

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:20-CV-21887-DPG

COMMODITIES FUTURES TRADING
COMMISSION,

Plaintiff,

v.

DANIEL FINGERHUT,
DIGITAL PLATINUM, INC., DIGITAL
PLATINUM, LTD., HUF MEDIYA
(A/K/A HOOV MEDIA), TAL VALARIOLA,
and ITAY BARAK,

Defendants,

AICEL CARBONERO,

Relief Defendant.

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**RECEIVER'S MOTION TO APPROVE
(A) NOTICING AND CLAIMS ADMINISTRATION
PROCESS AND (B) PLAN OF DISTRIBUTION**

Melanie E. Damian, the court-appointed Receiver (the "Receiver") in the above-captioned enforcement action, pursuant to this Court's *Consent Order for Permanent Injunction and Other Statutory and Equitable Relief Against Digital Platinum Ltd., Tal Valariola and Itay Barak* [ECF No. 284] and *Consent Order for Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief Against Defendant Daniel Fingerhut* [ECF No. 283] (collectively, the "Permanent Injunctions"), moves for approval of the Receiver's proposed (a) notice and claims administration procedures and notice and claim form to be sent to potential claimants (the "Claims Process"); and (b) plan of distribution (the "Distribution Plan") to be made from the assets recovered from Daniel Fingerhut ("Fingerhut") and from Digital Platinum, LTD ("DPL"), Tal Valariola ("Valariola"),

and Itay Barak (“Barak”) (collectively, the “Israeli Defendants” and together with Fingerhut, the “Defendants”).¹ In support of this Motion, the Receiver states:

I. SUMMARY OF PROPOSED CLAIMS PROCESS AND PLAN

Since her appointment on May 8, 2020, the Receiver has worked diligently with the Commodity Futures Trading Commission (the “CFTC”) to identify and marshal all known assets and records of Defendants and certain real property belonging to Relief Defendant Carbonero.

As of January 31, 2022, the Receiver held funds totaling \$2,350,186.85 in her fiduciary account for the Receivership Estate at City National Bank in Miami, Florida. In addition to this cash on hand, the Estate includes certain personal property that may be liquidated to raise funds to distribute to claimants. Moreover, the Receiver expects to recover additional funds from Defendants Fingerhut, DPL, Valariola, and Barak, pursuant to their payment obligations under the Permanent Injunctions. In addition, remaining claims against Aicel Carbonero may result in additional disgorgement funds recovered by the Estate.

Since her appointment, the Receiver has deposited all funds and other assets recovered from each Defendant and the Relief Defendant in one account for the Receivership but has maintained a detailed accounting to keep track of the source of all such recoveries. However, because the Defendants operated the business that is the subject of the CFTC’s Complaint as a common enterprise, the Receiver proposes to conduct one claims process for all Defendants’ customers who lost funds as a result of Defendants’ misconduct and to use the assets recovered

¹ Because these Defendants and Defendants Digital Platinum, Inc. (“DPI”) and Huf Mediya, LTD (a/k/a Hoof Media, LTD) (“Huf”) operated as one common enterprise, and certain assets of Relief Defendant Aicel Carbonero (“Carbonero”) can be traced to that enterprise, in the event the Court enters final judgments against DPI, HUF and/or Carbonero, the Receiver proposes to include any assets recovered from those Defendants, after payment of administrative expenses, in the distribution fund.

from all Defendants to fund that claims process and the distributions to be made to all claimants holding allowed claims.

The Receiver proposes herein a process for identifying and notifying all potential claimants of the claims process and how they may participate and a plan to distribute the assets of the Estate to the claimants determined to have allowed claims.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Commencement of the Enforcement Action and Appointment of the Receiver

On May 5, 2020, the CFTC filed a Complaint for injunctive relief and for restitution against Defendants, naming Carbonero as a relief defendant, commencing the above-captioned CFTC enforcement action (the “Enforcement Action”). *See* ECF No. 1.² On May 6, 2020, the CFTC also filed an Expedited Motion for Preliminary Injunction [ECF No. 11] and an Expedited Motion for Appointment of Temporary Receiver [ECF No. 12] to preserve the status quo during the pendency of litigation in the Enforcement Action and to secure the assets and documents of the Defendants. *See* ECF No. 12. On May 8, 2020, the Court entered the Appointment Order (the “Appointment Order”) appointing Melanie E. Damian, Esq. as temporary Receiver of the entity Defendants and of all the funds, properties, premises, accounts, income, now or hereafter due or owing to the entity Defendants and the individual Defendants, and other assets directly or indirectly owned, beneficially or otherwise, by all such Defendants. *See* ECF No. 33.

B. Entry of Preliminary Injunction Order and Continuation of Receivership

On January 7, 2021, the Court entered a Preliminary Injunction Order (“Preliminary Injunction”) as to all Defendants that, among other things, found good cause to continue the appointment of the Receiver as a permanent Receiver for the duration of the case. *See* ECF No.

² On June 12, 2020, the CFTC filed its first Amended Complaint. *See* ECF No. 101.

199. The Court’s Preliminary Injunction further held that, “[d]uring the pendency of this action or until further ordered by this Court, Melanie Damian shall continue as the Receiver and shall execute the powers vested within the Order Appointing Temporary Receiver. [ECF No. 33].” *Id.* at p. 34.

C. Entry of the Permanent Injunctions

On October 6, 2021, the CFTC filed Plaintiff’s Motion for Entry of Proposed Consent Orders for Permanent Injunction against Defendants Daniel Fingerhut, Digital Platinum, Ltd., Tal Valariola & Itay Barak [ECF No. 273] (the “Motion for Permanent Injunctions”).

On November 17, 2021, the Court entered the Permanent Injunctions, granting the Receiver the powers of a full equity, permanent receiver and authorizing and directing her to collect the disgorgement obligations ordered against the Defendants and devise and implement a consolidated claims process and plan of distribution. ECF Nos. 283 and 284. In particular, the Permanent Injunctions charge the Receiver with collecting Defendant Fingerhut’s \$400,011 disgorgement obligation and the Israeli Defendants’ \$3 million disgorgement obligation. *See id.* Accordingly, the Receiver hereby submits her proposed Claims Process and Distribution Plan for the disposition of the Estate’s assets, including: (i) \$50,189.38 in cash and liquidated investments recovered from Defendant Fingerhut; (ii) \$2,434,497.42 recovered from the Israeli Defendants; (iii) any additional disgorgement amount that the Receiver collects from Defendants; and (iv) any recoveries from actions the Receiver is pursuing against third parties. The funds received from Relief Defendant Carbonero totaling \$126,088.22 are included in the total cash on hand reported above but will be set aside and not included in the initial distribution proposed to be made to allowed claimants, unless by the time the Receiver is prepared to make that distribution, the Court makes a final determination on the CFTC’s claims as to Ms. Carbonero, or those parties reach a settlement, that

would permit the Receiver to include the funds recovered from Ms. Carbonero in the distribution.

E. Potential Claimants of the Receivership Estate

In formulating the Claims Process, the Receiver conducted in-depth investigations of the Defendants' mass marketing campaigns subject of the Enforcement Action and the prior, related enforcement action brought by the CFTC against Jay Passerino, Gasher, Inc. ("Gasher"), Timothy Atkinson, and All In Publishing, LLC ("AIP"), Case No. 3:17-cv-774-J-32MCR (M.D. Fla.), in which the Receiver is also the Court-appointed Receiver.

The Receiver's team reviewed voluminous business records related to Defendants' ad campaigns that marketed binary options trading, forex and digital assets in exchange for commissions and bonus payments. Defendants' business records reveal that the marketing campaigns were operated in part with the assistance of the Gasher and AIP Defendants. From discussions with Jay Passerino, the Receiver's counsel learned that AIP assisted Defendants by providing "leads" (individuals to which solicitations were sent by email) and marketing services for the mass dissemination of the campaigns. Thus, there is a significant overlap between the AIP and Gasher claimants and Defendants' potential claimants. Accordingly, the Receiver proposes to send notice of this Claims Process and Distribution Plan to all of the valid email addresses previously noticed in the AIP and Gasher claims process. The Receiver also proposes to notice those customers that have contacted the Receiver's office asking to participate in the claims process and all customer addresses contained in Defendants' business records and in records received from Defendants' marketing vendors. The lists include approximately 1.4 million potential customers and leads of the Defendants, located all over the world, all of which are potential claimants for this claims process.

F. Connecting Potential Claimants to the Defendants

As discussed in the Permanent Injunctions, Defendants participated in marketing online campaigns for multiple binary options trading, forex and digital asset investment schemes (collectively, the “Investment Schemes” and each an “Investment Scheme”). All known Investment Schemes are listed on **Exhibit A**, attached hereto and attached to the Notice and to the Proof of Claim Form. That list will be updated if the Receiver learns of additional Investment Schemes. The Receiver expects that most claimants were targets of those Investment Schemes, but the Receiver is not proposing to limit the claims process to the Investment Schemes listed on Exhibit A but, rather, proposes to permit claimants to submit claims demonstrating that they were the targets of other Investment Schemes marketed, and/or other affiliate marketing campaigns deployed, by Defendants, subject to verification by the Receiver’s team.

It is possible and perhaps likely that a claimant was lured in by more than one of the affiliate marketers that are defendants in multiple government enforcement actions. Many direct marketers, like Defendants, simultaneously marketed the same Investment Schemes by creating ads and disseminating them in return for pay-per-click compensation and bonuses for attracting the most clicks. For example, an alleged binary options trader would send a mass email to Defendants (and other marketers like Gasher) advising them of an opportunity to participate in an Investment Scheme such as Fast Cash by creating and running banner ads or a mass email campaign to advertise that Investment Scheme. Defendants would then create and disseminate targeted banner ads, commercials, radio ads, and mass email and SMS text blasts that were sent to or seen by millions of potential customers. If a customer clicked on an ad, they would be redirected to the webpage of an Investment Scheme, and the affiliate marketer responsible for that ad would receive a commission. The affiliate marketing service providers and the direct marketers, like

Defendants, often used Total Send, Express Pigeon, etc. to disseminate mass email campaigns and services such as Click Better, Clickbooth, ClickDealer, etc., to manage the resulting traffic to their ad campaigns and to post their ads and quantify the value of the traffic produced.

The Receiver was able to make this determination because Defendants kept detailed records for many of the Investment Schemes marketed by their salespeople, with the commissions and bonuses earned for each one, the number of emails disseminated, the clicks received, and invoices from the affiliate marketing service providers billing for disseminating Defendants' spam emails and ads. Those records reference Defendants' simultaneous participation in the same pay-per-click ad campaigns in which Gasher and AIP participated and Defendants' use of AIP and Gasher to disseminate and manage some of these marketing campaigns on their behalf.

Therefore, potential claimants of the Estate would not necessarily know what direct marketer lured them to a particular Investment Scheme. All they would know is that they clicked on an ad for binary options trading, for instance, and that ad led them to a landing page where they were able to place trades for which they paid by credit card or wire transfer. Copies of the banner ads, commercials and websites that were used to lure in customers show that customers could not identify the producer of the advertising materials or otherwise link them to a specific Defendant in this action. Therefore, assigning each claimant to one or more of the Defendants at this point would be very difficult, if not impossible.

In the event the claimants provide documentation identifying losses suffered as a result of receiving any online or text campaign employed by any of the Defendants to market an Investment Scheme, the Receiver proposes to accept that claim, even if the claimant cannot identify the specific Defendant that directed them to the Investment Scheme through which they suffered the losses. The Receiver's noticing and claim agent will cross check claims filed using the names and

email addresses provided by the claimants in this and the AIP and Gasher joint claims process to determine whether claimants have filed duplicate claims seeking to recover the same damages in both actions, and the Receiver proposes to disallow any duplicate claims identified.

Given the overlap of customers of Defendants and customers of AIP and Gasher and the fact that allowed claimants in the AIP/Gasher claims process will not receive 100% of their losses from the AIP/Gasher estate, the Receiver proposes to grant the AIP and Gasher claimants an allowed claim in this claims process for the balance of their losses after the distributions from the AIP/Gasher estate. Rather than requiring those claimants to submit a new claim in this claims process, the Receiver proposes to provide each such claimant with a personalized notice setting forth the proposed amount of his or her allowed claim with a request that the claimant accept that allowed amount or submit a request for reconsideration to the Receiver. If the claimant accepts that proposed amount as his or her Allowed Claim amount, then the Receiver shall seek this Court's permission to make a *pro rata* distribution to the claimant based on that amount.

III. PROPOSED NOTICING AND CLAIMS PROCESS AND PLAN OF DISTRIBUTION

As of the filing of this Motion, the Receivership Estate has \$2,350,186.85 in cash on hand. In light of the remaining work to be done to recover additional assets of the Estate, to recover the disgorgement amounts from Defendants, and to prosecute claims against third parties, and the unknown number of potential claimants, the Receiver expects that she and her professionals will incur additional fees and costs in connection with fulfilling her duties. Therefore, the Receiver proposes an initial *pro rata* distribution to claimants holding allowed claims of up to eighty percent (80%)³ of the Estate's total amount of cash on hand (excluding the \$126,088.22 received from

³ In the event the total amount of allowed claims is less than 80% of the Distribution Fund, the Receiver will distribute that total amount rather than 80% of the Distribution Fund.

Relief Defendant Carbonero) upon the conclusion of the claims process, with the remaining sum to be held by the Receiver as a reserve to cover the fees and costs that the Receiver and her professionals incur through the conclusion of the Receivership and to make a final distribution to allowed claimants should sufficient funds be available to justify the cost of such a distribution. The fund from which the proposed initial distribution will be made shall be referred to as the “Distribution Fund”.

The Receiver anticipates that, following the proposed initial distribution, the Distribution Fund will be replenished with additional funds that the Receiver recovers as a result of her various asset recovery efforts, as described above. As such, the Receiver expects to file with this Court a subsequent motion to approve a final distribution after the Receiver has completed her recovery efforts and a meaningful amount of funds are available for distribution to claimants holding allowed claims, as the Receiver determines, using her business judgment, is in the best interest of the Estate and the defrauded customers.

**A. Proposed Definition of “Allowed Claim”
and Basis for Distribution**

1. Limitation on Claims

The Receiver will provide the Notice of the proposed Claims Process and Distribution Plan to all of Defendants’ potential customers and encourage them to submit a claim to the Estate.

The claim of a customer will be allowed (an “Allowed Claim”) provided that the customer sufficiently demonstrates to the satisfaction of the Receiver through documentation and/or sworn statements, among other things:

- (i) that such customer transferred funds to an Investment Scheme that paid any amount to any Defendant for its affiliate marketing services;

AND

- (ii) that such customer (a) was not an affiliate, family member or insider of any Defendant, any affiliate of any Defendant, or any Investment Scheme, and (b) did not knowingly assist any Defendant, affiliate of any Defendant, or Investment Scheme to effectuate, perpetuate or promote binary options trading, forex trading or digital currency investment or have knowledge of its fraudulent nature at the time funds were transferred to any Defendant, Investment,

AND

- (iii) that the total amount of funds that such customer transferred to any Investment Scheme exceeds the total amount of funds that the Investment Scheme(s) transferred back to such customer, such that the customer suffered a net loss.

The Receiver may consider other factors in determining whether a claim is an Allowed Claim.⁴ If a customer cannot show the foregoing factors (i), (ii) and (iii), that customer's claim will be disallowed and such customer will receive no distribution.⁵ If a *customer* makes the requisite showing regarding his or her claim and the Receiver determines that such claim is an Allowed Claim, the Receiver will calculate the amount of such Allowed Claim by subtracting the total amount of all transfers that such customer received from the Investment Schemes from the total amount of transfers that such customer made to such Investment Schemes. **Customers with Allowed Claims will only be entitled to receive a *pro rata* distribution based on the *net loss* of the customer (assuming there is insufficient funds to repay each claimant the entirety of their**

⁴ Notwithstanding these factors for determining whether a claim should be allowed, the Receiver, through a claims processing agent, will analyze each claim individually and the circumstances surrounding each customer's transfers to and relationship with the Defendants, their affiliates, and/or the Investment Schemes, and reserves the right to object to and seek to disallow any claim.

⁵ To the extent a customer received transfers from any Investment Scheme in excess of such customer's total transfers to such Investment Scheme, such that the customer profited from the Defendants' conduct, the Receiver reserves the right to pursue a claim against such customer for the return of the profit received and any other appropriate relief.

claim); the Receiver will not include within her calculation for distributions any profit or bonus that was reported or promised to a customer.

For example, a customer who demonstrates that he or she transferred a total of \$100,000 to any Investment Schemes and received back from those Investment Schemes a total of \$60,000 would have, subject to the Receiver's final determination and the Court's approval, an Allowed Claim in the amount of \$40,000.

2. Proposed Noticing and Claims Process

Based on the definition of Allowed Claim, the Receiver proposes to effectuate the Claims Process and Distribution Plan as follows:

a. Sending Out Electronic Notices

The Receiver will use her best efforts to notify all potential claimants by (i) sending the Notice with a link to the online claim form to their last known email addresses and (ii) posting the Notice (described below) on the websites of the Receivership (www.digitalplatinumreceivership.com) and her counsel (www.dvllp.com). In light of the nature of the Defendants' businesses and the manner through which they lured in and communicated with customers, the extent to which the customers were tech-savvy with respect to the use of computers, email and the internet, and the fact that the only contact information the Receiver has for the vast majority of the customers are email addresses, the Receiver will only communicate with potential claimants through electronic means rather than on paper delivered by U.S. Mail or other conventional, non-electronic means.

b. The Proposed Claims, Noticing and Distribution Agent

Due to the substantial number of potential claimants, the Receiver believes it is in the best interest of the Estate to employ Stretto to assist with providing the Notice to and processing the

claims of those claimants and making distributions to the claimants whose claims are allowed pursuant to the Claims Process and Distribution Plan proposed herein.⁶ The Receiver has not been able to locate or assemble a definitive, exhaustive list of potential customers of the Defendants, but, as explained above, the Receiver is aware of significant overlap between the potential customers of AIP and Gasher and the customers of Defendants, and the Receiver will use a substantial amount of the data compiled in that case.

Therefore, the Receiver will require the assistance of an experienced electronic noticing and claims agent with the expertise and technology to establish, implement and manage high-volume electronic noticing and claims administration. Such a noticing and claims agent can cost-effectively provide electronic notice to all potential claimants and handle the high volume of claimants' responses and inquiries, submissions of the online claim forms and releases (described below) and supporting documentation, and the significant website, email and telephone traffic that will likely follow from such electronic noticing.

Accordingly, the Receiver requests authority to employ Stretto as the noticing, claims processing, and distribution agent and to pay it (on a monthly basis) using funds of the Estate, without further order of the Court, (i) to serve as the noticing and claims agent to assist the Receiver in communicating with all potential claimants and administering the Estate's claims process, and (ii) to assist with making distributions to claimants with allowed claims in connection with the Claims Process and Distribution Plan.

⁶ The Receiver's office has already completed two other claims processes using Stretto as the noticing, claims processing, and distribution agent in prior CFTC enforcement actions involving binary options marketing schemes that targeting many of the customers of the Defendants in this case. Because the Claims Process and Distribution Plan proposed herein is similar in form, complication, and size to those two prior claims processes and distribution plans, Stretto's experience in those cases should aid in the implementation of the Claims Process in this case.

c. Stretto's Noticing Services

Stretto will use, in part, the email addresses of potential customers previously culled to remove all duplicate, erroneous and ineffective email addresses during the AIP and Gasher claims process. Stretto has the capability to carry out a mass mailing to those email addresses utilizing technology that minimizes or prevents emails from ending up in spam folders or bouncing back.

Stretto also has the technology in place to implement a progressive claim form, previously used in the AIP and Gasher claims process, that will reduce the number of baseless claims submitted by eliminating ineligible claimants as they complete the form with information that renders them ineligible. This will reduce the time and expense necessary to process claims, thereby conserving the resources of the Estate.

Stretto will then deliver to all potential customers the Notice, which will contain a link to the electronic claim form, which will invite each potential claimant to fill out the claim form online, upload documents supporting their claims, and submit additional information concerning their involvement with Defendants or the Investment Schemes.

d. Stretto's Claims Agent Services

In addition to providing electronic noticing services, Stretto has the capacity to manage a high-volume of potential claimants using experienced staff in many different languages, with chat features, automated toll-free lines, customizable email distribution groups for targeted claimant communications and online frequently asked questions from customers and the Receiver's answers for the timely dissemination of information.

After the claims bar date, Stretto will process the claim forms that the customers have filled out online in accordance with the instructions of the Receiver to streamline the review and analysis of the claims by the Receiver and her professionals for purposes of allowing and disallowing

claims. In particular, the questions and layout of the electronic claim form will enable the noticing and claims agent to run reports of the information provided by claimants based on certain parameters established by the Receiver and set aside the claims of potentially ineligible claimants based on factors that the Receiver has proposed herein.

After Stretto has eliminated the ineligible claimants, the Receiver and her professionals will analyze the claims submitted by the eligible claimants and make determinations as to the allowance and disallowance of claims based on various factors that the Receiver has established.

In sum, Stretto will also provide the following claims administration services throughout the duration of the receivership: (i) creating an online claims portal for electronic filing, viewing and management of claims by eligible claimants; (ii) storing claim information, supporting documentation and other records; (iii) generating reports regarding claimants and claims filed; (iv) processing claims; (v) creating, managing and updating the receivership website for interfacing with claimants and interested parties and posting important case information, FAQs, notices, deadlines, and court filings; and (vi) a private portal for the Receiver to view all claims and supporting documentation filed by eligible claimants, a real-time claims register, a claimant matrix, mailing service lists, and an undeliverable mail report, among various other information pertinent to administering the Claims Process. In exchange for the foregoing services, the Receiver proposes to use the funds of the Estate to pay to Stretto (i) a one-time set-up fee of \$15,000, (ii) \$0.50 per claim filed by eligible claimants, and (iii) hourly fees for Stretto's staff when required to provide their services and expertise.

The full details of the scope of work to be performed by Stretto and the fees to be paid by the Estate are explained in detail in Stretto's Proposal for Noticing, Claims Processing and Distribution Services, attached hereto as **Exhibit B**.

e. The Proposed Notice and Claim and Release Form

The Receiver proposes to send a notice and proof of claim and release form (substantially similar to the form attached hereto as **Exhibit C**) (the “Notice and Claim Form”) by email to all potential claimants explaining who is eligible to submit a claim in order to receive a distribution from the Distribution Fund, the process by which eligible claimants can submit a claim, and the process by which the Receiver will determine which eligible claimants have Allowed Claims and thus are entitled to receive a distribution from the Distribution Fund. *See* Exhibit C. The Notice contains a link to the Claim Form which is an electronic proof of claim and release form that will solicit, among other information: (a) details regarding the claimant’s identity and contact information; (b) details regarding the amount and timing of the claimant’s transfer of funds to one or more of the Investment Schemes, Defendants, and/or their affiliates; (c) details regarding the amount, timing and transfer of any monies received by the claimant from the Investment Schemes, Defendants, and/or their affiliates; and (d) the information necessary to receive a distribution from the Estate via electronic funds transfer (*e.g.*, wire transfer, Venmo, PayPal, or check). *See* Exhibit C. The Claim Form will also require the claimant to, *inter alia*, certify the accuracy of the information provided, produce to the Receiver appropriate documentation, and certify that each of the three factors of an Allowed Claim, set forth above, are satisfied, as well as, whether a duplicate claim has been filed in another claims process. *Id.*⁷ Claimants will complete and submit the electronic claim form and supporting documentation through the online claims portal hosted by Stretto. And, Stretto will provide claimants with online technical assistance as needed.

⁷ Because of the nature of the scheme and of Defendants’ role as marketers, the Receiver does not have documents that would corroborate the claims of the Defendants’ customers, the Receiver will likely require documentation showing the transfer(s) between individual customers and any Investment Scheme to which the Defendants directed the customers.

4. Stretto's Distribution Services

Stretto also has extensive experience and know-how and industry-leading software to provide distribution services at a minimal cost to the Estate relative to the substantial benefit of Stretto's services and the large number of claimants to which the Receiver expects to make distributions. *See* Exhibit B. Therefore, the Receiver proposes to use Stretto to carry out the potentially high-volume distributions and provide other ancillary services pursuant to the claims process and distribution plan proposed herein. *See* Exhibit B.

5. Proposed Sequence and Timing of Claims Process and Distribution Plan

The Receiver proposes that the Claims Process proceed in accordance with the following schedule:

- i. Claims Process and Distribution Plan Approval: The date upon which this Court grants this Motion and approves the Receiver's proposed Claims Process and Distribution Plan shall be referred to herein as the "Plan Approval Date".
- ii. Receiver's Sending Notice to Potential Customers: Stretto will send the Notice to potential customers of the Defendants by email to the extent email addresses are known, within thirty (30) days after the Plan Approval Date, and the Receiver will post the Notice on the websites of the Receivership and of the Receiver and her counsel.
- iii. Claims Bar Date: Customers would then have until sixty (60) days after the Plan Approval Date (the "Claims Bar Date") to submit (through the online portal) the completed electronic claim form. Any claim form not received by the Claims Bar Date will be barred, and claims received after the Claims Bar Date will not be allowed except for good cause shown.
- iv. Receiver's Initial Determination of Allowed Claims: The Receiver will have until thirty (30) days after the Claims Bar Date ("Receiver's Initial Determination Date") to approve or reject, in whole or in part, all claims received. In the event the Receiver were to reject any claim, in whole or in part, the Receiver would apprise the claimant, via email and/or notice through the online portal used by the claimant to submit the claim, of the rejection of the claim, the basis for that rejection, and the process for appealing such rejection.

- v. Claimant’s Request for Reconsideration of Initial Determination: Any claimant whose claim is rejected by the Receiver, in whole or in part, may request that the Receiver reconsider that denial by sending the Receiver a letter seeking reconsideration, which must be received by the Receiver within thirty (30) days after the Receiver’s Initial Determination Date and which must state the basis of the claim and the claimant’s response to the Receiver’s notice of rejection.
- vi. Receiver’s Final Determination: The Receiver has until thirty (30) days after the deadline for claimants to request reconsideration of the Receiver’s Initial Determination (the “Receiver’s Final Determination Date”) to reconsider any request by any claimant whose claim was initially rejected by the Receiver and to apprise the claimant, via email and/or notice through the online portal used by the claimant to submit the claim, of the reconsideration or rejection of the claim.
- vii. Claimant’s Appeal of Receiver’s Final Determination: Any claimant whose claim was finally rejected by the Receiver may appeal the Receiver’s rejection of the claim to the Court by filing with the Court an Appeal of the Receiver’s Final Determination, which must be received by the Receiver within thirty (30) days after the Receiver’s Final Determination Date (the “Appeal Deadline”), and which must state the basis of the claim and the claimant’s response to the Receiver’s Final Determination.
- viii. Receiver’s Response to Appeals: The Receiver’s Response to all appeals filed with this Court shall be due within fifteen (15) days after the Appeal Deadline. Following the Receiver’s deadline to file her response to any Appeal, the Court may make a final determination or may set the matter for hearing. The Receiver proposes that a final determination by the Court would be final for all purposes; there can be no further appeal of such proceedings.
- ix. Receiver’s Motion to Approve Initial Distribution: The Receiver shall file her motion to approve the initial distribution, which motion would apprise the Court of the status of approved and rejected claims, the status of pending appeals, if any, the Receiver’s expectation regarding administrative fees and costs, and proposed interim distribution calculations and methodology, by no later than thirty (30) days after the Appeal Deadline.

The foregoing schedule is reflected in the following summary timetable:

Day 0	Plan Approval Date
Day 30	Receiver Sends Out Notice
Day 60	Claims Bar Date

Day 90	Receiver's Initial Determination Date
Day 120	Claimant Deadline for Appealing to Receiver
Day 150	Receiver's Final Determination Date
Day 180	Claimant Deadline for Appealing to the Court
Day 195	Receiver Response to Appeals Deadline
Day 210	Receiver Files Motion to Approve Initial Distribution
TBD (based on completion of asset recovery phase)	Receiver Files Motion to Approve Final Distribution

C. Proposed Distribution to Customers with Allowed Claims

Stretto will review all Proofs of Claim and Releases received from customers as of the Claims Bar Date and determine the total amount of Allowed Claims escalating claims that require additional review to the Receiver's office. The Receiver then will determine what percentage of the total Allowed Claims is represented by the proposed initial *pro rata* distribution of up to eighty percent (80%) of the cash on hand, as limited herein, upon the conclusion of the claims administration process (the "*Pro Rata Percentage*"). For example, if there was a total of \$20 million in Allowed Claims, and \$2,000,000 in funds available for distribution, then the *Pro Rata Percentage* would be 10%. To continue with the example on page 10, *supra*, the customer with an Allowed Claim of \$40,000, would receive \$4,000 as an initial distribution based on the *Pro Rata Percentage* of 10%. Upon this Court's approval, the Receiver will utilize the services of Stretto to make the initial distribution to approved claimants (based on determinations made in the Claims Process). Following completion of the Receivership work, the Receiver will make a second and final *pro rata* distribution to approved claimants of the funds remaining in the Estate (less

administrative expenses), following the entry of an order granting the Receiver's motion to approve such final distribution; however, approved claimants would not need to resubmit any claim forms to obtain that distribution.

IV. LEGAL AUTHORITY FOR CLAIMS PROCESS AND DISTRIBUTION PLAN

The Receiver believes that the foregoing proposed Claims Process and Distribution Plan will provide a fair, equitable, and efficient method for distributing the proceeds of the Estate to defrauded customers of the Defendants. Generally, the District Court has broad powers and wide discretion to grant relief in an equity Receivership, including in approval and implementation of a claims process and plan of distribution. *See SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 218 (3d Cir. 2007) ("District Courts have wide equitable discretion in fashioning distribution plans in Receivership proceedings, and we review the District Court's order only for abuse of that discretion.") (citations omitted); *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (finding that a district court has wide latitude when it exercises its inherent equitable power to approve a plan to distribute Receivership assets and that such approval is reviewed for abuse of discretion). When approving a distribution plan, the District Court has the authority to approve any plan provided it is fair and equitable. *See SEC v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) (citing *S.E.C. v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)). The most common method of distribution approved by Receivership courts is the net loss/net investment method.

A Receiver has discretion to fashion a distribution method that maximizes the number of customers who receive a distribution. *See SEC v. Huber*, 702 F.3d 903, 907 (7th Cir. 2012). Specifically, a Receiver may opt to utilize the "net loss method of distribution to maximize the overall utility of the customers." *Id.* In *Infinity Group*, the Third Circuit affirmed the District Court's approval and implementation of a plan of distribution that provided for a *pro rata*

distribution of receivership proceeds, based on net loss, to all innocent victims of the defendant's Ponzi scheme because that plan was determined to be the fairest approach to the greatest number of customers. *See id.* at 218-19. The net loss approach is preferred over the rising tide approach when a large number of customers would not be allocated Receivership assets under the rising tide method. *See, e.g., Byers*, 637 F. Supp. 2d at 182 (rejecting the rising tide method because 45% of customers would not receive additional compensation); *see also U.S. Commodity Futures Trading Com'n v. Barki, LLC*, No. 3:09 CV 106-MU, 2009 WL 3839389 at *2 (W.D.N.C. Nov. 12, 2009) (approving the net investment method over the rising tide method because 55% of customers would not receive additional compensation under the rising tide approach).

The Receiver is proposing a plan providing for a pooled *pro rata* distribution, rather than a distribution of the assets of each Defendant to the customers of that Defendant. Receivership courts have approved such a plan when those entities were intertwined and utilized to perpetrate one fraud and/or their funds were commingled. *See, e.g., SEC v. Amerifirst Funding, Inc.*, 2008 WL 919546 *2-4 (N.D. Tex. 2008) (approving pooling of funds and *pro rata* distribution to all customers of all entities involved in a unified scheme to defraud where the entities were intertwined and their funds were commingled) (citing *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 331-32 (5th Cir. 2001) (affirming a pooled *pro rata* distribution because it was "a logical way to divide the money" and finding that the absence of commingling between various Receivership entities does not render such a distribution inequitable)); *see also SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88-89 (2nd Cir. 2002) ("Courts have favored *pro rata* distribution of assets where . . . the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders."). Because the Defendants, in fact, were intertwined and perpetrated one fraudulent scheme, all of their customers overlapped in the sense that all of

them, regardless of the Investment Scheme through which their customers made trades and suffered losses, were binary options-related, forex or digital currency investment customers, and their funds were paid to the Defendants as commissions or fees and then commingled in Defendants' business bank accounts and/or subsequently transferred to Defendants, the Receiver's pooling of the assets recovered for all of the Defendants' customers and the pooled *pro rata* distribution proposed herein is both logical and equitable.

Accordingly, the Receiver submits that this Court should exercise its discretion to approve the proposed Claims Process and Distribution Plan as detailed herein.

V. CERTIFICATION OF CONFERRAL

The Receiver hereby certifies that she has sent a near final draft of this Motion and the attached Notice and Claim Form and Release to counsel for the CFTC and counsel for the Defendants, and she has conferred with counsel for the CFTC and counsel for the Israeli Defendants regarding the relief requested herein. Counsel for the CFTC has confirmed that they have no objection to the requested relief. Counsel for the Israeli Defendants has confirmed that they have no objection to the requested relief. Counsel for Defendant Fingerhut and Relief Defendant Carbonero did not indicate their position with respect to the requested relief by the time the Receiver filed this Motion.

VI. CONCLUSION

WHEREFORE, Melanie E. Damian, as the Court-appointed Receiver, respectfully requests that this Court enter an order similar in form to the proposed Order attached hereto as **Exhibit D**: (1) approving and authorizing the Receiver to implement the Claims Process and Distribution Plan proposed herein or a process and plan that is substantially similar in form, effect and cost as the Receiver may determine, in her sole discretion, is necessary, appropriate and in the

best interest of the Estate; (2) authorizing the Receiver to employ Stretto to provide noticing and claims processing and distribution services pursuant to the terms of the Proposal attached as Exhibit B; (3) authorizing the Receiver to utilize Stretto to send by email a Notice and Claim Form (in a form substantially similar to the forms proposed herein as Exhibit C) to all potential claimants; (4) authorizing the Receiver, without further order of the Court, to use the funds of the Defendants' Estate to pay to Stretto the initial setup fee and the amount of Stretto's monthly statements or a lesser amount that the Receiver may determine, in her sole discretion, is reasonable and appropriate based on the services provided and costs incurred by Stretto, pursuant to the terms of the Proposal attached as Exhibits B; and (5) granting such other relief as this Court deems just and appropriate.

Dated: February 9, 2022.

Respectfully submitted,

DAMIAN & VALORI, LLP
Counsel for the Receiver
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: (305) 371-3960
Facsimile: (305) 371-3965
kmurena@dvlip.com

/s/ Kenneth Dante Murena

KENNETH DANTE MURENA
FLORIDA BAR NO. 147486

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Receiver's Motion to Approve (A) Claims Administration Process; and (B) Plan of Distribution was served via CM/ECF this 9th day of February upon all counsel of record.

/s/ Kenneth Dante Murena

KENNETH DANTE MURENA
FLORIDA BAR NO. 147486