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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

COMMODITY FUTURES TRADING
COMMISSION, and

STATE OF UTAH DIVISION OF
SECURITIES, through Attorney General
Sean D. Reyes

Plaintiffs,
v.

RUST RARE COIN INC., a Utah corporation,
and GAYLEN DEAN RUST, an individual,
DENISE GUNDERSON RUST, an individual,
JOSHUA DANIEL RUST, an individual

Defendants;

and

ALEESHA RUST FRANKLIN, an individual,
R LEGACY RACING INC, a Utah
corporation, R LEGACY ENTERTAINMENT
LLC, a Utah limited liability company, and R
LEGACY INVESTMENTS LLC, a Utah
limited liability company.

Relief Defendants.

**RECIEVER'S REPLY TO
OBJECTIONS TO DISTRIBUTION
PLAN AND REQUEST FOR HEARING**

Case No. 2:18-cv-892

Judge Tena Campbell

Magistrate Judge Dustin B. Pead

Jonathan O. Hafen, the court-Appointed Receiver (the “Receiver”) for the assets of Rust Rare Coin, Inc. (“RRC”), Gaylen D. Rust, Denise G. Rust, and Joshua D. Rust (collectively, “Defendants”) and Aleesha rust Franklin, R Legacy Racing Inc., R Legacy Entertainment LLC, and R Legacy Investments LLC (collectively, “Relief Defendants” and, together with Defendants “Receivership Defendants”), respectfully requests that the Court set hearing dates to rule on all objections (the “Objections”) that have been submitted against Receiver’s Proposed Distribution Plan, Objection Procedure, and Claim Analysis (“Proposed Distribution Plan”), and allow the Receiver to move forward with Distribution consistent with the Courts rulings. As described below, the Receiver respectfully suggests that the Court set three hearing dates, grouping similar Objections together for a more efficient resolution.¹

On April 30, 2020, following a motion by the Receiver, the Court established an Objection Procedure through which nonparties could object to the Receiver’s Proposed Distribution Plan. *See* Dkt. No. 302. Pursuant to this Objection Procedure the Receiver lodged all nonparty Objections submitted to the Receiver and provided notice to all interested parties through his mailing matrix and by posting the Objections on his website.

On July 8, 2020, the Court entered a Briefing Order (“Order”) instructing the Receiver to respond to the twelve lodged Objections. *See* Dkt. No. 326. The Receiver was also instructed in this Order to remotely meet and confer with objectors about their preferences concerning hearing logistics considering the COVID-19 pandemic and to report back to the Court the Receiver’s suggestions for hearings considering objectors’ preferences.

Through this reply, and consistent with the Court’s Briefing Order, the Receiver hereby responds to the twelve Objections lodged against the Receivers Proposed Distribution Plan and

¹ Of course, the Receiver is happy to accommodate any schedule the Court believes will be most efficient.

respectfully requests that the Court set three hearings to (1) rule on the Objections received by the Receiver in opposition to the Proposed Distribution Plan by category and (2) grant the Receiver permission to move forward with the distribution of funds in accordance with the Receiver's Proposed Distribution Plan as modified by any rulings in the above-mentioned hearings.

I. Receiver's Analysis of Objections

After reviewing both the Formal and Informal Objections submitted, the Receiver determined that the Objections generally fall into three categories, as they were lodged with the Court: (1) Objections to the method or "Distribution Approach" proposed by the Receiver for Distribution of Funds and Claim Analysis, (2) Objections to the inclusion of certain claimants in the fourth class of priority claims, currently including both unsecured creditors and defrauded investors and (3) an Objection made by Peter Guyon challenging various actions of the Receiver and this Court's jurisdiction over the above-captioned matter. Each of these Objection categories are responded to and discussed in greater detail below.

The Receiver believes that, in his professional judgement, the Proposed Distribution Plan is in the best interest of the Receivership Estate, provides the most equitable distribution to Claimants, and complies with applicable law. In preparing the Proposed Distribution Plan, the Receiver consulted with both the Commodity Futures Trading Commission ("CFTC") and the Utah Division of Securities ("UDOS") to obtain their perspective and input on the Plan prior to filing it with the Court. The Receiver maintains that the methods, classifications, and procedures proposed in his Proposed Distribution Plan are the most equitable and precedent-consistent approach to distribution of recovered funds, while at the same time recognizing that the

nonparties' concerns are valid, reasonable, and reflect the difficulty of resolving competing interests among the victims of Receivership Defendants' scheme.

The Court has broad discretion and power in the administration of a federal equity receivership and the distribution of all assets collected by the Receiver. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). The Receiver's main objective is the timely and efficient distribution of collected assets for the benefit of the victims. The following responses serve to further explain the Receiver's reasoning for selecting the methods and categories that he did and to address specific concerns of objectors.

1. *Objections to the Method or "Distribution Approach" Proposed by the Receiver for Distribution of Funds and Claim Analysis*

The Receiver received Objections from five nonparties who object to various features of the method proposed by the Receiver for distribution of recovered funds.

Alan Lambert. Alan Lambert objects to the Receiver's use of the rising tide method of distributing funds. Mr. Lambert objects to the use of the rising tide method for distribution of funds, arguing that it fails to consider that some distributions made by RRC were to investors in service of loans and taxes in order to further invest in the Silver Scheme. Mr. Lambert asserts that by using the rising tide method the Receiver will be engaging in a "virtual" claw back from those who have received a portion of their investment back while ignoring those who have received back their entire investment. The Receiver understands Mr. Lambert to be advocating use of a net loss distribution method instead of a rising tide method. *See* Objection of Alan Lambert, attached as Exhibit A.²

² Although the Receiver previously lodged the Objections with the Court, the Receiver has included the Objections as exhibits here for the convenience of the Court and the nonparties who may not have ready access to the docket.

As explained in the Receiver’s original motion to approve the Proposed Distribution Plan, the rising tide method of distribution strikes an equitable balance between those investors who were in the scheme for longer periods of time and therefore received pre-receivership disbursements and those investors who invested near the end and are unlikely to have received any disbursements from the scheme. The Silver Pool scheme took place over a period of at least 10 years. Some of the investors were long-term investors who invested very early on and others invested mere hours before the Court froze all assets of the Receivership Defendants. The rising tide’s inherent equity is part of the reason that it “appears to be the method most commonly used (and judicially approved) for apportioning receivership assets.” *S.E.C. v. Huber*, 702 F.3d 903, 906 (7th Cir. 2012). The rising tide method aims to “equalize recovery for victims regardless of whether the recovery comes before or after the commencement of the [receivership],” serves equity and is the best fit to account for the large variety of victims of the Receivership Defendants’ scheme. See Michael L Martinez, *The Ebb of Rising-Tide Distributions in Ponzi Scheme Bankruptcies*, 35 AM BANKR INST J 16 (June 2016).

When evaluating the Proposed Distribution Plan, the Receiver considered other possible distribution methods, including the net loss method. Although Courts have employed a net loss methodology in appropriate circumstances, this method suffers from significant deficits and would, in the Receiver’s view, create inequities in these factual circumstances. Specifically, a net loss method would disregard amounts distributed to the claimant during pre-receivership periods, focusing instead on the amount of the claimant’s net loss on the date the receivership started. See *S.E.C. v. Par.*, 2010 WL 5394736, at *7 (D.S.C. Feb. 10, 2010) (holding, “[a] closer examination of [the net loss distribution] proposal reveals that it suffers from serious flaws and produces inequitable results because it ignores the illegal activities of the defendants, including the fact

that the money paid to those investors during the course of the scheme came from other victims of the fraud.”(internal citations omitted)). Under some circumstances, this could be an equitable means of distributing assets. However, the Receiver believes the facts of this case would make the net loss method inherently inequitable.

Net loss may be an attractive method when facing a case in which a large number of claimants will receive no recovery under the rising tide method.³ Here, the Receiver’s initial analysis has shown that at least 75% of allowed claims will receive a distribution under the rising tide approach. Moreover, those who have received no pre-receivership distribution account for a significant number of the investors who have submitted a claim for repayment. In the final years of the Silver Pool, Receivership Defendants engaged in a massive push to increase investment to fund payment requests from earlier investors. This resulted in a large group of defrauded investors who received no pre-receivership distributions. Given the large increase in investors during the final years of the scheme, a distribution method that fails to recognize that some investors have already recouped portions of their investment while others have recouped nothing would be fundamentally inequitable.

Mr. Lambert also objects to the extent that the Receiver is not seeking to recover pre-receivership disbursements when the recipient received less than their principal investment amount. In theory, bringing all of the investors back to “zero” could then allow a pure pro rata distribution. But in most cases, Utah law does not allow the Receiver to seek disgorgement of disbursements in amounts less than the investor’s initial principal investment. This is because

³ See, e.g., *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 182 (S.D.N.Y. 2009) (affirming use of the net investment method where 45% of investors would receive no distribution under the rising tide method); *U.S. Commodity Futures Trading Comm’n v. Barki, LLC*, 2009 WL 3839389, at *2 (W.D.N.C. Nov. 12, 2009) (finding the net investment method most equitable where 55% of investors would receive no distribution under the rising tide method); but see, *Lake Shore Asset Mgmt. Ltd.*, 2010 WL 960362, at *10 (“The fact that certain investors may not receive a distribution under the ‘Rising Tide’ method is . . . not germane.”).

Courts routinely hold that transfers in excess of an innocent investor's initial principal investment can be recovered as fraudulent transfers. *Miller v. Wulf*, 84 F. Supp. 3d 1266, 1274 (D. Utah 2015); *see also Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008). The fraudulent nature of these transfers are what allow the Receiver to recover them or "claw" them back. The Receiver does not have the similar ability to claw back amounts less than the investor's initial principal investment in the absence of other factors such as a lack of good faith. *See Klein v. King & King & Jones, P.C.*, No. 2:12-cv-00051, 2013 WL 4498831, at *2 (D. Utah Aug. 19, 2013). The Receiver intends to seek all amounts for which he has a legal basis to make a claim, but the weight of precedent makes clear that the Receiver does not have a basis to pursue disbursements that total less than the recipient's initial principal investment in the majority of cases.

The Receiver maintains his position that the rising tide method of distribution is the most equitable and well suited to this particular case and respectfully requests that the Court deny Mr. Lambert's objection and allow the Receiver to move forward with distribution according to the rising tide method.

Wayne Hall. The Receiver also understands Mr. Hall to object to the rising tide method, although Mr. Hall did not specifically call out the name of the method. To the extent that Mr. Hall's objection is to the use of a rising tide distribution the Receiver's response to Mr. Hall is the same as the response to Mr. Lambert laid out above. Mr. Hall asserts that he has never received a distribution from RRC, in which case a rising tide distribution method may favor his position. *See Wayne Hall Objection*, attached as Exhibit B, ¶ 3.

Adam Wells. Mr. Wells objects to investors and claims being treated as a group and requests that each claim be "reviewed and considered individually." *See Adam Wells Objection*,

attached as Exhibit C. Mr. Wells also asks for consideration of the fact that much of his distribution from the scheme was immediately reinvested.

As described in his original motion, the Receiver is considering each claim individually and doing a thorough analysis of all distributions, investments, and re-investments. Each claim is being analyzed individually and, at the conclusion of all claim analysis, the Receiver will issue a Claims Analysis Report (Report) detailing the determinations made for each individual claim. All those creditors who submitted a Claim, including Mr. Wells, will be sent a copy of the Report before filing and will have an opportunity to object to the Receiver's analysis of their specific claim. The Receiver's current procedure for claims analysis comports with the requests contained in Mr. Wells' objection and the Receiver does not believe that any further action by the Court is needed in response.

Catherine Binsacca. Mrs. Binsacca objects to the fact that distributions from the Silver Pool will be considered as recoupment of the Binsacca's investment when those funds went to pay taxes and interest on loans that formed the basis of the Binsaccas investment in the Silver Pool. *See* Catherine Binsacca Objection, attached as Exhibit D.

The Receiver recommends that the Court not consider the ultimate fate of disbursements made to investors when evaluating the Proposed Distribution Plan and any distribution methodology. First, offsets for fees associated with money management such as taxes, loan fees, or interest payments are difficult to limit and define. *See Donell*, 533 F.3d at 779. Second, the complex tracing and questions of proof required to consider investor offsets for taxes, loan fees, and interest payments would impose an enormous administrative burden on the Receivership Estate and would not be an effective use of the Estate's resources. *Id.* Third, it would be

inequitable to prioritize some investors over others simply because those investors used the funds they received to make debt payments or to pay taxes. *Id.*

There is also no basis for an offset to gains received from a Ponzi scheme in UFTA. *Janvey v. Alguire*, 647 F.3d 585, 602 (5th Cir. 2011). At its base, disbursements from the Silver Pool to investors were payments from other defrauded investors, regardless of the use of those funds after disbursement. These pre-receivership disbursements should be credited against an investor's principle. The Receiver respectfully requests that the deny Mrs. Binsacca's objection and decline to consider the purpose for which fraudulently transferred funds were used.

2. *Receiver's Response to Objections to Classification of Claimants*

The Receiver received roughly⁴ seven Objections from nonparties relating to the proper categorization of claimants in the Proposed Distribution Plan. Most of these Objections concern the fourth category, which groups both non-investor unsecured creditors and defrauded investors together. One group of nonparty objectors⁵ assert that non-investor unsecured creditors ("unsecured creditors") should be in a higher priority class than defrauded investors. A second group of nonparty objectors⁶ ("defrauded investors"), conversely, want unsecured creditors classified below defrauded investors in priority. Finally, Mr. Thomas Williams seeks the inclusion of a "bailment" or "warehousing" classification.

a. Thomas Williams' Objection

Mr. Williams requests the creation of a separate and higher priority class of claimants for those individuals who purchased goods from RRC and merely wanted to have a

⁴ Some Objections were sent in multiple times by different nonparties or later supplemented. This category also contained the most groups of nonparties objecting all together.

⁵ This group consists of three separate objections submitted by Sara McCormick, Chase Taylor, and as a group Daxson hale, Jared Clark Gay and J. Scott Rakozy.

⁶ This group consists of Alice B. Jones, Jennifer Jones Clawson, Bryan Douglas Jones, Lindsay Erin Jones, Courtney Jones Nielsen, Kathleen Barlow, Gloria Barlow, Phyllis Bowman, David Bowman, Sarah Bowman and various related entities and trusts.

“warehousing/bailment” relationship with RRC rather than being considered an investor in the Silver Pool. *See* Thomas Williams Objection, attached as Exhibit E.

The Receiver has previously addressed claims related to RRC customers who had consignment, appraisal, and similar relationships with RRC. *See* Dkt. Nos. 168, 281, 295. The Receiver does not dispute Mr. Williams’ assertion of what constitutes a bailment under Utah law and has returned specific items to identifiable owners who had brought them to RRC to merely warehouse or consign them. *See id.* Unfortunately, the Receiver’s investigation has revealed that Mr. Williams is not similarly situated to the owners of identifiable RRC inventory items.

Mr. Williams asserts in his Objection that he wrote a check for \$30,000 to RRC to “purchase and warehouse silver for him.” Unfortunately, when the Receiver was appointed, there is no evidence that silver belonging to Mr. Williams was present at RRC. Nor was the Receiver able to identify a purchase of silver corresponding to Mr. Williams’ order in the records of the Receivership Defendants. It appears that Receivership Defendants merely accepted Mr. Williams’ payment and either never ordered his goods or ordered his goods and subsequently liquidated them to make payments to other investors. If Receivership Defendants ever did purchase \$30,000 of silver on behalf of Mr. Williams, that silver was not present at RRC at the time of the Receiver’s appointment. In the absence of identifiable goods being held in Mr. Williams’ name, Mr. Williams has no special property interest and is, therefore, in the same position as other unsecured creditors. *See* UTAH CODE § 70A-2-501(1), -502(2). Consequently, the Receiver respectfully requests that the Court deny Mr. Williams’ objection and decline to create another higher priority class for “bailment/warehousing” claimants.

b. Unsecured Creditors’ Objection to Inclusion in Fourth Priority Class

The unsecured creditors include customers who sold items to RRC prior to appointment of the Receiver but who never received payment due to the asset freeze, employees who never

received all of their compensation, and vendors who provided a service to RRC or their related entities but who did not receive payment prior to appointment of the Receiver. The unsecured creditors argue that they did not engage in any inherently risky behavior, such as investing. These creditors also argue that the unsecured creditors are more likely to be low wage workers trading their time for pay rather than investors trying to grow their disposable income. *See* Unsecured Creditors' objections, attached as Exhibits F, and G.

The Receiver maintains that equity is served by classing unsecured creditors alongside defrauded investors. The guiding principle should be that "any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike." *Sec. & Exch. Comm'n v. Homeland Commc'ns Corp.*, 2010 WL 2035326, at *2 (S.D. Fla. May 24, 2010) (quoting *S.E.C. v. Credit Bancorp. Ltd.*, 2000 WL 1752979, at *13 (S.D.N.Y. Nov. 29, 2000)). Receivership Defendants operated a labyrinth of organizations and entities, all of which were comingled with and—in most cases—dependent on defrauded investor money. It is true that employees, customers and vendors were engaging in what they presumed to be a risk-free transaction, but any recovery in a distribution process will ultimately come from funds sourced from defrauded investors. Inclusion of unsecured creditors in the fourth priority class strikes an appropriate balance between the innocent behavior of unsecured creditors and the fact that investors were unwittingly funding the entire enterprise.

c. Defrauded Investors' Objection to the Inclusion of Unsecured Creditors in the Fourth Priority Class

The defrauded investors group objects to the inclusion of unsecured creditors in the fourth priority class and argue that unsecured creditors should be classed below investors for purposes of distribution. *See* Defrauded Investors' objections, attached as Exhibits H, and K.

The Receiver maintains that equity is best served by both the unsecured creditors and defrauded investors being included in the fourth priority class. The Receiver's initial analysis of Claims shows that although unsecured creditor claims account for less than five percent of the total repayment claims, and if not included in the fourth priority class it is unlikely that unsecured creditors will receive any recovery. Inclusion of unsecured creditors in the fourth priority class strikes an appropriate balance between the innocent behavior of unsecured creditors and the fact that investors were unwittingly funding the entire enterprise. The Receiver respectfully requests that both objections to class unsecured creditors above and below defrauded investors be denied.

3. Receiver's Response to Guyon Objection

Mr. Guyon lodged a broad Objection challenging various actions of the Receiver and this Court's jurisdiction over the above-captioned matter, which is an enforcement action brought by government agencies. Mr. Guyon further asserted various legal challenges to the propriety of the Receivership and sought to have certain questions of law certified to the Utah Supreme Court. *See* Peter Guyon Objection, attached as Exhibit L.

Mr. Guyon's Objection is largely inappropriate for resolution through the Summary Disposition Procedure established by the Court. The purpose of the Summary Disposition Procedure was to allow resolution of narrow disputes related to the ownership of certain property and to allow nonparties to be heard on issues such as the Proposed Distribution Plan. *See* Dkt. No. 165 (establishing Summary Disposition Procedure). When the Receiver requested that the Court establish the Summary Disposition Procedure it was with the understanding that the procedure would not be used "to resolve traditional 'clawback actions' from 'net winners.'" Dkt. No. 155 at 2. It was expressly contemplated that these more substantive issues would be resolved

through ancillary actions. *Id.* Similarly, in its Order Establishing Objection Procedure, the Court indicated that parties “wishing to object to the Receiver’s Proposed Distribution Plan” could do so. *See* Dkt. No. 302.

Mr. Guyon’s Objection is largely unconcerned with the issues presently before the Court related to the Proposed Distribution Plan. Instead, Mr. Guyon’s Objection seeks to challenge various past actions of the Receiver, to question this Court’s jurisdiction over the underlying government enforcement action, and to certify questions of law to the Utah Supreme Court. Although such arguments may be appropriate in an ancillary action related to amounts owed by Mr. Guyon to the Receivership Estate, no such action has yet been filed. If the Receiver decides to initiate litigation against Mr. Guyon to recover fraudulently transferred funds, Mr. Guyon will have standing, as a party, to pursue many of the Objections that he has submitted here.⁷ Such an ancillary proceeding would be the appropriate venue for Mr. Guyon’s broad challenges, but Mr. Guyon should not be allowed to litigate such a potential ancillary action through the Summary Disposition Procedure.

Moreover, as a non-party, Mr. Guyon lacks standing to challenge the Court’s jurisdiction over the enforcement action brought against Receivership Defendants or other determinations of the Court with respect to the actions of the Receivership Defendants, the propriety of the appointment of the Receiver, and the Court’s other findings. Allowing nonparties to challenge the Court’s rulings in the above-captioned enforcement action would not serve the interests of judicial economy and would only serve to interfere in the government’s action against the Receivership Defendants.

⁷ Mr. Guyon’s Objection is also not ripe for resolution. *Texas Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018) (holding, “[t]he purpose of the ripeness doctrine is to prevent the premature adjudication of abstract claims.”)

To the extent Mr. Guyon’s Objection challenges his classification as an investor, it is not relevant to the issues being presented with respect to the Proposed Distribution Plan—i.e., what method should be used to distribute funds in the event the Receiver makes a distribution. Whether Mr. Guyon is properly classified as an investor should be addressed either in an ancillary proceeding with the benefit of full discovery processes, or through the Receiver’s Claims Analysis Process. But that issue is not before the Court at this time.

For these reasons, the Receiver respectfully requests that the Court deny Mr. Guyon’s Objection.

4. *Receiver’s Recommendations for Hearings After Conferring with Objecting Non-Parties*

The Receiver was able to meet and confer with almost all objecting nonparties and makes the following suggestions:

1. The Receiver respectfully requests the Court schedule three separate telephonic⁸ hearings to address each category of Objections identified above.
2. The Receiver respectfully requests that all objecting non-parties have an opportunity to speak at the hearing addressing their Objection and has encouraged non-parties who submitted group objections to elect a single spokesperson.

CONCLUSION

The Receiver respectfully requests that the Court to set hearings to rule on the above detailed objections and ultimately allow the Receiver to proceed with a Distribution Plan consistent with the Court’s rulings in said hearings.

⁸ One objector did request an in-person hearing. However, the current uncertainty related to the COVID-19 pandemic renders an in-person hearing impractical. Approval of a distribution plan is necessary before any distributions can take place. Given the significant hardships affecting victims of the Receivership Defendants’ scheme, the Receiver is reluctant to delay approval of a distribution plan and would urge the Court to move forward with telephonic hearings.

DATED this 21st day of July 2020.

PARR BROWN GEE & LOVELESS

/s/ Cynthia D. Love

Joseph M.R. Covey

Cynthia D. Love

Attorneys for Receiver Jonathan O. Hafen

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, a true and correct copy of the foregoing was (1) filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record, (2) posted to the Receiver's website (rustrarecoinreceiver.com), and (3) emailed to all those on the Receiver's master mailing matrix.

/s/ Cynthia D. Love
