

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UNITED STATES COMMODITY FUTURES  
TRADING COMMISSION,

*Plaintiff,*

V.

IB CAPITAL FX, LLC (A/K/A IB CAPITAL FX  
(NZ) LLP) D/B/A IB CAPITAL, MICHEL  
GEURKINK, AND EMADE ECHADI,

*Defendants.*

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CASE NO. A-12-CV-0862-DEA

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RECEIVER’S UNOPPOSED MOTION FOR APPROVAL OF SECOND INTERIM  
DISTRIBUTION PLAN & PROCEDURES

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I. Introduction

The Receiver moves the Court to order a Second Interim distribution of funds from the Receivership Estate for the benefit of defrauded investors that invested funds with IB Capital and/or paid membership fees to ProphetMax. These investors were the primary source of funds for the ProphetMax and IB Capital frauds. They are also the primary victims of the frauds.

A. Second Interim Distribution Plan

The Receiver’s proposed Second Interim Distribution Plan & Procedures (the “Second Interim Plan”), which is contained in the proposed Order, would distribute USD \$6,673,622.40 to defrauded investors (the “Second Interim Distribution Amount”). Specifically, the distribution would be limited to holders of approved claims for (1) losses caused by providing ProphetMax

and IB Capital with funds they thought were being utilized in foreign currency trading transactions or (2) 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 schemes 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.

Thirty days after the Court approves the Second Interim Distribution Plan, the Second Interim distribution process would begin. The Second Interim Plan is not intended to be the final distribution by the Receivership. The monies the Receiver is seeking to distribute are from his recent recovery efforts from Sloviakia. 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.<sup>1</sup>

#### **B. The Receiver’s Asset Recovery Efforts**

To date, the Receiver’s asset recovery efforts including the anticipated Second Interim distribution, will result in approximately 82 percent on the dollar of the Investor Claimants’ losses. These efforts included monies repatriated from Sloviakia, the Netherlands, Cyprus and a settlement with ING Bank.

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<sup>1</sup> The Receiver is being assisted in his asset recovery efforts by law firms he has retained in the jurisdictions of France, Morocco and the Netherlands. The Receiver also continues to work closely with representatives of the Dutch Public Prosecutor’s Office and his Dutch counsel. The Receiver fully anticipates a future distribution will be made from these additional asset recovery efforts.

The Receiver is actively pursuing repatriation efforts in Morocco in the approximate amount of \$4.87 million.

### **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 \$23,834,366.86 million.

#### **3. Net Loss Approach**

Many Investor Claimants asserted Total Claimed Amounts in their proofs of claim equal to their ending balances. In determining the Approved 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. Pro Rata Distribution Calculation**

Under the Second Interim Plan, the Receiver would distribute funds to the defrauded Investor Claimants on a pro rata basis according to their Approved Claim Amounts, which are reflected in the Notices of Determination sent by the Receiver to the Investor Claimants.

#### **5. Notices of Determination**

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

## **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 Second Interim Plan Compensates the Investor Claimants, who are the Victims of the ProphetMax and IB Capital Fraud**

The Second 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 was supplied by the Investor Claimants. Second, the Investor Claimants were the persons most directly and substantially harmed by the ProphetMax and 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 (7<sup>th</sup> 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 (5<sup>th</sup> 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 (2<sup>nd</sup> 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" formula.

Two features of the net loss approach are particularly appropriate for investors in a fraudulent financial scheme. First, investors are only approved 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 Second Interim distribution process would begin thirty (30) days after the Court's Order becomes final (assuming there are no objections to the Order and no notices of appeal are filed). For the foregoing reasons, the Receiver respectfully requests the Court approve the Receiver's Second Interim Plan & Procedures.

Respectfully submitted,  
**THE HOHMANN LAW FIRM, LLC**

By: /s/ Guy Hohmann  
Guy Hohmann  
State Bar No:  
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Austin, Texas 78701  
(512) 495-1438  
(512) 499-0094 (Facsimile)

**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 June 21, 2024, 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

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UNITED STATES COMMODITY §  
FUTURES TRADING COMMISSION, §  
§  
*Plaintiff,* §  
v. §  
§  
SENE POUSA, INVESTMENT §  
INTELLIGENCE CORPORATION, §  
DBA PROPHETMAX MANAGED FX, §  
JOEL FRIANT, MICHAEL DILLARD, and §  
ELEVATION GROUP, INC., §  
*Defendants.* §

Civil Action No. A-12-CV-0862-DAE

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**ORDER ON RECEIVER’S UNOPPOSED MOTION FOR APPROVAL OF SECOND  
INTERIM DISTRIBUTION PLAN AND PROCEDURES**

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This Order addresses the Receiver’s Unopposed Motion for Approval of the Second Interim Distribution Plan and Procedures (the “Motion”). After considering the Motion, any responses, objections, or replies thereto, the arguments of counsel, if any, and the evidence in the record, the Court grants the Motion in full. Accordingly, the Court orders the Receiver to make distributions in connection with the Second Interim Distribution Plan and Procedures (the “Second Interim Plan”).

The obligations, rights and responsibilities of the Receiver, the distribution agent Donlin Recano & Company, Inc. (“DRC”) and the United States Commodities Futures Trading Commission (the “CFTC”) shall be as follows:



**A. Treatment of Claims under the Second Interim Distribution Plan**

The Second Interim Distribution amount shall be apportioned among Investor Claimants on a pro rata basis. Investor Claimants will receive payments equal to a percentage (the “Distribution Percentage”) of their approved claim amounts as reflected in their Notice Of Claim Determinations previously sent by the Receiver to the Investor Claimants. The approved claim amounts shall be based on the Investor Claimants’ net losses.

The distribution percentage can be represented mathematically as: The Distribution Amount ÷ Investors’ Approved Claim Amounts = Distribution Percentage.

As of June 19, 2024, the aggregate of the Investors’ Approved Claim Amounts equaled \$23,834,366.86. The Distribution Percentage, therefore, is calculated as follows:

$$\frac{\text{Distribution Amount } \$6,673,622.40}{\text{Total Approved Claims } \$23,834,366.86} = 28\%$$

Investor Claimants shall receive distributions under the Second Interim Plan equal to their approved claim amounts as reflected in their Notice of Receiver’s Claim Determination multiplied by the distribution percentage.

**B. Payments under the Second Interim Plan**

All payments to Investor Claimants living in the continental U.S. shall be made via check.<sup>1</sup> Investor Claimants that live outside of the continental U.S., shall receive their distribution via wire transfer. If a check is being made to compensate for losses that derive from accounts jointly owned or otherwise associated with two or more Investor Claimants, the Receiver shall issue the check jointly payable to both investors.

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<sup>1</sup> The Receiver will make exceptions on a case-by-case and honor exceptions that have already been established.

### **C. Execution of the Second Interim Plan**

The distribution under the Second Interim Plan shall be made from the monies the Receiver has recovered from Slovakia. Assuming this motion is granted, the Receiver will begin executing the Second Interim Plan thirty (30) days after the Order is signed. The Receiver shall use DRC as the distribution agent to facilitate the distribution of checks and Internal Revenue Service (“IRS”) 1099 forms.<sup>2</sup>

The Responsibilities of the Receiver, DRC and the CFTC are outlined as follows:

1. **The Receiver:**
2. The Receiver shall wire transfer the funds to be distributed to a checking account which was previously established by DRC, at the Receiver’s request.
3. For security purposes, prior to releasing Investor Claimants’ names, addresses and pro rata claim amounts to be issued to those particular Investor Claimants, the Receiver and/or his paralegals will reconfirm mailing addresses for those investors living within the continental U.S. and/or wire confirmation details for those investors living outside the continental U.S.
4. For those Investor Claimants governed by U.S. tax law and (1) that have notified the Receiver of a new mailing address or (2) that have not previously contacted the Receiver and were unresponsive to previous distribution attempts, prior to releasing

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<sup>2</sup> This Court previously granted the use of Donlin Recano & Company, Inc. as the Receiver’s Distribution Agent. [Dkt # 262, 268].

their pro-rata distribution to the DRC, the Receiver's paralegals will provide a W-9 form to be completed by Investor Claimants.<sup>3, 4</sup>

5. Upon receipt of those completed W-9 forms, the Receiver shall email the completed W-9 to DRC via secure file.
6. On a rolling basis, as the Receiver reconfirms the Investor Claimants mailing addresses, every ten (10) business days the Receiver shall send a secure file via email to DRC with a schedule of investors with their names, addresses and pro rata claim amounts to be issued to those particular Investor Claimants.
7. Investor Claimants who do not live outside of the continental U.S. and are governed by U.S. tax laws shall receive a 1099 form in order to safely and securely send and receive sensitive information such as social security numbers and employment identification numbers.
8. For Investor Claimants that live outside of the U.S. and are not governed by U.S. tax laws, the Receiver's paralegals, with oversight from the Receiver, shall send wire transfers to those investors who completed wire transfer forms.
9. The Receiver and the paralegals at the Hohmann Law Firm shall continue to communicate with investors via the Receivership email address and through telephone calls to answer questions, update contact details and provide updates if applicable. The Receiver's paralegals shall also assist the Receiver in communications with DRC and assist with wire transfers.

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<sup>3</sup> The Receiver will utilize ShareFile to send secure and sensitive Investor Claimants' names, addresses and claim amounts to be issued the Investor Claimants.

<sup>4</sup> The IRS requires W-9 forms to be replaced when specific information is changed, including changes in names, type of business entity or a taxpayer ID number.

10. The Receiver shall review any Investor Claimants requesting exceptions to the steps outlined in this Order, assuming the Motion is granted, on a case-by-case basis.

11. The Receiver shall keep detailed records of all fees and expenses that are incurred during the distribution phase of the Second Interim Plan.

12. The Receiver shall post a statement on the Receivership Facebook site and the Receivership website notifying the Investor Claimants when the distribution phase commences.

**13. DRC:**

14. DRC shall provide the Receiver with their wire transfer instructions.

15. Upon receipt of the Receiver's wire transfer and schedule of the Investor Claimants to be issued a distribution check with the language "Second Interim Distribution" printed on the check.<sup>5</sup>

16. DRC shall issue and mail checks via First Class postage through the U.S. Postal Service within three (3) to five (5) business days at the addresses provided by the Receiver.

17. Each check shall state on its face "void after 180 days".

18. If any checks mailed by DRC are returned as undeliverable, DRC shall forward them to the Receiver in batches at the end of each calendar month.

19. DRC shall not publish or release any investor claimant information. All investor claimant information is confidential and not public.

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<sup>5</sup> DRC will send wire transfer instructions to an account previously established in this Court's order. [Dkt. #262]. DRC utilizes check templates to print checks for purposes of printing distribution checks i.e. Second Interim Distribution.

20. DRC shall retain and store securely all investor claimant's IRS W-9 forms received from the Receiver.

21. For investors that receive payment in calendar year 2024, DRC shall issue each investor claimant a 1099 form no later than January 31, 2025. For investors that receive payment in calendar year 2025, DRC shall issue a 1099 form no later than January 31, 2026.

22. The 1099 form shall be mailed via USPS First Class mail to the address stated on the investor claimant's completed W-9 forms.

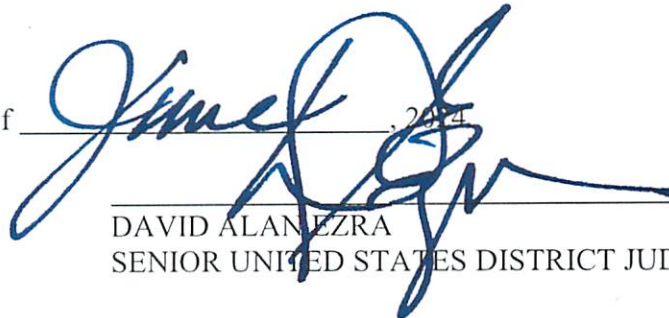
23. DRC shall track and invoice all fees and expenses and submit invoices at the end of each month.

24. Upon request, DRC shall wire all remaining funds back to the Receiver to the wire instructions provided by the Receiver.

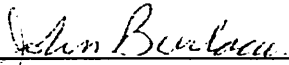
**25. The CFTC shall:**

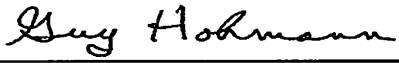
26. Continue to assist the Receiver in locating Investor Claimants that he has not been able to locate.

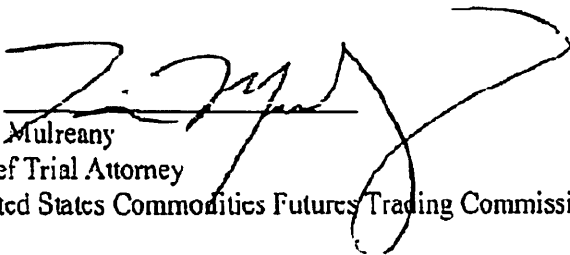
SIGNED this 24 day of

  
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DAVID ALANEZRA  
SENIOR UNITED STATES DISTRICT JUDGE

Approved as to Form and Substance:

By:   
John Burlacu  
Senior Director  
Donlin Recano & Company, Inc.

By:   
Guy Hohmann  
Receiver for IB Capital FX, LLC and Investment Intelligence Corporation

By:   
Tim Mulreany  
Chief Trial Attorney  
United States Commodities Futures Trading Commission