IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. LAKE DOW CAPITAL, LLC a/k/a CLIFFORD, EDWARDS & TAYLOR and TY EDWARDS, Defendants.	)	CIVIL ACTION FILE NO: 1:05-CV-2709-CC

OBJECTION TO RECEIVER'S PROPOSED SECOND AMENDMENT TO PLAN OF DISTRIBUTION, AND MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

Aiken Grading Company, Dean Conn, Conn Associates, LLC, Kesco Dynamics, Inc., Waymon Ragan, Wayne Ragan, and Ragan Enterprises, Inc. (collectively, "General Investors") submit this objection to the proposed second amendment to the plan of distribution submitted by S. Gregory Hays (the "Receiver") and memorandum of law in opposition to Receiver's motion for reconsideration and/or clarification.

INTRODUCTION

Pursuant to this court's October 19, 2005 and November 8, 2005 orders, the Receiver was appointed to serve as a receiver for the defendants.

On August 25, 2006, the Receiver submitted a plan of distribution with respect to the assets that the Receiver has marshaled, categorizing claims and proposing a *pro rata*

distribution among all of the defrauded investors. This *pro rata* plan of distribution (the "83% Plan") was submitted pursuant to abundant authority supporting a *pro rata* distribution, and would have yielded an approximate 83% recovery for all of the defrauded investors. Bolstering the Receiver's 83% Plan calling for a *pro rata* distribution was the fact that all of the defrauded investors were parties to the Aurora Investment Fund, L.P. ("Aurora") limited partnership agreement in which each investor agreed to share alike the investment experience of the partnership to which they were contributing funds. Delaware limited partnership statutes also supported, if not mandated, this *pro rata* treatment.

On September 25, 2006, this court entered an order and notice with respect to the 83% Plan. This order set a November 8, 2006 bar date for the submission of objections by investors wishing to object to the 83% Plan, and scheduled for November 13, 2006 a hearing on objections that were submitted timely.

Only three investors – Harold Mintz, Alvin Pannell and Joseph Wyant (the "Mintz Investors") – submitted objections to the 83% Plan. The Mintz Investors sought a recovery greater than the 83% return proposed in the 83% Plan based on a discredited theory that they should be permitted to trace their assets to certain individual retirement accounts ("IRA" or "IRAs") and an utterly blind disregard of the Receiver's irrefutable evidence that their supposedly "non-commingled" accounts had in fact been treated by the Aurora partnership in a commingled manner – i.e., the expenses of those accounts were paid out of Aurora's Sky account.

On November 13, 2006, the court held its scheduled hearing on the objections submitted by the Mintz Investors.[1] Thereafter, on November 16, 2006, this court entered its order sustaining the objections of the Mintz Investors, and approving the 83% Plan except as to the Mintz Investors only, consistent with the November 8, 2006 bar date that had been established in the court's previous order. The court further directed the Receiver to submit an amended plan of distribution consistent with the court's ruling. In its ruling, the court plainly recognized the commingled treatment among the accounts even as to the Mintz Investors' accounts supposedly "non-commingled" accounts, and the court ordered the Receiver to implement an adjustment to the Mintz Investors' accounts – i.e., an adjustment that would be entirely without basis in the absence of commingled treatment.

On November 16, 2006, pursuant to the court's order earlier that day, the Receiver filed its first amended plan of distribution (the "79% Plan") consistent with the direction given by the court. Under the 79% Plan that the court ordered to be implemented, the Mintz Investors were put into a separate class of IRA investors and treated differently from their fellow IRA investors. The Mintz Investors were permitted to trace their investments, subject to an adjustment for expenses. The net effect of the court's November 16, 2006 order, and the edits to the 83% Plan of distribution that

[1] At the hearing, attorney Joel Arogeti appeared on behalf of Movants and was permitted to speak in favor of the 83% Plan.

the Receiver was ordered to implement in the 79% Plan, was to approve *pro rata* treatment for all investors other than the Mintz Investors, but to allow special tracing treatment for the Mintz Investors with an adjustment. Mathematically, the result was to reduce the distribution to all investors other than the Mintz Investors from approximately 83% to 79%, a reduction of 4%.

Receiver now has filed and submitted a motion for reconsideration and/or clarification, and also a proposed second amendment to its plan of distribution. Under the proposed second amended plan, the tracing that was allowed for the Mintz Investors could be extended to all investors who invested through an IRA. If such tracing is allowed by the court, and if there are not adjustments that fully equalize treatment among all of the investing partners, then the proposed second amendment could implement a plan of distribution that will dilute the recovery that would be realized by General Investors from the 79% previously ordered by the court to approximately 63% – a reduction of hundreds of thousands of dollars.

General Investors object to any treatment that is not *pro rata* treatment.

ARGUMENT AND CITATION OF AUTHORITY

The Receiver's newly proposed second amended plan of distribution, submitted pursuant to its motion for reconsideration and/or clarification, now proposes to return all Segregated IRA

Investors[2] to a single class for purposes of distribution so that there are no distinctions made among these similarly situated IRA investors. The proposed re-classification will remove distinctions between the Mintz Investors and their fellow Segregated IRA investors.

General Investors do not object to re-classification if the result is to remove the tracing preference for all Segregated IRA investors, including the Mintz Investors. General Investors do object, however, if the re-classification results in a tracing preference that is extended to all of the Segregated IRA investors, or to any investors. In other words, General Investors object to the second amended plan, and to any plan of distribution, to the extent that such plan does not ultimately achieve equal treatment among all investors, regardless of the particular type of investment account they utilized to make their contributions.

The only fair and equitable result is a *pro rata* distribution. A tracing preference is inappropriate and inequitable. *U.S. v. Real Property Located at 13328 and 13324 State Hwy. 75 North, Blaine County, Idaho*, 89 F.3d 551, 553-554 (9th Cir. 1996)(tracing should not be applied where innocent parties are all competing for recovery); *U.S. v. Durham*, 86 F.3d 70, 73(5th Cir. 1996)(court not

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[2] Notably, not all IRA accounts were "segregated." Some IRA investors had accounts that were in use and pooled with Aurora's general investment account before the switch of brokerage houses to Man Securities, Inc. The term "Segregated IRA Investors" refers to those investors whose accounts Man Securities did not, for administrative purposes, place into Aurora's general investment account, called the "Sky account."

required to follow tracing principles even if evidence of tracing is uncontroverted). Here, all of the investors, regardless of the type of account they contributed and the administrative treatment by Man Securities, are innocent victims. There is no rational distinction that can be drawn to the contrary.

Furthermore, the fact that IRAs may have been used in lieu of some other type of account yields no logical preference for an IRA investor vis-a-vis any other investor. Money is money; regardless of the form in which it was contributed for investment purposes, it is important to all of the investors that contributed funds and their families. There is no legitimate basis for concluding otherwise. Indeed, even the IRA investors apparently were sufficiently comfortable to be able to take their IRA accounts and invest them into a highly risky hedge fund.

Additionally, the particular type of account utilized by an investor to contribute, and whether that account was or was not placed into the Aurora Sky account by the brokerage house that was trying to administer Aurora's funds, does not in any way alter the investors' agreements with one another. There is nothing in the investors' limited partnership agreement that suggests different treatment for certain investors based on the particular type of account that is used to contribute funds. The limited partnership agreement provides simply that all investors shall receive *pro rata* treatment. See e.g., Sections 3.05 and 7.02 of Aurora's limited partnership agreement ("Agreement"). This was the agreement between the investors, plain and simple. This agreement between

the investors should be respected, not cast aside. Indeed, given the bad circumstances that already have taken place, the court should not be the instrument to exacerbate matters and force General Investors to the further expense of having to file new litigation against their co-investors in order to enforce the partnership agreement they made. Under Delaware law,[3] the partnership agreement controls any distribution that is made to partners. The partnership agreement cannot simply be ignored, regardless of the form of account that was used to make an investment. See, e.g., *Boesky v. XC Partners,L.P.*, Civil Action Nos. 9739, 9744, 9748, 1988, WL 42250, 14 Del.J.Corp.L. 230 (Court of Chancery of Delaware, New Castle County, April 28, 1988) (rejecting a proposed distribution plan that ignores the *pro rata* distribution requirements of the governing partnership agreement). Delaware's limited partnership statutes mandate the distribution set forth in the partnership agreement, providing that profits and losses or distributions of a limited partnership **shall be** allocated among the partners, and among the classes or groups of partners, in the manner provided in the partnership agreement. 6 Del.C. §§ 17-503-504. And, if a partnership agreement does not so provide, profits and losses or distributions **shall be** allocated on the basis of the agreed value (as stated in the records of the limited

[3] Pursuant to Section 8.11 of the Agreement, Delaware law controls its construction and enforcement. Therefore, the relevant Delaware statutes are cited herein. Notably, the result would be the same under Georgia law because both states have enacted the Revised Uniform Limited Partnership Act.

partnership) of the contributions made by each partner to the extent they have been received by the limited partnership and have not been returned. Id.

It also bears noting that, under the Agreement and applicable Delaware law, no investor had or has a right to the return of its accounts. Once invested, the contributed accounts became property of the limited partnership and, in consideration of that transfer, the partners received an interest in the limited partnership. See Agreement at Section 1.06. A partnership interest is personal property under Delaware law, and a partner has no interest in any specific limited partnership property. See 6 Del.C. § 17-701. A partnership interest is defined under Delaware law as "a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." See 6 Del.C. § 17-101. Thus, the only right retained by any investor was and is a right to participate in the distribution of the partnership's assets. These same principles apply to distributions upon a partner's withdrawal from the limited partnership. See 6 Del.C. § 17-604. Indeed, Delaware law specifically provides that unless provided for in the partnership agreement, "a partner, **regardless of the nature of the partner's contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash**." 6 Del.C. § 17-605. Here, Section 6.02 of the Agreement governs withdrawals and

contains no provision that provides any partner with a right to demand a distribution other than cash.

It also does not matter that, for internal or administrative reasons, some accounts were supposedly segregated from others. This is a "distinction without a difference." See, *S.E.C. v. Forex Asset Management, LLC*, 242 F.3d 325, 331. (5th Cir. 2001)(rejecting argument that segregated funds deserve different treatment). Here, all funds were in fact contributed to an investment partnership. The investors, including the Mintz Investors, intended their monies to go to the Aurora partnership, and signed papers giving trading authority to the Aurora partnership. The documents evidence this clear intention. The broker for the Mintz Investors deposed that this was the intention of the Mintz Investors. The fact that there was thereafter an internal administrative arrangement at Man Securities pursuant to which Man Securities administratively recognized separate accounts should not yield to those IRA investors an advantage over their equally innocent co-victims. Applicable law discredits not just the tracing concept that has been propounded, but also any outcome that does not respect the *pro rata* requirements of Delaware law.

Finally, and equally significantly, the Mintz Investors' claims that their accounts were never blended with the partnership's funds blindly ignores evidence adduced by the Receiver, which was not refuted by the Mintz Investors, that the expenses of their accounts were paid by the partnership out of the Aurora Sky account. The Receiver also adduced and can show that

the account balances were all reported to Aurora's operators. There also was or may have been allocation of assets/balances/reserves that took into account the amounts in the IRA account. This court recognized plainly that the supposedly segregated accounts of the Mintz Investors received the benefit of this blended treatment among accounts, and the court attempted to adjust for this blended treatment by the partnership. Any argument offered by the Mintz Investors, or any other of the IRA investors, that there was no blending of treatment belies the evidence.

CONCLUSION

This court should reconsider, and confirm the 83% Plan originally proposed by the Receiver. Alternatively, the court should just order the Receiver to implement a plan that yields *a pro rata* distribution, and let the Receiver manage the task of implementation.

Submitted respectfully, this 18th day of December, 2006.

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CERTIFICATE OF SERVICE

I certify that on December 18, 2006, I electronically filed the foregoing OBJECTION TO RECEIVER'S PROPOSED SECOND AMENDMENT TO PLAN OF DISTRIBUTION AND MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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