

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**KINETIC INVESTMENT GROUP, LLC and
MICHAEL SCOTT WILLIAMS,**

CASE NO.: 8:20-cv-394

Defendants, and

**KINETIC FUNDS I, LLC,
KCL SERVICES, LLC d/b/a LENDACY,
SCPIO, LLC, LF 42, LLC, EL MORRO
FINANCIAL GROUP, LLC, and KIH, INC.,
f/k/a KINETIC INTERNATIONAL, LLC,**

Relief Defendants.

**RECEIVER'S UNOPPOSED MOTION TO APPROVE PROCEDURE TO
PURSUE POTENTIAL THIRD-PARTY CLAIMS**

Mark A. Kornfeld, by and through undersigned counsel and solely in his capacity as Court-appointed Receiver (the "Receiver") over the assets of Defendant Kinetic Investment Group, LLC and Relief Defendants Kinetic Funds I, LLC ("Kinetic Funds"), KCL Services, LLC d/b/a Lendacy ("Lendacy"), Scipio, LLC ("Scipio"), LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the "Receivership Entities"), hereby files this motion seeking the Court's approval of a framework by which he may pursue any potential

claims against third parties that received loans or other improper transfers and/or benefits that equity requires should be returned to the Receivership Estate. The Receiver believes this framework will offer an efficient method to conserve resources and minimize any necessary litigation. In support, the Receiver states as follows:

I. RELEVANT BACKGROUND

On February 20, 2020, Plaintiff Securities and Exchange Commission (the “Commission”) filed a complaint (the “Complaint”) (Doc. 1) in the United States District Court for the Middle District of Florida (the “Court”) alleging violations of federal securities laws against Defendants Kinetic Investment Group, LLC (“Kinetic Investment Group”) and Michael S. Williams (“Williams”) and Relief Defendants Kinetic Funds I, LLC (“Kinetic Funds”), KCL Services, LLC d/b/a Lendacy (“Lendacy”), Scipio, LLC (“Scipio”), LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the “Receivership Entities”).

At the Commission’s request, the Court entered an Order on March 6, 2020 (Doc. 34), appointing Mark A. Kornfeld as Receiver (the “Order Appointing Receiver”) over the Receivership Entities and directing him to, among other things, identify, secure and marshal the Receivership Entities’ assets for the benefit of defrauded victims.

Paragraph 36 of the Order Appointing Receiver provides that:

Subject to the requirement, in Section VIII above, that leave of this Court is required to resume or commence certain litigation, the Receiver is authorized, empowered and directed to investigate, prosecute, defend,

intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in his discretion, and in consultation with Commission counsel, be advisable or proper to recover and/or conserve Receivership Property.

Doc. 34 ¶ 36. The Order Appointing Receiver also authorizes and directs the Receiver to:

“institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate....[including actions for] disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order.”

Id. ¶ 37.

The Receiver has made significant progress in securing and marshaling assets for the benefit of victims, which includes:

- Securing approximately **\$7.5 million** in bank accounts belonging to Receivership Entities and moving the funds to the Receiver’s fiduciary accounts;
- Securing and liquidating approximately \$13.2 million in assets held in Kinetic Funds’ brokerage account which, after satisfying a margin balance of approximately -\$7.7 million, resulted in a net transfer of approximately **\$5.5 million** to the Receiver’s fiduciary accounts;
- Secured and liquidated gold coins for approximately **\$220,000**;
- Negotiated a favorable settlement with two Kinetic Funds investors that ultimately resulted in the payment of **\$3.5 million** to the Receiver’s fiduciary accounts and the assumption of over \$4 million in margin obligations that could have otherwise been Kinetic Funds’ responsibility; and
- Marketing and listing two Puerto Rico real estate parcels, including the Receiver’s recent agreement to sell (pending Court approval) one of those properties for **\$2.1 million**.

Through these ongoing efforts and after deducting estate administration expenses, the Receiver's fiduciary accounts currently have a balance of approximately \$16 million. The Receiver continues to focus on and prioritize the recovery and liquidation of any remaining assets to benefit investors.

A. The Receiver's Investigation Of The Receivership Defendants

At the hearing on March 6, 2020, the Court and Defendant Williams' then-counsel engaged in a dialogue in which they calculated the approximate shortfall between the Receivership Entities' "hard money" assets (i.e., cash and securities) and the outstanding investor obligations to be approximately **\$17 million**:

THE COURT: You tell me if I'm wrong. Is there any -- I saw -- and I looked. I saw no documentation that collateralizes the Lendacy loans with the fund deposits. I saw to the contrary; the Lendacy loans says this is unsecured. Am I wrong?

MR. MALINA: Correct.

THE COURT: So you got paper. You got unsecured loans. So putting aside -- by your lights then -- we won't value Lendacy right now. By your lights, hard money you have roughly 20 [million]. And customers' claims on that money, I'm going to give you a benefit and say 37 [million]; is that correct?

MR. MALINA: Yes.

THE COURT: **So you are \$17 million in the hole at the end of last year, is that correct**, hard money, net of debt? I understand that we can continue this and everything is set, the dividends are paying and we are going to get the margin and all of that. **Hard claims versus claims on that money, you are \$17 million in the hole at the end of 2019.**

MR. MALINA: **Yes.**

(emphasis added).

The Receiver retained various professionals to assist him in executing his duties in accordance with the Order Appointing Receiver, including understanding the

shortfall referenced by the Court as well as any outstanding Lendacy loans. The Receiver's forensic accountants have conducted a preliminary analysis¹ of various banking and brokerage funds maintained by the Receivership Entities, which has resulted in the following observations.

- The primary bank account utilized by Kinetic Funds (with an account number ending in x4255) (the "Bank Account") received more than \$40 million in deposits during the time period from January 1, 2013 to March 6, 2020 (the "Relevant Period"), with the vast majority of those deposits coming from investors in Kinetic Funds;
- During the Relevant Period, Kinetic Funds transferred over \$12 million in investor funds to Relief Defendant Lendacy to be used to make at least 26 unsecured loans totaling \$12.3 million to investors, non-investors, employees, and insiders. This included over \$4 million transferred to fund Defendant Williams' purchase of real estate in Puerto Rico, which was characterized as a Lendacy loan. Kinetic Funds ultimately received repayment of approximately \$2 million of non-insider loans during that time period, with approximately \$10.27 million remaining in outstanding loans as of March 6, 2020;
- During the Relevant Period, approximately \$11 million in investor deposits were transferred from the Bank Account to Interactive Brokers, the brokerage institution where Kinetic Funds maintained brokerage accounts. Of that amount, the majority was used to pay down an existing margin obligation while roughly \$5 million was transferred to the Kinetic Funds KFYield brokerage sub-account which conducted trading on behalf of the KFYield sub-fund; and
- Kinetic Funds transferred over \$6 million during the Relevant Period to investors consisting of dividends and investor redemptions.

¹ As of February 8, 2021, Yip Associates has analyzed over 5,500 pages of bank statements and supporting documents (i.e. deposit slips, deposited items, cancelled checks, wire/transfer advices, etc.) and has reconstructed the activity for eight bank accounts over the seven-year period of January 2013 through March 2020. A comprehensive database has been prepared with over 7,700 transactions.

The Receiver continues to review (i) whether investors received transfers of purported profits that were either inconsistent with the fund's actual performance or were made when Kinetic Funds was insolvent ("recoverable transfers"); (ii) the status of more than \$10 million in outstanding Lendacy loans; and (iii) certain transfers from the Receivership Entities to individuals or entities for purposes that do not appear related to Kinetic Funds' investment strategy. This includes transfers (including some categorized as commissions or purported Lendacy loans) to non-investors, insiders, and Kinetic Funds employees, as well as transfers to or for Defendant Williams' benefit. The Receiver seeks approval of a framework to, as necessary and cost-effective, seek to recover or recoup assets for the benefit of the Receivership Estate.

B. The Proposed Pre-Suit Resolution Procedure

Subject to his discretion and continuing analysis, the Receiver proposes sending a tailored demand letter to any (i) investor who received potentially recoverable transfers exceeding \$25,000 from their investment; (ii) recipient of a Lendacy loan with a current outstanding balance; and (iii) individual or entity that received any other impermissible or improper transfer of funds and/or benefit traceable to investor deposits. For any individual that received any transfer under the referenced subsections (i) and (iii), the Receiver will offer to settle his claims against the recipient for the repayment of 90% of the identified amount(s).² For any

² The Receiver reserves the right to exclude certain individuals or entities from this offer.

individual that received a Lendacy loan, the Receiver will offer the recipient the ability to resume repayment of the currently outstanding balance of the loan pursuant to the prevailing documentation and the Receiver's calculations. In each of those instances, the Receiver's offer will include an agreement not to seek prejudgment interest and/or attorney's fees, if applicable or available by law. The recipient will have a limited time to respond to the Receiver's offer, and the Receiver will not negotiate individual settlements.³ The Receiver's counsel has used this procedure successfully in other receiverships to avoid unnecessary litigation.

If any recipient refuses to settle pre-suit, the Receiver will analyze the cost-efficiency and merits of, and appropriate mechanism for, instituting formal litigation.⁴ If the Receiver determines that litigation is necessary and cost-effective, he will seek 100% of the amount of the transfer, loan balance, or benefit to the recipient as well as any other available relief including attorney's fees and any fees and prejudgment and/or postjudgment interest from the date(s) of the pertinent transfer(s). To the extent the Receiver reaches any settlement or compromise with any of these recipients within these parameters, the Receiver seeks approval to enter into a settlement agreement which he will then present for the Court's approval.

³ The Receiver will, at his discretion, evaluate claims of financial hardship contingent upon the receipt of sufficient information requested by the Receiver.

⁴ For any investors that received recoverable transfers on or before January 1, 2016, the Receiver may use his discretion to file a "placeholder" complaint on or before March 6, 2021, in order to ensure any potential claims are preserved under the Florida Uniform Fraudulent Transfer Act, Fla. Stats. § 726.101 *et seq.*

II. ARGUMENT

A. The Requested Relief Is Consistent With The Court's Wide-Discretion And Equitable Powers And Will Also Conserve Resources

Importantly, this Motion does not seek Court approval of any determination of ultimate fact or law; rather, it only seeks approval of the proposed settlement and pre-suit resolution procedure. Federal courts have broad powers and wide discretion to determine relief in an equity receivership, including the authority to determine the appropriate actions to be taken in the administration of the Receivership. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). A court imposing a receivership assumes custody and control of all assets and property of the receivership, and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See SEC v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *SEC v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980).

The court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds within the receivership estate. *See, e.g., Official Comm. Of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006). Any action taken by a district court in the exercise of its discretion is subject to great deference by appellate courts. *See U.S. v. Branch Coal*, 390 F.2d 7, 10 (3d Cir. 1969). Such discretion is especially important considering that

one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to creditors. *See Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted). This includes establishing procedures to recover improper transfers for the benefit of the Receivership Estate. *See, e.g., CFTC v. Oasis International Group, Limited et al.*, Case No. 19-cv-00886, Doc. 247 (M.D. Fla. 2020) (approving similar procedures); *SEC v. Billion Coupons, Inc.*, Case No. 09-cv-00068, Doc. 52 (D. Haw. July 10, 2009) (granting receiver authority to demand return of false profits, commissions and other transfers).

B. The Court Should Approve The Proposed Settlement Procedure

The Receiver's paramount priority is to identify assets that can be efficiently recovered for the benefit of the Receivership Estate, and he believes that the proposed framework outlined in this Motion provides an efficient and cost-effective method to achieve that goal. It is a well-recognized rule "that in the administration of receiverships, the maxim 'equality is equity' prevails." *Andrew v. Union Sav. Bank & Trust Co.*, 28 N.W.2d 37 (1947). The Receiver submits that equity would not be served if those investors fortunate enough to recoup purported profits on top of their investment were permitted to retain any recoverable transfers at the expense of other less fortunate investors. Nor would equity be advanced by abandoning any recovery of current Lendacy loan obligations or otherwise permitting the selective enrichment

of non-investors who received improper transfers or other impermissible benefits that were funded using investor monies.

III. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court approve the proposed pre-suit settlement and resolution procedure to allow the Receiver to move forward with a cost-effective process of recovering additional funds for the benefit of the Receivership Estate.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for the Receiver conferred with counsel for the Commission and counsel for Defendant Michael Williams prior to filing this Motion. Counsel for the Commission and Williams have indicated that they do not oppose the relief requested in this motion.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the following counsel of record:

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