

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:18-cv-23992-JEM

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

TIMOTHY JOSEPH ATKINSON, JAY
PASSERINO, ALL IN PUBLISHING, LLC,
& GASHER, INC.,

Defendants.

RECEIVER'S FOURTH STATUS REPORT

Melanie E. Damian, the court-appointed temporary Receiver (the "Receiver") in the above-captioned enforcement action, submits her fourth status report setting forth her activities and efforts to fulfill her duties under the Orders pursuant to which she was appointed for the period from August 1, 2019 through May 31, 2020 (the "Reporting Period").

I. INTRODUCTION

Since her appointment, the Receiver has worked diligently with the Commodity Futures Trading Commission (the "CFTC") and Defendants Timothy Joseph Atkinson ("Atkinson"), All In Publishing LLC ("AIP"), Jay Passerino ("Passerino") and Gasher, Inc. ("Gasher") to identify and marshal all known assets and records of the Defendants.

During the initial reporting period, the Receiver located at least 76 accounts in which she froze funds totaling \$2,979,630.90, of which \$2,615,399.09 was transferred to the fiduciary accounts for the Receivership Estate. The funds frozen but not yet transferred to the Estate include

Defendant Jay Passerino's investments and certain funds in a foreign account of a company owned by Defendant Timothy Joseph Atkinson ("Atkinson") that the Receiver and Atkinson have together sought to have transferred to the Estate but which the foreign institution has refused to transfer despite the consent of Atkinson and the entry of the Permanent Injunction (defined below). During and after the initial and second reporting periods, Defendants turned over to the Receiver all of their personal items with significant value, which, pursuant to a subsequent order approving the sale of personal property of the Estate, the Receiver has been selling through public auctions and private sales at fair market value. Defendants Passerino and Atkinson also turned over their respective real property, which the Receiver has been marketing for sale at fair market value through licensed and experienced realtors and selling pursuant to Orders approving the sales proposed by the Receiver.

During the Reporting Period, the Receiver sold the last of Atkinson's real properties with Court approval and continued to market for sale Passerino's sole real property, leasing it during the summer and fall when the South Florida real estate market is less strong. The Receiver entered into a lease agreement commencing June 1, 2020 but the tenant agreed to permit the Receiver's realtor to show the unit during the lease and will vacate upon execution of contract to sell the unit. The Receiver received a significant offer to purchase the property and is negotiating with the potential purchaser. Also during the Reporting Period, the Receiver prepared and filed her motion to approve the proposed claims process and distribution plan, of which the Magistrate Judge recently recommended approval in a Report and Recommendation. Finally, the Receiver pursued fraudulent transfer and unjust enrichment claims against third parties, insiders and/or affiliates who received significant transfers from AIP without providing reasonably equivalent value, settling with one of the transferees (with the Court's approval), engaging in settlement negotiations with another transferee, and litigating the Receiver's claims against a third transferee.

II. PROCEDURAL BACKGROUND AND THE APPOINTMENT AND DUTIES OF RECEIVER

On September 27, 2018, the CFTC filed a *Complaint for Injunctive Relief and Demand for Jury Trial* (the “Complaint”) against Atkinson and his business AIP, and Passerino and his business Gasher, (collectively, “Defendants”), commencing the above-captioned enforcement action (the “CFTC Action”). The CFTC also filed an Emergency Motion for Statutory Restraining Order [ECF No. 6], an Emergency Motion for Preliminary Injunction [ECF No. 7], and an Emergency Motion for Appointment of Temporary Receiver [ECF No. 9] seeking to enjoin Defendants from continuing their operations and further violations of the Act, an inspection of Defendants’ records, the freeze of their assets, the appointment of a receiver, and other equitable relief.

A. Entry of Statutory Restraining Order and Appointment of Temporary Receiver

On October 5, 2018, the Court entered an *Order Granting Plaintiff’s Motion for Statutory Restraining Order, Appointment of Receiver, an Accounting and Other Equitable Relief* (the “Statutory Restraining Order”). ECF No. 48. Pursuant to the Statutory Restraining Order, the Defendants’ assets were frozen, all records of Defendants’ activities and assets were ordered to be preserved, and Melanie E. Damian was appointed Temporary Receiver of the entity Defendants and the assets of the individual Defendants in the CFTC Action. The Statutory Restraining Order required the Receiver to file with the Court periodic status reports that describe the performance of her duties, including her efforts to marshal and secure assets and administer the Receivership Estate. *See id.*

B. Entry of Preliminary Injunctions Against Defendants

On October 11, 2018, Defendants Atkinson and AIP consented to the Court’s entry of a Preliminary Injunction against them. On November 16, 2018, the Court entered the agreed upon

Consent Order for Preliminary Injunction and Other Ancillary Relief Against Defendants Timothy Joseph Atkinson and All in Publishing, LLC (the “Consent Injunction”), extending the injunctive relief, asset freeze and directives ordered in the Statutory Restraining Order and continuing the Receiver’s appointment. *See* ECF No. 127. Also on November 16, 2018, the Court entered the *Order for Preliminary Injunction and Other Ancillary Relief Against Defendants Jay Passerino and Gasher, Inc.* [ECF No. 125] (the “Preliminary Injunction” and together with the Consent Injunction, the “Preliminary Injunctions”). The Preliminary Injunction extended the injunctive relief, asset freeze and directives as to Defendants Passerino and Gasher ordered in the Statutory Restraining Order and continued the Receiver’s appointment until final disposition of the CFTC’s claims against those Defendants. *See id.* at pp. 17-30.

C. Entry of Permanent Injunctions Against Defendants

On May 22, 2019, the Court granted the CFTC’s *Motion to Approve Consent Judgment Against Defendants Timothy Atkinson and All In Publishing LLC* [ECF Nos. 204 and 205] and entered the *Consent Order For Permanent Injunction, and Other Statutory and Equitable Relief Against Atkinson and AIP* (the “Permanent injunction”). *See* ECF No. 206. The Permanent Injunction authorizes and directs the Receiver to, among other things, bring fraudulent transfer recovery actions to increase the value of the Receivership Estate of AIP and Atkinson. *See id.* at Section V, ¶ 30.

During this Reporting Period, after months of negotiations between the CFTC and Defendant Passerino, with the Receiver’s input on behalf of Gasher, Inc., the CFTC and Passerino finalized the terms of the proposed permanent injunction against Defendants Passerino and Gasher. Then, on December 23, 2019, the CFTC filed the *Motion to Approve Consent Judgment Against Defendants Jay Passerino and Gasher Inc.* *See* ECF No. 233. The Court granted that Motion and entered the Consent Judgment on February 12, 2020. *See* ECF No. 237.

III. THE RECEIVER'S ACTIVITIES AND EFFORTS TO DATE

A. Obtaining Defendants' Records and Freezing and Recovering Funds and Assets in Defendants' Accounts

Following her appointment, the Receiver and her professionals swiftly took action to review all available documents associated with the Defendants for the purpose of identifying and investigating their assets and business operations. Thereafter, the Receiver identified 67 accounts held by the Defendants at various institutions, received confirmation that \$2,979,630.90 in cash and investments were frozen, and deposited \$2,615,399.09 of those funds into the Receiver's fiduciary accounts. *See* Exhibit A. The frozen funds not transferred to the Estate remain in an investment account of Defendant Passerino and in the account in St. Lucia of an entity owned by Defendant Atkinson.¹ During this Reporting Period, when the Court entered the Permanent Injunction against Defendant Passerino, the Receiver investigated the liquidation of his investments (including equities and cryptocurrencies²) but, given the significant decline in the value of such assets as a result of the global health and economic crisis, the Receiver decided to wait for the financial markets to recover before liquidating those assets.

B. Marketing and Selling Real Property of the Defendants

During this Reporting Period, the Receiver continued to market Defendant Atkinson's condominium unit, located at 911 Meridian Avenue in Miami Beach, for sale through an experienced real estate broker while leasing the unit to offset its carrying costs until it could be sold. The Receiver accepted a cash offer to purchase the unit for \$134,000, and on February 14,

¹ Despite repeated joint efforts by the Receiver and Defendant Atkinson, the bank at which approximately \$9,300 is frozen in St. Lucia (Boslil Bank), refuses to transfer the funds to the Receiver's fiduciary account.

² The current value of Passerino's cryptocurrencies is approximately \$3,971.85.

2020, the Receiver filed and this Court granted a motion to approve that sale. *See* ECF Nos. 238 and 239. The sale of that condominium unit closed on March 10, 2020, and the net sale proceeds were deposited in the Receiver's fiduciary account.

For most of the Reporting Period, through January 31, 2020, the Receiver continued to lease Passerino's Ft. Lauderdale condominium unit for \$5,800 per month while the Receiver's realtor marketed it for sale. When the tenant vacated the unit, the realtor had it professional cleaned and then showed it to potential customers during the high season for luxury condominium units. Like the financial markets, however, the global pandemic has had a significant detrimental effect on the real estate market, depressing values and the demand for the purchase and rental of luxury condominium units in South Florida. Nevertheless, the Receiver's realtor was able to locate a tenant to lease the unit during the summer and fall while the real estate market recovers and to locate a potential purchaser who made a reasonable offer for the unit. The Receiver entered into a lease agreement with the tenant, commencing July 1, 2020, and made a counteroffer to the potential purchaser at market value subject to the lease or closing upon the expiration thereof.

C. Marketing and Selling Personal Property of the Defendants

During the prior reporting period, the Court authorized the Receiver to sell all of the personal property of the Estate without further order of the Court.³ *See* ECF No. 220. Accordingly, the Receiver immediately began marketing the personal property, including artwork, jewelry, sports memorabilia and firearm and accessory, for sale through online auctions and private dealers and directly to end customers.

During the Reporting Period, the Receiver sold Atkinson's two luxury watches to one end customer for \$18,000, which, according to the Receiver's counsel's investigation, exceeded market

³ An inventory of all personal and real property of the Estate is attached hereto as **Exhibit A**.

value. The Receiver also obtained two offers to purchase Atkinson's diamond engagement ring and wedding band and two offers to purchase Atkinson's David Yurman diamond earrings. Because those offers were below market value, the Receiver continued her search for buyers willing to pay market value for the items. The Receiver has also received one offer to purchase the baseball card but that offer was below market value and, thus, the Receiver continued to market the card for sale. With respect to the artwork, the Receiver sold seven pieces through Ebay auctions and directly to end customers, generating sale proceeds totaling \$6,950.00, and will sell the remaining pieces through Ebay auctions. Finally, the Receiver continued to market Atkinson's firearm and a firearm accessory through a local gun store, which has agreed to sell them both on consignment, with the net sale proceeds to be transferred to the Estate.

With respect to Passerino's personal property, the Receiver is marketing his sports memorabilia through an Ebay auction and will sell the remainder of his property, including electronic equipment and furniture, with his condominium unit which increases the value and appeal of the unit and avoids the costs and logistical difficulties associated with selling such items.

D. Identifying and Communicating with Customers and Creditors of the Defendants and Formulating Noticing and Claims Process

Based on her discussions with counsel for the CFTC and the nature of Defendants' businesses, the Receiver understands that the Defendants may have had tens of thousands if not hundreds of thousands of customers. The Receiver has compiled lists of Defendants' potential customers that the Receiver located among the Defendants' records into one spreadsheet comprising what the Receiver believes is a non-exhaustive list of Defendants' potential customers.

During the Reporting Period, the Receiver formulated a noticing and claims process and distribution plan, and with the consent of the Defendants and the CFTC, on April 28, 2020, the Receiver filed a motion to approve that process and plan with this Court. *See* ECF No. 242. The

Receiver proposes to run one claims process and implement one distribution plan for all of the Defendants' customers and creditors given that Defendants operated a common enterprise and their customers will most likely not be able to identify which Defendant lured them to the binary options trading campaign(s) through which they suffered losses.

In a separate CFTC enforcement action involving a binary options and affiliate marketing scheme in which the Receiver's counsel serves as the Receiver, the Receiver's counsel proposed and the Court approved a noticing and claims process taking into account the large number of unknown customers and potential claimants and employing a noticing and claims agent (Stretto) to remove duplicate customer information accumulated by the Receiver and to manage the communications between the Receiver and potential claimants at a discounted, bulk rate. Stretto has significant experience and proprietary technology to implement and manage a process that will facilitate the communication with a significant number of claimants and storing and processing a high volume of claims and supporting documents. And, working with the Receiver's counsel to formulate and begin the implementation of the claims process in the other CFTC enforcement action, Stretto gained specific experience that will streamline and reduce the cost of the formulation and implementation of the noticing and claims process in this receivership. Therefore, the Receiver proposed to employ Stretto to serve as the noticing and claims process for purposes of the noticing and claims process and distribution plan that the Receiver proposed to this Court. *See* ECF No. 242. The Receiver's Motion to approve that process and plan remain pending before the Court, pending adoption of the Magistrate Judge's Report and Recommendation.

The Receiver maintains a website (www.allinpublishingreceivership.com) and set up a dedicated email address and telephone number for Defendants' customers and creditors to use to communicate with the Receiver and her counsel and stay apprised of the status of the Receivership and the CFTC's enforcement action. On the website, the Receiver has been posting Court filings,

notices, orders and important dates and deadlines, and answering frequently asked questions.

In the event the Court approves the Receiver's proposed noticing and claims process, the Receiver will send a notice to all potential customers and creditors of the Defendants, inviting them to visit a claims portal to determine their eligibility to participate in the claims process and, if they are eligible, to submit a claim for their losses resulting from binary options campaigns marketed by Defendants with supporting documentation. The noticing and claims agent will process the claims and field questions and concerns of eligible claimants, in accordance with instructions and parameters set by the Receiver, and will only escalate claims and inquiries to the Receiver and her counsel as necessary and appropriate, to minimize the cost to the Estate.

E. The Estate's Claims Against Third Parties, Affiliates and Insiders

Throughout the Reporting Period, the Receiver utilized analyses and account reconstructions prepared by her Forensic Accountants to identify and pursue claims against recipients of significant transfers from Defendants. In particular, the Receiver followed up on formal demand letters to various transferees, engaged in settlement negotiations with others, entered into a settlement with a relative of one Defendant, and prosecuted fraudulent transfer and unjust enrichment claims against third parties and affiliates of the Defendants.

Just prior to the Reporting Period, in July 2019, the Receiver settled its claims against Defendant Atkinson's father, Ronald A. Atkinson, totaling \$69,700, for a lump sum payment of \$55,000. And, on July 23, 2019, the Receiver filed a motion to approve that settlement. *See* ECF No. 223. Thereafter, in anticipation of the Court's approval of the settlement, Ronald A. Atkinson made the lump sum settlement payment to the Estate. During the Reporting Period, on February 12, 2020, the Court granted the Receiver's Motion. *See* ECF No. 237.

The Receiver also asserted fraudulent transfer and unjust enrichment claims against Payoneer, Inc., a vendor for AIP which appeared to receive significant sums from AIP, according

to AIP's bank statements. Based on information and documents that Payoneer subsequently produced to the Receiver, it became clear to the Receiver that Payoneer's role in the transactions underlying the Receiver's claims was minimal and the fees it earned from those transactions were *de minimus*, with the nearly all of the funds being transferred to a third-party affiliate network through which AIP conducted much of its affiliate marketing. Accordingly, during this Reporting Period, the Receiver dismissed its complaint against Payoneer.

Further, during this Reporting Period, the Receiver's counsel also engaged in settlement negotiations with third parties who received significant transfers from AIP, namely, Melinda Berry, Yahia Mefta and Yahia Mefta Sole Prop., in an attempt to avoid filing fraudulent transfer actions. Because the Receiver was unable to reach an agreement with those transferees, however, the Receiver prepared and filed fraudulent transfer complaints against them. The Receiver has engaged in extensive settlement negotiations with Ms. Berry and has obtained financial records and disclosures to determine the collectability of any judgment the Receiver may obtain against her. And, the Receiver is actively litigating her fraudulent transfer claim against Yahia Mefta and Yahia Mefta Sole Prop.

F. Determination of Restitution Obligations of Individual Defendants

During the Reporting Period, the Receiver and her professionals, utilizing the forensic account reconstructions prepared by the Receiver's Forensic Accountant, worked with counsel for the CFTC to determine the appropriate restitution obligations to be included in the Permanent Injunctions the CFTC would submit to the Court for approval. The Defendants consented to those amounts and the entry of the Permanent Injunctions, and the Court entered the Permanent Injunctions against all Defendants. *See* ECF No. 236 (Defendants Atkinson and AIP) and ECF No. 237 (Defendants Passerino and Gasher).

IV. CASH ON HAND AND ADMINISTRATIVE EXPENSES OF ESTATE

The Receiver presently holds a total of \$2,582,143.79 in cash on hand, in two fiduciary accounts at City National Bank in Miami, Florida, earning interest at 1.26% (APR) and segregated based on the owner(s) of the accounts from which the funds were transferred.

Since the inception of the Receivership, the Receiver has made disbursements from the Receiver's fiduciary accounts for necessary expenses to preserve and administer the Estate, pursuant to the authority granted to the Receiver in the Court's Orders. Such expenses included without limitation maintenance fees and assessments for Defendant Atkinson's Miami Beach condominium units, mortgage payments, maintenance fees for Defendant Passerino's Ft. Lauderdale condominium unit, and fees for bank account services and check printing.

Pursuant to the Court's Orders, the Receiver has filed three applications seeking approval of the fees and expenses she and her professionals incurred during the first, second and third reporting periods and seeking payment of such fees and expenses from the funds the Receiver has marshaled and deposited into her fiduciary accounts pursuant to the Court's Orders. During this Reporting Period, the Court approved the Receiver's third fee application and the Receiver disbursed the Court-approved amounts. *See* ECF Nos. 231 (Application) and 232 (Order). A detailed statement of the Estate's Receipts and Disbursements during this Reporting Period is attached hereto as **Exhibit B**. In short order, the Receiver will file an application seeking approval and payment of the fees and expenses that she and her professionals incurred during this Reporting Period.

V. CONCLUSION

The Receiver and her professionals appreciate the opportunity to assist the Court in this matter. Significant progress has been made, but the Receiver and her professionals will continue their efforts, as discussed herein, to fulfill the Receiver's duties under the Court's Orders, with the

focus on affording the most cost-effective protection to, and maximizing the ultimate recovery by, the Defendants' customers.

Respectfully submitted this 10th day of June, 2020.

Respectfully submitted,

/s/Kenneth Dante Murena

Kenneth Dante Murena, Esq.

Florida Bar No.: 147486

DAMIAN & VALORI LLP

1000 Brickell Avenue, Suite 1020

Miami, Florida 33131

Telephone: (305) 371-3960

Facsimile: (305) 371-3965

Email: kmurena@dvlip.com

Counsel for Melanie E. Damian,

Court-Appointed Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on June 10, 2020 on all counsel or parties who have appeared in the above-styled action.

/s/Kenneth Dante Murena

Kenneth Dante Murena,

Counsel for Receiver