

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 FIFTH STATUS REPORT

Melanie E. Damian, the court-appointed temporary Receiver (the "Receiver") in the above-captioned enforcement action, submits her fifth 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 June 1, 2020 through November 30, 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 past four reporting periods, 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 only funds frozen but not yet transferred to the Estate

include approximately \$9,300 in a foreign account of a company owned by 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), and Passerino's liquidated investments which Merrill Lynch is in the process of transferring to the Estate. During this Reporting Period, the Receiver sold some of Defendants' personal items, investments and cryptocurrency, with significant value, pursuant to the Court's order approving the sale of personal property of the Estate. In accordance with that Order, the Receiver has been selling the personal property through public auctions and private sales at fair market value.

Further, during the Reporting Period, the Receiver continued to market for sale Passerino's sole real property, leasing it during the summer and fall when the South Florida real estate market for luxury condominium units is less strong. The Receiver entered into a six-month agreement to lease the unit commencing June 1, 2020, but the tenant agreed to permit the Receiver's realtor to show the unit during the lease term and, if a sales contract is executed during that term, to vacate the unit within thirty days after such execution. The Receiver received a significant cash offer to purchase the property and is negotiating with the potential purchaser. Also, during the Reporting Period, the Receiver implemented the Court-approved noticing and claims processing, sending out notices to all potential claimants, receiving claims from various claimants, and beginning the process of processing those claims. 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, obtaining a default final judgment against one of those transferees, seeking to negotiate a settlement with another transferee, and litigating the Receiver's claim against two affiliated transferees.

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.

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 76 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.* Among the frozen funds and investments that were not initially transferred to the Estate were approximately \$9,300 in an account in St. Lucia in the name of an entity owned by Defendant Atkinson,¹ investments in Defendant Passerino's brokerage accounts, and cryptocurrencies in Defendant Passerino's cryptocurrency wallets and exchange accounts. As discussed in further detail below, during this Reporting Period, the Receiver liquidated Passerino's investments and cryptocurrencies, resulting in a recovery of \$504,448.19 for the Estate.²

B. Marketing and Selling Real Property of the Defendants

During the Reporting Period, the Receiver commenced a new lease on Passerino's Ft. Lauderdale condominium unit for \$3,800 per month while the Receiver's realtor marketed it for sale but had to reduce the monthly rent to \$3,300 for November and December 2020 because the building closed the pool and deck for renovations. The global pandemic has had a significant detrimental effect on the real estate market, depressing values and the demand for the purchase

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

² While the \$496,251 in proceeds from the liquidation of Passerino's investment accounts have not yet been transferred to the Estate, the \$8,230.19 in proceeds from the sale of Passerino's cryptocurrencies were transferred to the Estate during the Reporting Period.

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 cash offer for the unit. The Receiver is currently negotiating with that potential purchaser 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 diamond engagement ring for \$50,000 and David Yurman diamond earrings for \$2,000. The Receiver also received one offer to purchase the baseball card but that offer was below market value and, thus, the Receiver continues to market the card for sale. 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, during the Reporting Period, when the equities markets reached an all-time high, the Receiver's counsel instructed Passerino's financial advisor to liquidate Passerino's retirement and non-retirement investment accounts at Merrill Lynch, generating proceeds of \$496,251, which funds are in the process of being transferred to the Receiver's fiduciary account for Passerino and Gasher. And, when the prices of cryptocurrencies

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

reached their highest point since the Receiver's appointment, the Receiver's counsel instructed Passerino to liquidate all of his cryptocurrencies, generating proceeds of \$8,230.19, and to transfer those proceeds to the Receiver's fiduciary account, which Passerino did during the Reporting Period. In total, the liquidation of Passerino's investments and cryptocurrencies resulted in a \$504,448.19 recovery for the Estate.

Finally, the Receiver continued to market Passerino's sports memorabilia through Ebay auctions. And, the Receiver will sell the remainder of Passerino's 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 marketing and selling those items separately.

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

During the Reporting Period, in preparation for the noticing and claims process, the Receiver refined and verified email 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.

Upon receiving Court approval of the claims process, on June 23, 2020 [ECF No. 249], the Receiver, through her noticing and claims agent Stretto, sent notice of the claims process 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 with supporting documentation demonstrating their losses resulting from binary options and cryptocurrency campaigns marketed by Defendants. Stretto then began tabulating and confirming completion of claims and fielding questions and concerns of eligible claimants, in accordance with instructions and parameters set by the Receiver. Stretto has only escalated claimants' inquiries to

the Receiver and her counsel as necessary and appropriate, to minimize the cost to the Estate.

The deadline for eligible claimants to submit claims was October 22, 2020. Shortly thereafter, the Receiver's counsel began an initial review of the 3,580 claims submitted through the online claims portal, most of which lack supporting documentation and likely will be disallowed. With Stretto's assistance, the Receiver will complete a review of all 3,580 claims. But, after a cursory review of those claims, the Receiver determined that only approximately 102 claims with a total dollar amount of \$5.7 million will remain after disqualifying claims (a) without any supporting documentation, (b) without affirmations of all declarations, and (c) that fail to demonstrate a net loss. This total claim amount includes one \$3 million claim that the Receiver has yet to verify. The Receiver's counsel has drafted an initial claims determination letter and will send it out by email to each claimant that submitted an online claim by December 20, 2020. Based on the foregoing, the Receiver expects to make a significant *pro rata* distribution to each claimant with an allowed claim.

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.

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

Throughout the Reporting Period, the Receiver prosecuted fraudulent transfer and unjust enrichment claims against third parties and affiliates of the Defendants. In particular, the Receiver actively litigated her claim against Yahia Meftah and Yahia Meftah Sole Prop. (collectively, the "Meftah Defendants"). Specifically, during this Reporting Period, the Receiver filed her response to the Meftah Defendants' motion to dismiss. *See* ECF No. 37 (Motion) and ECF No. 47

(Response). Defendants moved to dismiss on the basis of lack of personal jurisdiction and alleging that the Receiver's claim for fraudulent transfer was barred by the statute of limitations. In support of her response, the Receiver submitted a declaration of Defendant Atkinson attesting to facts relevant to the issue of personal jurisdiction. *See* ECF No. 47-1. The Receiver also engaged in discovery, including serving her Rule 26 Initial Disclosures, responding to Defendants' first set of written discovery requests, conferring with opposing counsel regarding the Receiver's objections to certain discovery requests, propounding the Receiver's first set of interrogatories and requests for production of documents, and preparing for a hearing on the Receiver's discovery objections. The Receiver also reached an agreement with opposing counsel to continue the trial and all pretrial and discovery deadlines and filed a joint motion for such relief. The Receiver's counsel interviewed Jay Passerino regarding the transfers to Yahia Meftah Sole Prop. and Zak Meftah's role in AIP. Thereafter, while discovery was ongoing, the Court entered an order granting the Meftah Defendant's motion to dismiss for lack of personal jurisdiction and closing the case. *See* ECF No. 54. Because the Court dismissed the Receiver's claim based solely on jurisdictional issues, the Receiver's counsel prepared and filed a motion to reopen the case and for leave to amend the complaint, or in the alternative, to transfer venue and a request for hearing ("Motion to Reopen Case"), attaching a proposed Second Amended Complaint. *See* ECF No. 55. The Meftah Defendants filed a response to the Receiver's Motion to Reopen Case, and the Receiver filed a reply in support of her Motion. *See* ECF Nos. 56 and 60. The Motion to Reopen Case is now fully briefed and ready for adjudication should the Court determine that hearing is not necessary.

The Receiver also continued to pursue the Estate's fraudulent transfer claims against Hasnain Rafiq, an associate of the Defendants who received significant transfers from AIP without providing reasonably equivalent value. Having already obtained a Clerk's Default against Mr.

Rafiq, the Receiver prepared and filed a motion for default final judgment, which the Court granted. *See* ECF No. 21 (Motion) and ECF No. 22 (Default Judgment). The Receiver is considering seeking to domesticate and record that judgment in Pakistan for purposes of collection. Should that prove to be too costly or unlikely to lead to a significant recovery, the Receiver will explore selling the judgment.

Finally, the Receiver's counsel negotiated and drafted a settlement agreement with Melinda Berry, who also received significant transfers from AIP without providing reasonably equivalent value. As part of that settlement, Ms. Berry and her husband Bill Berry, who had made videos that assisted AIP to promote binary options trading and against which the CFTC obtained a Consent Judgment, agreed to provide declarations attesting to their current financial condition and confirming that the CFTC's judgment against Mr. Berry covered most of the transfers that had been made to Ms. Berry which the Receiver sought to recover. After receiving the settlement agreement, however, Mr. Berry informed the Receiver's counsel that he and his wife did not want to execute it. So, the Receiver's counsel continued settlement discussions with the Berrys. In the event a settlement agreement is executed, the Receiver will present it to this Court for approval; otherwise, the Receiver will pursue the claim as appropriate.

IV. CASH ON HAND AND ADMINISTRATIVE EXPENSES OF ESTATE

As of the end of the Reporting Period (November 30, 2020), the Receiver held a total of \$2,489,078.79 in cash-on-hand, in two fiduciary accounts at City National Bank in Miami, Florida, earning interest at 1.25% (APR) and segregated based on the owner(s) of the accounts from which the funds were transferred. In addition, \$496,251 in cash remains frozen in three accounts at Merrill Lynch and will be transferred to the Receiver's fiduciary account for Passerino/Gasher during the next reporting period.

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 four applications seeking approval of the fees and expenses she and her professionals incurred during the first through fourth 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 fourth fee application, and the Receiver disbursed the Court-approved amounts. *See* ECF Nos. 246 (Application) and 250 (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 Estate's claimants.

Respectfully submitted this 9th day of December, 2020.

Respectfully submitted,

/s/Kenneth Dante Murena
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Florida Bar No.: 147486

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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 December 9th, 2020 on all counsel or parties who have appeared in the above-styled action.

/s/Kenneth Dante Murena
Kenneth Dante Murena,
Counsel for Receiver