
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff(s)

Case No: 09-cv-3332 MJD/FLN

v.

TREVOR COOK d/b/a CROWN
FOREX, LLC, PATRICK KILEY d/b/a
CROWN FOREX, LLC, UNIVERSAL
BROKERAGE FX and UNIVERSAL
BROKERAGE FX DIVERSIFIED, OXFORD
GLOBAL PARTNERS, LLC, OXFORD
GLOBAL ADVISORS, LLC, UNIVERAL
BROKERAGE FX ADVISORS, LLC f/k/a
UBS DIVERSIFIED FX ADVISORS, LLC,
UNIVERSAL BROKERAGE FX
GROWTH, L.P. f/k/a UBS DIVERSIFIED FX
GROWTH L.P., UNIVERSAL BROKERAGE
FX MANAGEMENT, LLC f/k/a UBS
DIVERSIFIED FX MANAGEMENT, LLC
and UBS DIVERSIFIED GROWTH, LLC,

Defendant(s)

R.J. ZAYED,

Receiver.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Case No: 09-cv-3333 MJD/FLN

Plaintiff(s)

v.

TREVOR G. COOK,
PATRICK J. KILEY,
UBS DIVERSIFIED GROWTH, LLC,
UNIVERSAL BROKERAGE FX
MANAGEMENT, LLC,
OXFORD GLOBAL ADVISORS, LLC,
and OXFORD GLOBAL PARTNERS, LLC,

Defendants

and

BASEL GROUP, LLC,
CROWN FOREX, LLC,
MARKET SHOT, LLC,
PFG COIN AND BULLION,
OXFORD DEVELOPERS, S.A.,
OXFORD FX GROWTH, L.P.,
OXFORD GLOBAL MANAGED
FUTURES FUND, L.P., UBS DIVERSIFIED
FX ADVISORS, LLC, UBS DIVERSIFIED
FX GROWTH, L.P., UBS DIVERSIFIED
FX MANAGEMENT, LLC, CLIFFORD
BERG, and ELLEN BERG,

Relief Defendants.

R.J. ZAYED,

Receiver.

MEMORANDUM IN SUPPORT OF THE RECEIVER’S MOTION FOR AN ORDER ENTERING RECOGNIZED CLAIM AMOUNTS AND APPROVING PROCESS FOR JUDICIAL RESOLUTION OF DISPUTED CLAIMS

Pursuant to the Court’s November 1, 2010 Order, the Receiver, R.J. Zayed, respectfully moves for an Order entering the Receiver’s recognized claim amounts for all settled and undisputed claims in these civil cases. *Order Approving Interim Distribution Plan and Claim Finalization Procedures*, SEC Docket No. 556 & CFTC Docket No. 514 (Nov. 1, 2010) (“Interim Distribution and Claim Finalization Order”), ¶ 17. The Receiver also submits his status report on all unresolved claims and respectfully moves the Court for approval of the Receiver’s plan for judicial resolution of these remaining claim disputes. *See id.*

I. BACKGROUND

On November 23, 2009, the United States Securities and Exchange Commission (“SEC”) and the United States Commodity Futures Trading Commission (“CFTC”) filed lawsuits against Trevor Cook, Patrick Kiley, and various entities controlled by them (collectively referred to as the “Receiver Estates”). *Complaint*, No. 09-cv-3333 (“SEC case”), Docket No. 1 (Nov. 23, 2009); *Complaint for Injunctive and Other Equitable Relief and For Penalties under the Commodity Exchange Act*, No. 09-cv-3332 (“CFTC case”), Docket No. 1 (Nov. 23, 2009).

On November 23, 2009, the Court established the Receivership in the related SEC and CFTC cases. *See Order Appointing Receiver*, SEC Docket No. 13 (Nov. 23, 2009); *see also Amended Order Appointing Receiver*, SEC Docket No. 18 (Nov. 24, 2009); *Second Amended Order Appointing Receiver*, SEC Docket No. 68 (Dec. 11, 2009); *Order*

Imposing Asset Freeze and Other Ancillary Relief, SEC Docket No. 14 (Nov. 23, 2009); *Order Identifying Frozen Accounts*, SEC Docket No. 15 (Nov. 23, 2009); *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21 (Nov. 23, 2009); *Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96 (Dec. 11, 2009).

The purpose of the Receivership is to marshal, preserve, account for and liquidate the assets of the Receivership for the benefit of the investors who were defrauded by Cook's scheme. *See, e.g., Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96, at 3.

A. The Receiver's Interim Distributions.

On October 18, 2010, the Receiver filed a motion to distribute \$2,250,000.00 in civil restitution to the victims of this Ponzi scheme, release \$363,700.00 for criminal restitution, and establish a claim finalization process for the civil cases. *Memorandum in Support of the Receiver's Motion for an Order Approving Interim Distribution Plan and Claim Finalization Procedures*, SEC Docket No. 538 & CFTC Docket No. 494, § II (Oct. 18, 2010) ("Interim Distribution and Claim Finalization Memorandum"). On November 1, 2010, this Court entered an Order allowing the distributions and approving the Receiver's claims finalization procedures. *Interim Distribution and Claim Finalization Order*, SEC Docket No. 556 & CFTC Docket No. 514. On January 13, 2011, the Court approved a supplemental distribution for certain investors whose claims were not part of the original distribution. *Supplemental Order Concerning Order Approving Interim Distribution Plan and Finalization Procedures*, SEC Docket No. 656 & CFTC Docket No. 611 (Jan. 13, 2011) ("Supplemental Order").

In furtherance of the Court's Orders, on November 12, 2010, the Receiver, via the Clerk of Court for the United States District Court for the District of Minnesota ("Clerk of Court"), mailed checks to 668 claimants for their *pro rata* shares of the \$2.25 million interim distribution. *Notice of Mailing of Receiver's Interim Distribution*, SEC Docket No. 581 & CFTC Docket No. 537 (Nov. 12, 2010). Investors received payouts ranging from \$67.98 to \$110,820.95, with an average payout of \$3,368.26. *See Interim Distribution and Claim Finalization Memorandum*, SEC Docket No. 538 & CFTC Docket No. 494, § II (Oct. 18, 2010).

At or about the same time as the interim civil distribution, the United States Probation Office, via the Clerk of Court, mailed separate criminal restitution checks to victims identified in the related criminal case of *United States of America v. Trevor Cook*, 10-cr-00075 (D. Minn. 2010). (Norgard Decl. ¶ 13.) The source of funding for the criminal restitution was the \$363,700.00, plus interest, that the Court authorized the Receiver to release for this purpose. *Interim Distribution and Claim Finalization Order*, ¶ 6.

Then, on or around November 29, 2010, the Receiver distributed an additional \$39,820.48 to twelve employee investor claimants. Those employee claims were not paid out as part of the original interim distribution, but were later approved for payment in the Court's Supplemental Order. (Norgard Decl. ¶ 14); *Seventh Status Report of Receiver R.J. Zayed*, SEC Docket No. 658 & CFTC Docket No. 614, at 6; *see also Supplemental Order*.

Each interim civil distribution check was accompanied by a letter from the Receiver explaining the investor's recognized claim amount, how that amount was used to calculate the investor's *pro rata* share of the interim distribution, and the process investors could use to challenge the recognized claim amount, should they wish to do so. *See Declaration of Tara C. Norgard*, SEC Docket No. 539 & CFTC Docket No. 495, ¶ 23, Ex. 6 (Oct. 18, 2010). Challenging investors were given 30 days to submit a sworn statement to the Receiver detailing the basis for the challenge and the dates and amounts of all deposits to, and receipts from, the Receive Estates, along with supporting documentation. *Id.*; *Interim Distribution and Claim Finalization Order* at ¶ 14.

B. The Receiver Continued To Notify The Public About The Claim Process And Identify And Verify Claims After The Interim Distributions Were Made.

The Receiver anticipated that after the original interim distribution, the number of victims on the civil claim list and the total dollars lost would be adjusted. For example, claims by employee investors had yet to be processed when the original interim distribution was made. *Interim Distribution and Claim Finalization Memorandum*, § III(A). The Receiver expected to make adjustments to existing recognized claim amounts, where appropriate, based on new information; his claim finalization plan afforded full Due Process, including the opportunity for investors to challenge the Receiver's recognized claim amount and seek judicial resolution of any claim dispute that could not be settled. *Id.*, § III(E). In addition, the Receiver expected that new claims would be made. *Id.*, § III(B)-(C).

The Receiver therefore proposed, and the Court approved, a process that allowed

investors to submit claims until January 14, 2011 (“Claim Bar Date”) and the Receiver to recognize new claims and adjust recognized claims, where appropriate, through the claim challenge process. Starting with his appointment and continuing on through today, the Receiver has used various means in these efforts, including, but not limited to, (1) communicating directly with investors; (2) reviewing seized hard copy records; (3) analyzing seized electronic data; (4) reviewing financial records from third parties; and (5) working with the SEC, U.S. Probation Office and counsel for the victims. *See Interim Distribution and Claim Finalization Memorandum*, SEC Docket No. 538 & CFTC Docket No. 494, § I(D).

To ensure that notice of the Claim Bar Date and submission process was disseminated as widely as possible to all potential victims, the Receiver undertook several additional communication efforts after the interim distribution. Specifically, the Receiver wrote letters to nearly 250 individuals whose names appeared in the Receiver’s seized files but who had not submitted a claim for civil restitution. (Norgard Decl. ¶ 15); *see also Seventh Status Report of Receiver R.J. Zayed*, SEC Docket No. 658 & CFTC Docket No. 614, at 6. Details of the claim submission process and Claim Bar Date also were posted on web sites for the Receiver, the United States District Court for the District of Minnesota, the United States Attorney for the District of Minnesota, the CFTC, and the FBI. (Norgard Decl. ¶¶ 3-5, 9-10.) In addition, the Receiver published this claim information in several printed publications, including the Minneapolis Star Tribune, the St. Paul Pioneer Press, and Investor’s Business Daily, and on those publications’ web sites. (*Id.* at ¶¶ 6-8.) Several news web sites, including KSTP TV, KAAL TV, and

BringMeTheNews.com, also ran stories about the process for submitting claims and the deadline for doing so. (*Id.* at ¶¶ 11-12.)

C. New Claims Submitted To Receiver By The January 14, 2011 Claim Bar Date.

After the interim distribution, the Receiver received and processed an additional fifty-five claims for civil restitution, bringing the total number of investors with losses recognized for civil distribution to 723.¹ (Norgard Decl. ¶ 16.) As with the prior claims, the Receiver reviewed all documents submitted by these new claimants along with documents and information from the Receiver's independent investigation. (*Id.*); *see supra*, § I(B). The Receiver then provided each new claimant with written notice of his or her recognized claim amount and an explanation of the claim challenge process. (Norgard Decl. ¶ 16); *see Interim Distribution and Claim Finalization Order*, ¶ 14. These new claims that have been recognized, but were not part of the interim distribution, will be paid out in future distributions. All payouts will be adjusted so that each investor receives his or her *pro rata* share of all civil restitution made by the Receiver.

D. Summary Of Resolved Claims.

Of the total claims submitted to the Receiver by the Claim Bar Date, 712 have been resolved. The recognized losses for these investors total \$155,523,763.90. (Norgard Decl., ¶ 2, Ex. A) The Receiver hereby moves for an Order entering these 712 recognized claim amounts as final for purposes of civil restitution to these claimants.

¹ Six additional claims have been submitted to the Receiver but are still being processed. (*See* Norgard Decl., ¶ 17.) The Receiver expects that four of these additional claims will be recognized upon receipt of additional documentation from the investors and that two may later require judicial resolution.

Additional recognized claims may later be added to this list, depending on the outcome of six claims that are still being processed, *see supra* fn.1, and resolution of the eleven pending challenges to the Receiver's recognized claim amounts. *See infra* I.D.

E. Challenges To The Receiver's Recognized Claim Amounts.

Forty-five investors submitted challenges to the Receiver, requesting an adjustment to their recognized claim amounts. (Norgard Decl. ¶ 18.) Of these challenges, thirty-four have been resolved and are included in the final claim list submitted herewith. (*Id.* at ¶ 19.)

Eleven challenges remain pending. (Norgard Decl. ¶ 20, Ex. M.) The Receiver has already recognized a total of \$3,022,616.16 in losses for these challenging investors.² They are seeking to increase their claims by a total of \$298,827.77 in the challenge process. (Norgard Decl., ¶ 20, Ex. M.) The challenges fall into four categories:

1. Four of the eleven disputed claims concern fees paid to or withheld by third party administrators Millennium and Entrust. (*Id.*)
2. Two of the eleven disputed claims concern claimants' failure to subtract all payments that were made to them from Receivership entities before the Receivership was installed. (*Id.*)
3. Four of the challenges concern deposits that are either unsubstantiated or have been rejected by the Receiver. (*Id.*)
4. The last disputed claim was untimely and has been rejected pursuant to

² Because these recognized claim amounts are still in the challenge process, they are not included in Exhibit A to the Norgard Declaration, which is the list that the Receiver asks the Court to enter as final in this motion.

paragraph fourteen of the Interim Distribution Order. (*Id.*)

On or around February 25, 2011, the Receiver provided written notice to claimants whose challenges were still in dispute as of that date. (Norgard Decl. ¶ 18.) That letter informed the claimants of the Receiver's decision on their challenges and their right to accept that decision or appeal it to the Court. (Norgard Decl. ¶ 18, Ex. L) Specifically, challenging investors were given three options: (1) accept the Receiver's final recognized claim amount; (2) appeal the Receiver's allowed amount and request a hearing before the Court; or (3) appeal the Receiver's allowed amount but request the Court rule on the evidence already available without a hearing. (*Id.*)

F. Proposed Judicial Resolution Of Remaining Disputed Claims.

The Receiver proposes the following process for judicial resolution of the eleven challenges to the Receiver's recognized claim amounts that remain pending as of this filing. Upon approval by the Court, the Receiver will explain this process in written correspondence to each investor with a pending challenge.

1. On Or Before April 15, 2011, The Receiver Will File A Motion Asking The Court To Resolve The Pending Claim Disputes.

On or before April 15, 2011, the Receiver will file a motion before Magistrate Judge Franklin L. Noel asking the Court to resolve the claims which, as of that date, are in dispute.³ The memorandum in support of this motion will explain the basis for any dispute concerning the Receiver's recognized claim amount and include relevant

³ This procedure shall not apply to any claims for civil restitution that may arise out of pending or future clawback litigation. Any such later-arising claims will be handled separately by the Receiver and, if necessary, the Court.

documentation supporting that amount. The memorandum shall be limited to three (3) pages per disputed claim. The Receiver will serve a hard copy of this filing on each investor with a pending claim dispute at issue in the motion.

2. On Or Before April 22, 2011, Each Challenging Investors Whose Claim Has Not Been Resolved May File A Responsive Brief And Any Additional Documentation Supporting His Or Her Challenge To The Receiver's Recognized Claim Amount.

On or before April 22, 2011, each investor with a pending claim dispute identified in the Receiver's motion may file a memorandum of no more than three (3) pages with the Court, explaining the basis for his or her challenge to the Receiver's recognized claim amount, along with any additional documentation supporting such challenge.

Challenging investors may file their memoranda and any exhibits conventionally, by delivering the documents to the Clerk of Court for the United States District Court for the District of Minnesota, 300 South Fourth Street, Minneapolis, MN 55415, by hand, overnight courier, or United States mail. Challenging investors shall be advised that their filings with the Clerk of Court are public, and upon filing will be posted on the Court's Electronic Case Filing system. Accordingly, challenging investors shall redact personal identifiers from their filing pursuant to Federal Rule of Civil Procedure 5.2, which is set forth below:

Federal Rule of Civil Procedure 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings.

Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-

identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

3. Magistrate Judge Franklin L. Noel Will Hear All Remaining Disputes On April 29, 2011.

Magistrate Judge Franklin L. Noel has scheduled a hearing for April 29, 2011, beginning at 9:30 a.m. for recognized claim amounts that are disputed by investors. In view of the fact that many investors do not reside in Minnesota, any challenging investor who wishes to do so may appear by phone. Challenging investors may have an attorney represent them in these proceedings, or they may represent themselves.

4. The Receiver Shall File An Amended Final Civil Restitution List After Judicial Resolution Of The Challenges.

After all disputed claims have been resolved, the Receiver will file an amended list of final recognized claim amounts with the Court. All future distributions based on the resolved claim amounts will be made on a *pro rata* basis using the claim amounts entered in the amended recognized claim list, less any prior distributions or recoveries.

III. LEGAL ANALYSIS

When reconciling and resolving claims, the Court has broad discretion, and the Receiver may properly deny any claims or deposits that are not substantiated by the

claimants. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (“To the extent that a party has a colorable claim against a receiver or the entities in receivership, due process demands that the claimant be heard, but the district court exercises significant control over the time and manner of such proceedings.”); *U.S.A. v. Fairway Capital Corp.*, 433 F.Supp.2d 226, 246-7 (D.R.I. 2006). It is well established that the Court has broad discretion in determining relief in an equity receivership. *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir. 1978) (“The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.”) As noted by the Ninth Circuit, “reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld. A district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad discretionary power.” *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Receiver may propose and the Court may adopt any distribution plan that is reasonable. *See SEC v. Wang*, 944 F.2d 80, 83-4 (2d Cir. 1991).

The district court’s choice of distribution plan is reviewed for abuse of discretion. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (holding that “the district court’s distribution plan will not be disturbed on appeal unless that discretion has been abused”). In *Wang* the court further held that a reasonable plan should be upheld even if the reviewing court may have chosen a different plan. *SEC v. Wang*, 944 F.2d at 88. Courts have also consistently found *pro rata* distributions to be appropriate, especially for fraud victims of Ponzi schemes, where “earlier investors’ returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate

investment activity.” *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-9 (2d Cir. 2002) (explaining the preference of courts for *pro rata* distribution of assets where funds have been comingled and victims are similarly situated relative to the defrauders); *see also SEC v. George*, 426 F.3d 786, 799 (6th Cir. 2005); *Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (rejecting tracing “fiction” where receivership fund consisted of money acquired by fraud perpetuated against many victims); *SEC v. Forex Asset Management LLC*, 242 F.3d 325, 331-2 (5th Cir. 2001) (affirming district court's approval of *pro rata* distribution plan where party's assets were held by defrauder in segregated accounts); *CFTC v. Topworth International, Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 1999) (affirming district court's approval of *pro rata* distribution plan where assets were comingled); *United States v. Durham*, 86 F.3d 70, 72-3 (5th Cir. 1996) (affirming district court's approval of *pro rata* distribution plan even though the majority of funds were traceable to specific claimants; whether at any given moment a particular customer's assets are traceable is “a result of the merely fortuitous fact that the defrauders spent the money of the other victims first”); *SEC v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992) (affirming district court's approval of *pro rata* distribution plan even though securities were traceable to claimants).

CONCLUSION

The Receiver respectfully requests that the Court issue an Order entering the Receiver's recognized claim amounts for the 712 settled and disputed claims listed in

Exhibit A to the Norgard Declaration, and approving the Receiver's proposed plan for judicial resolution of the remaining disputed claims. A Proposed Order is submitted herewith.

Respectfully submitted,

Dated: March 15, 2011

s/Tara C. Norgard
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