

v. Stanford Int'l Bank, Ltd., 945 F.3d 883 (5th Cir. 2019). As was done in that case, and thereafter approved by the Fifth Circuit, the Receiver here seeks approval of the settlement and the issuance of ancillary channeling and bar injunctions, as well as the establishment of distribution procedures.

LEGAL STANDARD

In the *Zacharias* case, the receiver in the Stanford case was similarly presented with a situation where, in order to negotiate a settlement, it was necessary to achieve global peace among all of the parties concerned. 945 F.3d at 889. That case likewise involved a fraudulent scheme in which the receiver pursued the various claims that arise under such circumstances against parties who faced potential liability not just to the receivership estate but also potentially independently from other parties, such as direct claims brought by individual victims. *Id.* Thus, a settlement was only practically possible if all claims could be addressed at once. *Id.* at 893.

In assessing the power of a federal court to provide the essential channeling and bar injunctions needed to provide global peace and the equitable distribution of a single settlement fund, the Fifth Circuit observed “equity receiverships are older than this country” and therefore are included within the term “suits in equity” in the grant of jurisdiction provided to the federal courts through Article III of the United States Constitution. *Id.* at 895.² A receiver is more than a mere agent of any party, but is instead “an officer or arm of the court appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court’s custody.” *Id.* at 896. Once a receiver takes over a fraudulently operated company, it ceases to be

where used in any releases, protective injunctions, or as otherwise necessary to ensure a global resolution for all such Persons.

² While the Stanford case arose in the context of the federal securities laws, the same statutory enforcement power in regard to receivers is present in the commodities futures statutes. *See CFTC v. Skorupskas*, 605 F. Supp. 923, 943 (E.D.Mich. 1985) (interpreting 7 U.S.C. § 13a-1); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583 (9th Cir. 1982) (same).

the tool of the wrongdoers, and instead becomes able to pursue the corporation's claims for the benefit of the victims of the fraudulent scheme. *Id.*

A receiver's power includes seeking "to reach settlements for the aggregate benefit of investors under the court's supervision". *Id.* "As directed by the court, a receiver may systemically use ancillary litigation against third-party defendants to gather the entity's assets. Once gathered, these assets are distributed through a court-supervised administrative process." *Id.*

"For this exercise, the federal district courts draw upon the power to impose a receivership free of interference in other court proceedings." *Id.* "These can include both stays of claims in other courts against the receivership and bar orders foreclosing suit against third-party defendants with whom the receiver is also engaged in litigation." *Id.*

A key equitable factor and limitation on the receivership court's power is that the investors must be able to participate in the receivership process to recover their share of a settlement reflective of their parallel and otherwise duplicative claims. *Id.* at 897-98, citing to *SEC v. Kaleta*, 530 F. App'x 360 (5th Cir. 2013). Thus, the court's power to enforce a common settlement is "limited to duplicative claims arising from the same fraudulent scheme," and the investors must be able to "participate in the receiver's distribution process." *Id.*

So long as these requirements are met, however, a district court may bar individual claims not before the court, so long as they involve "the same loss, from the same entities, related to the same conduct, and arising out of the same transactions and occurrences by the same actors." *Id.* at 898, following *SEC v. DeYoung*, 850 F.3d 1172, 1176 (10th Cir. 2017). As the Fifth Circuit held: "It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's investors will have hypothetical claims they could independently bring but for the receivership: the receivership exists precisely to gather such interests in the service of equity and aggregate recovery." *Id.* at 899.

Thus, a global settlement supported with channeling and bar injunctions supports the objective of maximizing the assets available to pay restitution to investors and facilitates an orderly and equitable distribution of those assets. *Id.* at 902. In *Zacharias*, the Fifth Circuit held: “The bar orders negotiated here were a legitimate exercises of the receiver's authority—indeed, the receiver's duty, all under the aegis of an Article III court.” *Id.* at 903. The Fifth Circuit noted there is a kinship between a class action settlement and a global receivership settlement, in that they both offer means to pursue litigation in an aggregative form. *Id.* at 904. However, the two vehicles are different mechanisms, both potentially available under comparable circumstances. *Id.*

In regard to due process for investor claimants, a receiver is expected to provide notice and thereby an opportunity to object as well as in regard to the settlement fund, the opportunity to present claims and seek judicial review of the receiver’s exercise of the distribution procedures. *Id.* at 903.

In regard to the particulars of the order affirmed in the *Zacharias* case, that order can be found at *SEC v. Stanford Int’l Bank Ltd.*, Case 3:09-cv-298, Doc. 2568 (N.D.Tex.).

FACTS

This settlement arises out of the context of a fraudulent scheme as more particularly detailed in the CFTC Complaints and the Consent Order entered in the IB Capital Case *See* [Dkt. #24 therein] (the “IB Capital Fraud”). The following additional facts are supported by the Affidavit of Guy H. Hohmann, which is contained in the concurrently filed Appendix.

The Receiver is acting in furtherance of orders entered by this Court, *inter alia*, *CFTC v. IB Capital FX, LLC (aka IB Capital FX (NZ) LLP), et al.*, Civil Action No. 1:15-cv-01022-LY, *See* [Dkt. #s 16, 24 & 25] (the “IB Capital Case”), and *CFTC v. Pousa, et al.*, Civil Action No. A-12-cv-0862- LY, *See* [Dkt. #s 4 & 22] (the “ProphetMax Case”) (collectively “Receivership Orders”). Through the Receivership Orders, the Court has taken exclusive possession of all the

funds, property, and assets of IB Capital and the other receivership defendants (“Receivership Assets” or “Receivership Estate”) and directed the Receiver to collect, receive, and take possession of, inter alia, all rights, moneys or accounts, as well as to seek, administer and equitably distribute restitution for the victims of the IB Capital Fraud. *Id.*

The Receiver contends one of the acts of IB Capital and two individual Receivership Defendants³ done in furtherance of the IB Capital Fraud was to establish accounts at ING and solicit deposits from certain persons who transferred funds directly or indirectly (“Deposits”) to such ING bank accounts (“IB Capital Investors”).

The Receiver has solicited, investigated and adjusted claims presented to him by IB Capital Investors, as well as certain persons who initially deposited funds in other financial institutions, and determined the names of the IB Capital Investors and their respective net cash losses and last known addresses of the IB Capital Investors are accurately stated on the Receiver’s official Claims Ledger. *See* Exhibit 1 to Sealing Motion [Dkt. # 205-1 pgs. 18-32].

The Receiver has presented to ING the claims of IB Capital and the IB Capital Investors arising out of the Deposits, and ING has disputed any liability to such parties (the “Disputed Claims”) and ING has expressly denied any and all allegations of wrongdoing, fault, liability or damages whatsoever.

The Receiver and ING have respectively conducted an extensive investigation into the facts and the law relating to the Disputed Claims and considered the results of those investigations and the benefits of a settlement, as well as the burden, expense, delays, and risks of litigation. Absent this Settlement, the Disputed Claims would have taken years to litigate to judgment likely in

³ Any terms used in this Motion not otherwise defined shall have the meanings set forth in the proposed Order, and where more detailed definitions are provided in the proposed Order, the meanings in such agreement shall control.

competing jurisdictions at substantial expense to all concerned and without any certainty as to the ultimate outcome.

In an effort to resolve the Disputed Claims, the Receiver and ING have engaged in an intense period of negotiation spanning the period of more than two years that has, at times, also included litigation as reflected in the Court's docket in the above-referenced matters, and, as a result, have now resolved a settlement that will provide a global resolution of the Disputed Claims ("ING Settlement") through the ING Settlement Agreement and the Proposed Final Order Approving the Settlement, Issuing Channeling and Bar Injunctions, and Approving Distribution Procedures set forth in the ING Settlement Agreement (the "Order"). *See* Dkt. #205-1 Exhibit 1 pgs. 40-44. Thus, the Parties have engaged in extensive, good faith, arm's-length negotiations.

To be clear, the Parties are entering into the ING Settlement to avoid the burden, expense, and risks of litigation and to achieve global peace with respect to all claims that have been, could have been, or could be asserted against ING relating to or arising out of the Deposits or the IB Capital Fraud in any respect.

The Parties have concluded that a settlement under the terms set forth herein is fair, reasonable, adequate and in the best interests of the Receiver, IB Capital, the IB Capital Investors and ING.

The Parties desire to fully, finally and forever compromise and effect a global settlement and discharge of all claims, disputes, and issues between them upon the terms set forth herein. Indeed, global peace is an essential condition for the ING Settlement.

The ING Settlement will permit the Receiver to issue Distribution Checks for pro rata immediate restitution of approximately 31% of the net cash losses of the investors, at today's exchange rates, taking into consideration the other recoveries in the case, the administrative expenses and recovery costs and the settlement amount.

The ING Settlement will permit the Receiver to pursue frozen funds in other jurisdictions that could substantially augment this restitution in the relative near term.

By motion filed contemporaneously herewith, the Receiver seeks approval of a form of notice (the “Notice”) for a hearing on the Motion and the setting of such hearing. The Receiver proposes to send the Notice to the email and/or physical addresses listed on the Claims Ledger, which are the last known addresses of the IB Capital Investors and the best available information as to where to send the Notice. The Receiver will first attempt email, and, if that is returned, will send the Notice via regular mail.

The ING Settlement provides Distribution Procedures that are based upon the Claims Ledger, which is the product of a thorough investigation and the employment of claims procedures that permitted the IB Capital Investors to present claims. The Distribution Procedures further provide notice of the approved claim amount, the proposed payment amount, the opportunity to object and the potential for Court review.

The proposed Order is modeled upon the *Zacharias* order and provides nearly identical channeling and bar injunctions.

RELIEF SOUGHT

WHEREFORE, the Receiver prays the Court enter the Order tendered herewith.

Respectfully submitted,
GUY HOHMANN

By: /s/ Guy Hohmann

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**RECEIVER FOR THE PROPHETMAX AND
IB CAPITAL RECEIVERSHIP ESTATES**

CERTIFICATE OF CONFERENCE

The Receiver conferred with Danielle Karst, counsel for the CFTC. The CFTC takes no position on this Motion. The Receiver has also conferred with counsel for ING, who represents ING agrees with the relief sought.

/s/ Guy Hohmann
Guy Hohmann

CERTIFICATE OF SERVICE

On June 14, 2022, I electronically submitted the foregoing document with the Clerk of the Court of the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Guy Hohmann
Guy Hohmann