

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP, CORP. and
TCA GLOBAL CREDIT FUND, LTD.,

Defendants, and

TCA GLOBAL CREDIT FUND, LP; TCA GLOBAL
CREDIT FUND, LTD.; TCA GLOBAL CREDIT
MASTER FUND, LP,

Relief Defendants.

MOTION FOR LEAVE TO FILE SUR-REPLY

AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman (the “Kaufman Creditors”) move for leave to file a Sur-Reply regarding the Receiver’s Reply in Support of Receiver’s Motion for Approval of the Creditor Distributor Distribution Plan (Doc. No. 306).

1. On August 22, 2022, the Receiver filed a Motion for Approval Of Creditor Distribution Plan and First Interim Distribution to Creditors. [Doc. No. 294]

2. On September 26, 2022, the Kaufman Creditors filed their Response to Receiver’s Motion for Approval of Creditor Distribution Plan. In that response brief, the Kaufman Creditors raised two objections to the Receiver’s proposed creditor distribution plan. First, the Kaufman Creditors objected to the Receiver’s suggestion that creditor claims be paid on a Rising Tide basis on equal footing with defrauded investors. Second, the Kaufman Creditors objected to delaying the resolution of known trade creditor claims pending notice to potential creditors of a claims bar

date and the Receiver's evaluation of any new claims. While the Kaufman Creditors set forth the basis for their claim to demonstrate that they have standing to proceed here, the Kaufman Creditors made no attempt to prove-up that claim through evidence or argument.

3. On October 3, 2022, the Receiver filed a reply brief. Although this Court's Local Rules provide that a "reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition",¹ the Receiver did not so limit his reply. Instead, the Receiver chose to attack the Kaufman Creditors:

[T]he Kaufman Creditors incorrectly assume that the Receiver does not object to their claim. That is not the case. The Kaufman Creditors' unsecured claim arises from an undomesticated, foreign judgment for attorneys' fees and costs entered by an Australian court in violation of the stay entered by this Court.

[Doc. No. 306 at 4]

4. The validity of the Kaufman Creditors' claim has no bearing on either the Receiver's proposed creditor distribution plan or the Kaufman Creditors' two objections to the plan. Whatever distribution plan that this Court adopts will necessarily require an adjudication of creditor claims.

5. The Receiver's attack on the Kaufman Creditors is simply unnecessary at this time and was done only so that the Receiver could attack the Kaufman Creditors for supposedly having violated this Court's order staying litigation – which the Kaufman Creditors deny. The Receiver's flagrant and irrelevant attempt to prejudice the Court by claiming a violation of the stay is even more offensive here given that, as demonstrated in the attached Sur-Reply, the allegation is false.

¹ Rule 7.1(c)(1) of the Local Rules of the Southern District of Florida (rev. December 1, 2021)

6. Accordingly, the Kaufman Creditors seek leave to file the attached brief Sur-Reply.

Notably, the Sur-Reply is limited to matters improperly raised by the Receiver in his reply brief.

Pursuant to Local Rule 7.1(a)(3), the undersigned counsel for the movants has conferred with Counsel for the Receiver, the Party who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

**AW EXPORTS PTY LTD, WARWICK BROXOM,
and JONATHAN JAMES KAUFMAN**

By: /s/ Charles A. Valente
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**UNITED STATES DISTRICT COURT
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SECURITIES AND EXCHANGE COMMISSION,

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MASTER FUND, LP,

Relief Defendants.

THE KAUFMAN CREDITORS' SUR-REPLY

After the Receiver filed a Motion for Approval Of Creditor Distribution Plan and First Interim Distribution to Creditors [Doc. No. 294], the Kaufman Creditors responded to the motion raising two objections: (1) the Receiver's proposal to treat the creditor claims and investor claims on equal footing and pay those claims on an a Rising Tide was inequitable here; and (2) there was no reason to delay the resolution of known creditor claims while the Receiver gave notice to potential creditors and set a claim bar date. [Doc. No. 302] The Receiver filed a reply to the Kaufman Creditors' arguments. [Doc. No. 306]

The Receiver's reply brief, however, failed to adhere to this Court's Local Rules that a "reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition". Because the Receiver raised arguments for the first time in his reply brief which the Kaufman Creditors never had the opportunity to address, the Kaufman Creditors sought leave to

file this Sur-Reply to respond to those arguments. [See Rule 7.1(c)(1) of the Local Rules of the Southern District of Florida (rev. December 1, 2021)]

In the Reply brief, the Receiver deliberately misstates the Kaufman Creditors' argument and then attacks supposedly improper behavior of the Kaufman Creditors:

The Kaufman Creditors argue that the Receiver should pay them in full because "there is no reason to delay payment of undisputed amounts to known creditors." [E.C.F. 302 at 13]. At the outset, the Kaufman Creditors incorrectly assume that the Receiver does not object to their claim. That is not the case. The Kaufman Creditors' unsecured claim arises from an undomesticated, foreign judgment for attorneys' fees and costs entered by an Australian court in violation of the stay entered by this Court.

[Doc. No. 306 at 4]

Contrary to the Receiver's portrayal of their position, the Kaufman Creditors have consistently taken the position that the Receiver has been recalcitrant in failing to inform the 27 known creditors as to whether the Receiver had an objection to their individual claims. Further, the Kaufman Creditors have argued that if the Receiver had no objection to a particular creditor's claim that the Receiver seek leave to pay that claim in full. Indeed, the "WHEREFORE" paragraph that appears immediately below the language quoted by the Receiver makes this plain:

WHEREFORE this Court should order the Receiver, within 30 days, to:

- a. review and determine which of the pending trade creditor claims are disputed, in whole or in part;
- b. file a motion with the Court seeking authorization for the immediate payment of all undisputed amounts....

[Doc. No. 302 at 13]

The Receiver's blatant distortion of the Kaufman Creditors' position standing alone might not have caused the Kaufman Creditors to file a sur-reply here. But the Receiver used the reply brief to take a cheap shot at the Kaufman Creditors by falsely accusing them – with no evidentiary

support – of violating this Court’s Orders. Specifically, the Receiver accuses the Kaufman Creditors of violating this Court’s stay of litigation, which the Kaufman Creditors deny.

While this accusation is improper here as it has no bearing on what a fair and equitable distribution plan for creditors as a whole should look like, the accusation is also improper here because it is demonstrably false.

In its Order appointing the Receiver, this Court entered a stay of all civil litigation involving:

- (a) the Receiver, in Receiver’s capacity as Receiver;
 - (b) any Receivership Property, wherever located;
 - (c) any of the Receivership Entities, including subsidiaries and partnerships;
- or,
- (d) any of the Receivership Entities’ past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature....

[Doc. No. 5, ¶ 26, at 10] This Court referred to these matters collectively as the “Ancillary Proceedings”.

As noted in the Declaration of Gavin Stuart¹ (an Australian legal practitioner specializing in commercial litigation), Australian Worldwide Pty Ltd (In Liquidation) and Australian Worldwide Exports Pty Ltd (In Liquidation) commenced proceedings against the Kaufman Creditors in the Supreme Court of New South Wales, Australia. [Stuart Decl. ¶ 5] “Neither TCA Global Credit Fund, LP (TCA Global) nor any other Receivership Entities” were parties to the Australian Proceedings. [Stuart Decl. ¶ 6] On October 29, 2019, the Australian court entered a

¹ Attached as Exhibit A.

judgment in favor of the Kaufman Defendants. [Stuart Decl. ¶ 7] Ultimately, on September 8, 2020, the Australian court entered a Costs Certificate in the amount of AUD\$425,575.92 with post-judgment interest continually accruing at a prescribed rate of 6.1% or \$71.12 per day. [Stuart Decl. ¶ 10] The Costs Certificate has the same force and effect as an enforceable judgment of the Supreme Court of New South Wales. [Stuart Decl. ¶11] Because the Australian Proceedings were not Ancillary Proceedings under this Court's Order appointing the Receiver, this Court did not stay the Australian Proceedings or the entry of the Costs Certificate.

TCA Global, while not a party to the Australian Proceedings, funded those proceedings for the AW Entities and bound itself to indemnify the AW Entities for any adverse costs orders made against the AW Entities in the Australian Proceedings, including the Costs Certificate. [Stuart Decl. ¶ 8]

Request for Oral Argument

The Kaufman Creditors request oral argument before the Court on the Receiver's Motion for Approval Of Creditor Distribution Plan and First Interim Distribution to Creditors [Doc. No. 294]. The Kaufman Creditors would prefer argument through remote audio-visual means if the Court is amenable.

**AW EXPORTS PTY LTD, WARWICK BROXOM,
and JONATHAN JAMES KAUFMAN**

By: /s/ Charles A. Valente
Charles A. Valente
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Declaration of Gavin Stuart

I, Gavin Scott Donald Stuart, Lawyer c/- Bartier Perry Lawyers, Level 10, 77 Castlereagh Street, Sydney NSW 2000 AUSTRALIA, declare under penalty of perjury under the laws of the United States of America that the following statements are true and correct:

1. I am over the age of 18 years and, if called to testify in this matter, I could testify competently to the following statements from personal knowledge.
2. In 1996, I completed:
 - (a) a Bachelor of Science and Bachelor of Laws degree from the University of Technology, Sydney; and
 - (b) a Graduate Diploma in Legal Practice from the Australian College of Law.
3. I have been admitted as an Australian legal practitioner since 4 April 1997. I have over 25 years' experience practising as a solicitor, specialising in the areas of commercial litigation and dispute resolution.
4. I have been involved in numerous commercial litigation matters where I have acted for both the plaintiff and defendant in a variety of courts and jurisdictions, including the Supreme Court of New South Wales and its Court of Appeal, the High Court of Australia and the Federal Court of Australia.
5. I have acted for AW Exports Pty Ltd, Warwick Broxom and Jonathan James Kaufman (the **Kaufman Creditors**) since about 23 February 2017, when Supreme Court of New South Wales proceedings 2017/40926 (**Australian Proceedings**) were commenced against the Kaufman Creditors by Australian Worldwide Pty Ltd (In Liquidation) and Australian Worldwide Exports Pty Ltd (In Liquidation) (**AW Entities**).
6. Neither TCA Global Credit Fund, LP (**TCA Global**) nor any other Receivership Entities in *SEC v TCA Fund Mgmt Grp, Corp.*, Case No. 20-CIV-21964-CMA (U.S. Dist. Ct. S.D. Fla.) were named parties in the Australian Proceedings. The Australian Proceedings did not involve the *SEC v TCA* Receiver, the Receivership Property, the Receivership Entities, or any of the officers, directors, managers, agents or partners, etc.
7. I acted for the Kaufman Creditors for the entire duration of the Australian Proceedings until final judgment was awarded by the Supreme Court of New South Wales in favour of the Kaufman Creditors on 29 October 2019 (**Australian Judgment**).
8. Christopher Palmer of O'Brien Palmer in Australia was the liquidator of the AW Entities. Mr Palmer obtained funding for the AW Entities generally and for the Australian Proceedings themselves from TCA Global pursuant to a Funding Deed dated 31 May 2016 and an undated Litigation Funding Deed, which were both signed on behalf of TCA Global by Mr Robert Press. Pursuant to the litigation funding deeds, TCA Global agreed to indemnify the AW Entities for any adverse costs orders made against the AW Entities in the Australian Proceedings.
9. In Australia, the standard rule in litigation is that "costs follow the event", which means that the losing party is ordered to pay the winning party's legal and disbursement fees for the litigation. In the Australian Judgment, the AW Entities were ordered to pay the Kaufman Creditors' legal costs for the Australian Proceedings.
10. After applying for an assessment of their costs, receiving a certificate of determination and taking into account a discrete sum paid into Court by the AW Entities as security

for costs in accordance with Australia's local civil procedure rules, the Kaufman Creditors received the Notice of Orders appearing at Annexure "A" to this declaration, dated 8 September 2020 in the amount of AUD\$425,575.92 with post-judgment interest continually accruing at a prescribed rate of 6.1% or \$71.12 per day (**Costs Certificate**).

11. The Costs Certificate has the same force and effect as an enforceable judgment of the Supreme Court of New South Wales. Hence, TCA Global is liable to pay the Costs Certificate by reason of the indemnities under the litigation funding agreements signed by Mr Robert Press of TCA Global.
12. By order of the United States District Court, Southern District of Florida dated 5 November 2020 (a date that is after the date of the Costs Certificate), Jonathan E Perlman was appointed Receiver of TCA Global and other TCA related entities.
13. By reason of the facts, matters and circumstances deposed above, I believe that the Kaufman Creditors have not breached any stay of litigation against the receiver of TCA Global or any other related TCA entities.

Executed: 20 October 2022

/s/ Gavin Stuart

Sydney, NSW Australia



District Court
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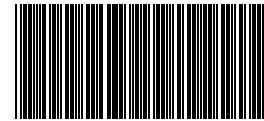
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ANNEXURE "A"

Gavin Stuart
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Your Ref:



D0001BKZML

8 September 2020

NOTICE OF ORDERS MADE

Case number 2020/00260315
Case title AW EXPORTS PTY LTD v AUSTRALIAN WORLDWIDE PTY LTD (IN LIQUIDATION)

On 8 September 2020 the following orders (and/or directions) were made:

Judgment:
AUSTRALIAN WORLDWIDE PTY LTD (IN LIQUIDATION), First Defendant
AUSTRALIAN WORLDWIDE EXPORTS PTY LTD (IN LIQUIDATION), Second Defendant
are to pay
AW EXPORTS PTY LTD, First Plaintiff
Warwick Broxom, Second Plaintiff
Jonathan James Kaufman, Third Plaintiff
the sum of
Claim amount: \$425575.92
Interest claimed: \$0.00
Filing fees: \$0.00
Service fees: \$0.00
Solicitors fees: \$0.00
Other costs: \$0.00
TOTAL: \$425575.92

Principal Registrar