IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:19-cv-02594-RM-SKC

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

MEDIATRIX CAPITAL INC. *et al.*,

Defendants,

and

MEDIATRIX CAPITAL FUND LTD. *et al.*,

Relief Defendants.

REPLY OF RECEIVER ON HIS MOTION FOR: (1) AUTHORITY TO PURSUE CERTAIN AVOIDANCE CLAIMS AND ASSET FREEZE VIOLATIONS; AND (2) APPROVAL OF PROPOSED SETTLEMENT PROCEDURES

Mark B. Conlan, the Court-appointed substitute receiver (the "Receiver"), hereby submits this Reply in support of his *Motion for (1) Authority to Pursue Certain Avoidance Claims and Asset Freeze Violations, and (2) Approval of Proposed Settlement Procedures* (the "Motion") (ECF No. 332). The Reply responds to Michael S. Young's and Maria C. Young's (the "Youngs") Opposition to the Motion (ECF No. 339).[1]

[1] A full copy of the Motion and related pleadings is available for free download at https://mediatrixreceivership.com.

INTRODUCTION

The Youngs misinterpret the Receiver's Motion.[2] The Receiver merely seeks "leave of this Court," as is required under the Receiver Order, "to resume or commence certain litigation." Preliminary investigations by the SEC (much of which is included in or attached to the sworn declaration of Jeffrey D. Felder, Senior Counsel in the Division of Enforcement in the SEC's Denver Regional Office ("Felder Decl."), (ECF No. 5) and the Receiver have uncovered evidence that a multitude of Net Winners, and several Brokers, received fraudulently transferred funds, disguised as "profits," that could only have been paid with earlier-investors' monies. These Ponzi-style payments, by definition and as a matter of law, are fraudulent transfers. The Receiver Order imposes obligations and duties on the part of the Receiver to "marshal and preserve" receivership assets for the benefit of the receivership estate and, ultimately, its creditors. For that reason, then, the Receiver must commence litigation against the Net Winners and the Brokers before the expiration of the applicable statute of limitations—or forfeit forever what preliminary investigations by the SEC and the Receiver to date indicate constitute fraudulently transferred funds. Indeed, the Receiver would be derelict in his duties to sit on his hands for several years awaiting a "finding of liability" on the part of the Defendants as the Youngs prefer, but by that time all the statutes of limitations on each and every Net Winner and Broker would have run out, leaving the receivership estate with unrecoverable losses. In other words, the Youngs appear to be inviting this Court's imprimatur on allowing avoidance claims to become time-barred.

[2] Capitalized terms not defined herein have the meaning ascribed to such terms in the Receiver's Motion for (1) Authority to Pursue Certain Avoidance Claims and Asset Freeze Violations, and (2) Approval of Proposed Settlement Procedures (ECF No. 332).

The Youngs also appear to treat the Receiver's Motion as a motion for summary judgment. Having done so, the Youngs take the opportunity in their Opposition to a relatively simple and straightforward motion for leave of Court to bring avoidance actions to prematurely argue the merits of the case. As if responding to a motion for summary judgment, they argue that "there is no evidence of a Ponzi scheme." The Youngs reduce the evidence that has been uncovered to date as mere allegations by the SEC in the Complaint in this matter and representations by the Receiver in his Motion. In doing so, the Youngs ignore the support in the sworn Felder Declaration for the SEC's allegations that Defendants falsified investors' account statements and manipulated trading results to reflect phantom profits rather than the actual losses suffered, and that the Entity Defendants made Ponzi-like payments to investors who opted to cash out their "profits"—all in order to prop up the façade of profitable trading.

The Young's failure to comprehend the Receiver's Motion reflects a further misapprehension of the posture of this case. As demonstrated by the Felder Declaration, evidence of fraudulent transfers exists. It is, therefore, now the Receiver's responsibility to recover receivership assets that "were fraudulently transferred by the Defendants." By the Motion, the Receiver merely requests leave of Court to bring actions to recover those assets, thereby preserving fraudulent transfer claims against the statutes of limitations. It is hornbook law that civil actions can be brought on information and belief, and the plaintiff need not have on hand at the time of a complaint all of the evidence necessary to prove the claims set forth therein. Such evidence can be—and often is—obtained through discovery. As demonstrated above, there is sufficient evidence to provide the Receiver with sufficient cause to file good faith complaints asserting fraudulent transfers by the Defendants to the Net Winners and Brokers.

Further evidence of the Youngs' misapprehension of the posture of this case is their contention that the fraudulent transfer actions the Receiver seeks leave to bring constitute pre-judgment collection activity. Merely filing a fraudulent transfer complaint will not provide the Receiver with authority to attach or sequester the assets of a Net Winner or a Broker. Entry of judgment would be a necessary condition for collection activities. To obtain judgment, the Receiver would have to prove that payments to a Net Winner or a Broker were, in fact, fraudulent transfers. More specifically, the Receiver would have to demonstrate that some or all of the Defendants operated a fraudulent scheme. Meanwhile, under the Federal Rules of Civil Procedure, the Youngs would enjoy more than adequate opportunities to dispute the SEC's and the Receiver's factual findings.

The Court should accordingly grant the Receiver's Motion and permit the Receiver authority to immediately "marshal and preserve" these receivership assets.

ARGUMENT

A. The Receiver Order Expressly Permits the Receiver to Marshal and Preserve Fraudulently Transferred Receivership Assets.

The Receiver Order, ECF No. 153, states that "the appointment of a receiver in this action is necessary and appropriate for the purposes of marshaling and preserving all assets of the Defendants ('Receivership Assets') and those assets of the Relief Defendants that . . . were fraudulently transferred by the Defendants." (Receiver Order at 1.) And it is well-settled that even where "innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers." *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008).

In the landmark decision of *Donell*, Kowell was one of the lucky investors in a Ponzi scheme that received a profit from his investments. *Id.* at 766. Several years later, after the SEC brought a civil enforcement action against the defendant Ponzi scheme operator, the receiver sent Kowell a letter demanding return of Kowell's "profits" and offering Kowell the option to settle for a lesser amount. *Id.* at 768. Kowell refused and instead "expressed confusion as to how he could be liable to other investors if he had no idea" about the Ponzi scheme. *Id.* ("Kowell . . . reiterated his utter disbelief . . . and his outrage that a good-faith investor in a business could be required to return his profits years later."). The Ninth Circuit affirmed the district court's finding that (i) it "properly authorized the Receiver to bring suits . . . for the purpose of effecting its decree of liability against [the defendant]"; and (ii) where "extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers." *Id.* at 769-70.

So, under *Donell*, not only may the District of Colorado "properly authorize the Receiver to bring suits," but the Receiver's authority to pursue these suits against the Net Winners, like in *Donell*, stems from the Receiver's authority to recover fraudulent transfers. *See id.* at 772 ("all payments of fictitious profits are avoidable as fraudulent transfers"). Indeed, the Court has already expressly determined that the Receiver in this action should "marshal and preserve" all receivership assets "fraudulently transferred by the Defendants." (Receiver Order at 1.) By this Motion, the Receiver merely seeks leave to achieve that goal. (*Id.* ¶ 34 ("leave of this Court is required to resume or commence certain litigation").)

The Youngs misinterpret the holdings in *Schlossberg* and *Cook* to conclude that "there is literally nothing in the [Receiver] Order that permits the Receiver to engage in pre-judgment

collection activities against non-party brokers or investors." (Opp. at 5.) The Youngs misinterpret *Schlossberg* to mean that the Receiver cannot sue the Net Winners and Brokers simply because "the investors and brokers the Receiver proposes to sue are not parties to this proceeding." (Opp. at 6.) And, the Youngs misconstrue *Cook* to mean that "the Receiver utterly lacks authority to collect transfers made *prior* to the date that the SEC's Complaint was filed." (Opp. at 6.) Neither of these cases stand for the mistaken propositions set forth by the Youngs.

First, in *Schlossberg*, a *Barton Doctrine* case, the Tenth Circuit reversed the District of Wyoming's ruling on a motion to dismiss, finding instead that the allegations in the complaint were "well-pleaded" and that "TMS has satisfied [the pleading] standard . . . show[ing] that [the receiver] does not enjoy absolute immunity." *Id.* at 150. Specifically, "the court order only vested him with . . . the right to obtain record title to . . . all of the assets of . . . Michael Palencar." *Id.* at 151. The receiver, however, allegedly "knew that Mr. Palencar was only a twenty-five percent shareholder in TMS," and yet the receiver seized the assets of TMS (i.e., "assets that did not belong to Mr. Palencar"), and thus the receiver "exceeded the scope of his authority by not acting in accordance with the court order." *Id.* The Tenth Circuit added that the complaint sufficiently alleged that the receiver also fraudulently "fail[ed] to mention that he was required to but had not obtained ancillary jurisdiction in Wyoming." *Id.* at 147, 151-52 (concluding that "[t]he foregoing analysis certainly does not resolve the issue of whether [the receiver] will ultimately enjoy absolute immunity. Because we are reviewing the grant of a motion to dismiss, we need only decide whether the complaint states sufficient facts such that it is plausible that [he] does not enjoy absolute immunity"). Thus, not only is *Schlossberg* inapposite here, but the ruling centered on the

receiver seizing property that did not belong to the receivership estate whatsoever—not because the receiver sued people and/or entities that "[were] not parties to [the] proceeding," (Opp. at 6).

Second, regarding *Cook*, the Youngs assert that "the Fifth Circuit explained that the Receiver utterly lacks authority to collect transfers made *prior* to the date that the SEC's Complaint was filed." (Opp. at 6.) The Youngs assertion here makes no sense—if a receiver "utterly lacked authority" to retrieve pre-complaint transfers for the benefit of the receivership estate, this concept would make fraudulent transfer law wholly inapplicable to receivers. But, that is not the proposition *Cook* stands for at all. Rather, in *Cook*, the receiver attempted to liken charitable donations to the American Cancer Society as "Ponzi-like fraud." *Am. Cancer Soc'y v. Cook*, 675 F.3d 524, 526 (5th Cir. 2012). The court discredited this strained legal theory because "nothing" the receiver showed "demonstrates that investor funds were used to issue 'returns' to other investors—a *sine qua non* of any Ponzi scheme." *Id.* at 528. In other words, the receiver demonstrated only that transfers occurred between the receivership entities and a charitable organization, not between any investors, and so ***for that reason*** the Fifth Circuit concluded that "the district court erred in applying the presumption of fraudulent intent." *Id.* at 528-29 (noting additionally that the receiver is authorized "to pursue the recovery of assets that may have been transferred by the defendants in violation of governing law"). Simply put, the Youngs' argument that a receiver cannot "take funds from parties who are not parties to the lawsuit" is an overstatement, a clear misstatement of *Cook*, and belied by well-established legal authority to the contrary. *See Donell*, 533 F.3d at 769-70.

Thus, because the Receiver Order permits the Receiver to recover the fraudulently transferred ill-gotten "profits" from the Net Winners and Brokers, in tune with the case law across this country, the Receiver respectfully requests leave of this Court to do so.

B. The Receiver Has Good Cause to Believe the Transfers to the Net Winners and Brokers Were, In Fact, Fraudulent Transfers.

The Receiver's investigation to date has revealed that the "profits" paid to the Net Winners constituted Ponzi-like payments because the trading profits in the Blue Isle Brokerage Accounts (pooled, non-individualized accounts) were ***in the negative***; and so, the Entity Defendants paying the Net Winners from an in-the-red account required misappropriating other investors' monies and falsifying the Net Winners' account statements to show phantom net gains (although the actual account itself indisputably showed net losses).

These findings are corroborated in large part by the sworn Felder Declaration. Mr. Felder worked with an SEC accountant to analyze the Blue Isle Brokerage Accounts—i.e., the "pooled" accounts opened with the Prime Brokers, wherein no separate account for the Fund or separate account for the MAFEF investors was ever opened. (Felder Decl. ¶¶ 73-74.) And even though most months analyzed from March 2016 to April 2019 showed cumulative losses, Net Winners "who cashed out their investments were led to believe, through account statements reflecting phantom trading profits, that they were receiving their initial investment back, along with profits earned from Defendants' trading, when, in reality, in order to prop up the façade of profitable trading, Defendants simply paid-out other investors' money that had not yet been lost or misappropriated." (ECF No. 1 ¶ 121.) For example, in November 2016, an investor closed out his $25,000 investment and received $40,279—from a pooled account that lost $312,193.92 on

closed trades and another $567,673.62 on open trades, for a total loss of $879,867.54 that month. (*See* ECF No. 1 ¶¶ 122-24; *and see* ECF No. 1-24 (depicted directly below).)

Blue Isle Brokerage Accounts

Gains and Losses

March 1, 2016 to April 30, 2019

All amounts in US Dollars ①

Month	Each Month: Gain (Loss) on *Closed* Trades	Each Month: Gain (Loss) on *Open* Trades	Each Month: Gain (Loss) on *All* Trades	Since Inception: Cumulative Gain (Loss)
Mar-2016	201.41	$373.14	$574.55	$574.55
Apr-2016	99,458.67	($225,859.72)	($126,401.05)	($126,199.64)
May-2016	287,573.39	($34,135.21)	$253,438.18	$353,098.26
Jun-2016	(536,439.24)	($21,480.62)	($557,919.86)	($170,686.39)
Jul-2016	(6,809.04)	($101,506.87)	($108,315.91)	($257,521.68)
Aug-2016	153,170.98	($67,579.96)	$85,591.02	($70,423.79)
Sep-2016	189,103.57	($270,592.05)	($81,488.48)	($84,332.31)
Oct-2016	(3,418,423.40)	($31,116.68)	($3,449,540.08)	($3,263,280.34)
Nov-2016	(312,193.92)	($567,673.62)	($879,867.54)	($4,112,031.20)
Dec-2016	(319,210.18)	($260,407.74)	($579,617.92)	($4,123,975.50)
Jan-2017	1,035,257.48	($49,375.49)	$985,881.99	($2,877,685.77)
Feb-2017	938,324.77	($84,920.15)	$853,404.62	($1,974,905.66)
Mar-2017	1,357,783.05	($53,168.75)	$1,304,614.30	($585,371.21)
Apr-2017	103,767.58	($1,088,943.22)	($985,175.64)	($1,517,378.10)
May-2017	(7,967,512.27)	($1,294,502.52)	($9,262,014.79)	($9,690,449.67)
Jun-2017	(2,282,283.98)	($474,923.02)	($2,757,207.00)	($11,153,154.15)
Jul-2017	(1,257,552.94)	($956,456.30)	($2,214,009.24)	($12,892,240.37)
Aug-2017	(994,431.59)	($1,011,128.34)	($2,005,559.93)	($13,941,344.00)
Sep-2017	3,972,837.27	$94,343.87	$4,067,181.14	($8,863,034.52)
Oct-2017	(836,253.25)	($2,420,071.16)	($3,256,324.41)	($12,213,702.80)
Nov-2017	1,120,335.43	($1,954,879.65)	($834,544.22)	($10,628,175.86)
Dec-2017	8,645,133.54	($4,450,608.34)	$4,194,525.20	($4,478,771.01)
Jan-2018	(11,458,789.91)	($7,936,714.91)	($19,395,504.82)	($19,423,667.49)
Feb-2018	4,675,626.46	$4,336,984.05	$9,012,610.51	($2,474,342.07)
Mar-2018	3,156,337.61	$2,504,796.46	$5,661,134.07	($1,150,192.05)
Apr-2018	2,805,391.47	($6,635,224.70)	($3,829,833.23)	($7,484,821.74)
May-2018	(17,093,508.11)	$1,014,941.74	($16,078,566.37)	($16,928,163.41)
Jun-2018	(3,643,451.09)	($1,322,721.99)	($4,966,173.08)	($22,909,278.23)
Jul-2018	6,731,791.87	($1,275,310.95)	$5,456,480.92	($16,130,075.32)
Aug-2018	(12,514,146.01)	($5,110,134.24)	($17,624,280.25)	($32,479,044.62)
Sep-2018	(1,479,196.14)	($4,059,090.10)	($5,538,286.24)	($32,907,196.62)
Oct-2018	4,731,569.07	($2,811,835.80)	$1,919,733.27	($26,928,373.25)
Nov-2018	6,813,481.89	($602,926.68)	$6,210,555.21	($17,905,982.24)
Dec-2018	4,306,148.29	($5,079,022.60)	($772,874.31)	($18,075,929.87)
Jan-2019	(9,088,595.32)	($4,491,773.98)	($13,580,369.30)	($26,577,276.57)
Feb-2019	1,820,454.16	($2,827,710.01)	($1,007,255.85)	($23,092,758.44)
Mar-2019	1,935,579.23	$523,753.68	$2,459,332.91	($17,805,715.52)
Apr-2019	1,438,817.52	($2,074,809.83)	($635,992.31)	($18,965,461.51)
Total	(16,890,651.68)			

① Gains/losses contained in brokerage accounts denominated in Euros or British Pounds were converted to US dollars using exchange rates certified by the Federal Reserve Bank of New York as of the last business day of each month.

Further, and directly contrary to the Blue Isle Brokerage Accounts Gains and Losses (directly above), Defendants made numerous false statements regarding Mediatrix Capital's operating history; regarding Mediatrix Capital's investment performances, stating that "we have achieved **54 straight months of client gains**," (Felder Decl. ¶ 102(a)); regarding Mediatrix Capital's performance fees; regarding Mediatrix Capital's "assets under management"; and regarding audits of Mediatrix Capital. (Felder Decl. ¶¶ 100-11.) The Felder Declaration further attests that Defendants misappropriated "more than $41 million of investor funds from the Blue Isle Bank Accounts." (Felder Decl. ¶ 113.) Indeed, notwithstanding $19 million in investment trading losses, Individual Defendants misappropriated funds "from investors to purchase luxury items," including "vehicles, boats, jewelry, firearms, artwork, furniture, as well as investments such as securities and whole life insurance." (Felder Decl. ¶ 122.)

The Receiver additionally analyzed a sample seven-month time period from July 2018 through January14, 2019, in part because July 2018's beginning balance was low enough to allow the source of funds used for investor payments to be precisely determined and generally traced. The Receiver accordingly found evidence that Ponzi-like payments to existing investors necessarily had to have been made from new investor funds during that time frame. After reviewing the transactional patterns revealed in Exhibit 21 to the Felder Declaration (*see* ECF No. 1-22), compared against the trading losses revealed in Exhibit 23 to the Felder Declaration (imaged above, i.e., the "Blue Isle Brokerage Accounts Gains and Losses"), ***and*** combined with the Receiver's investigation uncovering $3.6 million in trading losses during the roughly seven-month period from July 2018 through January2019, the Receiver concluded that Entity Defendants did not have sufficient profits to pay the returns promised to investors. Thus, payments to investors

necessarily came from existing investor funds—detail of this period analyzed shows that new investor deposits were used to make payments to existing investors. Below is a summary from July 1, 2018 to January 14, 2019:

Beginning Balance, July 1, 2018	**$ 75,019**
Investor Deposits	32,929,338
Funds Returned from Brokerage Firms	1,976,641
Other Deposits	25,002
Total Deposits	**$ 34,930,981**
Funds Sent to Brokerage Firms	(17,399,065)
Island Technologies LLC Payments	(8,886,641)
Investor Payments	(4,836,346)
Real Estate	(1,937,089)
Purported business expenses	(754,807)
Michael Young Payments	(298,525)
Boat expenses	(82,947)
Bank Fees	(10,957)
Commissions	(63,347)
Total Disbursements	**$ (34,269,724)**
Ending Balance, January 14, 2019	**$ 736,276**

At bottom, sufficient evidence exists to provide the Receiver with good cause to believe that Defendants fraudulently operated the Funds, failed to create separate accounts for each investor, and prepared and provided investors wholly falsified account statements. The Receiver's investigation shows that while the pooled Blue Isle Brokerage Accounts suffered heavy losses, and while certain investors sought to cash out their investments, and meanwhile determined to maintain the appearance of profitable trading to encourage future investments, the Entity Defendants paid the Net Winners with other investors' monies—while the accounts were deeply in the red—which transfers constitute textbook fraudulent transfers. *See Donell*, 533 F.3d at 770 (finding that even where "innocent investors have received payments in excess of the amounts of

principal that they originally invested, those payments are avoidable as fraudulent transfers"). The Youngs can dispute these facts at the appropriate time, which is not now on a motion for leave.

Any funds recovered from the avoidance defendants will be held in segregated accounts from the general receivership assets. In the event that there is ultimately no finding of liability against the Defendants in this case, those recovered funds will be returned to the avoidance defendants. The important point is to commence the avoidance claims before they become time-barred and lost.

The Court should therefore grant the Receiver's Motion to (i) authorize the commencement of avoidance claims and asset freeze violations, and (ii)_approve the Receiver's proposed settlement procedures.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court grant the relief as requested in detail in the Motion (ECF No. 332) and all other appropriate relief.

Respectfully submitted,

Dated: June 6, 2022

GIBBONS P.C.

By: */s/ David N. Crapo*

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2022, I caused the foregoing to be electronically filed by means of the CM/ECF system.

Further, I certify that a copy of the foregoing was served on the same date, upon the following counsel of record via the Court's CM/ECF system and via email:

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Further, I certify that a copy of the foregoing was served on the same date upon the following non-CM/ECF participant by regular U.S. Mail: Aaron Stewart, 23800 North 73rd Place, Scottsdale, AZ 85255.

/s/ David N. Crapo
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