AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

Advanced Fraud-Based Litigation and Uncovering Hidden Assets

Hon. Janet S. Baer
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Gabe Bluestone
OmniBridgeway; Washington, D.C.

Thomas P. Jeremiassen
Development Specialists, Inc.; Los Angeles

Shoba Pillay
Jenner & Block LLP; Chicago

Luis E. Rivera, II
GrayRobinson, P.A.; Fort Myers, Fla.

CONCURRENT SESSION

2024

American Bankruptcy Institute
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Marriott Marquis, Washington DC

"Advanced Fraud-Based Litigation and Uncovering Hidden Assets"

Friday, April 19, 2024, 9:45–10:45

Hon. Janet S. Baer, U.S Bankruptcy Judge, N.D. Illinois (Moderator)

Gabe Bluestone, Investment Manager and Legal Counsel, Omni Bridgeway, New York

Thomas P. Jeremiassen, Sr. Managing Director, Development Specialists Inc., Los Angeles, California

Shoba Pillay, Partner, Jenner & Block, Chicago, Illinois

Luis E. Rivera, II, Bankruptcy Deputy Section Chair, Gray Robinson, P.A., Fort Myers & Tampa, Florida

Advanced Fraud-Based Litigation and Uncovering Hidden Assets

A Few Interesting Issues

Hon. Janet S. Baer, Bankr. N.D. Ill.

1. The "Golden Creditor"—extended look-back period

(a) Applicable look-back period

(i) § 548(a)(1) includes a look-back period (statute of limitations) of two years before the petition date.

(ii) § 544(b)(1) provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title . . . ."

(iii) Under § 544(b)(1) "[a] trustee stands in the shoes of an actual unsecured creditor and becomes subject to the same rights and limitations that the actual unsecured creditor would be subject to outside of bankruptcy." *Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 708 (Bankr. N.D. Ill. 2014) (explaining that the trustee's power under § 544(b) is derivative of that of an actual unsecured creditor under the applicable law).

(iv) § 544(b)(1) allows a "trustee to do in a bankruptcy [case] what a creditor would have been able to do outside of bankruptcy—except the trustee will recover the property for the benefit of the estate." *In re. Equip. Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2014). Accordingly, "if any unsecured creditor could reach an asset of the debtor outside bankruptcy, the [t]rustee can use § 544(b) to obtain that asset for the estate." *In re Leonard*, 125 F.3d 543, 544 (7th Cir. 1997).

(v) Pursuant to § 544(b)(1), known as the "strong-arm statute," the look-back period to bring an avoidance action is generally four to six years, depending on what is permitted under applicable state law.

(vi) When exercising her powers under § 544(b), the trustee utilizes the applicable non-bankruptcy voidable transfer statute and must identify the "triggering" creditor.

(b) IRS as the triggering "Golden Creditor"

(i) There is a split of authority regarding whether a trustee can step into the shoes of the Internal Revenue Service and use the ten-year limitations window available to the IRS for collection of assessed taxes. *See* 26 U.S.C. § 6502(a)(1).

(ii) A majority of courts allows a trustee to take advantage of the longer limitations period *as long as* the IRS is a creditor in the bankruptcy case, seeking collection of back taxes.[1]

(iii) Under this line of authority, if the IRS is a creditor of the debtor on the petition date, the trustee steps into its shoes and takes its rights as of that date. If the IRS could have brought an action on that date to avoid a transfer, so may the trustee.

(c) Practical application of the IRS as the "Golden Creditor"

(i) The Internal Revenue Code does not provide a look-back period; instead, § 6502 is a forward-looking limitation that focuses on the date that a tax is assessed.

(ii) To be successful, the trustee must meet the factors outlined under § 548 or applicable state law.

(iii) Even if there has been a tax assessment, the trustee must also determine:

(1) when the assessment was completed and, correspondingly, when the IRS limitations period begins and ends;
(2) the tax year(s) subject to the assessment;
(3) when the tax liability accrued; and
(4) when the allegedly fraudulent transfers were made in relation to the accrual of the tax liability. The timing of tax liability accrual compared to the timing of an allegedly fraudulent transfer will dictate avoidability both inside and outside the bankruptcy.[2]

2. <u>Determining the value of a business sold in a challenged leveraged acquisition</u>

(a) In order to prevail on a constructive fraudulent transfer claim, a plaintiff must satisfy two elements: (i) the transferor failed to receive reasonable equivalent value for the asset transferred; and (ii) the transferor was insolvent at the time of the transfer.

(b) Typically, fraudulent transfer litigation involves a battle of experts opining as to reasonably equivalent value and their analyses of the three tests for insolvency: the balance sheet test, the cash flow test, and the capitalization test.

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[1] On May 15, 2023, this author issued a Memorandum Opinion in *Fogel v. Specialty Industries II, LLC (In re Palmieri)*, 651 B.R. 349 (Bankr. N.D. Ill. 2023), in which the Court agreed with the majority in finding that, pursuant to § 544(b), the trustee could step into the shoes of the IRS to avoid the fraudulent transfers at issue.

[2] For a more detailed and helpful discussion of these issues, see Jason S. Brookner & Amber M. Carson, *Further Reflections on Using the Tax Code's Extended Period for Avoidance Under § 544(b)*, 41-OCT Am. Bankr. Inst. J. 14 (Oct. 2022).

(c) "The gold standard for determining the value of an asset is to sell it in an open and fair market." *In re Samson Res. Corp.*, Case No. 15-11934 (BLS), Adv. Pro. No. 17-51524 (BLS), 2023 WL 4003815, at *1 (Bankr. D. Del. June 14, 2023).

(i) Primacy should be placed on the reliability of a transaction in which parties have evaluated risk and reward and placed their own money on the line.

(ii) The opinion of a valuation expert, invariably influenced by hindsight, is by definition less reliable than a closed sale by market participants.

(iii) The Bankruptcy Code does not define "reasonably equivalent value." Courts should consider employing a "common sense" approach: "a party receives reasonably equivalent value for what it gives up if it gets roughly the value it gave." *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir 2007) (internal quotation omitted).

(iv) In conducting this analysis, a totality of the circumstances should be examined.

(v) Relevant circumstances include the market value of the transfer, whether the parties dealt at arm's length, and whether the transferor acted in good faith.

(d) In the context of a going concern, fair value is determined by "'the fair market price of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts.'" *Travellers Int'l AG v. Trans World Airlines, Inc. (In Re Trans World Airlines, Inc.)*, 203 B.R. 890, 895 (D. Del 1996), *rev'd on other grounds*, 134 F.3d 188 (3d Cir. 1998).

(e) If the sale process was properly conducted, there may be no reason to review an expert's valuation opinion. Objective evidence from the marketplace is generally a more reliable measure of value than the subjective estimates of an expert witness.

3. <u>The trustee's power to sell or assign avoidance actions</u>

(a) § 363 authorizes the trustee to sell "property of the estate" other than in the ordinary course of business.

(b) Are avoidance actions property of the estate?

(i) § 541(a)(1) defines "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case."

(ii) The scope is intended to be broad and includes tangible and intangible property, causes of action, and all other forms of property.

(iii) § 541(a)(3) provides that "property of the estate" includes "any interest that the trustee recovers" under § 550 and other sections of the Bankruptcy Code.

(iv) § 550(a) states that "to the extent that a transfer is avoided . . . , the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of the property."

(v) In *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 205 (1983), the Court explained that § 541(a) should be viewed "as a definition of what is included in the estate, rather than as a limitation," and that "property of the estate" includes "any property made available to the estate by other provisions of the Bankruptcy Code," including "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced."

(vi) § 541(a)(7) provides that "[a]ny interest in property that the estate acquires after the commencement of the case" is also "property of the estate."

(vii) § 926(a) states that "[i]f the debtor refuses to pursue a cause of action under section 544, 545, 547, 548 549(a), or 550," then the court, on the request of a creditor, "may appoint a trustee to pursue such cause of action."

(c) Permitting the sale of chapter 5 causes of action is practical and consistent with the trustee's duties to creditors.

(i) Selling chapter 5 causes of action allows a trustee to obtain recovery for creditors where there might otherwise be insufficient funds to litigate claims.

(ii) Courts regularly approve asset sales that include chapter 5 causes of action in a chapter 11 case.

(iii) Allowing a sale of chapter 5 causes of action is consistent with the trustee's duties under § 704(a) to maximize either the value of the estate or the distribution to creditors of the estate.

(iv) This duty includes consideration of the expense associated with pursuing causes of action.

(d) Split of authority on the trustee's sale of avoidance actions

(i) The First, Fifth, Seventh, and Ninth Circuits have ruled that avoidance actions can be included in property of the estate, although in each case the courts have analyzed the specific claims before them instead of issuing a general ruling.[3]

[3] *See Morley v. Ontos, Inc. (In re Ontos, Inc.)*, 478 F.3d 427, 431 (1st Cir 2007); *Briar Cap. Working Fund Cap., L.L.C. v. Remmert (In re S. Coast Supply Co.)*, 91 F.4th 376, 381 (5th Cir. 2024); *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 260–61 (5th Cir. 2010); *Mellon Bank, N.A. v Dick Corp.*, 351 F3d 290, 291 (7th Cir. 2003);

(ii) Conversely, the Third Circuit in *Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243–47 (3d Cir. 2000), held that avoidance actions which were sold as part of a sale of all of the debtor's assets were not property of the debtor. The court found that the power to avoid a debtor's pre-petition transfers and obligations to maximize the value of the bankruptcy estate for the benefit of creditors pursuant to § 544 neither shifts ownership of the fraudulent transfer actions to the debtor in possession, nor constitutes a debtor's assets. The court held that the "debtor's assets" and "property of the estate" have very different meanings under the Bankruptcy Code. However, the court left open the questions of whether a *trustee's* causes of action were property of the estate and whether the trustee could transfer such causes of action.

4. <u>Is a fraudulent transfer action capped at the value of the creditors' claims?</u>

(a) Under the Uniform Fraudulent Transfer Act (the "UFTA"), a creditor may not recover *in excess of* its unpaid claim. UFTA § 8(b).

(b) § 550(a) contains no explicit cap on recoveries of fraudulent transfer claims. It provides that, "to the extent that a transfer is avoided . . . , the trustee may recover *for the benefit of the estate*, the property transferred, or, if the court so orders, the value of such property."

(c) Courts are split on the issue.

(i) *See Giuliano v. Schnabel (In re DSI Renal Holdings, LLC)*, Case No. 11-11722 (KBO), Adv. Proc. No. 14-50356 (KBO), 2020 WL 550987, at *8 (Bankr. D. Del. Feb. 4, 2020) (holding that a fraudulent transfer recovery may not exceed unpaid creditors' claims and finding that § 550's "for the benefit of the estate" language really means "for the benefit of creditors").

(ii) *But see Moore v. Bay (In re Sassard & Kimball, Inc.)*, 284 U.S. 4 (1931), which seems to provide for an unlimited avoidance recovery. Note, however, that *Moore* did not squarely address the issue. Instead, the court held that any recovery was not limited to the triggering creditor's claim.

(d) The distinction generally focuses on the alleged "plain meaning" of § 550(a), which requires a recovery for "the benefit of the estate." Some courts have held that this phrase means that as long as the recovery provides some benefit to the estate, then a plaintiff may recover the entire transfer—even if it exceeds creditors' claims. Other courts disagree, tending to consider the purpose and policy of fraudulent transfers law, which is primarily a creditor remedy.

Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 287 (B.A.P. 9th Cir. 2005); *Duckor Spradling & Metzger v. Baum Tr. (In re P.R.T.C., Inc.)*, 177 F.3d 774, 781 (9th Cir 1999).

5. Is § 548 another way to challenge "predatory lending"? [4]

(a) Recently, there has been a lot of discussion over transactions among syndicated lenders subject to what they have alleged are "predatory lending" tactics, also called "creditor on creditor" or "lender on lender" violence. Essentially, these situations involve the use of complex contract terms to benefit some syndicate members over others in ways arguably never contemplated at syndicate formation.

(b) Court thus far have generally declined to intervene when these lending subgroups collide, and most cases in which the issue arises are ultimately resolved. When courts are involved, they ordinarily conclude that the parties signed the syndication agreements, went into the transactions with "eyes wide open," and had their chance to agree or disagree to provisions that could potentially harm them when they signed the deals. If the agreement arguably permits the actions taken, that typically ends the inquiry.[5]

(c) However, what if these transactions were examined not from a contractual perspective, but from the creditor's perspective? Perhaps affected lenders could argue that these "predatory' actions were undertaken with the express purpose of hindering, delaying, and even defrauding excluded lenders.

(d) If that were the case, could both drop-down and uptier transactions undertaken with the intent to hinder, delay, and defraud creditors be avoided as fraudulent transfers?

(e) If so, maybe excluded lenders dealing with aggressive debtors and fellow syndicated lenders could find some relief that they could not otherwise obtain by challenging the transactions on contractual grounds.

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[4] This section is based on the thought-provoking premise and discussion in *Predatory Lending, Twyne's Case and Dean v. Davis* by Bruce A. Markell, 43 No. 5 Bankruptcy Law Letter NL 1, Vol. 42, Issue 5 (May 2023).

[5] For relatively recent examples of cases in which this issue arose and the court may have been involved, see *Boardriders, Serta, Revlon, Neiman Marcus, PetSmart,* and *J.Crew.*

Advanced Fraudulent Transfers – Practical Considerations

Luis E. Rivera II
GrayRobinson, P.A.
Fort Myers & Tampa, Fla.

1. **Direct Versus Derivative Standing: Who owns the claims?**

   a. The questions of whether a claim is property of the estate and whether the trustee has standing to bring such claims are critical determinations, as a bankruptcy court may lack jurisdiction over non-estate property or such claims may be dismissed for lack of standing it they are unrelated to a debtor or its estate.

   b. Claims that benefit the creditor body as a whole are derivative actions related to the bankruptcy estate, while claims that implicate a recovery that is individualized and particularized to a specific creditor are direct actions.

      i. "[C]reditors 'lack standing to bring causes of action [that] are . . . similar in object and purpose to claims that the trustee could bring in bankruptcy regardless of whether such claims are technically part of the estate.' " *In re Revlon, Inc.*, No. 22-10760 (DSJ), 2023 WL 2229352, at *15 (Bankr. S.D.N.Y. Feb. 24, 2023) (quoting *In re Hatu*, No. 19-05428-5-JNC, 2022 WL 1436051, at *10 (Bankr. E.D.N.C. May 5, 2022)).

      ii. "If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate." *In re With Purpose, Inc.*, 654 B.R. 715, 721–22 (Bankr. N.D. Tex. 2023) (quoting *Matter of Educators Grp. Health Tr.*, 25 F.3d 1281, 1284 (5th Cir. 1994)).

2. **Bankruptcy Rule 2004 vs. Discovery under the Federal Rules of Civil Procedure: What is the proper mechanism for obtaining discovery?**

   a. Bankruptcy Rule 2004 permits significantly broader and more liberal discovery akin to "fishing expeditions" and provides examinees less procedural safeguards than the discovery rules in the Federal Rules of Civil Procedure.

      i. *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) ("As Fed. R. Bankr. P. 2004 is meant to give the inquiring party broad power to investigate the estate, it does not provide the procedural safeguards offered by Fed. R. Bankr. P. 7026. For example, under Fed. R. Bankr. P. 2004 examination, a witness has no general right to representation by

counsel, and the right to object to immaterial or improper questions is limited.").

ii. *In re Defoor Ctr., LLC*, 634 B.R. 630, 639 (Bankr. M.D. Fla. 2021) ("Unlike Rule 26 of the Federal Rules of Civil Procedure, which generally prohibits 'fishing expeditions,' Rule 2004 is often described as being in the nature of a fishing expedition.").

b. Pending Proceeding Rule: Bankruptcy Rule 2004 may not be used to obtain documents and testimony from another party or witness on an issue that is the subject of a pending action.

i. *In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 274–75 (D. Colo. 1991) (trustee's commencement of adversary proceeding precluded trustee from continuing to examine parties to the proceeding through preexisting orders granting Bankruptcy Rule 2004 examinations; instead, trustee was limited to discovery under Federal Rules of Civil Procedure).

ii. *In re Blackjewel, L.L.C.*, No. 3:19-BK-30289, 2020 WL 6948815, at *6 (Bankr. S.D.W. Va. July 14, 2020) (granting bank's motion to discontinue responses to debtor's pending Bankruptcy Rule 2004 requests because debtor had initiated adversary proceeding against bank).

3. Substitute Service of Subpoenas

a. There is a split of authority on whether substitute service of a subpoena is permissible or whether personal service is required.

i. *In re Procom America, LLC*, 638 B.R. 634, 640 n. 23 (Bankr. M.D. Fla. 2022) (citing *Rainey v. Taylor*, No. 18-24802-MC, 2019 WL 1922000, at *2 (S.D. Fla. Apr. 30, 2019) ("There is a split among the circuits as to whether delivery of the subpoena requires personal delivery.")).

b. Bankruptcy Rule 9016, which incorporates Federal Rule of Civil Procedure 45, only requires a subpoena to be delivered—the word "personally" does not appear. Compare to Federal Rule of Civil Procedure 4(e)(2)(A), which provides that an individual may be served by "delivering a copy of the summons and of the complaint to the individual personally"—if merely "delivering" a document requires personal service, then the word "personally" is surplusage in Rule 4(e)(2)(A). *In re Falcon Air Exp., Inc.*, No. 06-11877-BKC-AJC, 2008 WL 2038799, at *1 (Bankr. S.D. Fla. May 8, 2008).

4. Bar Orders: What are they and when are they appropriate?

a. Bar orders often arise in the context of settlement approval in a liquidation to prevent claimants from pursuing non-debtor entities in exchange for a settlement payment to the bankruptcy estate.[1]

b. Courts who approve bar orders typically rely on section 105 of the Bankruptcy Code and section 1123(b)(6), if the bar order is proposed in a chapter 11. Section 105 empowers bankruptcy courts to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title," while section 1123(a)(6) provides that a plan of reorganization may "include other appropriate provisions not inconsistent with the applicable provisions of this title."

c. Bar orders are typically litigated in connection with Rule 9019 motions in chapter 7 or 11 liquidations.

d. When is a bar order appropriate?

i. The settlement must be fair and equitable. *In re Bard*, 49 F. App'x 528, 530 (6th Cir. 2002) (a court must "apprise itself of all facts necessary to evaluate the settlement and make an informed and independent judgment as to whether the compromise is fair and equitable.").

ii. Some courts evaluate bar orders based on the factors established by the Eleventh Circuit in *Matter of Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996). These factors are (i) interrelatedness of the claims that the bar order precludes, (ii) likelihood of barred parties to prevail on barred claims, (iii) complexity of the litigation, and (iv) likelihood of depletion of the resources of the settling parties. *Matter of Munford, Inc.*, 97 F.3d 449.

iii. As bar orders are often proposed in the context of a settlement, the bar order must also satisfy the requirements for the approval of a settlement (although there is some overlap between the factors and some courts collapse the Munford factors into the analysis for approving a settlement). Several circuits have embraced a four-factor test to evaluate whether a settlement is fair and equitable. The factors are "(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attended it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in

[1] Understanding the distinction between bar orders and releases is particularly important, given *Purdue Pharma*, which has not yet been decided by the Supreme Court. While the Supreme Court's ruling in *Purdue Pharma* may impact all forms of injunctive relief granted by bankruptcy courts, whether in the form of a release, bar order, or channeling injunction, Purdue Pharma involves extremely broad, non-consensual releases of non-derivative claims. *In Re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir.), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023).

the premises." *In re Just. Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990); *In re Bard*, 49 F. App'x at 530.

iv. The bankruptcy court may be required to conduct an evidentiary hearing on fairness, "when a settlement agreement contains a bar order extinguishing possible legal claims of non-settling defendants . . . to determine whether the settling defendants are paying their fair share of the liability." *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 484 (6th Cir. 2001). This rule applies when the defendants share a common liability and the bar order eliminates the non-settling defendants' contribution rights.

v. Jurisdictional considerations are also important. Without consent, the bankruptcy court and district courts must have jurisdiction to enjoin the claims subject to the bar order. *Matter of Zale Corp.*, 62 F.3d 746, 751 (5th Cir. 1995).

vi. There is a circuit split as to the appropriate inquiry for determining whether claims are sufficiently related to a bankruptcy estate or proceeding to establish a jurisdictional nexus. The Eleventh Circuit has held that if a defendant in an adversary proceeding conditions a settlement upon the entry of a bar order, the claims encompassed by the bar order are "related to" the bankruptcy case. *Matter of Munford, Inc.*, 97 F.3d at 454–55. But the Fifth and Sixth Circuits reject the "related to" inquiry in favor of simply evaluating whether the outcome of the actions subject to the bar order affect the bankruptcy case. *Matter of Zale Corp.*, 62 F.3d 746; *In re Greektown Holdings, LLC*, 728 F.3d 567, 578 (6th Cir. 2013).

vii. The scope of the bar order must be scrutinized and limited "to ensure that the only claims that are extinguished are claims where the injury is the non-settling defendant's liability to the plaintiffs." *Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 307 (2d Cir. 2003).

e. Case Summaries

i. *In re Rothstein Rosenfeldt Adler, P.A.*, No. 09-34791-BKC-RBR, 2010 WL 3743885, at *6 (Bankr. S.D. Fla. Sept. 22, 2010) (Ray, J.). The trustee proposed a compromise to resolve adversary proceeding involving preferential and fraudulent transfers. The avoidance defendants offered to turn over virtually all of their assets, but requested a bar order relating to claims arising from their involvement in the debtor's Ponzi scheme as condition to the settlement. The bankruptcy court concluded it had subject matter to bar the claims and that the bar order was interrelated to the trustee's claims and arose out of the same facts as the trustee's claims against the defendants.

ii. *In re GunnAllen Fin., Inc.*, 443 B.R. 908, 917–18 (Bankr. M.D. Fla. 2011) (Williamson, J.). Bankruptcy court declined to approve settlement which

contained a bar order precluding securities claimants from pursuing claims against dealer's employees in exchange for fewer than 25 cents on the dollar.

iii. *In re J.C. Householder Land Tr. #1*, 501 B.R. 441, 457–60 (Bankr. M.D. Fla. 2013) (Williamson, J.). Unlike *GunnAllen Financial* and *Fundamental Long Term Care*, which addressed bar orders as part of a motion to compromise, chapter 11 plan included a bar order enjoining lender from pursuing its claims against non-debtor on account of personal guaranties as long as the debtor was current on its plan payments Chapter 11 plan included a bar order enjoining lender from pursuing its claims against non-debtor on account of personal guaranties as long as the debtor was current on its plan payments. Judge Williamson concluded that all the *Transit* factors weighed in favor of approving the bar order, as among other things, without the bar order, the guarantors would likely be forced into their own bankruptcy cases, resulting the needless consumption of resources and preventing the guarantors from rehabilitating their credit, which would be essential to the debtor's ability to successfully reorganize.

iv. *In re Fundamental Long Term Care, Inc.*, 515 B.R. 352 (Bankr. M.D. Fla. 2014) (Williamson, J.). The (i) chapter 7 trustee, (ii) state court receiver, and (iii) six probate estates that sued the entity in the state court receivership and the debtor's wholly-owned subsidiary reached a settlement resolving all claims among them. The settlement contemplated a bar order prohibiting third parties from suing the state court receiver for withdrawing its defense of the entity in the receivership. The bankruptcy court concluded that the bar order was not fair and equitable to the enjoined parties because the bar order deprived the shareholders, investors, and lenders of their bargained for right to defend the entity in the receivership against liability and the enjoined parties did not receive any benefit under the proposed compromise.

f. Use of bar orders in Rule 9019 motions can either be express (*e.g., In re HWA Properties, Inc.*, 544 B.R. 231 (Bankr. M.D. Fla. 2016) (Delano, J.); *In re GunnAllen Financial, Inc.*, 443 B.R. at 917–18 (Williamson, J.)) or disguised in a manner where the terms of the bar order are not clear and the inclusion of the bar order creates due process issues (*e.g., In re SportStuff, Inc.*, 430 B.R. 170 (B.A.P. 8th Cir. 2010)).

g. Rule 7001(7) and (9) provides that a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, 11, 12, or 13 plan provides the relief and a proceeding to obtain a declaratory judgment must be brought as adversary proceedings, triggering the various procedural protections afforded by the incorporation of portions of the Federal Rules of Civil Procedure made applicable by the Part VII Rules.

h. Rule 3017(f) requires creditors to be given 28 days' notice of the time the time for objecting to a plan and the hearing on confirmation where the plan provides for an

injunction that enjoins conduct not otherwise enjoined under the Bankruptcy Code and an entity is subject to the injunction is not a creditor or equity security holder.

i. If a plan provides for an injunction of conduct not otherwise enjoined by the Bankruptcy Code, Rule 2002(c)(3) requires the notice of hearing on confirmation of the plan to:

   i. Include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;

   ii. Briefly describe the nature of the injunction; and

   iii. Identify the entities that would be subject to the injunction.

j. If the bar order provides declaratory or injunctive relief, parties may attempt to sidestep the procedural safeguards provided by Bankruptcy Rules 2002(c)(3), 3017(f) and 7001 by using a Rule 9019 motion as a vehicle for obtaining approval of the bar order. This is particularly problematic where the declaratory or injunctive relief impacts on the rights of third parties who are not party to the settlement and such parties are not afforded the appropriate due process protections. *In re SportStuff, Inc.*, 430 B.R. at 181.

Tips From a Forensic Accountant

Thomas P. Jeremiassen
Sr. Managing Director
Development Specialists, Inc.
Los Angeles, California

1. Forensic accountant's investigation of a debtor's financial transactions
    a. Vital records
        i. Access to or copy of debtor's accounting system
            1. The general ledger provides a history of the debtor's financial transactions, including an accounting for its cash receipts and disbursements
            2. Provides for historical financial position (balance sheet) and operating results (income statement), which may be necessary for, among other things, determining the debtor's solvency
        ii. Bank records
            1. Monthly statements, canceled checks, deposit detail, wire transfer advices
            2. Third-party evidence and necessary for confirmation and reconciliation of cash transactions recorded by the debtor
        iii. Outside accountant records
            1. Audited/reviewed/compiled financial statements and related workpapers
            2. Tax returns and related workpapers
            3. Provides for, among other things, additional confirmation of transaction recorded in the debtor's accounting system, or evidence of missing assets or liabilities
        iv. Invoices and other backup documentation
            1. Confirmation and further evidence of substance of transactions
            2. Provides additional information not captured in the debtor's accounting system
        v. Emails

1. Communications among debtor personnel that may provide additional information and clarity for certain transactions

vi. Public records

1. May provide evidence of additional assets or liabilities that were not recorded in the debtor's accounting system

b. Identification of potentially fraudulent transactions/activity

i. Reconstruction of historical cash activity

1. Compilation of database of cash receipts and disbursements
2. Provides payee/payer, timing, amount and purpose for each transaction
3. Identification of potentially avoidable cash transfers
   a. Transfers of cash potentially made with actual intent to hinder, delay or defraud creditors
   b. Disbursements made that were potentially for the benefit of a non-debtor person or entity
   c. Disbursements for which the purpose can not be determined from the available documentation
   d. Other disbursements for which the debtor potentially did receive reasonably equivalent value

ii. Identification of transfers of non-cash assets evidencing potentially actual fraud, or for which the debtor potentially did not receive reasonably equivalent value

iii. Analysis of debtor's solvency at the time of potentially constructive fraudulent transfers

iv. Identification of potentially fraudulent scheme (*e.g.*, Ponzi scheme)

2. Litigation support

a. Assist counsel with preparation of complaints and supporting evidence

i. Preparation of analyses or schedules of avoidable transfers

ii. Compilation of documentation for each transfer

b. Preparation of expert report(s)

i. Counsel should review to ensure that the report encompasses all necessary opinions

ii. Counsel's review will assist the expert in ensuring that his opinions and the bases for the opinions are expressed in language that is understandable to a layperson

c. Provision of expert testimony at deposition and/or trial

i. Rehearsal of direct examination in advance of trial

1. Helps the expert focus and be prepared on the key components

2. Prepares the expert with delivering answers in a clear, concise and understandable manner

ii. Rehearsal of cross-examination questions in advance of deposition and trial

1. Counsel generally has more insight than the expert as to questions that could be asked at deposition and on cross-examination at trial

2. Prepares the expert with delivering responses in a calm and non-defensive manner

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BRIDGEWAY
ABI Spring Meeting
Advanced
Fraud-Based Litigation
Gabe Bluestone
Investment Manager, Legal Counsel
gbluestone@omnibridgeway.com, 212-488-5331
April 2024
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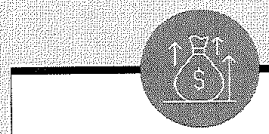
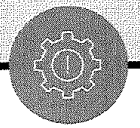
Debtors, Creditors and Estate Representatives Face Unique Challenges



Bankruptcy / insolvency administration and claims prosecution can be **expensive and have long durations**



Most debtors, creditors and trustees have **limited resources** for potential litigation

Thus, parties may have to abandon valuable claims, or **settle for a fraction of their value**

Awards and judgments can be **difficult to enforce**

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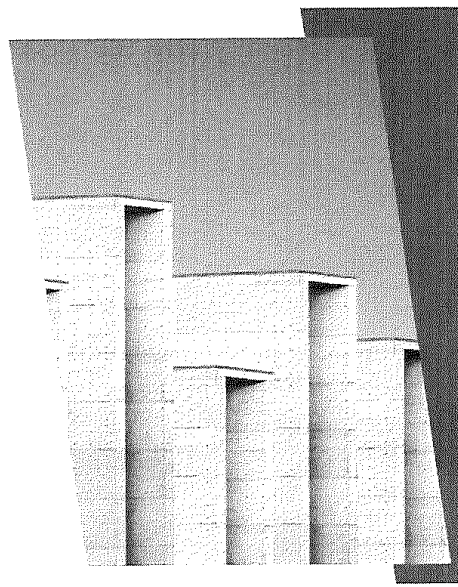
Litigation Funding Can Help

What is litigation funding?

Non-recourse capital where the return is contingent upon an expected legal outcome.

Bespoke Funding Obligations:

- Hourly fees
- Hybrid Fees
- Costs/Experts
- Working Capital
- Appeals
- Judgment/Award Enforcement



What types of actions can litigation funding be used for?

- Avoidance actions
- Fraudulent transfer litigation
- DIP Financing
- Preference actions
- Breach of fiduciary duty claims
- Insurance coverage disputes
- Turnover and tax recoveries
- Lien avoidance claims
- Recoupment and setoff disputes
- Other commercial disputes

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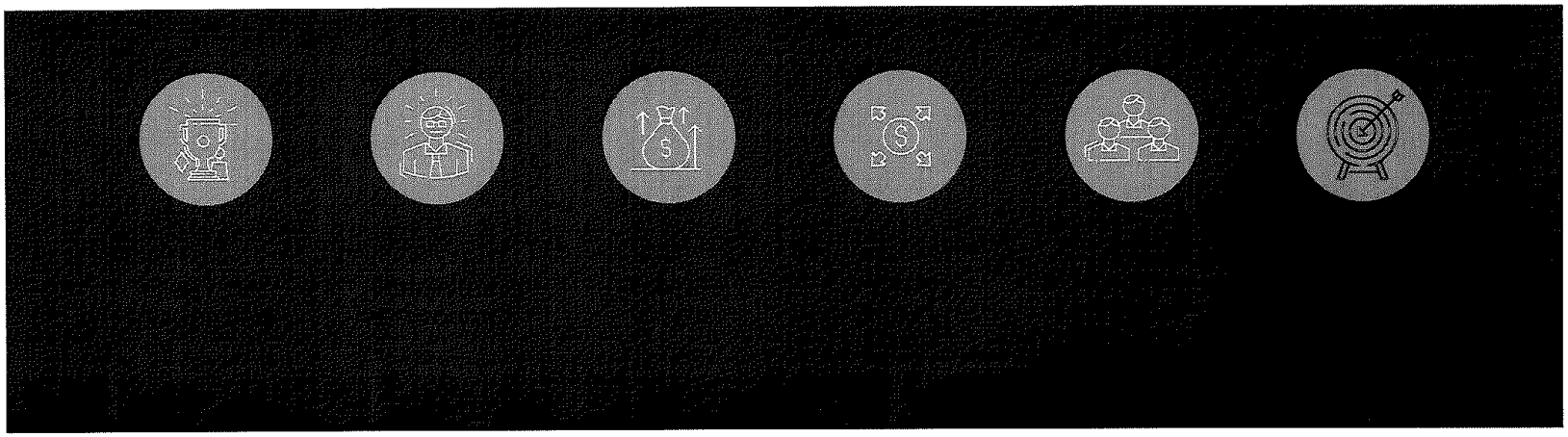
Client and Firm Advantages



Solutions to Monetize Claims, Judgments, Awards and Receivables

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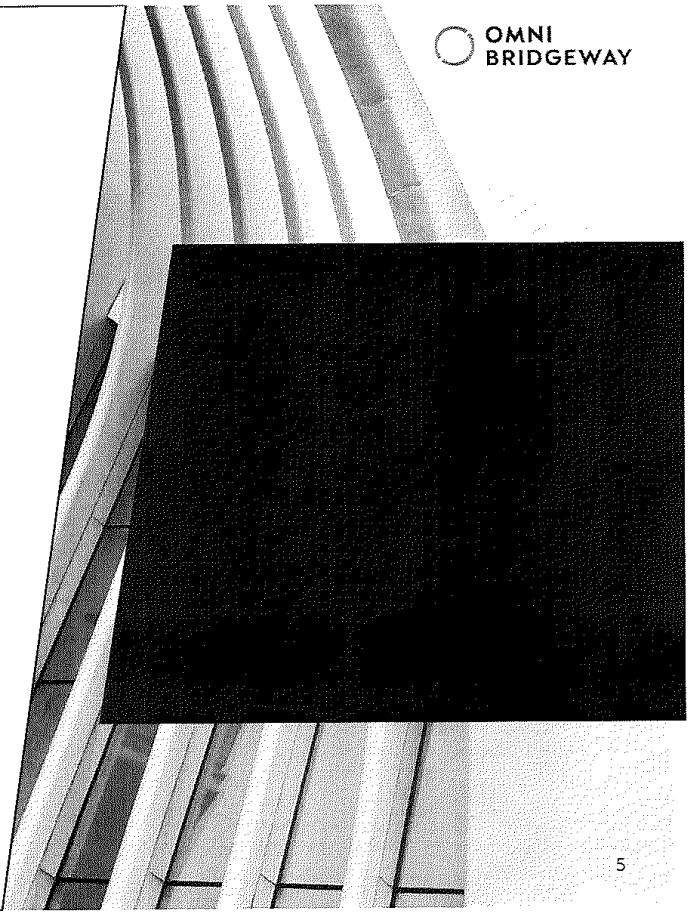

Preventative action
A funder can help devise, implement and fund strategies from the outset to help map out a strategy.

Recovery and enforcement
An appropriate litigation funder can provide the financing and project management support to recover judgments and arbitration awards against able but unwilling debtors.

Purchasing legal assets
For those seeking immediate capital, a funder can purchase (or pay cash advances on) debts, judgments, arbitration awards and certain other claims (such as insolvency claims which may be held by other parties). This can include single claims or portfolios of multiple disputes, non-performing loans or subrogation rights held by insurers.

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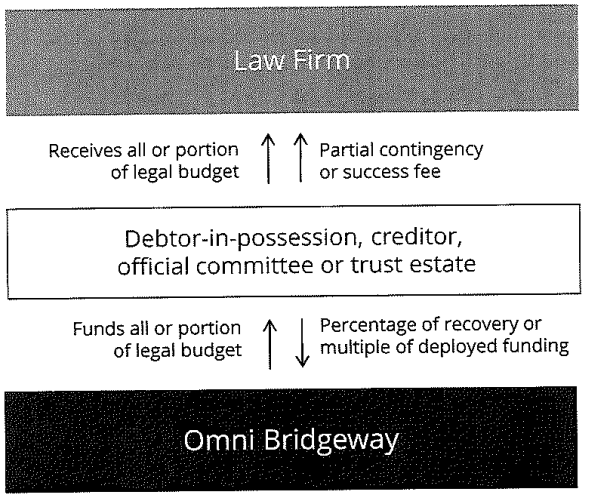
Law Firms Win Engagements

By Offering AFAs To Clients

Single-Case Financing



CRITERIA

$1M+
In fees

$10M+
Potential recovery

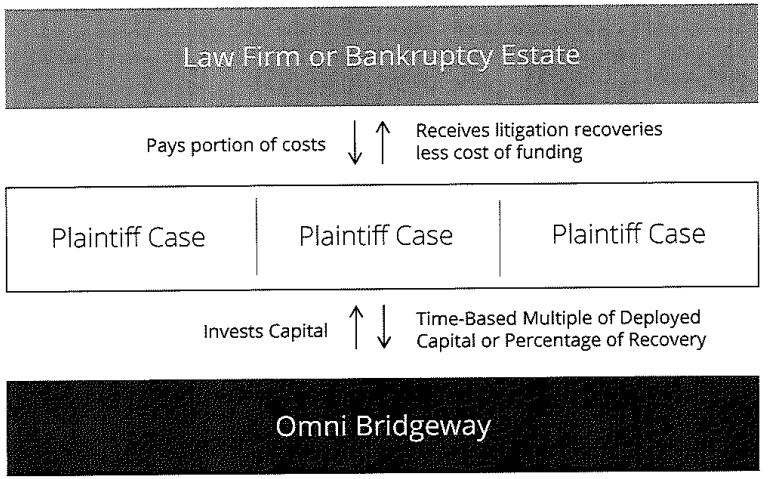
Strong likelihood of success

Collectability (enforcement services available from our team)

OMNI BRIDGEWAY

Portfolio Funding for Law Firms

Bankruptcy Estates Yields Increased Recoveries



PORTFOLIO FUNDING
Portfolio-Case Financing

CRITERIA

3+
Cases

$2M+
Funding needed

Strong likelihood of success

Collectability (enforcement services available from our team)

OMNI BRIDGEWAY

Relevant Experience

Enforcement and recovery

Practical Considerations

- Are there assets?
- Where are the assets located?
- Relevant jurisdictions
- Sequencing proceedings
- Asset freeze/restraint
- Discovery/disclosure

State Law Procedural Tools

- State Law Procedural Tools
- New York Restraining Notice (CPLR 5222) (including against non-judgment debtor)
- Less creditor friendly jurisdictions (*i.e.*, leave required for third party discovery)
- Third Party Discovery
- CHIPS/bank Discovery
- Injunctive Relief

General Considerations

- Third Party Investigators (including Desktop research, human source)
- Non-US jurisdictional considerations (*i.e.*,. recognition of judgments/awards, freezing orders)
- Alter ego: Veil piercing and reverse veil piercing
- Fiduciary claims (including trust fund doctrine)

Additional Considerations

- Homestead exemptions (*i.e.*, FL, TX)
- Community property
- Parallel criminal proceedings
- Competing creditors
- Sovereign immunity

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Delivering Result

How Omni Bridgeway works together with counsel and trustees/claimants

Asset enforcement
(High value/low impact or low value/high impact)

Non-asset / financial leverage
(Trade relations, financial ratings)

Diplomacy

Legal
(Impact on other proceedings)

Ex-parte versus inter-parte jurisdictions

Time limitation considerations

Sequencing of jurisdictions based on recognition and disclosure regimes

Timing of asset seizure/injunctive relief requests between jurisdictions

Public and proprietary databases

Politics and publicity

Regional customs & cultures

Networks & connections

Decades' experience successfully negotiating with Heads of State / government officials

Key Tips Learned During Celsius Investigation[1]

Shoba Pillay, Partner
Jenner & Block, Chicago, Illinois

A. Follow the Money

1. When dealing with a fraud involving crypto, the bad actors often hope they can hide the proceeds of their fraud because they believe crypto is untraceable. That is an incorrect. Most crypto transactions can be traced on the public blockchain.
   a. The challenges arise when a more sophisticated actor uses a mixer or conducts business via the dark web, which are both tactics used by criminals and less common with crypto companies purporting to be legitimate operations.
   b. Use third-party experts to assist with blockchain analytics and tracing.
   c. Do not assume a purportedly cold wallet is the end of the line. You can use legal process, including depositions, to obtain information about the assets inside the wallet.
2. When dealing with fiat currency, asset tracing via traditional methods, including serving legal process on relevant financial institutions, is the best course of action.
   a. Do not ignore purchases of high-value and luxury items and real property as viable avenues to trace assets.

B. Collect All Communications

1. Employees at crypto and other startup companies tend to communicate via messaging rather than email.
2. In addition to email, be sure to collect and review content for relevant employees for:
   a. All instant messaging tools, including Slack, Teams Chats, Zoom Chats, Skype, Lync, etc.
   b. All mobile messaging tools, including SMS, WhatsApp, Telegram, Signal, SnapChat, Discord, Instagram, Facebook, X (Twitter), etc.

C. Talk to the Victims

1. The victims of fraud, including individual creditors, are a critical resource to understanding what really happened that led to a bankruptcy.
2. Interview victims to understand:

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[1] See the attached "Final Report of Shoba Pillay, Examiner," *In re Celsius Network LLC, et al*, 22-10964 (Bankr. S.D.N.Y., January 30, 2023)

a. How they were recruited to or attracted to become a customer.
b. What they understood was the business model for the company.
c. What they understood re why the company filed for bankruptcy.
d. The impact to their savings and lifestyle due to the bankruptcy.
e. Their level of sophistication in understanding the business of the company and how it operated.

3. Developing these facts can help you understand if the company committed fraud, who was involved in the fraud, how they executed the fraud (did they lie?), etc.
4. Use these facts coupled with asset tracing to determine if there are viable fraudulent transfer claims.

22-10964-mg Doc 1956 Filed 01/31/23 Entered 01/31/23 02:17:35 Main Document
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
CELSIUS NETWORK LLC, *et al.*,	Case No. 22-10964 (MG)
Debtors.	(Jointly Administered)

FINAL REPORT OF SHOBA PILLAY, EXAMINER

Jenner & Block LLP
353 N. Clark Street
Chicago, Illinois 60654
(312) 222-9350

1155 Avenue of the Americas
New York, New York 10036
(212) 891-1600

Counsel to the Examiner

January 30, 2023

TABLE OF CONTENTS

Part One: Investigation Background.

Part One of this Report addresses the scope of, and investigative steps taken in, the Examiner's investigation.

I. Scope Of The Report.

On September 29, 2022, the Bankruptcy Court appointed Shoba Pillay (the "Examiner") to investigate and report on certain topics related to Debtors Celsius Network LLC and related entities.[1] The Court also directed the Examiner to review Celsius customer *pro se* filings on the Court's docket to determine whether her investigation should be expanded.[2] After considering those hundreds of filings and communicating with customers, the Examiner asked the Court to clarify that the Examiner's investigative mandate included an examination of Celsius's native currency, the CEL token, and Celsius's representations to its customers.[3] The Court so clarified.[4] After directing the

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[1] *Order Approving the Appointment of Chapter 11 Examiner* dated September 29, 2022, *In re Celsius Network LLC,* Case No. 22-10964 (MG) [Dkt. 923]; *Order Directing Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code* dated September 14, 2022, *In re Celsius Network LLC,* Case No. 22-10964 (MG) [Dkt. 820] ("Examiner Order"). Unless otherwise indicated, all references to the "Dkt." are to filings found on the docket for the lead case, *In re Celsius Network LLC,* Case No. 22-10964 (MG).

Debtors in this case are Celsius Network LLC; Celsius KeyFi LLC; Celsius Lending LLC; Celsius Mining LLC; Celsius Network Inc.; Celsius Network Limited; Celsius Networks Lending LLC; Celsius US Holding LLC; GK8 Ltd.; GK8 UK Limited; and GK8 USA LLC. For ease of reference, this Report uses "Celsius" to include Celsius Network LLC and its affiliated debtors and debtors-in-possession.

[2] Examiner Order at ¶ 16.

[3] *Examiner's Motion to Confirm Examination Scope or Alternatively for Expansion of the Scope of the Examination* dated October 18, 2022 [Dkt. 1112].

[4] *Order Approving Examiner's Motion to Confirm Examination Scope or Alternatively For Expansion of the Scope of the Examination* dated November 1, 2022 [Dkt. 1260] ("Order Approving Examiner's Motion").

Examiner to confer with the parties,[5] the Court further expanded the Examiner's investigative mandate to include an examination of claims that Celsius's business operations amounted to a Ponzi scheme.[6]

Consistent with the Court's Orders, the Examiner's Report therefore addresses the following subjects:

- "the Debtors' cryptocurrency holdings, including a determination as to where the Debtors' cryptocurrency holdings were stored pre-petition and are stored post-petition, and whether different types of accounts are commingled"[7] and including "why and how other digital assets were converted into CEL tokens, and how these tokens were marketed, stored, and traded—including whether any of the Debtors' trading practices involving CEL tokens generally or determinations of CEL tokens awarded as part of the Earn Rewards program—impacted their value;"[8]

- "the representations Debtors generally made in public representations to customers to attract them to their platform and about their cryptocurrency holdings and account offerings;"[9]

- whether "the Debtors used new deposits being made by customers to make payments or otherwise meet obligations to existing customers at a time when the Debtors had no other sources (whether liquid or which could have been monetized) from which to make such payments or meet such obligations;"[10]

- "the current status of the utility obligations of the Debtors' mining business;"[11] and

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[5] Hearing Transcript (November 1, 2022), at 80:14-18.

[6] *Stipulation and Agreed Order Modifying the Scope of Examiner Order* dated November 14, 2022 [Dkt. 1343] ("Stipulation and Agreed Order").

[7] Examiner Order at ¶ 3.

[8] Order Approving Examiner's Motion at ¶ 2.

[9] *Id.* at ¶ 3.

[10] Stipulation and Agreed Order at ¶ 1.

[11] Examiner Order at ¶ 3.

- "the Debtors' procedures for paying sales taxes, use taxes, and value added taxes and the extent of the Debtors' compliance with any non-bankruptcy laws with respect thereto."[12]

Parties are directed to the Examiner's Interim Report, dated November 19, 2022, for the Examiner's investigative findings regarding (i) "why there was a change in account offerings beginning in April 2022 from the Earn Program to the Custody Service for some customers while others were placed in a 'Withhold Account;" and (ii) how and where the cryptocurrencies held in Custody and Withhold accounts were stored pre- and post-petition and whether assets in those accounts were commingled with other Celsius assets.[13] Those findings are not repeated here.

II. Executive Summary.

The business model Celsius advertised and sold to its customers was not the business that Celsius actually operated. Through its website, marketing emails, Twitter, livestream town hall meetings, and other messaging, Celsius sold its customers on the concept that it was better than traditional "big banks." By investing with Celsius, its customers were told that they would be able to "unbank" themselves and enjoy "financial freedom" as part of the Celsius community. Celsius emphasized that it put "its community first" and that its business would be "built on trust" and "transparency" with its community members. Celsius promoted itself as an altruistic organization, bragging in one

[12] *Id.* at ¶ 3.

[13] *Interim Report Of Shoba Pillay, Examiner* dated November 19, 2022 [Dkt. 1411] ("Examiner's Interim Report").

blog post: "Can we really bring unprecedented financial freedom, economic opportunity and income equality to everyone in the world? We are Celsius. We dream big."

Celsius boasted that its primary financial product—its "Earn" program—was the "safest place for your crypto." Customers who participated in the Earn program transferred their crypto assets to Celsius in exchange for interest, or what Celsius called rewards. In turn, Celsius deployed its customers' crypto assets—through further loans, investments, or on exchanges—to generate income, or what Celsius called yield. Celsius's co-founder and majority owner, Alex Mashinsky, repeatedly told customers in his weekly livestream conversations (referred to as "Ask Mashinsky Anything" or "AMAs") that customer-deposited coins "are your coins, not our coins . . . [i]t's always your Bitcoin." When asked what would happen in the event of a bankruptcy, Mr. Mashinsky told customers "coins are returned to their owners even in the case of bankruptcy."

Celsius advertised that it knew how to generate high returns with low risk by doing "what Celsius does best"—carefully vetting its financial counterparties and ensuring that when those counterparties borrowed crypto assets from Celsius, they pledged "over 100% collateral" to secure their loans. Celsius sold its customers on the promise that Celsius would pay them "at least 5% annual interest" and that their rewards would equal each customer's share of up to 80% of Celsius's revenues.

Another cornerstone of Celsius's marketing strategy was its promotion of its native CEL token. Celsius told its customers that CEL was its "backbone" with Mr. Mashinsky repeatedly equating the value of CEL with Celsius's value. Celsius explained that it intended to raise the initial capital to fund its business by selling 325 million CEL through private pre-sales and an initial coin offering ("ICO") and that these sales would raise $50 million. Celsius told customers that they would receive rewards in CEL that Celsius would obtain from its internal treasury (which would hold an additional 325 million CEL) or by buying CEL in the secondary market. According to Celsius, this process would create a self-sustaining "flywheel." Celsius's marketing efforts would start the wheel spinning by generating more users and thus more assets for Celsius to invest; Celsius in turn would earn more profits and buy more CEL in the market that it would use to pay rewards, and as result of the demand spurred by Celsius's CEL purchases, CEL's price would increase, generating more earnings for Celsius's customers.

From its inception, however, Celsius and the driving force behind its operations, Mr. Mashinsky, did not deliver on these promises. Behind the scenes, Celsius conducted its business in a starkly different manner than how it marketed itself to its customers in every key respect.

CEL Trading.

Celsius abandoned its promise of transparency from its start. Celsius's first significant transaction after it was formed was to launch its ICO, a transaction that Celsius expected would raise $50 million. That did not happen. Instead, Celsius sold 203 million of the 325 million CEL offered for sale, raising

$32 million. But Celsius never told its "community" that it failed to sell all of the CEL. Despite its promises of transparency, Celsius debated internally whether to tell its community how the ICO actually turned out but decided not to do so because it feared its community would be upset. Celsius also did not reveal that while Mr. Mashinsky originally pledged to purchase any unsold tokens from the ICO, he failed to close on that purchase. Those unsold tokens amounted to 117 million CEL.

Celsius also hijacked its flywheel, concealing from its customers the extent to which it was making the market for CEL. Initially, in 2018 and 2019, when the crypto markets were in decline, Celsius bought CEL, as it advertised it would, to pay rewards. During this time period, the price of CEL remained well below the ICO price of $0.20.

But starting in 2020, Celsius decided to substantially expand its purchases of CEL for the purpose of increasing CEL's price. Instead of buying CEL when it needed to pay rewards, Celsius began timing its purchases so that they would prop up CEL's price by creating activity in the market. Celsius also began placing "resting" orders to buy CEL, which were triggered if the price of CEL dipped below a set amount. Celsius also began selling CEL in private over-the-counter (OTC) transactions, while making offsetting purchases of CEL in public markets where it believed its purchases would impact the trading price. Internally, Celsius referred to this new strategy as its "OTC Flywheel."

Celsius's buying spree worked to push the price of CEL higher and higher. Although the crypto markets were up in 2020 and 2021, the percentage increase

in CEL's price was significantly greater than the overall market increase, due primarily to Celsius's purchases of CEL. Between mid-March 2020 (just as Celsius was beginning its buying spree) and June 2021, CEL's price increased by 14,751%.

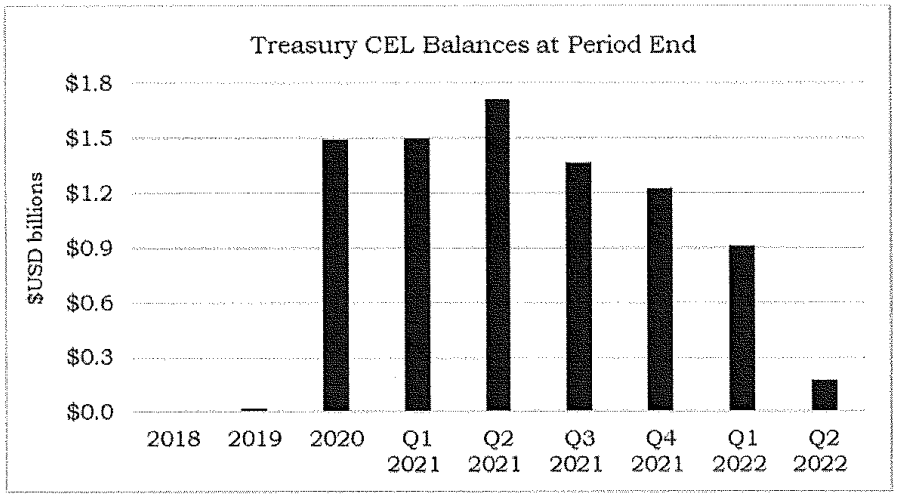
Although Celsius told customers that it would purchase CEL to pay customer rewards, it did not tell its customers the extent to which it was making the market for CEL. Instead, in one of his AMAs, Mr. Mashinsky told customers that the "over 2,000 percent increase this last year" in CEL's price was "a great validation of the utility of [CEL] as well as the flywheel running on its own instead of us having to crank it up once in a while." But internally, Celsius's Head of Trading Desk recognized that Celsius was in fact cranking up the flywheel. He wrote to other employees, including Celsius's then-Chief Financial Officer: "Just to clarify between us three: The last 3-4 months we bought always more CEL than what we pay as interest per week but we did not buy it for the interest payments, that is just what we told the community." After a round of CEL purchases in September 2020, the same Celsius employees congratulated themselves on "our good work" resulting in "people thinking [the price of CEL] is going to the moon haha."

The increasing price of CEL had three significant consequences for Celsius and its insiders. First, it significantly inflated Celsius's balance sheet. Celsius accounted for CEL in two buckets: (i) Treasury CEL consisting of the CEL Celsius minted at the time of the ICO but did not offer for sale; and (ii) Non-Treasury CEL consisting of the CEL that Celsius bought on the market for itself and its

customers. In February 2019, Celsius added its Treasury CEL to its balance sheet at then-market prices resulting in an increase in reported assets of $6.6 million. By December 30, 2021, Celsius reported that the market value of its Treasury CEL was $1.5 billion.

The following chart illustrates how the increasing market price for CEL improved Celsius's balance sheet and what happened as Celsius could no longer afford to prop up CEL's price in the run-up to its bankruptcy filing.

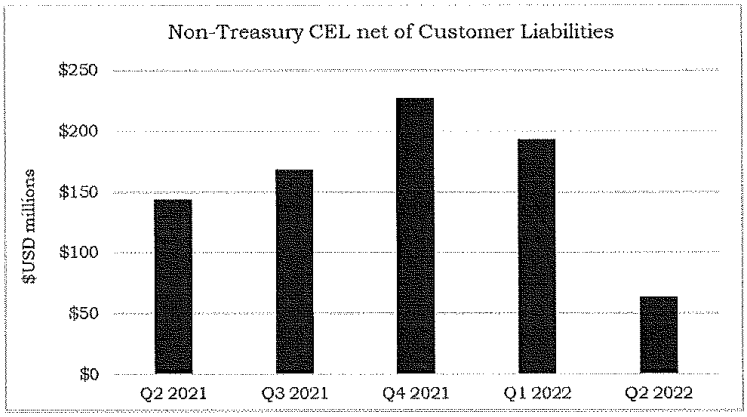
TREASURY CEL BOOK VALUES



Note: This chart depicts the Treasury CEL values reflected on Celsius's books and records from 2018 until the second quarter of 2022.

Including the Non-Treasury CEL on its balance sheet at its market price also improved Celsius's balance sheet, as demonstrated in the following chart:

NON-TREASURY CEL BOOK VALUES



Note: This chart summarizes the non-Treasury CEL values (excluding CEL held to meet customer obligations) reflected on Celsius's books and records from the second quarter of 2021 until the second quarter of 2022.

Despite the values reflected on its balance sheet, CEL had limited utility, including because there was no market to deploy CEL outside of Celsius's platform. In 2022, Celsius employees routinely discussed that CEL was "worthless," stating that its price "should be 0," and that Celsius should "assume CEL is $0 since we cannot liquidate our current CEL position," and questioning whether any party (other than Celsius itself) was purchasing CEL.

Second, the increasing price of CEL benefited Celsius's insiders who held most of the CEL following the ICO and then made millions of dollars selling a substantial portion of their CEL tokens. Between 2018 and the Petition Date, Mr. Mashinsky sold at least 25 million CEL tokens, realizing at least $68.7 million on these sales. S. Daniel Leon, also a founder of Celsius, sold at least 2.6 million CEL tokens for at least $9.74 million.

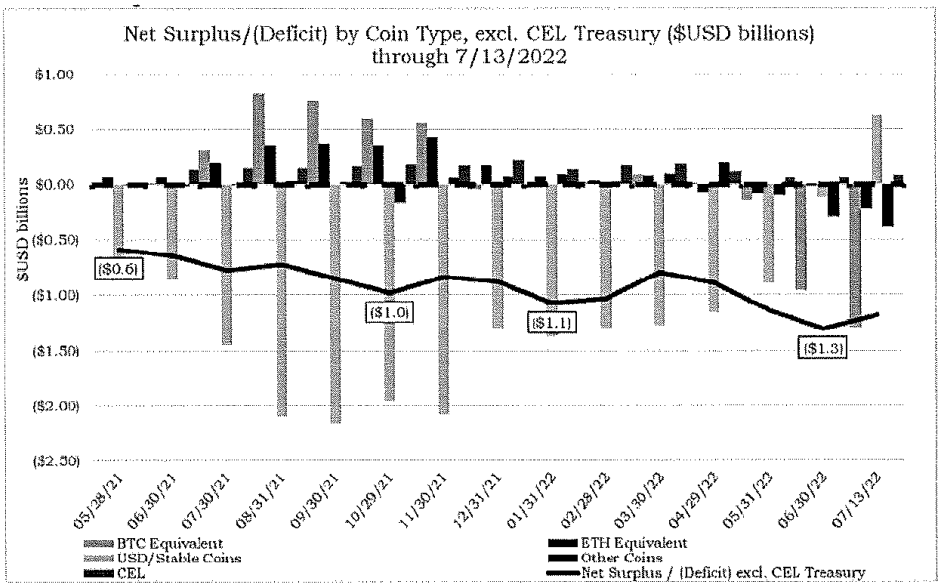
During the height of Celsius's market making, Celsius often sought to protect CEL from price drops that it attributed to Mr. Mashinsky's sales of large amounts of his personal CEL holdings. As a result of Mr. Mashinsky's sales, Celsius often increased the size of its resting orders to buy all of the CEL that Mr. Mashinsky and his other companies were selling. These trades caused Celsius's former Chief Financial Officer to write "[w]e are talking about becoming a regulated entity and we are doing something possibly illegal and definitely not compliant." As one employee noted in an internal Slack communication: "if anyone ever found out our position and how much our founders took in USD could be a very very bad look . . . We are using users USDC to pay for employees worthless CEL . . . All because the company is the one inflating the price to get the valuations to be able to sell back to the company."

Finally, Celsius did not earn sufficient yield on its crypto asset deployments to fully fund its CEL buybacks. As a result, it began using customer-deposited Bitcoin (BTC) and Ether (ETH) to fund its CEL purchases. But because Celsius lacked adequate reporting systems to track and reconcile customer assets on a coin-by-coin basis, Celsius was unable to track when it was short the necessary coins to meet customer obligations. Celsius was therefore caught off guard in early 2021 when it discovered a shortfall in BTC and ETH (which it had been using to fund CEL buybacks). Because the prices of BTC and ETH were increasing at that time, the amount of dollars it cost Celsius to acquire the necessary number of BTC and ETH also increased. Celsius

scrambled to correct the shortfall by using stablecoins to buy or borrow the number of BTC and ETH it needed.

Correcting the shortfall in BTC and ETH cost Celsius approximately $300 million, which it paid in stablecoins. Celsius used customer deposits to acquire those stablecoins. As a result, Celsius was left with a hole in its balance sheet of stablecoins rather than BTC and ETH. That hole continued to grow as a result of Celsius's continued buybacks of CEL and the significant losses Celsius suffered on some of its deployments in 2021. Celsius's stablecoin deficit between May 28, 2021 and Celsius's bankruptcy filing is depicted in the below chart and amounted to a billion-dollar hole in Celsius's assets. As the chart also demonstrates, as customers began withdrawing BTC and ETH from Celsius in May and June 2022, Celsius had to unwind its borrowings to recover the BTC and ETH it had pledged. As a result, its stablecoin deficit was replaced with a deficit in BTC and ETH.

NET COIN SURPLUS/(DEFICIT) MAY 2021 TO PETITION DATE



Note: This chart reflects the net surplus or deficit in all coins (total AUM) categorized by coin type, from May 2021 through the Petition Date.

Celsius recognized that it should not use customer assets to purchase the coins necessary to cover liabilities to other customers. But it justified its use of customer deposits to fill this hole in its balance sheet on the basis that it was not selling customer deposits but instead posting them as collateral to borrow the necessary coins. Celsius also used the proceeds of these borrowings to continue to purchase CEL. In April 2022, Celsius's Coin Deployment Specialist described Celsius's practice of "using customer stable coins" and "growing short in customer coins" to buy CEL as "very ponzi like." A few weeks later when Celsius made another push to prop up the price of CEL, Celsius's former Vice President of Treasury asked where the cash was coming from to make the CEL

purchases and Celsius's Coin Deployment Specialist replied, "users like always." This same employee explained that at the time he made this statement, Celsius had "negative equity" and therefore necessarily was using customer funds when it made these purchases.

In addition to using customer deposits, Celsius also turned to the funds it was raising from outside investors to buy CEL. Internally, Celsius's managers expressed concern that Celsius was using "equity money [to buy CEL] that should be strategically used to grow the company." When the Examiner asked Celsius's former Vice President of Treasury why Celsius bought CEL to pay rewards rather than using the CEL it held in Treasury, he acknowledged that the answer lies in who holds the most CEL. Another manager put it more bluntly: "we spent all our cash paying execs and trying to prop up alexs [sic] net worth in CEL token."

In total, Celsius spent at least $558 million buying its own token on the market. From 2018 through the Petition Date, Celsius transferred at least 223 million CEL from the secondary market to its own wallets, a greater number than the total amount of CEL (203 million) released to the public in the ICO. In effect, Celsius bought every CEL token in the market at least one time and in some instances, twice.

But once Celsius acquired this CEL, it had no ability to deploy its CEL outside of its own platform. In fact, Celsius never liquidated any of its CEL to address its liquidity needs, even as it scrambled to find liquid assets in the run up to June 12, 2022, the date on which it paused all customer withdrawals.

Today, Celsius holds essentially the same amount of CEL as it did on January 1, 2022 (an amount which constitutes approximately 95% of all CEL in existence).

Reward Rates.

What Celsius told its customers about its reward rates also did not match what Celsius actually did. Celsius did not distribute up to 80% of its revenues to its customers because it had little to no profits to distribute. Celsius also made no effort to set its reward rates based on its yield. When regulators asked Celsius how it set its reward rates, Celsius explained that there was no correlation between the interest rates it paid to customers and the yield it generated from investing customer assets. Despite leading customers to believe that it had a defined reward rate setting policy that allowed it to distribute up to 80% of its revenues to customers, Celsius had no reward policy until July 2021. And the policy it adopted at that time did not correlate reward rates to yield.

Importantly, if Celsius had set its reward rates based on its revenues or profits, those rates would have been substantially lower than what Celsius paid. Instead, Celsius consistently set its reward rates based on what it perceived was necessary to beat the competition and not based upon the yield it was earning from investing customer assets. While this strategy of offering high rates suggested to customers that Celsius was generating the high yield on investments that it advertised, the reality was that for most of Celsius's existence, the rewards it paid exceeded by substantial amounts the revenues Celsius could earn.

Some in Celsius's management sounded alarm bells over this practice and attempted to lower reward rates. Mr. Mashinsky, who prioritized growth in Celsius's customer base over profitability, however, overrode their recommendations and refused to do so. The result was that between 2018 and June 30, 2022, Celsius accrued reward obligations to customers of $1.36 billion more than the net revenue it generated from customer deposits.

The disparity between Celsius's yield on customer assets and the rewards it paid to customers was a significant reason why Celsius's net interest margin (referred to as "NIM"), a key indicator of a financial institution's health, was generally negative. As it did with other financial metrics (such as its profit margin for its mining business) Celsius calculated its NIM aggressively, by comparing the yield on its assets to their cost, instead of using the conventional (and more conservative) method of comparing the yield on assets to liabilities. Internally Celsius's managers understood this had the effect of overstating Celsius's NIM, but even as overstated, Celsius's NIM demonstrated that Celsius was never a profitable company. As one of Celsius's former Chief Financial Officers put it: while NIM can vary (and even at points be negative), "over time it should be around 3% as otherwise there is no business." For much of its existence, Celsius's NIM was either negligible or negative and was never close to 3% .

Risky Investments.

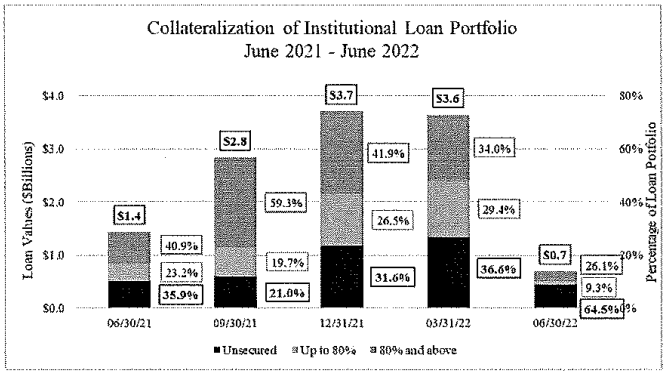
Mr. Mashinsky's insistence that Celsius maintain its high reward rates, often over the objection of other managers, led Celsius to turn to riskier investments to increase its yield. Initially, Celsius deployed its customer assets

as it advertised it would—by loaning crypto assets to institutions in the form of fully collateralized loans or allowing customers to use their crypto assets as collateral for loans Celsius made to those customers. But as Celsius's customer base grew exponentially in the crypto market boom of 2020 and 2021, the need to increase yield to close the gap between customer reward rates and revenue led Celsius to make riskier investments. Celsius made loans that were not fully secured or were unsecured so that it could charge higher interest rates; it placed crypto assets into DeFi and staking protocols; it purchased a DeFi company, KeyFi, Inc. (a purchase that failed within months and now is in litigation); it allocated crypto assets to exchanges; and it invested approximately $604 million in the form of an intercompany loan to start a BTC mining operation.

Despite these material changes to its investment strategies, Celsius continued to promote the idea that it was investing customer funds in low-risk and fully collateralized institutional and retail loans. In 2021, Mr. Mashinsky told the Financial Times that "[f]rom a risk standpoint, we are probably one of the least risky businesses that regulators worldwide have ever seen." Mr. Mashinsky continued to tell customers that "we only do asset back lending so always have 200% collateral." In another AMA, he told customers "Celsius is very, very strict who we lend to . . . We do not do unsecured lending." After he made this statement, Celsius's then Chief Financial Officer wrote to Celsius's then Head of the Trading Desk: "I just told [Mr. Mashinsky] that the number [of unsecured loans] is increasing and the overall ratio of collateral with institutions is going down." The Chief Investment Officer responded that Mr. Mashinsky's

statements were "dangerous" because the borrowers with unsecured loans could tell everyone Mr. Mashinsky is a "liar."

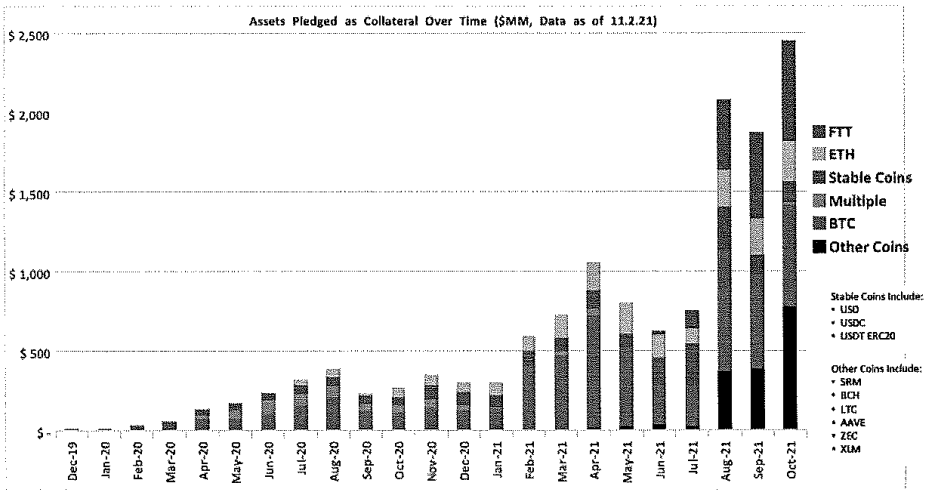
Celsius's records demonstrate just how far off the mark Mr. Mashinsky's representations were. In December 2020, approximately 14% of Celsius's institutional loans were wholly unsecured. By June 2021, it was routine for one-third of Celsius's institutional loan portfolio to be wholly unsecured and more than half of the portfolio to be under-collateralized, as demonstrated in the following chart:



Although the above chart appears to indicate that in the Fall of 2021, fully collateralized loans increased, that is misleading because the collateral Celsius accepted did not provide real security. During that time period, Celsius accepted FTX's native token, FTT, as collateral from FTX, despite knowing that the price of FTT was largely dependent on FTX, and thus failed to provide meaningful security against a default by FTX (the same sort of correlated risk that led lenders not to accept CEL as collateral from Celsius).

The below chart breaks down by asset type the collateral Celsius held over time:

ASSETS PLEDGED AS COLLATERAL (12/19 – 10/21)



Note: This chart presented to Celsius's Risk Committee describes Celsius's deployment of coins as collateral for loans over time.

In addition to making riskier loans, in 2021, Celsius recognized losses of over $800 million primarily as a result of investments with Equities First Holdings, LLC, Grayscale, KeyFi, Inc., and Stakehound. Celsius did not report these losses to its customers at the time they were incurred. None of these investments were the fully collateralized institutional loans that Celsius told its customers it was making with their crypto assets.

Risk Management.

Although Celsius sold its customers on its ability to manage risk—claiming that risk management was "what Celsius does best"—Celsius did not have a risk

management function or written risk policies in place before 2021. In 2021, in response to the significant losses it had suffered, Celsius hired its first risk management team—four individuals who had previously held risk compliance positions with traditional financial institutions. This new team began to institute what were described as "stop-gap" measures to allow time to implement more robust procedures in 2022.

A key priority for this new team was developing an internal audit procedure to ensure risk policies were being followed—a critical component of a robust risk management policy. Although Celsius hired an individual for this audit role in August 2021, Celsius's executive team delayed his proposals to implement a formal internal audit process. As a result, Celsius never fully implemented a robust risk management policy before it filed for bankruptcy.

Celsius also lacked the ability to accurately track and report on its assets and liabilities, a problem that became more acute as Celsius engaged in riskier deployments. To correct for these problems, Celsius developed two internal reports—the Freeze and Waterfall Reports. But Celsius did not devote the necessary resources to fully develop its Freeze Report, viewing it as a "band-aid" until a better reporting system could be devised. In addition, Celsius employees believed that the Waterfall Report overstated its profitability. An internal Celsius document listing Celsius's challenges noted that Celsius had "[a]bsolutely pathetic systems of records" and as a result, Celsius did "not do a good job of knowing anything about how our assets are actually performing. Our systems are horrible, and . . . can cause us to take on excessive risk." Further, Celsius

managers knew that these reports incorrectly calculated NIM and therefore presented an inaccurate and overly optimistic view of Celsius's financial performance.

Both reports also did not precisely track Celsius's assets and liabilities and were only "directional" estimates of Celsius's assets and liabilities. As a result, when Celsius attempted to execute more sophisticated trading strategies in 2021 and 2022 to increase its yield, it lacked the real-time information about its positions necessary to successfully execute these trades and lost over $150 million. When Celsius's new Chief Risk Officer reviewed these losses, he expressed concern over the fact that Celsius was engaged in this type of trading because Celsius "had conveyed to the public that we take coins and lend them out."

Key Contract Terms.

Celsius's Terms of Use, which customers accepted by clicking their agreement when opening a Celsius account, also conflicted with what Celsius told its customers. In its marketing materials and AMAs, Celsius and its managers told customers that the crypto assets they deposited with Celsius were "your assets" and that the coins belonged to the customers. But Celsius's Terms of Use stated from March 2020 forward that a customer transferred all "rights of ownership" in her crypto assets by depositing them in a Celsius account. Similarly, Mr. Mashinsky told customers that in the event of a bankruptcy they would get their coins back, while the Terms of Use told customers (starting in

March 2020) that in the event of bankruptcy they may not be able "to recover or regain ownership" of their crypto assets.

Celsius's Efforts To Erase Its Misrepresentations.

Internally, Celsius managers recognized that many of the statements that Mr. Mashinsky made during AMAs and in his tweets, particularly about how Celsius was deploying customer assets, were not true. Starting in May 2021 Celsius's Chief Risk Officer raised the prospect of editing the AMAs after the fact and before posting them to YouTube to eliminate any misleading statements. Mr. Mashinsky resisted that suggestion fearing that any delay would create "FUD" (Fear, Uncertainty, and Doubt) in the community. The AMA that prompted this initial concern continues to be available on the internet.

Throughout 2021 and up through the bankruptcy filing, Celsius continued to identify incorrect statements Mr. Mashinsky made during the AMAs. Lists containing these misstatements were circulated internally. In some instances, Celsius was able to edit the AMAs after posting; in other instances, it was not. But what Celsius and Mr. Mashinsky never did was correct the record after the fact for the thousands of live audience members who heard these misstatements or for those who watched the recorded videos on YouTube before they were edited. Instead, in some instances, internal documents suggest that Celsius employees hoped viewers would not notice the discrepancies that had been edited from the videos.

* * *

In every key respect—from how Celsius described its contract with its customers to the risks it took with their crypto assets—how Celsius ran it business differed significantly from what Celsius told its customers. The Examiner interviewed and communicated with a number of Celsius's customers, many of whom stated that Celsius's misstatements about how it would handle their crypto assets led them to invest significant crypto assets with Celsius that they would not have invested if they had understood the level of risk Celsius was taking or that many of the things Celsius presented in its AMAs, tweets, and other marketing materials were not true.

Celsius's Collapse.

In the run-up to the June 12, 2022 pause on customer withdrawals and Celsius's July 12, 2022 bankruptcy filing, Celsius's problems came to a head. During a bull market, in 2021, Celsius still recorded a pre-tax loss of $811 million. As the markets began to fall in 2022, Celsius continued to lose money, reporting a first quarter loss of $165 million. The bear market also made it more difficult to close the gap between Celsius's reward rates and the yield it could earn on its customers' assets and fill the hole in its balance sheet as a result of its CEL buybacks and other losses. In January 2022, for example, nearly every opportunity Celsius had to deploy its BTC was below its cost of funding, contributing to an overall continuing firmwide negative NIM.

As a result, Celsius's Treasury department began pushing Mr. Mashinsky to change the way Celsius set its reward rates so that those rates did not exceed

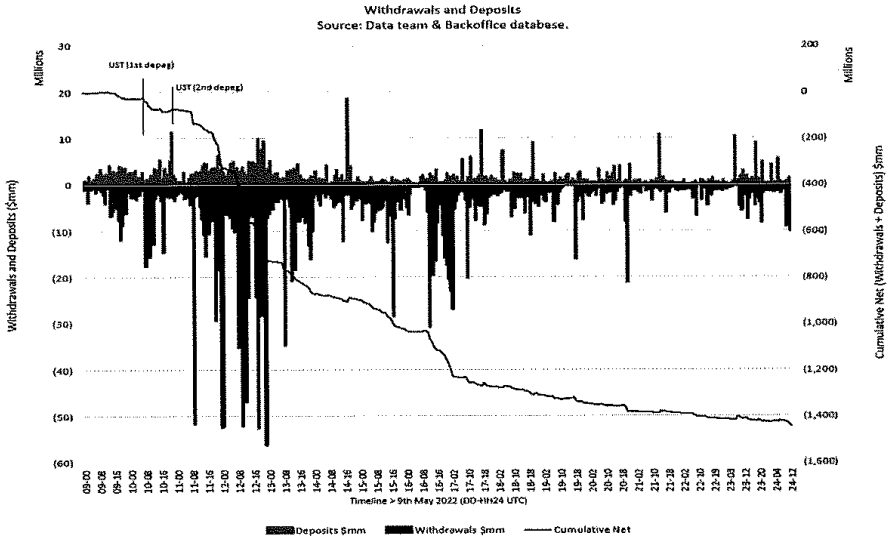
Celsius's yield. Mr. Mashinsky continued to resist because of his belief that "all of our customers will leave us" if rates were cut. In particular, Mr. Mashinsky refused to reduce the reward rates for CEL or to suspend the ability of customers to collateralize their loans with CEL. When Celsius's new Chief Financial Officer pressed these issues, Mr. Mashinsky told him to "tell your team to stay in their lane" and that he did not need help with marketing, as he would "bring in a few billion just like I brought in the first 20B."

Instead of lowering the reward rate for CEL, Mr. Mashinsky did the opposite. He instituted a policy that allowed any user that held 1 CEL to earn a 10% bonus on their in-CEL earnings. Celsius's customers quickly took advantage of this new offer. Because Celsius did not charge for swaps, customers began to arbitrage, taking their higher CEL rewards and then swapping that CEL for other coins.

As Celsius struggled with its reward rates, it also began experiencing a severe and rapid reduction in its liquidity. By early May 2022, Celsius's capital was "near zero." And Celsius's employees were openly speculating about its ability to survive. Between May 7 and May 9, 2022, as the price of the Terra stablecoin (UST) dropped, Celsius scrambled to reduce its exposure, escaping with a $30 million loss. By May 11, 2022, Celsius had failed its own Modeled Liquidity Outflow (or "MLO") test. Celsius developed the MLO test to determine how much of each type of coin it would need to hold to meet anticipated withdrawals if prices dropped significantly over one day or over one week. When

the tests began to fail, however, Celsius relaxed the test instead of prohibiting further deployments as its Liquidity Risk Policy required.

Between May 9 and May 24, 2022, Celsius began to experience significant customer withdrawals—a net loss of over $1.4 billion in assets:



On May 12, 2022, the price of CEL had fallen to $0.57, causing one employee to comment CEL was "legit being wiped out." Celsius propped up the market that day, leading to a temporary increase in the price to $0.90, which its former Vice President of Treasury took as "proof we are the only buyers." Later on May 12, Mr. Mashinsky directed the purchase of $5 million of CEL, but Celsius only had $1.6 million of stablecoin and could not make the purchase, marking the end of Celsius's sustained efforts to support CEL's price. By June 12, 2022, the price of CEL had fallen to $0.28.

By May 27, 2022, Celsius only had sufficient liquidity to meet 30% of its BTC obligations and 21% of its ETH obligations to customers. Celsius also had triggered the modified stress test introduced only three weeks earlier. The percentage of Celsius's assets that constituted "Deployable Liquidity" (*i.e.*, assets Celsius could access within seven days) went from approximately 49% in February to under 33% by the end of May and under 24% by the Pause. In other words, a substantial majority of Celsius's assets were essentially unavailable to meet withdrawal requests.

Throughout May 2022, as Celsius's employees openly expressed the view that Celsius was a "sinking ship" without a plan, Mr. Mashinsky continued to assure customers that all was well at Celsius. On May 11, 2022, both Celsius and Mr. Mashinsky posted on Twitter that "All user funds are safe." That same day, Mr. Mashinsky posted that "Celsius has not experienced any significant losses and all funds are safe." At the beginning of the May 13, 2022 AMA, he stated "Celsius is stronger than ever."

Celsius also continued to focus on growth, attempting to attract additional deposits by offering promo codes and reassurances about its liquidity. In a May 27, 2022 AMA, Celsius offered rewards for referring friends to Celsius. On May 29, 2022, Mr. Mashinsky offered to pay $1,000 to one new Celsius customer that week.

In early June 2022, Mr. Mashinsky continued to publicly represent that customers' crypto assets were safe at Celsius. He pushed promo and referral codes to attract new customers. But on June 5, 2022, a report appeared that

Stakehound lost the keys to 35,000 of Celsius's ETH one year earlier in May 2021—a loss that Celsius had not previously made public. In response to those reports, between June 7 and 10, 2022, Celsius published a series of blog posts and continued to livestream AMAs in which it continued to emphasize its core themes of transparency and liquidity. Mr. Mashinsky told a June 10 AMA audience that Celsius had "billions" in liquidity. Behind the scenes, on June 9, 2022, the Risk Committee reported that additional withdrawals would deplete Celsius's liquidity.

By June 12, 2022, Celsius was forced to pause all withdrawals. One month later, on July 12, 2022, Celsius filed its chapter 11 petition. Celsius's former Vice President of Treasury summed up Celsius's problems as follows: "Pay unsustainable yields so you can grow AUM [assets under management], forcing you to take on more risk, experience losses bc of those risks + bad controls / judgment and you are where you are."

Celsius's Use Of New Customer Assets To Fund Withdrawals.

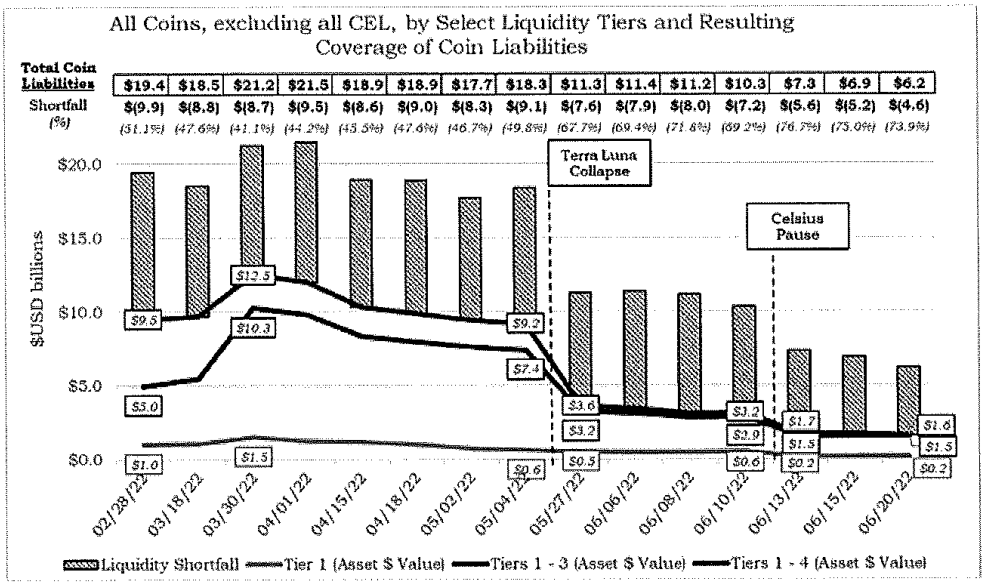
The Court directed the Examiner to investigate "whether the Debtors used new deposits being made by customers to make payments or otherwise meet obligations to existing customers at a time when the Debtors had no other sources (whether liquid or which could have been monetized) from which to make such payments or meet such obligations."

To address this question, the Examiner assessed Celsius's liquidity in the time period leading up to the pause of customer withdrawals. Celsius ranked its assets based on their ability to be liquidated within certain time frames. Assets

ranked in Tier 1 were capable of being liquidated immediately and assets ranked in Tiers 5 and 6 were considered illiquid because only a small percentage of deployments in these tiers could be unwound. Assets in Tiers 2, 3, and 4 were capable of being liquidated in one day, two to three days, and four to seven days respectively.

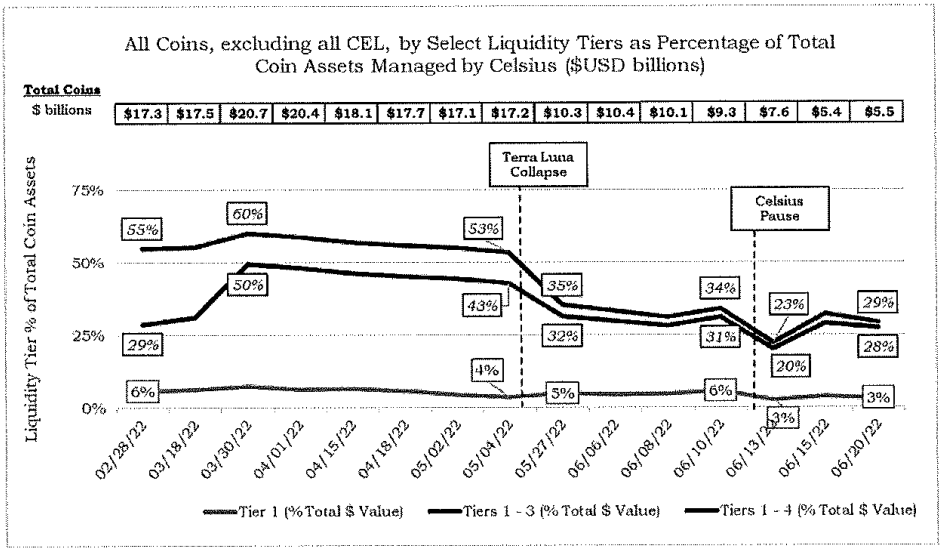
The Examiner reviewed all coin types and then for each coin category, the percentage of assets within each tier, as categorized by Celsius, and included all assets under management. The charts below depict the liquidity shortfall in respective tiers over all coins between February 28 and June 20, 2022.

ALL COIN LIQUIDITY ($)



Note: This chart reflects all coins comprising Celsius AUM (excluding CEL and custody assets) measured in dollars, in Liquidity Tiers 1, 1-3, and 1-4 as reflected in Celsius's records.

ALL COIN LIQUIDITY (%)



Note: This chart reflects all coins comprising Celsius AUM (excluding CEL and custody assets) measured as a percentage of all coins in AUM, in Liquidity Tiers 1, 1-3, and 1-4 as reflected in Celsius's records.

As these charts demonstrate, due in part to the billion-dollar hole in its balance sheet, Celsius lacked liquidity to cover anticipated future withdrawals, and its remaining liquid assets were being quickly depleted. If Celsius had not instituted the Pause and the run on the bank continued, new customer deposits inevitably would have become the only liquid source of coins for Celsius to fund withdrawals.

But as of the Pause, Celsius appeared to satisfy the withdrawal requests from the commingled pool of crypto assets under management. In some instances, however, between June 9 and June 12, Celsius did directly use new customer deposits to fund customer withdrawal requests. The detail regarding

these transactions is set forth in the Report. The Examiner's identification of the instances where Celsius directly used new customer deposits to fund customer withdrawals is not a comprehensive or exhaustive list of all transactions for all time periods.

Celsius Mining's Utility Obligations.

The Examiner also was tasked with investigating the "current status of the utility obligations of Celsius's Bitcoin mining business." Celsius Mining LLC ("Celsius Mining") conducts its Bitcoin mining at sites operated by third-party hosts and at sites it owns and operates. The fees it pays its third-party mining hosts include utility charges. Celsius Mining pays utilities directly for the sites it owns and operates.

Celsius Mining's unpaid utility-related bills total $13,982,152. Of this amount, $8,381,830 consists of post-petition amounts owed to one of its mining hosts that are disputed. The remaining balance of $5,600,322 consists of pre-petition invoices that are either disputed or that were not paid due to the bankruptcy filing. Celsius Mining's mining hosts, however, also hold prepayment balances totaling $46,809,756, which may be available to offset Celsius Mining's obligations.

Celsius's Use, Value Added, And Sale Tax Obligations.

The Examiner's investigation into Celsius's "procedures for paying sales taxes, use taxes and value added taxes" uncovered significant tax compliance deficiencies. Celsius did not employ any dedicated tax professionals for the first three years of its existence. Once Celsius established a tax department in June

2021, its professionals failed to institute the necessary systems and procedures to ensure that its operating subsidiaries complied with their use tax and value added tax ("VAT") obligations on a timely basis. The result is that Celsius Mining owed $16.5 million in use taxes as of the Petition Date and may owe $6.6 million in use taxes after the Petition Date. In addition, Celsius Network Limited ("Celsius Network (UK)"), a United Kingdom private limited company, which until August 2021 operated Celsius's customer-facing network business, has reserved $3.7 million for its potential VAT liability.

Celsius Mining incurs significant use tax liabilities, primarily when deploying mining rigs in the United States that it purchased from foreign vendors that do not collect sales tax as part of the transactions and when there is no available tax exemption or exclusion. When Celsius Mining deploys those mining rigs (*i.e.*, starts operating the mining rigs), it must pay use tax to the jurisdiction in which the mining rigs will be operated. Celsius Mining also has the potential to incur additional use tax when it moves mining rigs from one jurisdiction to another.

With respect to use taxes, the Examiner's investigation revealed that Celsius and Celsius Mining lacked adequate systems and procedures to track and to timely pay use taxes when due. These failures, however, did not create use tax compliance failures until 2022. Prior to 2022, Celsius Mining's use tax obligations were satisfied by either paying sales tax to its United States vendors when no exemptions or exclusions were available or relying on its data center host, Core Scientific, Inc., to identify and obtain the appropriate exemptions.

That changed in 2022 when Celsius Mining began purchasing mining rigs from foreign vendors that did not collect sales taxes, triggering the obligation to pay use taxes. Although contemporaneous emails and other documents demonstrate that questions were raised at the end of 2021 and throughout the spring of 2022 about the need to address use tax issues with respect to the foreign-sourced mining rigs that were expected to be deployed in 2022, no one in Celsius's tax department took responsibility for ensuring that Celsius Mining was addressing its use tax obligations. As a result, neither Celsius Mining nor Celsius's tax department applied for relevant use tax exemptions in Pennsylvania and Georgia—the two states in which Celsius Mining deployed foreign-purchased mining rigs before the bankruptcy filing. Lior Koren, Celsius's most senior tax professional, told the Examiner that it was "unknown to [him]" how or why Celsius Mining did not apply for use tax exemptions on a timely basis. Celsius's tax professionals are attempting to mitigate the consequences of this failure, but if those efforts are unsuccessful, Celsius Mining will owe substantial pre-petition use taxes.

Celsius Mining's lack of coordination with Celsius's tax department continued even after June 2022, when Mr. Morgan told the Examiner he first believed he had responsibility for ensuring Celsius Mining's compliance with its use tax obligations. After the filing of the bankruptcy cases, Celsius Mining deployed foreign-sourced mining rigs in Texas, triggering an estimated $6.6 million in use tax liabilities. Celsius's tax professionals are now working after the fact to address this liability, which has not been paid.

With respect to Celsius Network (UK)'s VAT liability, in 2021, Celsius engaged Mazars to advise on its VAT obligations. Celsius Network (UK) did not receive its first letter from Mazars about its obligation to register with the United Kingdom's tax authority, HM Revenue & Customs ("HMRC") and pay VAT until January 14, 2022—two years after it first met the threshold to register with HMRC and pay VAT. Celsius explains this delay by pointing to the fact that its first tax professional was not on board until June 2021.

Based on Mazar's advice, Celsius Network (UK) believes that it was not required to register with the United Kingdom's applicable taxing authority until January 2020 and that Celsius Network (UK) owes approximately $1.085 million in VAT for its business activities between January 1, 2020 and July 31, 2021. Celsius Network (UK) is now working with Mazars to complete its registration, and it intends to file a VAT return and seek mitigation of any late penalties associated with the VAT it owes. Celsius Network (UK) has obtained professional advice that its activities no longer trigger VAT obligations because it transferred its customer-facing business to a U.S. entity in August 2021.

III. Investigative Steps.

The Examiner's Final Report is the culmination of her review of voluminous data and records, as well as information gathered during interviews of current and former Celsius employees, customers, and vendors. The Examiner also met with numerous interested parties, including representatives of Celsius, the Unsecured Creditors' Committee, state and federal regulatory agencies, and the *ad hoc* committees from whom she gathered relevant information.

Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI Board of Directors, the CARE National and Chicago Advisory Boards, and the Chicago IWIRC Network Board, as well as several committees. She also is chair of the NCBJ 2023 Education Committee and a frequent speaker for ABI, TMA, the Chicago Bar Association, IWIRC and NCBJ. Judge Baer received her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Gabe Bluestone is an investment manager and legal counsel at Omni Bridgeway in New York, where he advances the company's U.S. judgment enforcement initiatives. He is responsible for sourcing, evaluating, negotiating and monitoring matters through to resolution. Mr. Bluestone serves as a resource for clients in devising, managing and executing domestic and cross-border enforcement strategies in multijurisdictional asset-recovery proceedings. He works with colleagues globally, including the enforcement team, researchers and asset-tracers. Prior to joining Omni Bridgeway, Mr. Bluestone was a shareholder and litigator at Bluestone, P.C., a leading asset-recovery law firm with offices in Washington, D.C., and New York, where he also maintained a robust business litigation practice. While in private practice, he represented a global roster of clients in commercial disputes and in enforcing judgments, often seeking injunction-predicated relief, striking down fraudulent conveyances, and unraveling fraudulent corporate schemes. He employed creative, cutting-edge discovery and asset-tracing methods to identify and monetize judgments globally. Mr. Bluestone also was an associate with a prestigious boutique litigation firm, where he represented defrauded investors often in connection with parallel proceedings brought by the SEC and DOJ. Mr. Bluestone received his B.A. in history from Connecticut College and his J.D. from Rutgers University School of Law, where he was an editor of the *Rutgers Journal of Law & Public Policy*. After graduating from law school, he served as a law clerk to the U.S. Senate Committee on the Judiciary; Antitrust, Competition Policy and Consumer Rights Subcommittee, in Washington, D.C.

Thomas P. Jeremiassen, CPA, CFF, CIRA is a senior managing director with Development Specialists, Inc. in its Los Angeles office, and has more than 25 years of experience providing services in bankruptcy, forensic/investigative accounting and litigation support. Hehas served as a fiduciary in bankruptcy and other matters, including roles as chapter 11 trustee, chapter 7 trustee, liquidating trustee, plan administrator, disbursing agent and receiver. Mr. Jeremiassen has served as an accountant and financial advisor for chapter 11 trustees, chapter 7 trustees, debtors, creditor committees, examiners, liquidating trustees and receivers in dozens of insolvency matters. He also has been involved in numerous engagements in which he provided expert-witness, litigation support, consulting

and investigative accounting services related to fraud, embezzlement, mismanagement, breach of contract, and other disputes. Mr. Jeremiassen received his B.S. from Pepperdine University.

Shoba Pillay is a partner and co-chair of Jenner & Block LLP's Data Privacy & Cybersecurity Practice in Chicago. She advises clients on mitigating and responding to cybersecurity threats and national security risks, as well as developing robust regulatory compliance programs. Mr. Pillay is a former federal prosecutor and corporate crisis manager with extensive trial and investigations experience who leads complex and high-stakes internal and government-facing investigations. Due her technical expertise and significant investigation experience, she was the court-appointed examiner in the bankruptcy of digital asset lender Celsius Network LLC. As a federal prosecutor, Ms. Pillay gained experience with complex investigations and prosecutions involving cybercrime, complex fraud, human trafficking, theft of trade secrets, terrorism, espionage, and export control and international sanctions violations. Among her significant trials during her 11 years in the U.S. Attorney's Office in the Northern District of Illinois, she prosecuted a theft of trade secrets case involving a Chinese competitor, the computer intrusion of a Fortune 500 company, and the illegal export of technical data to China. She was honored with the Department of Justice John Marshall Award from the Attorney General in 2022. Ms. Pillay received her B.A. in political science in 1998 from Washington University and her J.D. in 2003 from Boston College Law School.

Luis E. Rivera, II is the deputy chair of the Bankruptcy and Creditors' Rights practice group at GrayRobinson, P.A. in Fort Myers, Fla. He is experienced in counseling clients in business litigation, bankruptcy, creditors' rights and insolvency. A 2017 ABI "40 Under 40" honoree, Mr. Rivera serves as a trustee of Florida Gulf Coast University and president of the Middle District of Florida *Pro Se* Legal Assistance Clinic, Inc. Since 2010, he has served as a panel trustee for the Middle District of Florida. Mr. Rivera received his B.A. *magna cum laude* from Loyola University New Orleans, where he was an Ignatian Scholar, and his J.D. from Washington and Lee University School of Law, where he was editor-in-chief of the *Washington and Lee Journal of Civil Rights and Social Justice*.