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Court-Appointed Receiver*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

U.S. VENTURES LC, a Utah limited liability
company, WINSOME INVESTMENT
TRUST, an unincorporated Texas entity,
ROBERT J. ANDRES and ROBERT L.
HOLLOWAY,

Defendants.

**RECEIVER'S MOTION PROPOSING
PLAN OF DISTRIBUTION AND
MEMORANDUM IN SUPPORT**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver"), by and through his
counsel of record, hereby moves for Court approval of the methodology to be used in distributing
receivership funds to allowable claimants and for approval to make initial distributions pursuant
to the proposed methodology.

I.
BACKGROUND

On May 21, 2012, the Court approved the process for investors to submit claims against funds being recovered by the Receiver. *See* Order Approving Proof of Claim Form and Claim Review Process [Doc. #157]. The order entered by the Court approved the claim form, procedures to govern the claims process, and the timetable for completing the claims process. *Id.*

On December 20, 2012, the Receiver filed his Report and Recommendations on the Claims Process, recommending which claims should be allowed and in what amounts. *See* Report and Recommendation re Claims Process [Doc. #233]. Three claimants filed objections to the Receiver's recommendation. One of those objections was resolved pursuant to a settlement between the Receiver and the claimant RCH2, LLC, and the settlement was approved by the Court on May 21, 2013. *See* Order Approving Stipulation Partial Allowance of Claim No. 1116 [Doc. #267]. Two objections, one submitted by Zaman Ali and the other submitted by Roberto Penedo, remain unresolved and have been submitted to the Court for decision.

The Receiver believes that commencing distributions to claimants should not be delayed due to the objections filed by Penedo and Zaman Ali. Accordingly, the Receiver hereby moves the Court for approval of the distribution methodology described below and permission to make an initial distribution to the non-objecting "allowable" claimants. The Receiver proposes to hold in reserve sufficient funds to make distributions to the two objectors should the Court rule in favor of their objections. If the Court denies their objections, those funds held in reserve will be available for subsequent distribution to other claimants.

II.

DISTRIBUTION PLAN

A. Discretion of the District Court.

A distribution plan must be adopted to determine how funds available for distribution should be allocated among the valid claimants. It is well established that federal district courts have broad discretion in fashioning relief in equity receiverships.¹ So long as the assets are distributed in a “logical way,” a court’s adoption of a distribution plan should not be disturbed.² Because the Court is acting in equity, the overarching test is whether the distribution plan is “fair and reasonable.”³

There are two principal approaches that commonly are implemented; the Receiver believes each could be considered fair and equitable. As noted below, the Receiver is recommending adoption of a hybrid distribution approach. Regardless of which distribution plan is adopted, the amounts paid to individual claimants will differ from amounts that would be paid under different distribution plans. The fact that competing distribution plans would result in different distribution payments to various investors does not mean that any particular plan is not fair and reasonable. The Court does not need to please everyone: “In any situation in which the

¹ *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002); *SEC v. Hardy*, 803 F.2d 1034, 1037-39 (9th Cir. 1986).

² *SEC v. Forex*, 242 F.3d at 331; *U.S. v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996).

³ *SEC. Wealth Mgmt., LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010).

pie is limited, each individual desiring a slice of that pie is, in a sense, adverse to others also wanting a slice of the pie.”⁴

The two most common distribution approaches are the “all claimant” approach (also called the net cash loss methodology) and the “rising tide” approach. Each is discussed below.

B. “All Claimant” Approach: Pro-Rata Distribution of Funds to All Allowable Claimants.

This approach involves determining the “Verified Investment Amount” paid by each claimant and deducting the total amount the claimant received as distributions, profits, or withdrawals (“Total Distributions”) on the investment from the Receivership Entities – or from others, such as third-party marketers. The difference is the “Allowable Claim Amount.” Under this plan, the net funds to be distributed by the Receiver would be divided among the claimants on a pro-rata basis using the approved Allowable Claim Amount. In other words, the total amount of money to be returned to claimants would be divided by the total amount of net principal loss (for valid claimants) and the Receiver would pay each claimant that percentage of her/his net losses. For example, if the Court approved distribution of \$2.3 million in the initial distribution, that amount would be applied against the total amount of net claimant losses (counting the disputed claims) of \$21,798,466.58 and each claimant would be paid 10.55% of her/his net losses.⁵

⁴ *SEC v. TLC Inv. & Trade Co.*, 147 F. Supp.2d 1031, 1042 (C.D. Ca. 2001).

⁵ If the Court denies the two remaining objections, the amount of allowable claims would be \$17,280,466.58, meaning each claimant would be paid 13.3% of her net principal loss.

This approach does not take into consideration the amounts that the claimant may have received from the Ponzi scheme during its operations, but gives equal percentage payments to those who received significant returns during operation of the scheme and those claimants who received no returns.⁶

C. “Rising Tide” Approach: Allocate Distributions Based on Amounts Already Received.

Under the rising tide approach, once the total losses are calculated, a further calculation is made to determine the percentage of the claimant’s principal investment amount that has already been paid to the claimant as distributions. Distributions by the Receiver would target those who had received little or no return of their investment amounts. Under this plan, the Receiver would establish a “base” recovery level based on the amount available for distribution. This base amount would result in the Receiver paying funds only to those claimants who had previously been paid less than this “base” amount in distributions (which, in many cases, was nothing). Those claimants who have already received more than this “base” amount, would receive funds only if the Receiver recovers sufficient funds to make additional distributions that would allow him to increase the base rate. For example, under this plan, the same hypothetical recovery of \$2.3 million discussed above would result in a “base” recovery of 20.44%. That means the Receiver would make payments only to those claimants who have received less than 20.44% of the money they invested. The payments would be made in a manner that would bring each

⁶ However, no claimant would be entitled to receive a distribution if she had been paid distributions in excess of the principal amount of her investment.

claimant's recovery to at least 20.44% of the amount they invested (counting amounts the claimants received directly from US Ventures or Winsome).

D. Analysis of Returns Already Paid to Claimants.

The following table demonstrates the extent to which the 118 Allowable Claimants have already received a partial return of their investment principal.⁷

% Return	# of Investors	Claim Amounts
80-90%	3	\$30,418.19
70-79%	1	\$58,500.00
60-69%	1	\$152,742.00
50-59%	4	\$282,650.00
40-49%	3	\$201,505.26
30-39%	6	\$1,689,290.43
20-29%	7	\$657,002.51
10-19%	7	\$1,448,237.15
1-9%	14	\$9,213,102.18
0%	72	\$3,547,018.86
Total	118	\$17,280,466.58

E. Discussion of the Merits of Each Distribution Plan.

The "All Claimant" plan has the advantages of being simple to administer and resulting in the payment of some money to every valid claimant. The "Rising Tide" plan has the advantages of ensuring that all claimants will have received a minimum level of recovery from the scheme (the "base" amount) and allocating recovered funds to those claimants who have been most harmed by the collapse of the scheme.

⁷ This does not include the two remaining objectors.

Each plan would yield very different results. It is expected that those who would benefit most from each particular distribution plan would favor that plan. Using the assumed \$2.3 million initial distribution amount, the All Claimant plan would result in all 118 allowable claimants receiving some recovery. Under the Rising Tide plan, distribution payments would be paid initially to 97 claimants; 21 claimants would receive no initial distribution.⁸

Thirty-two of the claimants would receive more under the All Claimant plan than the Rising Tide plan, including 11 who would receive some money under either plan. The All Claimant plan would result in 86 claimants receiving less, although every claimant would receive some distribution.

Regardless of the plan selected, if the Receiver is successful in recovering additional net funds, further distributions will be made to at least some of the claimants. It is hoped that additional distributions can be made by the Receiver when lawsuits that he has filed are resolved, if the Court denies the pending objections to the claims process,⁹ or upon the discovery of other assets or claims that can be pursued by the Receiver.

F. Initial Recommendation by the CFTC.

Generally, the CFTC supports the “rising tide” approach. The CFTC has informed the Receiver that it believes the rising tide approach is the most equitable approach to use in cases

⁸ However, if the Receiver succeeds in making additional distributions, some of these 21 claimants would receive distribution payments.

⁹ Additional distributions also would be made if the Court denies the objections filed by Penedo and Ali, freeing up distribution funds that have been held in reserve in the event payments need to be given to those objectors.

such as this. While 21 investors would receive nothing under the rising tide approach and another 11 would receive less under this approach than under the “all-claimant” approach, more than twice that amount (86 investors) would receive less under the “all-claimant” approach. The CFTC points out that the vast majority of those who would receive nothing under the rising tide approach have already received anywhere from two to five times the rate of return as those who would benefit under the rising tide approach. Accordingly, the CFTC believes that a balancing of equities favors the use of the rising tide approach.

Courts have held that the rising tide approach is equitable and the most fair approach. Earlier this year, the Southern District of California approved the use of the rising tide approach, with an opinion that provided a detailed analysis of the merits of this approach. In *U.S. Commodity Futures Trading Commission v. Wilson*, 2013 WL 3776902 (S.D. CA, July 17, 2013), the court concluded that “consideration of prior withdrawals as a full or partial satisfaction results in a fair method for a majority of the defrauded customers.” *Id.* at * 5. The court reached this conclusion despite the fact that “twenty eight customers will not receive any distributions from the estate because of their previous withdrawals.” *Id.*¹⁰

G. Recommendation by Receiver.

The Receiver is reluctant to recommend any choice to the Court because such a choice

¹⁰ Numerous other CFTC cases have also applied the “rising tide” approach: *CFTC v. Lake Shore Asset Management, Ltd.*, NO. 07C3598, 2010 WL 960362, at *7-10 (N.D. Ill. Mar. 15, 2010); *CFTC v. Equity Financial Group, LLC*, No. Civ. 04-1512, 2005 WL 2143975, at *24-25 (D. NJ Sept. 2, 2005); *CFTC v. Hoffberg*, NO. 93C3106, 1993 WL 441984, at *2-3 (N.D. Ill. Oct. 28, 1993).

necessarily involves picking winners and losers for the monies to be distributed. The objective of the Receiver has been to maximize recovery for investors and laments that selection of a distribution plan requires favoring some claimants over others. Nevertheless, the Receiver recognizes that a distribution plan needs to be chosen. In the process of selecting a plan, the Receiver believes it is important that the Court and the claimants be advised of the alternative approaches that were considered and, ultimately, not recommended.

After extensive analysis and thoughtful consideration, the Receiver recommends that the Court approve a hybrid approach. Under this hybrid approach, \$1 million would be distributed to claimants using the all-claimant method and an additional \$1.3 million would be distributed using the rising tide approach. While the Receiver generally agrees that the rising tide approach is more equitable, in this case he believes that some distributions should be made to all valid claimants. Allocating some funds to be paid to all claimants rewards those who have taken the time to complete claims forms in the hopes of receiving some distribution and who have provided assistance to the Receiver in his investigation.¹¹ The Receiver will recommend that any future distributions be allocated using solely the rising tide approach.

The chart attached as Exhibit A shows the amount that each claimant would receive under the hybrid distribution plan being proposed by the Receiver. Exhibit A shows each claimant by claim number, without identifying the claimants by name. Exhibit A also shows the

¹¹ It is also hoped that by giving some distribution to all valid claimants it will be less likely that there will be objections to the distribution plan. This will allow the Receiver to begin making distributions promptly.

potential allocation of the \$682,218.00 being held in reserve, that otherwise would be payable to the two objectors if their objections are upheld in full by the Court.

Application of this hybrid approach results in the following:

- i. As a result of the all-claimant distribution component, all allowable claimants will receive a minimum distribution equal to 4.5875% of their allowable claim amount.¹² A total of \$1,000,004.65 will be spent on this component of the hybrid approach.
- ii. As a result of the rising tide distribution component, \$1.3 million will be allocated to claimants who have received less than 15.1% in distributions—either as a result of pre-receivership payments or the all-claimant distribution component of the plan. This means that all allowable claimants will have received at least 15.1% of the verified investment amount in distributions—either from the Receivership or from pre-Receivership distributions. Some claimants will have received as much as 89.65% of their investments returned. A total of \$1,316,525.55 will be spent on this component.
- iii. 29 claimants will receive only the all-claimant component because they have already received distributions of 13.81% to 89.15% of their investment principal.
- iv. 89 claimants will receive payments from both the all-claimant and rising tide components.
- v. A total of \$2,316,530.20 in Receivership funds will be allocated for this initial

¹² As noted above, amounts that otherwise would be paid to the two objectors will be held in reserve and paid to them only to the extent their objections are accepted by the Court.

distribution, although \$682,218.00 will be held back pending resolution of the disputed claims.

The CFTC has informed the Receiver that it does not object to use of the hybrid rising-tide/all-claimant approach in this case.

H. Opportunity to File Objections to Recommendation on a Distribution Plan.

Since every claimant will be affected positively or negatively by the selection of a particular distribution plan, the Court may want to permit claimants to file objections to the Receiver's recommendation and identify the reasons that a plan other than the one recommended—or some other distribution methodology altogether—should be chosen. The Receiver recommends that the Court set a deadline of thirty (30) days from date of this motion for the filing of any objections to the Receiver's recommendation regarding a distribution plan. A proposed order is attached.

If the proposed order is signed, the Receiver will cause it to be posted on the Receivership website and sent by email or mail to all claimants whose claims have been allowed or which have filed objections.

**III.
CONCLUSION**

For the foregoing reasons, the Receiver respectfully moves the Court to grant his Motion Proposing Plan of Distribution and Memorandum in Support.

DATED this 8TH day of November, 2013.



WAYNE KLEIN, Receiver

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S MOTION PROPOSING PLAN OF DISTRIBUTION AN MEMORANDUM IN SUPPORT** to be served in the method indicated below this 8th day of November, 2013, addressed as follows:

☐ VIA FACSIMILE
☐ VIA HAND DELIVERY
☐ VIA U.S. MAIL
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