

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

ABNER ALEJANDRO TINOCO and KIKIT &
MESS INVESTMENTS, LLC,

Defendants.

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CIVIL ACTION
NO. 3:21-CV-00237-DCG

(ECF)

**REPORT REGARDING OBJECTIONS TO
RECEIVER’S CLAIMS REPORT, AND RESPONSE**

Kelly M. Crawford (the “Receiver”) respectfully submits this report as required by the *Order Establishing Claims Adjudication Process (“Claims Order”)* [Dkt. 36], and in support, respectfully shows the Court as follows:

**I.
CLAIMS ADJUDICATION PROCEDURE**

Pursuant to the *Claims Order*, on March 15, 2022 the Receiver filed the *Receiver’s Claims Report* (the “*Claims Report*”) containing his recommendations of the claim amounts for each investor and creditor [Dkt. 62]. The Receiver also posted a copy of the *Claims Report* on the receivership website. A copy of the *Claims Report* was served by mail upon each investor and creditor with a letter informing the recipient that the investor or creditor have the opportunity to file an objection with the Receiver if the investor or creditor does not agree with the Receiver’s recommendation regarding the investor’s or creditor’s claim. The investors and

creditors were further advised of the April 15, 2022 deadline for filing with the Receiver¹ objections to the *Claims Report*.

Of the more than 223 investors and two creditors included in the *Claims Report*, the Receiver received challenges to his *Claims Report* from approximately 23 investors and two creditors. The Receiver resolved all but seven of the objections. These unresolved objections are hereby submitted to the Court for resolution.

In addition, the Receiver received 11 new claims from investors who either were unaware of the receivership or the deadline to file a claim, or had circumstances such as health conditions, that prohibited them from timely filing the claim. Because the claims have not been approved by the Court and no distributions have been made to claimants, there is no prejudice to the receivership estate in allowing these late claims. Each of the 11 new claims were approved by the Receiver in the amounts set forth in the Revised Claims Report.

The Receiver's Revised Claims Report, incorporating the new claims submitted, and the revised claims based on objections resolved by the Receiver, is included in the Appendix as **Exhibit A** ("Revised Claims Report"). The unresolved objections submitted by the investors and creditor are included in the Appendix as **Exhibits B, and B-1 through B-7**. By this Report, the Receiver requests the Court to approve the Revised Claims Report.

II. AUTHORITIES

Fairness provides the overriding principle for evaluation of every issue arising in the supervision of an equitable receivership. See *U.S. v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996)(district court supervising equitable receivership and evaluating methods of distribution to

¹ The Court ordered that all objections were to be filed with the Receiver and not the Court. See *Section 3.3 of Order Establishing Claims Adjudication Process*,

victims of Ponzi scheme is “court of conscience”)(internal quotation omitted). A supervising court has extremely broad discretion and is merely required to do “what is right under the circumstances”. *Id.*; *see also*, *CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 2000)(upholding *pro rata* distribution plan despite one investor’s claim to tracing specific gains and losses attributable to the trading on his investments). Accordingly, given the dearth of cases addressing the precise issues presented below, the Receiver relies on fairness, common sense, and the “Court’s conscience” in submitting the following objections for resolution.

III. **RESPONSE TO OBJECTIONS**

A. Investor Objections

1. Jorge Antonio Rodriquez Arzola (Claim No. 0020)

Jorge Antonio Rodriquez Arzola filed a claim for \$80,445.22. He supported his claim with a contract in the amount of \$80,445.22 with the Defendants. Mr. Arzola obtained an affidavit from former Kikit & Mess employee, Efren Reza, in support of Mr. Arzola’s claim that he delivered \$80,445.22 in cash for his investment, and that rather than issuing a receipt for the investment, a contract was signed in lieu thereof. A copy of Mr. Arzola’s objection, as well as the Affidavit of Efren Reza in support thereof are included in the Appendix as **Exhibit B-1**.

The Receiver denied Mr. Arzola’s claim and valued it at \$0 because there were no cash deposits in the amount of \$80,445.22 made to defendants’ bank account on or around the time of the investment. Mr. Arzola’s claim is based on a contract dated April 26, 2021. The Receiver has reviewed the defendants’ bank statements for the month of April and May 2021 and show no cash deposits for \$80,445.22, or any sum close thereto. Moreover, Mr. Arzola did not produce any bank records showing the source of the “cash” he claims he invested with Defendants.

Accordingly, the Receiver contends Mr. Arzola's objection to the Receiver's claim recommendation should be overruled.

2. Guillermo Antonio Lopez Flores (Claim No. 0095)

Mr. Lopez filed a claim in the receivership for \$15,000. The Receiver's records indicate Mr. Lopez invested \$13,900, and received in return \$6,000. As a result, the Receiver reduced Mr. Lopez' claim to \$7,900 to reflect his net loss from the investment (total monies invested less monies received).

Mr. Lopez objects to the Receiver reducing his claim by \$6,000 the Receiver contends was returned to him. Mr. Lopez states he never received any payments from the Defendants. A copy of Mr. Lopez' objection is included in the Appendix as **Exhibit B-2**.

This claim was thoroughly investigated by the Receiver carefully examining the Defendants' bank records, which reveal the following:

Date	Deposits	Returns	Investor	Banking Source
2/2/2021	\$500.00		Guillermo Lopez	Zelle Transfer Conf# TO9RB 9SPX; GUILLERMO LOPEZFLORES
2/3/2021	\$500.00		Guillermo Lopez	Zelle Transfer Conf# TO9RJMYYWR; GUILLERMO LOPEZFLORES
2/5/2021	\$500.00		Guillermo Lopez	Zelle Transfer Conf# TO9RW3KJX; GUILLERMO LOPEZFLORES
2/18/2021		\$1,000.00	Guillermo Lopez	Check
3/1/2021		\$1,000.00	Guillermo Lopez	Zehle Transfer Conf# 43bda0bd0; Guihlermo Lopez
3/29/2021		\$1,000.00	Guillermo Lopez	Zelle Transfer Conf# jd53qltr; Guillermo Lopez
5/6/2021	\$2,000.00		Guillermo Lopez	Zelle Transfer Conf# XXXXXXXXX; GUILLERMO LOPEZ
5/7/2021	\$400.00		Guillermo Lopez	Zelle Transfer Conf# XXXXXXXXX; GUILLERMO LOPEZ
7/19/2021		\$3,000.00	Guillermo Lopez	Zelle Transfer Conf# v3rl 1 d2u9; Guillermo Lopez
9/8/2021	\$10,000.00		Guillermo Lopez	WT from JP Morgan Chase
	<u>\$13,900.00</u>	<u>\$6,000.00</u>		Total Transactions

Based on the records available to the Receiver, there appears to be only one Guillermo Lopez who invested with the Defendants. Therefore, the Receiver contends that based upon the Defendants' bank records, Mr. Lopez' objection to the Receiver's claim recommendation should be overruled.

3. Jesus M. Carranza (Claim No. 0100)

Mr. Carranza filed a claim in the receivership for \$41,667.00 based on his last contract with the Defendants dated August 3, 2021. Initially, the Receiver reduced Mr. Carranza's claim to \$11,469.14 based on records that showed he received \$31,197.86 from the Defendants. Mr. Carranza filed an objection to the Receiver's claim recommendation and produced bank records showing transfers of \$45,000 and \$30,000 from his savings account to Defendants' checking account. A copy of Mr. Carranza's objection to claim recommendation is attached as **Exhibit B-3**.

Upon learning the deposits from Mr. Carranza were recorded in the banking records of Defendants as "TX LTR transfer", the Receiver was able to further trace monies deposited by Mr. Carranza with the Defendants and monies paid to Mr. Carranza by the Defendants. In this tracing, the Receiver discovered that in addition to Mr. Carranza receiving a payment of \$31,197.86 from the Defendants, Mr. Carranza also received an additional payment from the Defendants in the amount of \$45,458. Consequently, the Defendants' bank records show that Mr. Carranza invested \$75,000 with the Defendants and received \$75,655.86 from the Defendants, leaving Mr. Carranza with a net profit of \$655.86.

With this newly discovered evidence the Receiver has re-designated Mr. Carranza's claim from a Category B reduced claim to a Category C denied claim. The Receiver contends Mr. Carranza's objection to the Receiver's recommendation should be overruled.

4. Ruby Quintero (Claim No. 0154)

Mr. Quintero filed a claim in the receivership for \$4,000. The Receiver's records indicate Mr. Quintero invested \$1,000 with the Defendants and received in return \$6,287, for a profit of \$5,287. Mr. Quintero objects to the Receiver reducing Mr. Quintero's claim by the

profits he received from the Defendants. A copy of his objection is included in the Appendix as **Exhibit B-4**.

The Receiver disallowed Mr. Quintero's claim because the Receiver's claim recommendations are based solely on any loss between actual dollars invested with the Defendants compared to actual dollars returned to the investor. Any "profit" should offset or reduce the amount invested because the Defendants did not use Mr. Quintero's monies to generate a profit, but instead, used Mr. Quintero's monies as part of a Ponzi scheme. Accordingly, any monies Mr. Quintero received in excess of his original investment were monies from other investors with the Defendants. Mr. Quintero's "false profits" came from other investors who lost their principal investment. For this reason, Mr. Quintero's objection should be overruled.

5. Edgar Alonso Hernandez (Claim 0170)

Mr. Hernandez filed a claim for \$5,576. He objects to the Receiver's calculation of his claim. A copy of his objection is included in the Appendix as **Exhibit B-5**.

According to the Receiver's review of the Defendants' records, Mr. Hernandez started out with an investment of \$1,000. This investment was corroborated with a deposit slip for \$1,000 and a contract dated December 10, 2020. Mr. Hernandez claims he then entered into a contract with the Defendants on March 26, 2021 for the amount of \$3,000, which he states he paid in cash. Finally, Mr. Hernandez claims he entered into a contract with the Defendants on June 29, 2021 for the amount of \$5,576.

Initially the Receiver denied Mr. Hernandez' claim in its entirety. However, in light of the Receiver being able to trace the original investment by Mr. Hernandez of \$1,000 with the Defendants, the Receiver revised his recommendation to allow a claim of \$1,000 and moved

Mr. Hernandez claim from Category C - denied to Category B - reduced to \$1,000. The Receiver did not give credit to Mr. Hernandez for subsequent contracts that were rolled over from his original contract and represented “false profits” instead of actual money invested.

Based on the information above, the Receiver respectfully requests the Court to overrule Mr. Hernandez’s objection to the Receiver’s claim recommendation.

6. Adrian Ortega Corona (Claim 0218)

Mr. Corona filed a claim for \$14,000. Mr. Corona disagrees with the Receiver’s calculation of Mr. Corona’s claim and objected to the Receiver’s claim recommendation of zero. A copy of Mr. Corona’s objection is included in the Appendix as **Exhibit B-6**.

Mr. Corona produced many contracts he entered into with Defendants as well as a detailed explanation of his cash deposits. He also produced a bank statement in Spanish. A careful review of all banking data available to the Receiver from Defendants’ Bank of America account, as well as Defendants’ Wells Fargo account reveal that Mr. Corona invested \$4,452 and received \$5,000 in return, all via wire transfers.

If Mr. Corona made investments via cash transactions, the Receiver is unable to verify those cash investments from the banking records, and therefore, the Receiver maintains his claim classification of Category C – denied. The Receiver contends Mr. Corona’s objection to the Receiver’s claim recommendation should be overruled.

B. Creditor Objection – Laura Avila Chavez (Claim C-0002)

Only one creditor objected to the Receiver’s claim recommendation that was not resolved by the Receiver. Ms. Chavez filed a claim for \$479,000 as a secured creditor for property located at 712 Emerald View Drive, El Paso, Texas (the “Emerald View Property”). The Receiver recommended that her claim be reduced to \$269,000, treated as an unsecured claim, and subordinated to the claims of the investors.

Ms. Chavez, through her attorney James Kirby Read, objected to the Receiver’s claim recommendation. A copy of Ms. Chavez’ objection to Receiver’s claim recommendation is included in the Appendix as **Exhibit B-7**. Ms. Chavez objects to the Receiver treating her claim as unsecured and subordinating the claim to the claims of the investors, arguing that she is a victim of the Defendants to the same extent as the investors.

There are three components to Ms. Chavez’ claim for the Court to decide: 1) the amount of her claim; 2) whether the claim is secured or unsecured; and 3) whether the claim should be subordinated to the claims of the investors.

The amount of Ms. Chavez claim was determined by the Receiver taking the amount of Ms. Chavez’ claim, \$479,000 and reducing it by the value of the Emerald View Property, which the Receiver had appraised at \$210,000. Accordingly, the Receiver determined the claim should be reduced to \$269,000 [$\$479,000 - \$210,000$].²

Since the Receiver is no longer asserting any interest in the Emerald View Property and has abandoned the property in favor of Ms. Chavez, as the first lienholder, the receivership does not have any property in which Ms. Chavez can claim a security interest. Ms. Chavez’ claim is unsecured.

² As set forth in the *Receiver’s Notice of Intent to Surrender Interest in Emerald View Property*, [Dkt. 52], the Receiver abandoned any interest in the Property and Ms. Chavez, as the lienholder, is entitled to ownership of the property.

Finally, the Receiver's recommendation that the claim of an unsecured creditor should be subordinated to the claims of the investors is based on the treatment of claims by a number of courts in federal equity receiverships. *United States Sec. & Exch. Comm'n v. Harris*, 2016 WL 1555773, at *4 (N.D. Tex. Apr. 18, 2016); *U.S. Commodity Futures Trading Comm'n v. PrivateFX Glob. One*, 778 F. Supp. 2d 775, 786 (S.D. Tex. 2011) (agreeing with the receiver that "courts regularly grant defrauded investors a higher priority than defrauded creditors"); *Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, at *1 (W.D. Mich. Dec. 14, 2006) ("As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud."); *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, at *3 (M.D. Fla. Aug. 14, 2009) ("Payment to claimants whose property was unlawfully taken from them is given a higher priority than payment to the general creditors." Citing Ralph Ewing Clark, *Treatise on the Law and Practice of Receivers* (3d ed. 1959)); *see also Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1110 (9th Cir. 1999), *as amended* (Mar. 23, 2000) (holding that it was within the district court's broad discretion to adopt the Receiver's plan proposing three classes of creditors, "first, the Receiver and fees associated with the receivership; second, the allowed claims of public investors in the companies; and third, the claims of all other creditors.") Consistent with the foregoing case law, for an equitable matter in receivership arising out of a fraud, the class of fraud victims should take priority over the class of general creditors.

In this instance, Ms. Chavez argues that she is a victim of Defendant Tinoco's bad acts (gutting the house, removing fixtures, etc.) like the investors. There are two significant distinctions. First, Defendant Tinoco used investor funds to purchase the Emerald View Property, including any payments made to Ms. Chavez. Second, Ms. Chavez is not left without

anything. She is left with a house worth substantially less than when it was sold. Nevertheless, she still will have a property worth more than \$200,000. Based on the monies recovered to date in the receivership and the total amount of claims, it is unlikely the investors will receive even 10% of their principal loss. Accordingly, the equities favor subordinating Ms. Chavez claim to that of the investors.

The Receiver requests the Court to overrule the objection of Ms. Chavez, and approve the Receiver's recommendation that her claim be allowed in the amount of \$269,000 as an unsecured claim, subordinated to the claims of the investors.

IV.
PRAYER

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests, after hearing, that the Court overrule the objections to his Claims Report, enter an order approving the *Receiver's Revised Claims Report*, and grant the Receiver such other and further relief to which he may show himself justly entitled.

Respectfully submitted, May 13, 2022.

Respectfully submitted,

SCHEEF & STONE, L.L.P.

By: /s/ Kelly M. Crawford
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RECEIVER
KELLY M. CRAWFORD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2022, I electronically filed the foregoing document with the clerk of the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record. In addition, on May 13, 2022, I served a copy of this Report and the Receiver’s Revised Claims Report upon each of the investors and creditor who filed claims with the Receiver, including those who filed objections with the Receiver that could not be resolved and that are the subject of the Receiver’ report to the Court, by first class mail addressed to their last known address or by electronic mail. Finally, I posted this Report and the Receiver’s Revised Claims Report on the website maintained by the Receiver at www.kikitreceivership.com.

/s/ Kelly M. Crawford _____

KELLY M. CRAWFORD