

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

U.S. COMMODITY FUTURES TRADING	§	
COMMISSION, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
	§	
v.	§	CIVIL ACTION NO.: 3:20-CV-2910-L
	§	
TMTE, INC. a/k/a METALS.COM, CHASE	§	
METALS, INC., CHASE METALS, LLC,	§	
BARICK CAPITAL, INC., <i>et al.</i> ,	§	
	§	
Defendants	§	

RECEIVER’S CLAIMS REPORT

Receiver Kelly M. Crawford respectfully submits this Claims Report as required by the *Order Establishing Claims Adjudication Process* [Docket No. 227]:

I.

IDENTIFICATION OF INVESTORS

1. The Receiver identified investors who sent money to the Defendants or Relief Defendant by: 1) taking possession of and reviewing hard copies of investor files maintained by the Defendants and Relief Defendant at their primary office, 8383 Wilshire Blvd, Beverly Hills, California; 2) receiving names of investors from State regulators who had records of investors; 3) identifying investors from digital information maintained by the Defendants and Relief Defendant on digital platforms such as Google, SalesForce, and Intuit; and 4) responding to inquires from investors who learned of the receivership through the website maintained by the Receiver or through the national publication of the receivership in *USA Today*.

2. Once the investors were identified, in order to obtain information regarding the investors and their investment, to the extent possible the Receiver provided them with a questionnaire to complete and return to the Receiver.¹

II.

DISTRIBUTION AND RECEIPT OF CLAIM FORMS

3. As required by the *Order Establishing Claims Adjudication Process*, on March 12, 2021 the Receiver published in the weekend edition of *USA Today*, a publication with national circulation, the Notice of Publication approved by the Court.² The Receiver also posted the *Order Establishing Claims Adjudication Process* on the website established by the Receiver at www.metalsandbarrickcapitalreceivership.com.

4. Because most of the investors are elderly, the Receiver provided most of the investors with a claim form that included the metals purchased as shown in the records the Receiver obtained from the Defendants and Relief Defendant. The investors were asked to either confirm the claim form was complete, or provide information showing how the claim form was either inaccurate or incomplete. For those investors in which the Receiver was unable to include in the claim form the metals purchased, the investors were required to complete the claim form with the specific information about their metal purchases and provide information to the Receiver to corroborate their claim.

5. Further, as required by the *Order Establishing Claims Adjudication Process*, the Receiver emailed and/or mailed a Confirmation form, Non-Metals Claim form, or Proof of Claim form to known investors or creditors. Specifically, the Receiver mailed and/or emailed

¹ The questionnaire was not a pre-requisite for an investor to file a claim, but was used by the Receiver for solely informational purposes to assist the Receiver in putting together a database of claimants and in preparing the initial claim forms sent to the investors. A true and correct copy of the questionnaire is included in the Appendix at p. 3 as Exhibit A.

² Exhibit B to Appendix at p. 6. .

Confirmation forms to 1,730 metals investors; mailed and/or emailed Non-Metals Claim forms to 431 possible investors; and mailed and/or emailed Proof of Claim forms to 128 known creditors.

6. Pursuant to the *Order Establishing Claims Adjudication Process*, Confirmation forms, Non-Metals Claim forms, and Proof of Claim forms (collectively, the “Claims”) were required to be served on the Receiver no later than April 30, 2021 (the “Bar Date”). As the Bar Date approached, the Receiver determined additional time was required in order to receive the Claims, and on April 26, 2021 the Receiver filed a motion with the Court requesting the Court to extend the Bar Date until June 15, 2021. [Docket No. 241]. On May 7, 2021, the Court entered an Order extending the Bar Date until June 15, 2021.

7. As the Claims were received they were scanned and each Claimant’s name and claim information was entered on spread sheets to facilitate further review. Each Investor was assigned an identification number to protect their privacy.

8. Once the Bar Date passed, all Claims, together with all supporting evidence, were reviewed by the Receiver’s paralegals or attorneys and the Receiver to formulate the Receiver’s recommendations regarding the Claims.

III.

CLAIMS ANALYSIS AND RECOMMENDATIONS

A. CLAIMS OF METALS INVESTORS

9. Because the vast majority of the metals investors are elderly, the Receiver attempted to simplify the claims process by including in the Claim Confirmation form a list of the metals purchased by the investor, unit price, and total price paid. The investors were asked on the claim form to either approve the list of metal purchases shown by the

Receiver or make corrections to what the Receiver listed as the investor's metal purchases. The Receiver prepared the list of metals purchased by the investor based upon the records of the Defendants or information provided in response to Questionnaires the Receiver circulated prior to the beginning of the claims process. In some instances, if information was not available to the Receiver, the Receiver would not include a list of the metals purchased by the investor and required the investor to list the metals purchased and corroborate the claim.

10. Because metals are commodities that fluctuate in value from day to day, the Receiver used the date the receivership was created, September 22, 2020, as the date to determine the fair market value of the metals purchased by the investors. The Receiver obtained the fair market value of each of the metals/coins as of September 22, 2020 from Dana Samuelson³, a well-recognized expert in determining values in the precious metals industry.

11. With respect to each metals claim, the Receiver compared the fair market value of the metals as of September 22, 2020 with the amount paid by the investor to determine the difference, if any. The total difference between the amount paid by the investor to the Defendants for the metals and the fair market value of the metals on September 22, 2020 formed the basis of the Receiver's recommendation for the investor's claim. For instance, if an investor purchased 100 Silver Canadian Polar Bear ½ oz coins for \$26.00 each and paid a total of \$2,600 to the Defendants, the Receiver compared this amount to the fair market value of the Silver Canadian Polar Bear ½ oz

³ The curriculum vitae of Dana Samuelson is included in the Appendix at p. 10 as Exhibit C.

coin on September 22, 2020, which was \$12.15. The Receiver calculated the difference between the amount paid (\$26 per coin) and the fair market value of the coin (\$12.15) to be \$13.85. Using this amount (\$13.85) and multiplying it by the total number of coins purchased (100), the Receiver calculated the claim at \$1,385.00.

12. A sample of the Receiver's worksheet in calculating a claim is included in the Appendix as **Exhibit D**, together with a copy of the Receiver's cover letter to the investors.⁴ The Receiver's cover letter and worksheet for each metals investor is being provided by the Receiver to the investor, together with a copy of this *Receiver's Claims Report*.

13. Certainly, there are situations in which investors or their agent are either still in possession of the metals they ordered, or they have already sold the metals for a different price than the fair market value as of September 22, 2020 used by the Receiver in his claim analysis. With the significant number of claims and the daily, if not hourly, fluctuation in values of the metals at issue, the Receiver's choice of using a fair market value as of the date of the receivership September 22, 2020, is the most equitable alternative available because it treats all claimants equally.

14. The Receiver also determined whether the metals ordered from the Defendants were delivered to the investor or to a depository to hold for the investor. If the Receiver confirmed the metals were paid for by the investor but never delivered to the investor or to a depository to hold for the investor, the Receiver's recommended claim

⁴ Appendix at p. 14.

amount for the investor is the full amount of money paid by the investor to the Defendants for the metals never delivered.

15. In addition, if fewer than all of the metals ordered were delivered, or if metals different than the metals ordered and paid for by the investor were delivered, the Receiver based his recommendation on the full amount paid by the investor for the metals never delivered, or the difference in value between the fair market value of the metals received by the investor as of September 22, 2020, and the amount paid by the investor for the different metals ordered but not delivered.

16. In some instances, investors swapped coins they already owned for coins they purchased from Defendants. In analyzing such claims, the Receiver treated the swapped coins as cash paid for the new coins based on the prices per unit at which the new coins were sold by the Defendants to the investor.

17. If the Receiver had insufficient information regarding a claim, the Receiver denied the claim pending the receipt of information from the investor to corroborate the claim.

18. Using the foregoing analysis, the Receiver's claim recommendations for each metals investor is set forth in Exhibit E to the Appendix⁵ and the Receiver requests the Court to approve his recommendations⁶. Claims from metals investors that were received by the Receiver *after* the June 15, 2021 Bar Date are identified on Exhibit E as

⁵ Appendix at p. 19.

⁶ In many instances investors purchased coins through an IRA or other qualified fund. For purposes of the claims process, claimants are identified by their name only. When distributions are made by the Receiver to the approved claimants, such distributions will be made to the claimants' IRA or other qualified fund if the purchase was made by the claimants' IRA or other qualified fund.

the “Late Filed Claims”. In each instance, the delay by the non-metals investor was not intentional, but was the result of the investor not learning about the receivership until either immediately before or after the Bar Date. The Receiver recommends that such Late Filed Claims be allowed in the amounts recommended by the Receiver, especially since there has been no prejudice to the receivership estate caused by the late filing of the claims.

B. CLAIMS OF NON-METALS INVESTORS

19. Some investors invested monies in certain entities in receivership owned and controlled by the Defendants that were not selling metals.

a. Revo LLC

20. Revo LLC, formerly known as Instration, LLC (“Revo”), operated by Defendants Lucas Asher and Simon Batashvili, was a music streaming application under development. Specifically, Revo was described in the private placement offering as “developing a mobile platform where users can share ephemeral music conversations with their friends.” In 2017, Defendants Asher and Batashvili, the two managers of Revo, agreed to sell \$3 million in securities in Revo. The Receiver is aware of six investors who purchased a total of \$255,000 in securities in Revo. No distributions were made by Revo to such investors.

21. Based on the Receiver’s investigation, it appears Revo was never launched and never profitable. Moreover, based on the Receiver’s investigation, it appears monies from sales of metals were commingled with monies for the operation of Revo. In addition, according to the Receiver’s investigation, monies raised through the PPM for Revo were not used as represented in the PPM. Accordingly, the Receiver recommends that each investor in Revo be allowed a

claim for the amount of his or her investment⁷. The Receiver's recommendation for the non-metal claims of the investors in Revo is set forth in Exhibit F to the Appendix, and the Receiver requests the Court to approve his recommendations.

b. Tower Equity, LLC

22. Tower Equity, LLC ("Tower") was a private venture capital company operated by Defendants Lucas Asher and Simon Batashvili. Tower was described in the private placement memorandum ("PPM") as a private venture capital company that "invests in pre-seed, seed-stage, early-stage startups, and established businesses." In 2018, Defendants Asher and Batashvili, the two managers of Tower, agreed to sell \$3 million in collateralized notes. The collateralized notes varied in terms from one to 10 years and promised to pay fixed interest rates at a monthly, quarterly, or annual basis until payment of the full amount of principal at maturity. The Receiver is aware of 9 investors purchasing a total of \$5,857,266 in collateralized notes issued by Tower. Distributions classified as "interest" were made from time to time to the investors.

23. Based on the Receiver's investigation, it appears Tower was never profitable and monies from sales of metals were commingled with monies for the operation of Tower. In addition, based on the Receiver's investigation, monies raised through the PPM for Tower were not used as represented in the PPM. Accordingly, the Receiver recommends that each investor in Tower be allowed a claim for the amount of his or her investment, less the amount of monies paid to the investor. Because Tower was not profitable, in making his recommendation the Receiver treats any monies returned to an investor as monies that should be credited to the investors' principal investment, and not characterized as interest. In addition, the Receiver's

⁷ One investor, Investor NM No. 013, invested \$50,000 in Revo, but that investment was offset by monies the investor received from Tower Equity, LLC that exceeded his investment in Tower Equity, LLC by more than \$50,000.

claim is limited to monies paid in and monies paid out and does not include any interest payments that were promised and not paid. The Receiver's recommendation for the non-metal claims of the investors in Tower is set forth in Exhibit F to the Appendix, and the Receiver requests the Court to approve his recommendations.

c. Other Entities

24. The Receiver received claims from two investors who did not invest in an entity in receivership and therefore the Receiver recommends disallowance of such claims.

C. CLAIMS OF CREDITORS

25. The Receiver received claims from the State of California tax authorities and 12 creditors who were not investors, but instead provided goods or services to the Defendants or Relief Defendant they allege were due and owing prior to the receivership. Of these claims, only 1 claimant alleged to be a secured creditor. The remainder of claims are for unsecured debt. The Receiver's recommendation for the creditor claims is set forth in Exhibit G to the Appendix, and the Receiver requests the Court to approve his recommendations. As set forth below, for approved claims of general creditors the Receiver recommends payment of such claims only after payment in full of the allowed metals and non-metals claims.

26. The secured claim was filed by Steve Richman, who was the lessor of the house leased by Defendant Simon Batashvili and his wife. Mr. Richman received a security deposit from Defendant Batashvili of \$32,000 and Mr. Richman filed a claim for \$14,000 in costs and expenses he contends should be paid out of the security deposit of \$32,000. Pursuant to the terms of the *SRO*, the Receiver made demand upon Mr. Richman to turn over the full amount of the \$32,000 security deposit and file a claim for the costs and he expenses he claims are due.

The Receiver's demand is based upon the express terms of the *SRO*⁸ and the decision of this Court in *SEC v. Provident Royalties, LLC*, No. 3:09-cv-1238, 2009 WL 10678431, at *2 (N.D. Tex. Sept. 9, 2009)(order denying motion to intervene filed by landlord to draw down on security deposit posted by defendants in receivership for damages caused by a breach of the lease and finding that landlord should file a claim in the receivership). Mr. Richman refused to turn over the security deposit to the Receiver in violation of the *SRO*. By his own admission, the security deposit of \$32,000 Mr. Richman is holding exceeds Mr. Richman's claim of \$14,000 by \$18,000. Accordingly, the Receiver recommends that Mr. Richman's secured claim of \$14,000 be allowed and paid from the security deposit held by Mr. Richman in the amount of \$32,000 provided Mr. Richman turns over to the Receiver the balance of \$18,000 remaining in the security deposit. If Mr. Richman refuses to turn over to the Receiver \$18,000 from the security deposit, the Receiver recommends that Mr. Richman's claim be disallowed in its entirety as a result of Mr. Richman violating the *SRO*⁹.

27. Of the unsecured creditors, seven creditors assert claims for unpaid wages or compensation arising out of their employment with the Defendants or Relief Defendants. Based upon the Receiver's investigation, the Receiver believes the operations of the Defendants and Relief Defendant were fraudulent. Accordingly, the Receiver contends any monies or compensation paid to employees are recoverable as fraudulent conveyances. More specifically, the Receiver believes the Defendants' or Relief Defendant's transfer of monies to pay wages, provide benefits, or pay compensation to the employees was made with fraudulent intent and for

⁸ *Order Granting Plaintiffs' Emergency Ex Parte Motion for Statutory Restraining Order, Appointment of Receiver, and Other Equitable Relief ("SRO")* entered on September 22, 2020 [Docket No. 16], which provides that persons who hold assets of the Defendants are required to turn such assets over to the Receiver. *See paragraph 29(b) of the SRO.*

⁹ In such instance, the Receiver will request the Court to compel Mr. Richman to turn over the entirety of the security deposit he is holding to the receivership.

the purpose of soliciting investor funds to either sell metals or sell securities. As such, the employees' defense to keeping such wages, compensation, or benefits, or claiming an entitlement to wages, compensation, or benefits, requires the employees to prove 1) they provided the services and received the wages, compensation, or benefits in good faith; *and* 2) they provided reasonably equivalent value in exchange for such wages, compensation, or benefits. As recognized by the Fifth Circuit Court of Appeals, regardless of whether the employees received compensation in good faith, they did not provide reasonably equivalent value. *See Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) (“[i]t takes cheek to contend that in exchange for the payments [Johnson] received, the RDI Ponzi Scheme benefitted from his efforts to expand the fraud by securing new investments”). Indeed, the efforts of the creditors seeking payment for wages only resulted in enlarging the number of investor victims. For that reason, the unsecured wage claims should be denied in their entirety.

28. Perez Batashvili, the brother of Defendant Simon Batashvili, filed an unsecured claim for “management fees” he claims are due and owing from 2018 and continuing through 2021. Mr. Batashvili’s claim should be denied in its entirety because: 1) he was never authorized by the Receiver to provide any management services to any receivership entity after the receivership was put in place; 2) he is not entitled to any compensation as explained above because his efforts only enlarged the number of investor victims, and he cannot prove that he provided any alleged management fees in good faith; 3) he aided and abetted his brother Defendant Simon Batashvili, in violating the *SRO* and hiding monies from the Receiver; and 4) the Receiver has a claim against Perez Batashvili to recover the monies he received from the Defendants, Relief Defendant, and entities in receivership.¹⁰

¹⁰ Such claim includes recovery of monies paid by the Defendants and/or Relief Defendant for credit card expenses incurred by Perez Batashvili.

29. The State of California taxing authorities filed claims for unpaid taxes owed by the entities in receivership. The Receiver recommends allowance of the claims for unpaid taxes through 2020 as priority claims, and disallowance of claims for franchise taxes for 2021¹¹. In addition, the Receiver recommends that claims by the taxing authorities for penalties and interest be allowed but subordinated to the claims of the investors.

IV.

TREATMENT OF CLAIMS

30. This Claims Report contains the Receiver's recommendations only. As set forth above, the recommendations are subject to revision based on additional information requested from numerous investors. Further, the claim amounts are also subject to additional proceedings in the claims approval process, including the Court's final determination of the amount and nature of each claimant's interest in Receivership Assets.

31. Pursuant to *Order Establishing Claims Adjudication Process*, and the Court's Order extending deadlines, any objections to the Receiver's recommendations are to be filed with the Receiver on or before September 30, 2021. [Docket No. 248]. No later than October 29, 2021, the Receiver is required to provide the Court with a copy of all timely objections and the Receiver's response to such objections. [Docket No. 248]. If necessary, the Court may set a hearing to rule upon the objections.

32. Fairness provides the overriding principle for evaluation of every issue arising in the supervision of an equitable receivership. *See U.S. v. Durham*, 86 F.3d 70,

¹¹ As the taxing authorities are aware, the entities ceased operations in 2020 and there is no basis to assess a franchise tax for 2021.

73 (5th Cir. 1996) (district court supervising equitable receivership and evaluating methods of distribution to victims of Ponzi scheme is "court of conscience") (internal quotation omitted); *U.S. Commodity Futures Trading Comm'n v. RFF GP, LLC*, No. 4:13-CV-382, 2014 WL 491639, at *2 (E.D. Tex. Feb. 4, 2014), *report and recommendation adopted*, No. 4:13-CV-382, 2014 WL 994928 (E.D. Tex. Mar. 10, 2014). "Once assets are in receivership, '[i]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.'" *Pre-War Art, Inc. v. Stanford Coins & Bullion, Inc.*, No. 3:09-CV-00559-N, 2021 WL 424283, at *2 (N.D. Tex. Feb. 8, 2021) (quoting *Sec. & Exch. Comm'n v. Stanford Int. Bank, Ltd.*, 927 F.3d 830, 840 (5th Cir. 2019)). "Pursuant to these broad powers, courts may authorize any distribution of receivership assets that is 'fair and reasonable.'" *Id.* (internal citations omitted); *Sec. & Exch. Comm'n v. Faulkner*, No. 3:16-CV-1735-D, 2020 WL 2042339, at *5 (N.D. Tex. Apr. 28, 2020) ("A district court has 'broad powers and wide discretion to determine the appropriate relief in an equity receivership.')" (quoting *SEC v. Kaleta*, 530 Fed. Appx. 360, 362 (5th Cir. 2013) (per curiam)); *see S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001) ("In shaping equity decrees, the trial court is vested with broad discretionary power, and appellate review is correspondingly narrow.") (quoting *Quenzer v. United States*, 19 F.3d 163, 165 (5th Cir.1993)); *see also U.S. Commodity Futures Trading Comm'n v. PrivateFX Glob. One*, 778 F. Supp. 2d 775, 779, 782–83 (S.D. Tex. 2011) (explaining that the abuse of discretion standard applies to review of a District Court's distribution of recovered assets).

33. With the foregoing principles in mind, the Receiver's *preliminary* recommendation regarding the treatment of claims is as follows:

a. Pro rata distribution to holders of allowed metals claims and non-metals claims

In administering the distribution of receivership assets, the Court is not bound by any particular method of distribution, but has “broad discretion to determine ‘a logical way to divide the money’, and tailor a distribution plan accordingly.” *Faulkner*, 2020 WL 2042339, at *5 (quoting *Forex*, 242 F.3d at 331). In cases of fraud, courts have “‘routinely endorsed’ the pro rata distribution of assets to investors as the most fair and equitable approach.” *Id.* (citing *SEC v. Quan*, 870 F.3d 754, 762 (8th Cir. 2017)); *see Forex*, 242 F.3d at 331-32 (finding that the district court’s approval of *pro rata* distribution was appropriate even when claimant-investor’s funds were held in a separate account); *Durham*, 86 F.3d at 73 (finding that the district court did not abuse its discretion by approving a *pro rata* distribution plan even though funds were traceable to specific claimants); *RFF GP, LLC*, 2014 WL 491639, at *2 (permitting *pro rata* distribution of funds and noting “[w]hen a portion of funds to be distributed from the assets of a receivership estate can be traced, it is permissible to apply tracing; however, it is also permissible to allow a pro-rata distribution.”) (citing *Durham*, 86 F.3d at 73; *Forex*, 242 F.3d at 331); *S.E.C. v. AmeriFirst Funding, Inc.*, No. CIV.A.3:07-CV-1188-D, 2008 WL 919546, at *5 (N.D. Tex. Mar. 13, 2008) (same).

Based on the foregoing, distributions should be made to the holders of allowed metals claims and non-metals claims on a pro-rata basis, calculated

according to the amount the approved claim bears to the total amount of approved metals and non-metals claims. If, for example, there are a total of \$50 million of approved metals and non-metals claims and there is \$10 million to distribute, each holder of an approved claim would receive 20 percent of their total claim. Under this scenario, the holder of a claim of \$25,000 would receive a distribution payment of \$5,000 (20 percent of \$25,000). Holders of metals claims and non-metals claims should be treated the same in the opinion of the Receiver because monies received by the Defendants and Relief Defendant from metals investors and non-metals investors were commingled.

b. Subordination of Creditor Claims

The Court has discretion to prioritize claims based on equitable concerns, and this discretion ordinarily includes subordinating the claims of creditors to the claims of investor-victims. *S.E.C. v. Great White Marine & Recreation, Inc.*, 428 F.3d 553, 557 (5th Cir. 2005) (the district court did not abuse its discretion in prioritizing investor claims over the claims of an unsecured creditor, particularly in light of the creditor's own misconduct); *Pre-War Art, Inc.*, 2021 WL 424283, at *2 (“[C]ourts generally give defrauded investors priority over creditors.”), citing *RFF GP, LLC*, 2014 WL 491639, at *2. Accordingly, the Receiver recommends the subordination of approved creditor claims to the approved claims of metals investors and non-metals investors so that a creditor is not paid unless and until all approved claims of metals investors and non-metals investors are paid in full. Indeed, the subordination of general creditor claims is justified because the source of income to the Defendants and Relief Defendant during the

relevant period when the general creditor debts were accrued was derived from investor funds for the purchase of metals or non-metals investments.

V.

CONCLUSION

This report is the Receiver's recommendation of what he believes to be the most fair and equitable means of handling the more than 1,100 claims received. When investors and creditors receive a copy of this *Receiver's Claims Report* they will have an opportunity to determine whether they agree or disagree with the Receiver's recommendation. The Receiver will evaluate any objections received to his claims report and determine whether the Receiver needs to revise his recommendation for a particular claim. If the Receiver determine a revision is necessary the Receiver will so inform the Court. If an objection cannot be resolved by the Receiver, it will be submitted to the Court for resolution.

