

determined within the next thirty (30) days for the reasons set forth in section C (4) below.

Specifically, the distribution would be limited to holders of claims for losses caused by providing IB Capital with funds they thought were being utilized in foreign currency trading transactions or membership fees which were paid to ProphetMax. Both groups will hereinafter be referred to as (“the Investor Claimants”). The distribution would be pro rata and based on the Investor Claimants’ net losses. The net loss would be calculated on a “money-in-money-out” basis—*i.e.*, money paid into the scheme minus any money returned to the investor. The Receiver proposes that any future distributions to Investor Claimants likewise be pro rata and based on the Investor Claimants’ net losses.

Once the Court approves the Interim Distribution Plan, the interim distribution process would begin. The Interim Plan is not intended to be the final distribution by the Receivership. It does not purport to distribute all remaining assets of the Receivership Estate. Sufficient cash will remain on-hand to fund ongoing asset recovery efforts, ongoing administrative responsibilities with respect to assets and legal fees related to the Receiver’s on-going recovery efforts.¹

B. The Receiver’s Asset Recovery Efforts

The Receiver has pursued a number of recent successful asset recovery efforts thus far, resulting in the recovery of approximately USD \$3.5 million from two accounts previously held by ING Bank in the Netherlands. In addition, the Receiver has obtained default judgments against six individuals or entities he sued last Fall (the “Relief Defendants”). The amounts (in United

¹ The Receiver is being assisted in his asset recovery efforts by law firms he has retained in the jurisdictions of the Netherlands, the United Kingdom, Morocco, Hungary, Slovakia and Cyprus. The Receiver is also working closely with representatives of the Dutch Public Prosecutor’s Office. The Receiver fully anticipates future distributions will be made from these additional asset recovery efforts and recovery efforts ultimately recovered through additional litigation, if necessary.

States Dollars) of the default judgments coincide with funds that are (or were at one time) being held in the banks listed below:

<u>Person/Entity</u>	<u>Amount</u>	<u>Bank</u>	<u>Country</u>
Essadia Moutaouakkil	\$4,294,584.60	Banque Populaire	Morocco
Neotex Advanced, Ltd.	\$1,151,428	Bank of Cyprus	Cyprus
Randius Ltd. (“Randius”) and Jennifer Marie Weare	\$7,218,499	Bank of Cyprus	Cyprus
Riknik & Sons, Ltd.	\$7,189,555.19	CO Banka ²	Slovakia
Rabiaa Moutaouakkil	\$325,337.69	Banque Populaire	Morocco

The Receiver has also recently received assignments from Essadia Moutaouakkil and Neotex Advanced, Ltd. for their accounts referenced above at Banque Populaire and the Bank of Cyprus, respectively. Finally, the Receiver is in ongoing negotiations with counsel for Relief Defendant Zsofia Dobos concerning an assignment for the funds in the Riknik & Sons, Ltd. account referenced above at CO Banka.

The Receiver’s Dutch Counsel recently reached out to newly appointed counsel for Relief Defendant Rabiaa Moutaouakkil. The Receiver will be seeking assignment documents from Rabiaa Moutaouakkil for a bank account containing USD \$325,337.69. In addition, the Receiver expects to be receiving title to five (5) parcels of Moroccan real estate presently titled in Ms. Moutaouakkil’s name with a total value estimated to be somewhere in the range of USD \$1.0 to \$1.5 million. Repatriating assets in Morocco will be a multi-step process. First, the parcels of land must be sold. Due to the complexity of the Moroccan jurisdiction, it has been communicated to the Receiver; he may not be able to gain access to all the funds, immediately.

² CO Banka is an abbreviation for Ceskoslovenska Obchodna Banka (“CO Banka”)

C. The Claims Process and the Interim Plan

1. Claims Received

The Receiver established a formal process by which parties could submit claims to the Receivership Estate. On August 11, 2015, the Court entered a Bar Date Order establishing a formal process for the submission of claims to the Receivership. [*See* Dkt. 101]. Under that Order, the Bar Date for submission of claims was October 27, 2015. [*Id.* at 101]. The Receivership received a total of 934 claims submitted through the Court-approved claims process.

2. Claims Reconciled

All Investor Claimants, except those claims that are duplicative or currently deficient pursuant to the terms of the Bar Date Order, have been reconciled by the Receiver's team. In total, the Receivership has reconciled 930 Investor Claims (excluding deficient and duplicative claims), which were submitted for an aggregate Total Claimed Amount of \$23,095,225 million. There are four (4) deficient Investor Claims that remain unresolved, despite the Receiver's requests for additional supporting information and/or documentation.

3. Net Loss Approach

Many Investor Claimants asserted Total Claimed Amounts in their proofs of claim equal to their ending balances. In determining the Allowed Claim Amounts, however, the Receiver has used the net loss approach, which is calculated on a "money in, money out" basis—*i.e.*, money paid into the scheme minus any money returned to the investor.

In regard to interest, as there never was any actual trading effectuated by IB Capital, there were no "profits" so that prejudgment interest is not available. The investors are only entitled to their original principal less any monies received from the Defendants. The

Commodity Futures Trading Commission's ("CFTC")'s judgment against the Defendants is accruing post-judgment interest since the date of the entry of the Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Defendants [*See* Dkt. 24] (the "Consent Order") on October 14, 2016. Post judgment interest is computed pursuant to 28 U.S.C.A. § 1961. That interest began accruing interest from the date of the Consent Order and continues until the judgment is satisfied.

4. Recipients of Payments under the Interim Plan

The Receiver is proposing two distribution calculations for the first interim distribution amount to the Investor Claimants, Plan A and Plan B. The methodology for this approach is the Receiver is in ongoing negotiations with one of the Relief Defendant's counsel in Hungary. If successful in these negotiations, the recovery from that account would be distributed and is represented in Plan A. If the recovery efforts are not successful, in the next thirty (30) days or a reasonable time thereafter, then the Plan B amount will be distributed. Those funds are from the recovery of the two accounts previously held by ING Bank in the Netherlands.

5. Pro Rata Distribution Calculation

Under the Interim Plan, the Receiver would distribute funds to the defrauded Investor Claimants on a pro rata basis according to their Allowed Claim Amounts, which are reflected in the Notices of Determination sent by the Receiver to the Investor Claimants. Specifically, under Plan A, the Investor Claimants would receive forty and twenty-six hundredths percent (40.26 %) (the "Distribution Percentage") of their Allowed Claim Amounts in this interim distribution (USD \$9.3 million). Under Plan B, the Investor Claimants would receive nine and nine hundredths percent (9.09 %) of their Allowed Claim Amounts.

The Distribution Percentages under Plan A and Plan B are calculated as follows:

Distribution Amount ÷ Allowed Claims = Distribution Percentage

Plan A: \$9,300,000.00 ÷ \$23,095,225.12 = 40.26%

Plan B: \$2,100,000.00 ÷ \$23,095,225.12 = 9.09%

Once it is determined if Plan A or Plan B will go into effect, the Receiver will immediately enter a Status Update to inform the Court of the first Interim Distribution Amount. It should be noted that if the Riknik funds are not received, a second interim distribution will be made shortly after their receipt along with any additional funds that may be recovered from other sources. The Receiver will file a Status Update to inform the Court of the second Interim Distribution Amount.

6. Notices of Determination

The proposed interim distribution will be based on the Investor Claimants' Allowed Claim Amounts as calculated by the Receiver and sent to Investor Claimants' in a Notice of Determination which stated their Allowed Claim Amount. [*See* Dkt.101]. The Investor Claimants would then receive an interim distribution payment equal to the Distribution Percentage multiplied by that Allowed Claim Amount.

7. Release Forms

Prior to receiving a payment, as a condition of receiving payment, the Receiver will send out a release form previously approved by the Court. [*See* Dkt. 101]. In the Order, it was thought the Receiver and his team would send the release form after the Notice of Determination was received. Due to the amount of time it has taken to recover the funds, the Receiver decided to send the release form coinciding with the distribution of payments. This will allow any investors who have not updated their contact information the most efficient way for the Receiver's small team to streamline mass communication responses to and from the investors.

The Receiver's team will post a statement on the ProphetMax Facebook site as well as the ProphetMax Receivership website once the release forms are transmitted to the Investor Claimants. The release forms will be sent via email to the email addresses the Receiver has on file. If the Receiver does not receive a response from an Investor Claimant within thirty (30) days, the Receiver's team will send a letter to the address on file to that Investor Claimant. If the Receiver is not able to contact and confirm the Investor Claimant's address and contact information, the Investor CD Claimant is not disqualified from receiving a distribution under the Interim Plan. Their distribution will be held in the IB Capital Receivership Account until their contact information is confirmed and their release form is received.

8. Publication of Payment Schedules

The Receiver has not attached to this Motion a schedule showing the dollar amount that each Investor CD Claimant will receive under the Interim Plan. However, once the Interim Plan is approved and the Receiver determines which Plan will be executed, the Receiver will provide that information to the Court, upon request. The schedules shall include claim ID numbers and the amount of the associated payments but shall not contain information from which the individual Investor Claimants can be identified.

The Receiver is aware that confidentiality concerns exist concerning the identity of those who will receive payments under the Interim Plan, and the Receiver has discussed such concerns with the National Futures Association ("NFA") [*See* Order Dkt. 173]. The Receiver does not propose to include in any public filing the names or other information that will individually identify those persons or entities that will receive payments.

II. Argument & Authorities

A. The Court may approve any distribution plan that is fair and reasonable

Federal district courts have broad discretion in fashioning relief in equity receiverships. *See SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560, 1566-67 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1037-39 (9th Cir. 1986). Pursuant to these broad powers, courts may authorize any distribution of receivership assets that is “fair and reasonable.” *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010).

B. The Interim Plan Compensates the Investor Claimants, who are the Victims of the IB Capital Fraud

The Interim Plan is designed to compensate the Investor Claimants, which is fair and reasonable for at least two reasons. First, virtually all of the money that came into the scheme were ill-gotten funds supplied by the Investor Claimants. Second, the Investor Claimants were the persons most directly and substantially harmed by the IB Capital fraud. Many of these people entrusted their entire life savings to IB Capital. Moreover, because many of the Investor Claimants are elderly and retired and have no other significant sources of income, this class of creditors has the most immediate and compelling need for equitable relief from the Court via an interim distribution.

1. Pro Rata Distribution among Investor Claimants is the Most Equitable Relief Available

In equity receiverships, federal courts overwhelmingly order pro rata distribution. *See United States v. Durham*, 86 F.3d 70 (5th Cir. 1996), *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d (5th Cir. 2001), *S.E.C. v Wealth Mgmt.*, 628 F.3d 325 (7th Cir. 2010); *S.E.C. v. Infinity Grp. Co.*,

226 F. App'x 217, 218 (3d Cir. 2007); *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 737, 746-47 (9th Cir. 2005); *S.E.C v. Forex Asset Management, LLC* , 242 F.3d at 331-32 (5th Cir. 2001); Pro rata distribution is “especially appropriate for fraud victims of a ‘Ponzi scheme.’” *S.E.C. v. Credit Bancorp*, 290 F.3d at 87-89 (2nd Cir. 2002). The equitable prerequisites for a pro rata distribution all exist in this case.

2. Distribution should be Pro Rata and Based on the Investor Claimants’ Net Losses

Courts routinely order that a pro rata distribution be based on the claimants’ net losses. A claimant’s net loss equals the amount paid into the scheme by the claimant minus the total amount paid to the claimant. This approach is sometimes referred to as a “money in, money out” (or “MIMO”) formula.

Two features of the net loss approach are particularly appropriate for investors in a fraudulent financial scheme. First, investors are only allowed to recover on the basis of money they actually paid into the scheme; interest reported to investors but never paid is fictitious and thus given no weight in the net loss calculation. *See In re Bernard Madoff Inv. Sec. LLC*, 654 F.3d 229, 238 (2d Cir. 2011) (affirming court order distributing Ponzi scheme’s assets based on net losses rather than customers’ account balances because “the profits recorded over time were after-the-fact constructs”) Second, any purported payments of interest are considered “money out” to be deducted from the claimant’s net loss.

III. Conclusion and Prayer

The interim distribution process would begin upon the Court’s approval of the Interim Plan and the Receiver is able to determine which plan will be executed. For the foregoing reasons, the Receiver respectfully requests the Court approve the Receiver’s Interim Plan.

Respectfully submitted,

THE HOHMANN LAW FIRM, LLC

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CERTIFICATE OF CONFERENCE

I have conferred with Timothy Mulreany, counsel for the Commodities Futures Trading Commission (the “CFTC”). The CFTC is not opposed to this motion.

By: /s/ Guy Hohmann

Guy Hohmann

CERTIFICATE OF SERVICE

On May 8, 2020, I electronically filed the foregoing document with the Clerk of the Court of the U.S. District Court, Western District of Texas.

I hereby certify that I will serve Defendants individually or through their counsel of record, electronically, or by other means authorized by the Court or the Federal Rules of Civil Procedure.

By: /s/ Guy Hohmann

Guy Hohmann

As of May 4th, 2020, the aggregate of the Investors' Allowed Claim Amounts equaled USD \$23,095,225.12.

The Receiver outlines two proposed Interim Plans, in the Motion. The Plan A distribution amount (USD \$9.3 million) would be distributed to the Investor Claimants' if he successful in his negotiations in repatriating USD \$7.2 million (the "Riknik funds"). If the recovery efforts are not successful in the next thirty (30) days or a reasonable time thereafter, then the Plan B amount (USD \$2.1 million) would be distributed. Those funds are from the recovery of the two accounts previously held by ING Bank in the Netherlands. Once, it is determined if Plan A or Plan B will go into effect, the Receiver will file a Status Update to inform the Court of the first Interim Distribution Amount.

The Distribution Percentages under Plan A and Plan B are calculated as follows:

	<u>Distribution Amount</u>	÷	<u>Allowed Claims</u>	=	<u>Distribution Percentage</u>
Plan A:	\$9,300,000.00	÷	\$23,095,225.12	=	40.26%
Plan B:	\$2,100,000.00	÷	\$23,095,225.12	=	9.09%

It should be noted that if the Riknik funds are not received within the next thirty (30) days or a reasonable time thereafter, once the Receiver recovers those funds or any additional funds that may be recovered from other sources, the Receiver is hereby Ordered to make a second interim distribution. The Receiver will immediately enter a Status Update to inform the Court of the second Interim Distribution Amount.

Investor Claimants will receive distributions under the Interim Plan equal to their Allowed Claim Amounts as reflected in their Notices of Determination multiplied by the Distribution Percentages reflected above.

B. Execution of the Interim Plan

Once the Court approves the Interim Plan, the interim distribution process would begin. Prior to receiving a payment, as a condition of receiving payment, the Receiver will send out a release form previously approved by the Court. [See Order Dkt. 101]. In the Court's previous Order approving the form of release, it was thought the Receiver and his team would send the Release forms after the Notice of Determination was received. If the Receiver does not receive a response from an Investor Claimant within thirty (30) days from the date sent, the Receiver's team will send a letter to the address on file to that Investor Claimant. If the Receiver is not able to contact and confirm the Investor Claimant's address and contact information, the Investor Claimant is not disqualified from receiving a distribution under the Interim Plan. Their distribution will be held in the IB Capital Receivership Account until their contact information is confirmed. The Receiver's team is moving forward with sending the release forms to expediate the confirmation of Investor Claimants' addresses and contact information. As stated in the Motion, the Receiver's team will post a statement on the ProphetMax Facebook site as well as the ProphetMax Receivership website once the release forms are transmitted to the Investor Claimants.

Payments under the Interim Plan shall be made on a rolling basis as release forms and address confirmations are received and processed. All payments pursuant to the Interim Plan shall be made via check unless otherwise agreed between the Receiver and the Investor Claimant(s). If payment is being made to compensate for losses that derive from accounts jointly owned by or otherwise associated with two or more Investor Claimants, the check shall be jointly payable to all such Investor Claimants and require the full endorsement of all such Investor Claimants.

C. Release

Any Investor Claimant who receives a payment pursuant to the Interim Plan shall be deemed to have released the Investor Claim(s) for which payment was made to the extent of the payment. Each Investor Claimant's Allowed Claim Amount shall be reduced, dollar for dollar, by the total amount received pursuant to the Interim Plan.

As set forth in [*See* Order Dkt. # 101], the Receiver retained the right to dispute, or assert offsets or defenses against, any filed claim as to the nature, amount, liability, or classification thereof and to approve claims submitted after the bar date. This Order supersedes the Court's previous Order in that the Receiver is no longer authorized to approve any Investor Claims after the date of this Order.

Having considered the Motion, the evidence presented, and arguments of counsel, The Court concludes the Motion should be, and is hereby, GRANTED.

SIGNED this _____ day of _____, 2020.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE