

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

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

Defendants,

AICEL CARBONERO,

Relief Defendant.

**RECEIVER'S MOTION TO
APPROVE INITIAL 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 initial distribution of assets of the Estate (the "Initial Distribution"). In support of this Motion, the Receiver states as follows:

I. INTRODUCTION

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 a result of the Receiver's efforts to recover the Defendants' assets and disgorgement obligations established in the Permanent Injunctions (defined *infra*), the Estate presently holds \$2,298,220.47 in cash.

On February 9, 2022, pursuant to the Permanent Injunctions, the Receiver filed her Motion to Approve (A) Noticing and Claims Administration Process (the "Claims Process") and (B) Plan of Distribution (the "Distribution Plan") [ECF No. 301] ("Motion to Approve Claims Process"), which the Court granted on March 2, 2022 [ECF No. 307].

In light of the amount of funds presently in the Estate, the difficult financial condition of many of the defrauded customers, the entry of the Permanent Injunctions, and the conclusion of the Claims Process (as defined in the Motion to Approve Claims Process), it is appropriate for the Receiver to make the Initial Distribution to claimants with Allowed Claims at this time. The total amount of Allowed Claims is \$4,087,125.96.

In the Motion to Approve Claims Process, the Receiver proposed to file a motion to approve the Initial Distribution to claimants with Allowed Claims of eighty percent (80%) of the total amount of cash-on-hand within thirty (30) days following the conclusion of the Claims Process. *See* ECF No. 301. Accordingly, the Receiver files this Motion seeking authority to make the Initial Distribution in the amount of \$1,838,576.38 (80% of the Estate's current cash), with each claimant to receive 45% of the amount of their Allowed Claim.¹

¹ To protect the claimants from potential telemarketing frauds that have preyed upon victims of binary options trading schemes, the Receiver, submits as **Exhibit A** hereto a list of the amounts to be distributed to each of the claimants with Allowed Claims identified only by a claim number in the Initial Distribution proposed herein. The Receiver retains all personal information necessary to identify claimants, process their claims and make distributions in her office. Should the Court wish to review such files, the Receiver would propose an *in camera* review of that personal information.

Because the Receiver has resolved all of the recovery actions that she commenced and does not intend to bring any further actions, and has recovered \$2,375,901.81 of the \$3 million disgorgement obligation of the Israeli Defendants, who are making periodic payments toward the \$624,098.19 balance of that obligation, the Receiver is focusing her asset recovery efforts on collecting the \$349,822.51 balance of Defendant Fingerhut's \$400,011 disgorgement obligation and will seek to recover any disgorgement obligation that the Court may establish against Relief Defendant Carbonero. After the asset recovery phase of the receivership, which the Receiver estimates will be concluded in approximately one year, the Receiver will file a motion to make a final distribution of the remaining cash-on-hand in the Estate after payment of all administrative expenses that are incurred through the conclusion of the Receivership.

II. 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

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

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. 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. *See* 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.* Given that the Receiver has collected a significant portion of the Israeli Defendants’ disgorgement obligation, she proposes making an Initial Distribution to claimants holding allowed claims.

III. CLAIMS PROCESS

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 noted a significant overlap between the AIP and Gasher claimants and Defendants' potential claimants. Accordingly, the Receiver provided notice of the Claims Process and Distribution Plan to all of the valid email addresses previously noticed in the AIP and Gasher claims process. The Receiver also noticed those customers who contacted the Receiver's office, asked to participate in the claims process, and demonstrated their involvement with Defendants and all customers whose addresses were in Defendants' business records and/or in records received from Defendants' marketing vendors. The lists included approximately 1.5 million potential claimants for this Claims Process.

The Receiver then conducted the Claims Process in accordance with the Motion to Approve Claims Process and the Order Approving Claims Process. *See id.* The Receiver, through her noticing and claims agent Stretto, collected claims through the online claims portal. Stretto then began tabulating and confirming completion of claims and fielding questions and concerns of eligible claimants, in accordance with instructions and parameters set by the Receiver. Stretto only escalated claimants' inquiries, unsupported but significant claims and late-filed claims to the Receiver and her counsel as necessary and appropriate, to minimize the cost to the Estate.

The deadline for eligible claimants to submit claims was April 30, 2022. Shortly thereafter, with Stretto's assistance, the Receiver completed a review of approximately 259 inquiries, claims

or partial claims that contained at least some supporting documentation and a completed or nearly completed claim form. Of those, the Receiver deemed allowed 93 claims that remain outstanding from the AIP and Gasher estate, allowed an additional 47 claims, received and processed 26 opt-out requests, and disallowed 93 claims (a) without sufficient supporting documentation, (b) without affirmations of all declarations on the claim form, (c) that failed to demonstrate a net loss, or (d) that were duplicate claims.

The Receiver's counsel then drafted an initial claims determination letter and sent it by email to each claimant who submitted an online claim by May 31, 2022. That initial determination letter prompted many claimants to ask for reconsideration of their disallowed claims and/or assistance in completing or amending their claim form and in submitting supporting documentation. The letter also convinced some potential claimants that this Claims Process is a legitimate Court-approved process rather than just another binary options fraud. Accordingly, the Receiver reconsidered 44 claims. Of those, 30 claims remained disallowed, 8 claims were changed from disallowed to allowed, 4 claims were given a greater claim amount, and 2 claims remained allowed at the same amount.

On July 30, 2022, the Receiver sent her final determination of claim allowance or disallowance to each claimant who had filed a claim at that point in the Claims Process. In total, 148 claims were allowed for a total of \$4,087,125.96 and 85 claims were disallowed.

After receiving the Receiver's final determinations, some claimants asked for clarification or additional assistance in correcting their claims, and the Receiver provided that assistance and/or provided detailed explanations as to why the claimant had failed to establish an allowable claim to avoid protracted litigation over claimant appeals of the final determinations. The claimants'

deadline to appeal expired on August 29, 2022. As of the filing of this Motion, no appeals to the Receiver's final determinations were filed with this Court or submitted to the Receiver.

The Receiver's counsel and Stretto have expended significant efforts reviewing all claims and documentation and communicating with claimants to assist them in correcting their submissions in an effort to give all potential claimants an opportunity to participate in the Claims Process and to recover their losses from the Estate. Indeed, because the Receiver did not have information or documents that would corroborate the claims of the potential claimants, the Receiver had to strictly require documentation showing the transfer(s) between individual customers and any Binary Options Platform to which Defendants directed customers. Such proof requirements led to significant interaction between the Receiver's office and claimants. During this process, the Receiver discovered many legitimate claimants that had lost their life savings through fraudulent binary options trading platforms, websites and companies and who will greatly benefit from the Initial Distribution that will be made from this Estate upon Court approval.

After reviewing all submitted claims, supporting documentation and requests for reconsideration and responding to all claimant inquiries, the Receiver determined that 148 claims with a total dollar amount of \$4,087,125.96 would be allowed or partially allowed and 85 claims (including duplicate claims) would be disallowed. The Claims Register showing the Receiver's final determinations of all claims is attached hereto as **Exhibit A**.

Accordingly, the Receiver now seeks authority to make a significant *pro rata* distribution to each claimant with an Allowed Claim.

IV. THE PROPOSED INITIAL DISTRIBUTION

The Receiver previously proposed and this Court approved the Initial Distribution on a *pro rata* basis, to claimants with Allowed Claims, of eighty percent (80%) of the total amount of cash-

on-hand 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 of the Receivership through its conclusion. *See* Motion and Order to Approve Claims Process [Motion, ECF No. 301, and Order, ECF No. 307]. The current cash-on-hand in the Receivership Estate is \$2,298,220.47. Thus, the proposed Initial Distribution amount is \$1,838,576.38. Based on the total amount of Allowed Claims, the Receiver estimates that the Initial Distribution to claimants will be 45% of the total amount of Allowed Claims.

The Receiver proposes to use Stretto to make the proposed Initial Distribution to claimants. Stretto's staff is trained to efficiently prepare and send electronic payments and checks to claimants from the Estate's fiduciary account using the email or physical addresses provided by claimants on their proof of claim forms. Stretto uses Paypal or Venmo for electronic transfers and the Positive Pay system³ and mail tracking to assure the checks reach the correct party and are not cashed by an unauthorized person. The cost per electronic transfer is \$0.35 and per check sent is \$2.00 plus the costs of delivery and Stretto's time expended at Associate rates (approximately \$170-\$260/hour) in providing review and quality control in the preparation, mailing and tracking of the checks and preparation of disbursement reports memorializing those payments to claimants. In order to reduce the cost of the Initial Distribution, Stretto will make disbursements by electronic transfer to those claimants who have consented to receiving electronic payments, which method is less expensive, more secure and more efficient than sending a check. Moreover, Stretto will track the checks and electronic payments sent to claimants and investigate any missing payments and/or

³ Positive Pay is a fraud-prevention system offered by Stretto's commercial bank to protect the Estate against forged, altered, and counterfeit distribution checks. Stretto will provide the bank with a list of the check number, dollar amount, and account number of each check sent to claimants.

seemingly altered or uncashed checks. The Receiver has determined that this is the most cost-effective and efficient method of making the Initial Distribution to claimants proposed herein.

In light of the remaining work to be done, including recovering the disgorgement amounts from Defendants and liquidating certain assets of the Estate, the Receiver expects that she and her professionals will incur additional fees and costs in connection with fulfilling her duties. The Receiver anticipates that, following the proposed Initial Distribution, the Estate will recover additional funds. As such, the Receiver expects to file with this Court a motion to approve a final distribution to claimants with Allowed Claims after the Receiver has completed her recovery efforts and a meaningful amount of funds are available for distribution, as the Receiver determines, using her business judgment, is in the best interest of the Estate and the defrauded claimants. Upon making the final distribution, the Receiver will file a motion with the Court to discharge the Receiver.

V. CERTIFICATION

Undersigned counsel hereby certifies that he has conferred with counsel for the CFTC and counsel for Defendant Fingerhut and Relief Defendant Carbonero regarding the relief requested herein. Counsel for the CFTC confirmed that the CFTC has no objection to the requested relief. Counsel for Defendants did not provide their position as of the time this Motion was filed.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the Receiver respectfully requests that this Court enter the attached proposed order: (i) approving the Initial Distribution to all eligible claimants holding Allowed Claims listed on Exhibit A, (ii) approving the use of Stretto as distribution agent to disseminate all distributions to be made by the Estate in this receivership, and (iii) granting such other relief as this Court deems just and proper.

Dated: September 28, 2022.

Respectfully submitted,

DAMIAN & VALORI LLP

Counsel for Receiver

1000 Brickell Avenue, Suite 1020

Miami, Florida 33131

Telephone: (305) 371-3960

Facsimile: (305) 371-3965

/s/ Kenneth Dante Murena

Kenneth Dante Murena, Esq.

Florida Bar No. 147486

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Receiver's Motion to Approve Initial Distribution was served via CM/ECF this 28th day of September, 2022, upon all counsels of record.

/s/ Kenneth Dante Murena

Kenneth Dante Murena, Esq.