 11-12). And their "strongest" case against CBSG – *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp*., 374 F.Supp. 3d 361 (E.D. Pa. 2019) – does not carry the weight Merchants place on it.

Fleetwood is a pre-Receivership putative class action complaint asserting RICO and usury violations under Texas law. CBSG moved to dismiss the complaint under 12(b)(6), based on the MCA Agreement's Pennsylvania choice of law provision. The *Fleetwood* court denied the motion, holding that a choice-of-law analysis compelled it to apply Texas law ***at that stage*** of the proceedings. *Id. at* 371-372.

Fleetwood offers no support for Merchants' position for several reasons. First, the Court acknowledged it had to accept the plaintiffs' averments regarding Texas' "materially greater interest in this dispute" at the motion-to-dismiss stage. *Id*. Secondly, the court recognized that CBSG did not yet raise facts supporting Pennsylvania's interest in the dispute. *Id*. Third, courts

within the Eastern District have since questioned the *Fleetwood* decision. *See, e.g., Complete Business Solutions Group v. Suess* 2019 WL 2637731 (E.D. Pa. 2019) (denying application of California law to a CBSG MCA Agreement and finding procedural posture of *Fleetwood* required the Court to accept application of Texas law).

Finally, prior to this Court's entry of the Litigation Injunction, *Fleetwood* was subject to a pending motion for judgment on the pleadings based on Texas law that exempts factoring agreements from RICO and usury claims. *See* Tex. Fin. Code § 306.001 (exempting "account purchase transaction[s]" from applicable usury laws); *see also* Tex. Fin. Code § 306.103(b) (providing that "the parties' characterization of an account purchase transaction as a purchase is conclusive that the account purchase transaction is not a transaction for the use, forbearance, or detention of money" – that is, it is not a transaction subject to "interest" as defined by § 301.002(a)(4)). Texas Courts strictly construe § 306.103(b) to apply to account purchase transactions. *See Koch v. Boxicon, LLC*, 2016 WL 1254048, at *7 (Tex. App. Mar. 30, 2016). Thus, Merchants' Reliance on *Fleetwood* is misplaced and fails to support their flawed position.

In short, Merchants' first argument lacks supporting legal authority, has been rejected by several other courts, and is contrary to this Court's Claims Administration Order [ECF No. 1471]. The Court should deny the argument and adjudicate Merchants' pre-Receivership claims in accordance with its inherent authority.

II. The Merchants consented to jurisdiction in the Receivership Court over their pending claims against the Receivership Entities.

Next, Merchants argue that: (i) they did not consent to jurisdiction in the Receivership Court over their claims against the Receivership Entities; (ii) they were deprived of their due process rights; and (iii) the Receiver unfairly denied their claims on the basis that they are not investors. (Response, p. 14-17). Merchants are wrong on all points. There is no reason to treat

the Merchants as a unique set of Claimants permitted to litigate pre-Receivership claims outside of the scope of the Claims Administration Order and seek potential judgments against the Receivership Entities. The Court should reject this ill-supported argument and adjudicate those claims in the present forum as required by the Claims Administration Order and applicable law.

A. *The Receivership Court is the proper forum to adjudicate matters involving claims for distributions from the Receivership Estate.*

There can be no question that the Receivership Court retains ultimate oversight to administer and authorize distributions to claimants, including litigation claimants like the Merchants. But rather than comply with the established reconciliation process, the Merchants seek to add a duplicative layer of costs and expenses to litigate matters in multiple foreign jurisdictions. The Court has previously dismissed this argument from the Merchants. It should do so again.

The Claims Administration Order establishes the process for resolution of pre-Receivership litigation claims. [ECF No. 1471 ¶ 4]. It provides that those eligible and required to submit a claim are:

> All Claimants and Administrative Claimants asserting or who believe they are entitled to assert a Claim or assert a right to distribution from the Receivership Estate regardless of whether the Claim is held with or through any individual or entity or based on a primary, secondary, direct, indirect, secured, unsecured, unliquidated or contingent liability ***MUST*** timely and properly submit a Proof of Claim.

Id. (emphasis in original). "Claimants" include pre-Receivership Litigants. *Id*. at p. 1, fn. 1; *see also* Receiver's Motion to Establish and Approve: (1) Proof of Claim Form; (2) Claims Bar Date and Notice Procedures; and (3) Procedure to Administer and Determine Claims (the "Claim Administration Motion") at ¶ B(ii). [ECF No. 1467]. The Claims Administration Order defines Claimants as "all claimants holding a claim against any of the Receivership Entities arising out of the activities of the Receivership Entities." *Id*. Pre-Receivership Litigants are defined as "any

individual or entity that instituted a legal action against any of the Receivership Entities," and are categorized as a specific sub-set of "Direct Claimants." Claim Administration Motion ¶ B(iv)(a).

Because the Court has not authorized resolution of pre-Receivership Litigation claims through different channels, pre-Receivership Litigation claimants must submit their claims in accordance with the Claims Administration Order for reconciliation, adjudication, and potential distribution. Moreover, Merchants should not be permitted to disguise their objection to the Receiver's treatment of their claims as a backdoor attack on the Court's prior rulings. *See* ECF No. 1530 (denying Merchants' Expedited Motion to Lift Litigation Stay and requiring Merchants to submit claims in accordance with the Claims Administration Order [ECF No. 1471]). This Court—rather than multiple federal, state, or arbitration tribunals—is the proper body to adjudicate Merchants' claims.

A "district court has broad powers and wide discretion to determine relief in an equity receivership." *Elliott*, at 1566. This discretion derives from the inherent powers granted to an equity court to fashion relief. *Id*. (citing *SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982)). To be sure, among these broad powers is the power to establish proof of claim procedures and set an effective claims bar date. *See SEC v. Tipco, Inc.*, 554 F.2d 710, 711 (5th Cir. 1977). When administering the distribution of receivership assets, federal district courts may "make rules which are practicable as well as equitable," including approving the use of summary procedures. *Hardy*, at 1038, 1040; *see also Elliott*, at 1566 (citing *Wencke*, at 837); *Ariz. Fuels*, at 460) ("A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets."). Specifically, "[r]eceivership courts have the general power to use summary procedure in allowing, disallowing, and subordinating the

claims of creditors." *Ariz. Fuels*, at 458; *see also Wencke*, at 836-38 (approving summary proceedings to adjudicate claims on receivership assets).

Summary proceedings are appropriate in equity receiverships and are within the jurisdictional authority of a district court. *Id*. Such procedures "avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership." *Wencke*, at 837 n. 9. District judges possess discretion to classify claims sensibly in receivership proceedings. *See SEC v. Wang*, 944 F.2d 80, 84-85 (2d Cir. 1991); *Elliott*, at 1566; *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 670-71 (6th Cir. 2001). In supervising an equitable receivership, the primary job of the district court is to ensure that the proposed plan of distribution is fair and reasonable. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 84 (2d Cir. 2006). It is reasonable to treat investor and non-investor claimants alike. *SEC v. Francisco*, 2019 WL 13026869, at *4 (C.D. Cal. Sept. 20, 2019).

The Merchants' argument lacks legal support, circumvents the Claims Administration Order, and attempts to subvert the Court's authority to adjudicate claims regarding distributions from the Receivership Estate. The Court established a claims bar date and resolution procedure in accordance with its inherent authority. *See* Claims Administration Order [ECF No. 1471]; *Tipco, Inc.*, 554 F.2d at 711. The Claims Distribution Order seeks to classify claims, resolve, and ultimately, distribute assets from the Receivership Estate to Claimants. *Elliott*, at 1566. This process inherently requires an adjudication regarding the validity of the Claims. *See* Claims Administration Order at ¶¶ 14-17 (requiring mandatory good-faith resolution attempts and setting process for adjudication). Applicable law contemplates summary proceedings to promote the efficient resolution of the Claims and the speedy distribution to claimants. *Wencke*, at 837 n. 9.

Put simply, this Court has the ultimate authority to approve the distribution of the assets of the Receivership Estate under its control. Nothing the Merchants argue in their Response changes that conclusion.

B. *The Merchants were afforded constitutional due process*.

The Merchants argue that the Receiver's proposed treatment of claims deprived them of their property (that is, their claims against the Receivership Entities) without due process. (Response, p. 15). This argument should be summarily denied. The Merchants *were* afforded an opportunity to submit Proofs of Claim, and to dispute the Receiver's disposition of their entitlements within the Receivership's administrative distribution process. As such, the Merchants were afforded all the process that is due to them.

In terms of a receivership claims process, a district court has summary jurisdiction over receivership proceedings and may deviate from the Federal Rules of Civil Procedure in favor of exercising its "broad powers and wide discretion to determine relief[.]" *SEC v. Torchia*, 922 F.3d 1307, 1316 (11th Cir. 2019) (citing *Elliott*, at 1566); *see also SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) ("[A] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad.") (quoting *Hardy*, at 1037). This discretion derives from the district court's inherent equitable powers. *Torchia*, 922 F.3d at 1316 (citing *Elliott*, at 1566).

This Court has affirmed the use of so-called summary proceedings to reduce the time necessary to settle disputes, decrease litigation costs, and prevent further dissipation of assets. *Id*. Although the word "summary" connotes an abbreviated procedure, it does not permit the district court to deny parties the right to due process. *Id*., *see also SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001) ("In exercising its equitable discretion . . . the district court

must still provide the claimants with due process."). Due process, in its most basic form, still requires notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *see also Torchia*, at 1316 (citing *Elliott*, at 1566).

To determine whether the summary proceedings in this claims process are providing Merchants with the necessary due process, the Court must "look at the actual substance, not the name or form, of the procedure to see if the [investors'] interests were adequately safeguarded." *Id*. Summary proceedings generally afford due process, and a district court does not abuse its discretion, so long as the claimants are permitted "to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id*. The process that is due depends on a number of factors, but at a minimum, summary proceedings must provide affected investors with necessary information, a meaningful opportunity to argue the facts and their claims and defenses, and an adjudication of their claims and defenses. *Torchia*, at 1319 (citing *Elliott*, at 1566).

As unsecured creditors to CBSG and other Receivership Entities, Merchants were provided notice of the Receiver's proposed distribution process and given opportunities to submit Proofs of Claim, and to dispute the Receiver's disposition of their entitlements within the Receivership's administrative distribution process, including judicial review. *See* Motion, p. 5-6. The Merchants clearly are participants in that process. The Receiver's decision to channel the Merchants' claims into that Receivership process, as opposed to costly and expensive independent litigation, does not deprive them of due process.

III. The Receivership Court retains jurisdiction over the Merchants' claims against CBSG and other Receivership Entities.

Incredibly, the Merchants contend that their claims against CBSG and other Receivership Entities are not subject to jurisdiction in the Receivership Court and that nothing in the Appointment Order says otherwise. (Response, p. 17). Merchants have consented to jurisdiction

in this Court by: (i) electing to file Proofs of Claim with the Receiver; (ii) seeking to lift the litigation injunction; and (iii) filing papers over the course of this Receivership. Merchants cannot appear before the Court when it is to their advantage, but then claim to be beyond the Court's jurisdiction when it is not.

By submitting a claim in a federal receivership proceeding, a claimant submits to the jurisdiction of the court to resolve claims by the receivership against it. *Alexander v. Hillman*, 296 U.S. 222, 241-42 (1935); *see also Gasser v. Infanti Intern., Inc.*, 2004 WL 1243114, * 2 (E.D.N.Y. Apr. 21, 2004); *Maiz v. Virani*, 2002 WL 550457, at * 3-4 (N.D. Tex. Apr. 11, 2002); *Freed v. Inland Empire Ins. Co.*, 166 F. Supp. 873, 874 (D. Utah 1958). This Court approved a claims administration process that directs all parties with potential claims against the Receivership Entities to submit those claims to the Receiver through a Notice and Proof of Claim Form. *See* Claims Administration Order [ECF No. 1471]. Consistent with that Order, the Merchants elected to file claims against certain Receivership Entities. *See* Response [ECF 1887]. Having sought to benefit from the Court's jurisdiction,[1] the Merchants cannot now be heard to deny it.

Furthermore, submitting a claim in a receivership amounts to filing an action against the Receiver. *See Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 164 (2d Cir. 1962) (finding that filing of its proof of claim was analogous to the commencement of an action in bankruptcy); *In re Best Payphones, Inc.*, 2007 WL 203980, at * 6 (Bankr. S.D.N.Y. Jan. 24, 2007). Merchants argue

[1] *See* Merchants' Expedited Motion to Lift Litigation Injunction [ECF No. 1727]. This Court is familiar with Merchants' counsel, attorney Shane Heskin, and his participation in these Receivership proceedings. *See* ECF No. 663 (sealed document). His name appears on multiple filings, *see* ECF Nos. 1527, 1771, indicating his awareness of the nature of this case and understanding of the Court's policies and procedures. Attorney Heskin has been heavily involved through various representations of corporate merchants in multiple ancillary matters opposite the Receiver. As such, Attorney Heskin has been, and continues to be, well aware of the language and requirements of the Appointment Order, the Litigation Stay, and other relevant Orders of this Court. As a result, the Merchants have submitted to jurisdiction in this Court.

that they should be permitted to pursue baseless RICO claims against the Receiver under foreign substantive and procedural laws. The Merchants claim that, once they have their anticipated judgment, they should be able to seek execution against the Receivership Estate. Their request amounts to nothing more than asking to duplicate their claims against the Receiver in another forum. The Merchants are not entitled to proceed with their foreign actions "in an effort to collaterally attack this court's orders and frustrate this court's ability to provide meaningful relief." *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 2007 WL 2915647, at * 21 (N.D. Ill. Oct. 4, 2007).[2]

CONCLUSION

WHEREFORE, for the foregoing reasons and those set forth in the Motion, the Receiver respectfully requests that the Court deny the objection of the Merchants, and permit the Receiver to proceed with filing a motion to approve a proposed distribution plan and initial distribution of assets from the Receivership Estate.

[2] The Merchants also argue that the first-filed rule "mandates" that their claims be heard in foreign forums. (Response, p. 18). To the contrary, the "first-to-file" rule is a discretionary rule that requires considerations of "wise judicial administration" and judicial efficiency. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952). Moreover, "[t]he receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets," and requiring the receiver to defend lawsuits drains receivership assets. *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006); *see also FTC v. Med Resorts Int'l, Inc.*, 199 F.R.D. 601, 609 (N.D.Ill. 2001) (permitting ancillary litigation would "[n]ot only ... take [the receiver's] attention away from other tasks, but the assets of the receivership estate would quickly be diminished"). Bearing in mind these realities, "[a] district court should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate." *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 442 (3d Cir. 2005). If the Court were to accept the Merchants' argument, claimants would be permitted to race to the courthouse to file their claims against the Receivership Estate without any judicial inquiry into the merits of those claims.

Dated: May 21, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2024, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Timothy A. Kolaya
TIMOTHY A. KOLAYA