

Kevin H. Kono, OSB #023528
kevinkono@dwt.com
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
Telephone: (503) 241-2300
Facsimile: (503) 778-5299

Attorneys for TRD Consulting, LLC

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**AEQUITAS MANAGEMENT, LLC;
AEQUITAS HOLDING, LLC; AEQUITAS
COMMERCIAL FINANCE, LLC;
AEQUITAS CAPITAL MANAGEMENT,
INC.; AEQUITAS INVESTMENT
MANAGEMENT, LLC; ROBERT J.
JESENIK, BRIAN A. OLIVER; and N.
SCOTT GILLIS,**

Defendants.

Case No. 3:16-cv-00438-JR

**LIMITED OBJECTION OF TRD
CONSULTING, LLC TO RECEIVER’S
MOTION TO APPROVE
COMPROMISES**

Request for Oral Argument

OBJECTION AND INTRODUCTION TO ARGUMENT

This limited objection is filed on behalf of TRD Consulting, LLC (“TRD Consulting”) to the Receiver’s Motion for Order (1) Approving Compromises of Claims, (2) Authorizing Performance of Settlement Agreements, and (3) Authorizing Disbursement of Funds Held in a



Segregated Account (Dkt. 980) (the “Receiver’s Motion”). TRD Consulting objects to that portion of the Receiver’s Motion that involves the “Tango Delta Liquidating Trust Settlement Agreement,” which is addressed starting on page six of the Receiver’s Motion, including approximately \$2.4 million held in a segregated account (the “Pre-Judgment Attachment Funds”).

First, the Receiver and Larry Hyman (the “Liquidating Trustee”), who is the liquidating trustee for Tango Delta Financial, Inc. (“Tango Delta,” formerly American Student Financial Group, Inc.), do not have authority to resolve the competing claims to the Pre-Judgment Attachment Funds without the participation of TRD Consulting. TRD Consulting is a party to the contract at issue and has its own claim to the Pre-judgment Attachment Funds. Moreover, as set forth in the Receiver’s Motion, Tango Delta and TRD Consulting filed a “joint” proof of claim in this case (the “Receivership Case”). Receiver’s Motion, p. 9.

Second, the Liquidating Trustee does not have authority to settle TRD Consulting’s claim. TRD and Tango Delta were parties to a contract with Aequitas Capital Management (“ACM”). While it is true that *Tango Delta’s claims* against ACM were transferred to a liquidating trust created under Tango Delta’s bankruptcy plan, TRD Consulting’s claims were not. Contrary to suggestions in the Receiver’s Motion, TRD Consulting did not assign its rights to the Liquidating Trustee. While TRD and other parties who filed UCC-1 financing statements against the assets of Tango Delta released their “liens” against amounts owed by ACM, TRD did not release its claim against ACM.

The Court should deny the Receiver’s Motion as to the Tango Delta Liquidating Trust Settlement pending resolution of TRD Consulting’s claim as well. Alternatively, if the Court grants the motion with respect to Tango Delta, the Court (a) should make clear that the settlement with the Liquidating Trustee for Tango Delta does not resolve the claims of TRD Consulting and not authorize the Receiver to release funds to the Receivership estate until TRD

Consulting's claims are resolved; or (b) the \$800,000 settlement payment should be made jointly payable to both the Liquidating Trustee and TRD Consulting.

BACKGROUND

Many of the facts related to the Receiver's Motion are not in dispute. The critical issues are (i) whether TRD Consulting is party to the contract and the litigation involving Tango Delta and ACM, and (ii) whether the Liquidating Trustee has authority to settle TRD Consulting's claims and entitlement to the Pre-judgment Attachment Funds. The facts show that TRD Consulting *is* a party to the contract, the proof of claim in the Receivership Case, and the underlying litigation. The Liquidating Trustee thus does not have authority to settle TRD Consulting's claims.

The Contract and the California Litigation.

Tango Delta, TRD Consulting, and ACM are parties to a contract dated June 29, 2011 (the "Consulting Services Agreement"). A copy of the Consulting Services Agreement is attached to the Proof of Claim filed on behalf of Tango Delta and TRD Consulting in 2019, and is attached as Exhibit 15 to the Declaration of Ronald F. Greenspan, filed February 22, 2022 (Dkt. 924) ("Greenspan 2/22 Decl.") at 292.¹ Under the Consulting Services Agreement, ACM agreed to pay commissions on student loans purchased by ACM from Corinthian College. ASFM and TRD both claim entitlement to money due from ACM under the Consulting Services Agreement.

In 2012, Tango Delta and TRD Consulting sued ACM in federal district court in California. Greenspan 2/22 Decl., Ex. 1 (Dkt. No. 924 at 10-38); *see* also Case No.: 12-cv-02446-CAB-JMA. The Court issued a pre-judgment attachment against ACM, to which ACM

¹ The full title of the Greenspan 2/22 Decl. is "Declaration of Ronald F. Greenspan in Support of Motion to Enforce Receivership Injunction and Receivership's Classification of the American Student Financial Group, Inc. Claim." Dkt. No. 924. For economy, TRD Consulting incorporates into this Limited Objection the cited portions of the Greenspan 2/22 Decl. and of other record documents cited herein.

responded by depositing approximately \$2.4 million in the Court registry. In April 2016, following the commencement of this Receivership Case, the Receiver filed a motion in the California litigation seeking disbursement of the funds held in the registry. *See Greenspan 2/22 Decl., Ex. 7* (Dkt. No. 924 at 113-17). The Southern District of California’s order states:

The funds at issue here were deposited in the Court Registry by Aequitas pursuant to an order of this Court. When granting the application for a writ of attachment the Court explained that “[a]ttachment is a provisional remedy, not a final one, and the court’s determination here will have no impact on future dispositive motions or at trial [Doc. No. 62 at p.5.] An ‘attaching creditor obtains only a potential right or a contingent lien, which is perfected or converted to a judgment lien upon judgment for the creditor.’ *In re Southern California Plastics, Inc.*, 165 F.3d 1243, 1246 (9th Cir. 1999).

Greenspan 2/22 Decl., Ex. 7 (Dkt. No. 924 at 116).

The Southern District of California gave Tango Delta and TRD Consulting 30 days to seek relief in this Court. *Greenspan 2/22 Decl., Ex. 7* (Dkt. No. 924 at 116). The parties thereafter responded by submitting a Stipulation To Transfer Venue And For Release Of Funds Held In The Court Registry and venue was transferred to this Court. *Greenspan 2/22 Decl., Exs. 8 and 9* (Dkt. No. at 118-30). The Stipulation provided for transfer of the funds to a segregated account, but reserved for future resolution entitlement to the funds. The funds were deposited into a segregated Receivership bank account, where the funds remain. *Greenspan 2/22 Decl., Ex. 9* (Dkt. No. 924 at 121-24).

The Tango Delta Chapter 11.

Tango Delta ended up in its own Chapter 11 bankruptcy case in 2020 in the Middle District of Florida. *Greenspan 2/22 Decl., Ex. 16* (Dkt. No. 924 at 320-66). As outlined in the Receiver’s Motion, resolution of Tango Delta’s bankruptcy was hard fought – but was eventually resolved through a Mediated Joint Plan of Liquidation for Tango Delta Financial, Inc. (the “Tango Delta Plan”). Receiver’s Motion, pp. 12-13; *Greenspan 2/22 Decl., Ex. 19* (Dkt. No. 924 at 383-420). The Tango Delta Plan was approved by the Bankruptcy Court on November 2,

2021. Greenspan 2/22 Decl., Ex. 23 (Dkt. No. 924 at 434-50). The Tango Delta Plan provided for most of its assets to be transferred to a liquidating trust which would monetize assets and make distributions according the plan. Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 399, 409-11).

The Tango Delta Plan does not provide for transfer of TRD Consulting's assets to the Liquidating Trust. Indeed, litigation between the Liquidating Trustee and TRD Consulting continues in the bankruptcy court in Florida. That the Liquidating Trust only contains Tango Delta's rights against ACM is clear from the language of the plan. Section 1.50 of the Tango Delta Plan defines Liquidating Trust Assets to include "Liquidating Trust Claims." Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 391). Section 1.51 defines Liquidating Trust Claims to include "any and all claims or Causes of Action involving the receivership of Aequitas." Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 391-92). Section 1.19 defines Causes of Action to include "all actions, causes of action . . . and any and all other *claims or rights of the Debtor or the Estate* of any value For the avoidance of doubt, the Causes of Action shall include all claims asserted in the Duoos Adversary and any potential claims described in the Disclosure Statement." Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 388) (emphasis added). Significantly, the Section 1.19 does not define Causes of Action to include claims and causes of action owned by TRD Consulting.

That TRD Consulting's assets were not being transferred to the Liquidating Trust is also clear from Section 5.1(d). Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 398). That section provides for the treatment of claims of TRD Consulting and the "Duoos Parties." TRD Consulting claims a security interest in certain of Tango Delta's assets to secure Tango Delta obligations to TRD Consulting. Among other things, Section 5.1 provides that "TRD and the Duoos Parties release their *liens*, if any, against any amounts owed by Aequitas." Greenspan 2/22 Decl., Ex. 19 (Dkt. No. 924 at 398) (emphasis added). It does not say that TRD Consulting transferred its own claims against ACM to the Liquidating Trust.

Put otherwise, TRD Consulting retains its claims against ACM and the Pre-Judgment Attachment Funds. The Receiver suggests that neither the Liquidating Trust or TRD Consulting have any claim to the Pre-Judgment Attachment Funds based on their jointly filed proof of claim. The proof of claim, which is 53 pages long, includes the Consulting Services Agreement, shows that it is a secured claim (consistent with the attachment), and contains a lengthy discussion of the claims. Greenspan 2/22 Decl., Ex. 15 (Dkt. No. 924 at 266-319).

ARGUMENT

TRD Consulting does not contest the right of the Liquidating Trustee to settle Tango Delta's claims against ACM. What neither the Liquidating Trustee nor Receiver can do, however, is resolve TRD Consulting's rights without the consent and participation of TRD Consulting. It appears that the Liquidating Trustee and Receiver are attempting to do just that. Under the Settlement Agreement, (i) the Receiver will pay \$800,000 to the Liquidating Trust, and (ii) the Liquidating Trust will release all claims, including those in the "Federal Court Case" and the "State Court Case," which are the two pre-receivership cases involving the \$2.4 million, and the "Liquidating Trust Claims," as defined in the Mediated Plan. Based on that settlement, the Receiver asks the Court to release the balance of the Pre-Judgment Attachment Fund. Declaration of Ronald F. Greenspan in Support of Motion for Order (1) Approving Compromise of Claims, (2) Authorizing Performance of Settlement Agreements, and (3) Authorizing Disbursement of Funds Held in a Segregated Account (Dkt. No. 981), at 24-33.

The Receiver and the Liquidating Trustee are certainly free to negotiate a compromise of any issues between them. As the foregoing shows, however, the Liquidating Trustee does not have the authority to compromise or release rights of TRD Consulting. Nor can the Receiver, by executing an agreement with the Liquidating Trustee, impair the rights of TRD Consulting. Perhaps the Receiver misunderstood the scope of the Liquidating Trustee's authority. To the extent that the Settlement Agreement seeks to affect TRD Consulting's rights, it cannot be approved.

Accordingly, the Court should deny the Receiver's motion with respect to the Tango Delta Settlement Agreement. If for any reason the Court is inclined to grant the motion, the Court's order should clearly state that it is without prejudice to the rights of TRD Consulting and should not authorize release of the remaining funds absent further Court order. Alternatively, it should require that the \$800,000 payment by the Receiver to be made jointly payable to the Liquidating Trustee and TRD Consulting.

DATED this 9th day of June, 2022.

DAVIS WRIGHT TREMAINE LLP

By s/ Kevin H. Kono

Kevin H. Kono, OSB #023528

kevinkono@dwt.com

Telephone: (503) 241-2300

Facsimile: (503) 778-5299

Attorneys for TRD Consulting, LLC