

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21964-CIV-ALTONAGA

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP CORP., et al.,

Defendants.

**LIMITED OBJECTION OF CLEARSTREAM BANKING S.A.
TO RECEIVER’S PROPOSED DISTRIBUTION PLAN**

In accordance with this Court’s *Order* entered on March 3, 3022 [ECF No. 215], investor Clearstream Banking S.A. (“Clearstream”), through its undersigned counsel, submits this limited objection to the *Motion for Approval of Distribution Plan and First Interim Distribution* [ECF No. 208] filed by the Receiver, Jonathan E. Perlman, on February 28, 2022 (the “Motion”) and respectfully states as follows.¹

PRELIMINARY STATEMENT

1. Clearstream is one of the nominees that provided the Receiver information concerning its customers’ investments in the Feeder Funds in compliance with the *Order Granting Motion to Disclose* (see Motion at 26–29). After the Receiver reviewed this information, he classified several of Clearstream’s customers as Subordinated Net Losers (the “Subordinated Customers”), upon finding that the information Clearstream provided was “deficient” in some way

¹ Capitalized terms not defined herein have the meanings given in the Motion.

(see Motion at 28–29). Clearstream understands that the Receiver wants clarity before making distributions from the estate. But an investor’s providing insufficient information is not remotely comparable to the kind of wrongful conduct that is punished by equitable subordination in the bankruptcy context. See, e.g., *First All. Mortg. Co. v. Lehman Commercial Paper Inc. (In re First All. Mortg. Co.)*, 471 F.3d 977, 1006–07 (9th Cir. 2006) (affirming bankruptcy court’s holding that aiding and abetting fraud did not rise to level of “gross and egregious conduct ... required before a court will equitably subordinate a [non-insider’s] claim”); cf. Motion at 28 n.9. And although the information that Clearstream provided was not complete, it was sufficient for the Receiver to initially conclude that the Subordinated Customers put more money into the Feeder Funds than they took out. For these reasons, Clearstream believes that the Plan should expressly provide for an investor’s status as Subordinated Net Loser to be curable and upon such cure for that investor to be treated as if it had been an Unsubordinated Net Loser all along.

2. Since the Motion was filed, certain Subordinated Customers (or their customers) have exchanged further information with the Receiver’s team, and certain Subordinated Customers (or their customers) plan to do the same in the near future. In each case, the Subordinated Customers’ goal is to cure any informational deficiencies and thereby escape subordinated status (“Unsubordination”) and receive distributions from the estate alongside the original Unsubordinated Net Losers. These information exchanges are complicated because they can involve several entities and transactions and even languages (Clearstream’s customers are in continental Europe). In fact, the Subordinated Customers have a great deal of information – including about beneficial ownership, which is the Receiver’s focus – that Clearstream never had and could not directly provide to the Receiver.

3. Clearstream does not object to the Rising Tide Plan generally. Clearstream asserts only that the Plan should be modified so that any Subordinated Net Loser: (i) is permitted to achieve Unsubordination by providing further information to the Receiver; (ii) in the event of a good-faith stalemate in discussions with the Receiver, has the right to move the Court for Unsubordination; and (iii) upon Unsubordination, receives the same treatment as has been received by Unsubordinated Net Losers up to that point.

LIMITED OBJECTION

4. Clearstream understands why the Receiver proposes to withhold distributions from investors whose transaction history is incomplete, but this condition should be curable. In the Motion (at 29), the Receiver notes that “the cost of ‘catching-up’ the Subordinated Net Losers to the Unsubordinated New Losers at a minimum recovery of 25% of the investor’s net cash investment is modest in relation to the Initial Distribution.” And yet the Plan provides no explicit process for Subordinated Net Losers to eventually become Unsubordinated Net Losers, in advance of the Initial Distribution or indeed at any time. The Receiver (*id.*) merely “may consider proposing (at a later date and on a case-by-case basis), an appropriate catch-up payment to any investor who belatedly provides the Receiver with the information necessary to administer their respective claim on the same basis as other investors.” This is the right idea, but the Plan should be more specific and transparent, in three respects.

5. First, Clearstream asserts that the Plan should treat Subordinated Net Losers that achieve Unsubordination before the Initial Distribution the same as other Unsubordinated Net Losers. As Clearstream reads the Plan, the Initial Distribution will be based on Scenario 1 in Exhibit C to the Motion, which identifies (among other things) Unsubordinated and Subordinated Net Losers as of the date the Motion was filed. The Plan does not appear to contemplate Exhibit

C ever being modified, even though (a) the Motion contemplates Subordinated Net Losers achieving Unsubordination and (b) Clearstream understands that the Receiver already intends to modify Exhibit C at some point before this Court decides the Motion, in order to make certain corrections to subscription and redemption amounts (the “Corrections”). Accordingly, the Plan should be modified to expressly provide that the Initial Distribution shall be based on a version of Exhibit C that is up-to-date (including any Unsubordinations) as of a record date no earlier than the date on which this Court grants the Motion or otherwise approves some version of the Plan. If the Unsubordinations and Corrections in combination “modest[ly]” (*see* Motion at 28) dilute the recovery rate, that is a price worth paying to meet the requirement that “[now] similarly situated claimants should be treated alike” (*see* Motion at 33 n.12).

6. Second, based on the experience of Clearstream’s customers, Clearstream believes that situations may arise in which the Receiver and a Subordinated Net Loser, despite good-faith discussions, reach a stalemate in the effort to provide sufficient information. The Plan appears to offer no recourse to a Subordinated Net Loser in this situation. Accordingly, the Plan should be modified to permit a Subordinated Net Loser to move the Court for Unsubordination, subject to notice and a hearing.

7. Third, Clearstream asserts that subsequent distributions should prioritize the “catching-up” of any Subordinated Net Losers (*see* Motion at 29) that achieved Unsubordination since the prior distribution. This is consistent with the Rising Tide principle. Accordingly, the Plan should be modified to expressly provide that Exhibit C shall be updated as of the record date of each distribution subsequent to the Initial Distribution and that each such distribution shall: (i) first distribute to those Subordinated Net Losers that achieved Unsubordination since the record date of the prior distribution sufficient funds to put their recovery at the Rising Tide Rate applicable

as of the prior distribution; and (ii) distribute any remaining available funds so as to increase the Rising Tide Rate for all investors entitled to distributions at that point.

RESERVATION OF RIGHTS

Clearstream reserves the right to supplement this limited objection as the circumstances may warrant, including prior to and at the hearing on the Motion.

CONCLUSION

For the reasons set forth above, Clearstream respectfully requests that the Court not approve the Plan without first modifying it in the three ways described above.

Dated: April 29, 2022

MORGAN, LEWIS & BOCKIUS LLP

/s/ Javier A. Roldán Cora _____

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I caused the foregoing *Limited Objection of Clearstream Banking S.A. to Receiver's Proposed Distribution Plan* to be served upon all parties registered to receive electronic notifications in these cases by CM/ECF and upon the Receiver by email to: emcintosh@gjb-law.com.

/s/ Javier A. Roldán Cora