

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**BRENDA SMITH, BROAD REACH  
CAPITAL, LP, BROAD REACH  
PARTNERS, LLC, and BRISTOL  
ADVISORS, LLC, et al.,**

**Defendants.**

**C.A. No. 2:19-cv-17213 (MCA)**

**Motion Day: No Hearing Date**

**LIMITED OBJECTION AND RESERVATION OF RIGHTS BY INDUSTRIAL AND  
COMMERCIAL BANK OF CHINA FINANCIAL SERVICES LLC IN RESPONSE TO  
JOINT MOTION OF RECEIVER, KEVIN DOOLEY KENT, AND INTERNAL  
REVENUE SERVICE ("IRS") FOR ORDER RESOLVING THE IRS CLAIM  
ASSERTED AGAINST THE RECEIVERSHIP ESTATE**

Industrial and Commercial Bank of China Financial Services LLC ("ICBCFS"), through its undersigned counsel, hereby submits this Limited Objection and Reservation of Rights in response to the Joint Motion of Receiver, Kevin Dooley Kent, and Internal Revenue Service ("IRS") for Order Resolving the IRS Claim Asserted Against the Receivership Estate (ECF 322) (the "Motion").<sup>1</sup>

**RESERVATION OF RIGHTS**

ICBCFS is a clearing agent that performs clearing and back office services for broker-dealers. ICBCFS and CV Brokerage Inc. ("CV Brokerage"), one of the Receivership Parties, are

<sup>1</sup> Capitalized terms used in this Reservation of Rights that are not defined shall have the meanings given to them in the Motion.

parties to that certain Fully Disclosed Clearing Agreement dated as of March 18, 2013 (as amended, supplemented or otherwise modified, the "Clearing Agreement"). ICBCFS timely filed a claim against the Receivership Estate asserting liquidated and unliquidated indemnity claims stemming from the fraud perpetrated by Brenda Smith, CV Brokerage's principal. Specifically, ICBCFS has incurred, and continues to incur, legal fees in defending itself against lawsuits filed against it by investors defrauded by Smith that wrongfully allege that ICBCFS was involved in or knew about the fraud. The Receiver filed certain objections to ICBCFS's claims, which the Court denied, without prejudice, pursuant to the *Order Regarding Receiver Kevin Dooley Kent's First Omnibus Motion for Order Resolving Disputed Non-Investor Creditor Claims* entered on March 28, 2024 (ECF 305). As such, the ICBCFS indemnity claim remains pending against the Receivership Estate.

The ICBCFS indemnity claim is secured to the extent of cash collateral being held by ICBCFS (subject to the terms of the *Stipulation Between the Receiver, Industrial and Commercial Bank of China Financial Services LLC, and the Securities and Exchange Commission to Resolve Motion to Amend the Amended Order Appointing Receiver* dated September 8, 2020 (ECF 30)) and unsecured to the extent that the claim exceeds the amount of cash collateral. The Receiver has categorized the ICBCFS secured and unsecured claims as "non-investor claims" and has categorized the claims of investors as "investor claims" (even though these "claims" may in fact be equity interests).

At present, the Receiver has not filed any plan of distribution and there has been no determination regarding how the Receivership Assets will be distributed to the non-investor creditors and the investor creditors.

By the Motion, the Receiver and the IRS propose a negotiated resolution of the Receiver's objections to the IRS claim, which, among other things, would allow the IRS Claim in the amount of \$515,984. The proposed settlement further provides that:

The IRS will agree to subordinate its claim ... to investor creditors and will share in a pro-rata distribution with other unsecured non-investor creditors as the terms "investor" and "non-investor creditors" are defined in the *First Omnibus Motion of Receiver, Kevin Dooley Kent, for Order Resolving Disputed Non-Investor Creditor Claims* (ECF No. 232, and re-filed at ECF No. 254)...

Motion, Ex. A, ¶ 5.

Moreover, among the arguments that the Receiver puts forth in support of the Proposed Resolution is that "the IRS' willingness to subordinate its claim to those of Brenda Smith's investor victims, and to participate pro-rata in any distributions made to unsecured non-investor creditors, allows the Receiver to prioritize maximizing recoveries for the defrauded investors." Motion, p. 6.

The only way that the IRS can share in a pro-rata distribution with other unsecured non-investor creditors and subordinate its claim to investor creditors is if all unsecured non-investor claims are subordinated to all investor claims. ICBCFS does not agree to any *de facto* or implicit subordination of its claim to the investor claims by virtue of the foregoing agreement between the Receiver and the IRS. While the IRS may agree to subordinate its claim to the investor claims, it may not, at the same time, require that its claim be treated *pari passu* with the claims of other non-investor creditors, who have not agreed to subordinate their claims to the investor claims.

If the Receiver seeks to use the Proposed Resolution with the IRS as a means of subordinating all non-investor claims to investor claims, then ICBCFS hereby objects to the Proposed Resolution on that limited basis. To the extent that the Receiver and the IRS may clarify the Proposed Resolution such that it does not presuppose the subordination of all non-investor

claims to investor claims, or otherwise affect non-investor claims (other than the IRS claim), ICBCFS would not object to the Motion.

As such, by this Limited Objection and Reservation of Rights, ICBCFS seeks to confirm that the IRS's agreement to subordinate its claim to the investor creditors does not have the implicit or explicit effect of causing the claims of other non-investor creditors to be subordinated to the claims (or interests) of investor creditors. Whether or not the IRS claim will be *pari passu* with other non-investor claims cannot be determined at this time.

ICBCFS hereby reserves all of its rights to oppose any effort by the Receiver, whether by the Motion or another motion, to seek to subordinate its claim to the investor claims and requests that any order entered by the Court with respect to the Motion provide that the Order shall not affect the priority of ICBCFS's claim.

Dated: June 26, 2024

SCHULTE ROTH & ZABEL LLP

By: /s/ Tara Lederer

Tara Lederer

Abbey Walsh (admitted *pro hac vice*)

919 Third Avenue  
New York, NY 10022  
Telephone: 212.756.2000

*Attorneys for Industrial and Commercial Bank of  
China Financial Services LLC*

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**CERTIFICATE OF SERVICE**

Tara Lederer, of full age, on his oath, hereby certifies and says:

1. On June 26, 2024, I caused (i) the Reservation of Rights by Industrial And Commercial Bank Of China Financial Services LLC In Response to the Joint Motion of Receiver, Kevin Dooley Kent, and Internal Revenue Service ("IRS") for Order Resolving the IRS Claim Asserted Against the Receivership Estate and (ii) this Certificate of Service to be served on counsel to the Receiver, the IRS and the SEC in the above-captioned action.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: June 26, 2024

SCHULTE ROTH & ZABEL LLP

By: /s/ Tara Lederer

Tara Lederer

Abbey Walsh (admitted *pro hac vice*)

919 Third Avenue

New York, NY 10022

Telephone: 212.756.2000

*Attorneys for Industrial and Commercial Bank of  
China Financial Services LLC*