

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 16-CV-24678- COOKE/LOUIS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ONIX CAPITAL LLC, *et al.*,

Defendants.

**RECEIVER’S MOTION TO APPROVE
DISTRIBUTION PLAN AND FIRST INTERIM DISTRIBUTION**

Melanie E. Damian, Esq., as the court-appointed Receiver (the “Receiver”) in the above-captioned action, pursuant to this Court’s Order Granting Receiver’s Motion to Approve Claims Administration Process [D.E. 179] (the “Order Approving Plan”), files this Motion (the “Motion”) for an order approving (a) a distribution plan for claims deemed allowed by the Receiver, and (b) approving the Receiver’s first interim distribution to claimants holding allowed claims (the “Initial Distribution”). In support of this Motion, the Receiver states as follows:

I. INTRODUCTION

In the Receiver's Motion to Approve Claims Administration Process [D.E. 133] (“Motion to Approve Claims Process”), the Receiver proposed and established a claims process based on set deadlines with the Court. *See Id.* at p.6-7. With the Court’s permission, the Receiver has completed her claims administration process and the deadline for claimants to file an appeal of the Receiver’s final claims determinations has expired.

Of the 76 claims filed and reviewed, there were only three (3) objections filed with the Court – two belonging to the BVI and Chilean Liquidators, and one filed by an individual

claimant, (Ely Magendzo), who seeks more than what the Receiver has approved for his partially-allowed claim (the “Magendzo Objection”). As the Court is aware, the objections filed by the Chilean and B.V.I. Liquidators have been resolved through an amicable settlement as a result of a successful mediation before Magistrate Judge McAliley. Pursuant to the terms of that settlement, the Receiver has now held a supplemental claims process to allow B.V.I.-related fraud victims an additional chance to submit claims. Many of the victims of the B.V.I.-related fraud had previously received notice of the Receiver’s claim process in light of the Receiver’s considerable efforts to notify all potential claimants including publishing notices in the United States and Chile. That supplemental B.V.I. claims process resulted in single, additional claim for \$15,000 being filed. The Receiver has reviewed that supplemental claim, and has confirmed that it should be allowed in its entirety.

Outside of the Magendzo Objection currently pending before this Court, the Receiver has concluded the Claims Administration Process.¹ For this reason, the Receiver requests an order approving the distribution plan for allowed claims, and authorizing an initial interim distribution to all claimants with allowed claims.

The Receivership Estate currently has cash on hand in the amount of \$7,583,862.13. In light of the remaining work to be done to liquidate all remaining assets of the Receivership Estate, to prosecute claims against third parties, to reserve for any contingencies, and to administer the distribution process, the Receiver seeks to make an *initial* distribution of

¹ Capitalized terms were defined in the Receiver’s Motion to Approve Claims Process.

\$5,000,000.00 to all claimants with allowed claims, the proposed amount of each claimant's initial distribution is reflected in the schedule, attached hereto as **Exhibit A**.²

Many claimants have inquired as to the timing of an initial distribution. Taking into consideration the amount of funds presently in the Estate, the financial condition of many of the defrauded investors, as well as the conclusion of the Claims Administration Process, it is appropriate for the Receiver to make the First Interim Distribution to claimants with Allowed Claims at this time.

After the asset recovery and liquidation phases of the receivership have been concluded, as well as resolving pending contingencies, the Receiver will file a motion to make a final distribution of the remaining cash on hand in the Receivership Estate.

II. BACKGROUND AND CLAIMS PROCESS

The Receiver conducted the Claims Administration Process in accordance with the Receiver's Motion to Approve Claims Administration Process [DE 113.] During the Claims Process, the Receiver received a total of 75 filed proofs of claims seeking a total of \$54,864,621.00 from the Receivership Estate from defrauded investors and creditors of the Receivership Entities. In accordance with the claims process approved by this Court, the Receiver analyzed each claim to determine whether the claimants were eligible to participate in the claims process and the extent to which, if at all, their claims should be allowed. With the assistance of her professionals, the Receiver made initial determinations concerning all of the claims received and sent letters to the claimants notifying them of the Receiver's determination regarding their claims.

² For the purposes of protecting the privacy of all claimants, the attached Exhibit A refers to claimants only by their claim number.

The Receiver maintained open lines of communication with all claimants who had questions as to the Receiver's initial determinations, and reviewed and analyzed all supplemental materials provided by all claimants who objected to the Receiver's initial determinations. The Receiver's goal through this process was to resolve all claims, if possible, without the Court's intervention.

The Receiver then provided written, final determinations to all claimants, to which only three (3) objections were filed, of which only one objection remains pending before the Court, as the other two have now been settled. The Receiver subsequently held a supplemental B.V.I. claims process, which resulted in one additional allowed claim. An interim distribution, as put forward in this motion, stands as the next step in the Claims Administration Process.

III. THE PROPOSED INITIAL DISTRIBUTION

The Receiver, after consulting with her legal counsel and forensic accountants, counsel for various investors, certain of the unrepresented investors, and by agreement with SEC has determined that the most equitable approach for making her initial distribution is through a percentage net-recovery/net-loss pro rata method of distribution.

The Receiver proposes carrying out the distribution as follows: First, the Receiver seeks the Court's approval of the Receiver's final claims determination. The proposed allowed claims put forward in the schedule attached as Exhibit A have been determined by calculating the amounts transferred from the claimant to the fraud, or the debt owed to a creditor of the Receivership Entities, less any amounts previously returned to the claimant by the Receivership Entities, less any recoveries obtained by the claimant from other sources based on the same losses or debt underlying such claimant's allowed claim (the total allowed claims of all investors

and creditors is referred to hereinafter as the “Net Investor Claims”), subject to this claims objections and adjudication process previously approved by this court [D.E. 133].

Second, the Receiver seeks the Court’s authorization to make a pro rata distribution to each allowed claimant, based on the net loss from the claimant’s investment or the principal amount owed. The Receiver has not included within her calculation for distributions any interest or profit that was promised to such investors or creditors.

Pursuant to the terms of the Receiver’s Court-approved settlement with the Chilean and BVI Liquidators, the Chilean Liquidator is entitled to, and will receive a distribution of 1/3 (one third) of all funds distributed to claimants pursuant to any distribution plan approved by the Court in this receivership proceeding [D.E. 249, 252.] In addition, per the terms of this settlement, the BVI Liquidator’s claims have been withdrawn and deemed disallowed. *Id.* As this Court ruled, “this Settlement Agreement is in the best interest of the Receivership Estate.” [D.E. 252.]

Third, and so as to not delay her making this first interim distribution to all claimants with allowed claims, the Receiver seeks the Court’s authorization to reserve the amount identified for Mr. Magendzo’s claim in Exhibit A so that she may make an initial distribution of Mr. Magendzo’s claim in its entirety, on a *pro rata* basis, in the unlikely event that the Court grants his objection in full.

IV. LEGAL ARGUMENT

The Receiver believes that a pro rata method of distribution will provide a fair, equitable, and efficient method for distributing the assets of the Receivership Estate to the fraud’s victims. 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 that it is fair and equitable. *See SEC v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) (citing *SEC v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)). A receiver has discretion to fashion a distribution method that maximizes the number of investors and creditors 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 investors.” *Id.*

For example, 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 investors. *Infinity Group*, 226 Fed. Appx. at 218-19.

Due to the comingled nature of how the funds were managed, the Receiver proposes utilizing a pooled distribution to all claimants. Such a distribution will be more cost effective for the Receivership Estate than a distribution of the assets of each Receivership Entity to the investors of that entity. Indeed, due to how the fraud structured its accounting, it would be

nearly impossible, and prohibitively costly, for the Receiver to tie each claim distribution to the precise losses and recoveries of each of the Receivership Entities.

For this reason, among others, receivership courts tend to approve pooled pro rata distribution plans so long as they are logical and equitable, even if the entities' funds were not commingled. *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)). In addition, courts favor pooled pro rata plans where the victims are similarly situated with respect to the defrauders. *See 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.").

The pro rata, pooled distribution plan proposed here falls squarely within the Court's inherent powers as a court of equity to fashion relief and within the Receiver's duties as set forth in the Receivership Order. Accordingly, the Receiver submits that this Court should exercise its discretion to approve the claims deemed allowed by the Receiver and the Receiver's proposed initial distribution plan as detailed herein. *See Bendall v. Lancer Mgmt. Grp., LLC*, 523 F. App'x 554, 557 (11th Cir. 2013) ("[A]ny action by a trial court in supervising an equity receivership is committed to [her] sound discretion . . .") (quoting *S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir. 1982)).

V. THE FINAL DISTRIBUTION OF ANY REMAINING FUNDS

As provided in the Motion to Approve Claims Administration Process, the Receiver anticipates that after the Receiver makes the first interim distribution proposed herein, the

Receiver will replenish the estate with additional funds as a result of her remaining asset recovery and liquidation efforts. As of the filing of this Motion, this is primarily comprised of the Receiver's efforts to liquidate the remaining equity holdings as well as the Receiver's actions against professional entities that were retained by and may have assisted the fraud. Accordingly, after the Receiver has completed her recovery efforts and paid all administrative expenses of the Estate, the Receiver will file with the Court a motion to approve a final *pro rata* distribution.

VI. CERTIFICATION

The Receiver has discussed the relief requested herein with the Securities and Exchange Commission and is authorized to represent to this Court that the SEC does not oppose the relief sought in this Motion.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Receiver respectfully requests that this Court enter the attached proposed order: (i) approving the allowed claims identified in the attached Exhibit A; (ii) approving the initial distribution to all eligible claimants holding allowed claims in the amounts reflected in Exhibit A; and (iii) granting such other relief as this Court deems just and proper.

Dated: March 13, 2019

Respectfully submitted,
KOZYAK TROPIN & THROCKMORTON, LLP
Counsel for the Receiver
2525 Ponce de Leon Boulevard, 9th Floor
Miami, Florida 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
By: /s/ Corali Lopez-Castro
Corali Lopez-Castro
FL Bar No. 863830
David L. Rosendorf
FL Bar No. 996823
Daniel S. Maland
FL Bar No. 10114932
clc@kttlaw.com
dlr@kttlaw.com
dmaland@kttlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served via transmission of Notices of Electronic Filing generated by CM/ECF on March 13, 2019 as filed with the Clerk of the Court using CM/ECF.

By: /s/ Corali Lopez-Castro
Corali Lopez-Castro

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 16-24678-Civ COOKE/LOUIS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ONIX CAPITAL LLC, *et al.*,

Defendants.

**ORDER APPROVING RECEIVER'S UNOPPOSED
MOTION TO APPROVE ALLOWED CLAIMS AND INITIAL DISTRIBUTION**

THIS MATTER comes before the Court on March ____, 2019, upon the Unopposed Motion to Approve Allowed Claims and Initial Distribution [ECF # ____] (the "Motion") filed by Melanie E. Damian, as the court-appointed Receiver (the "Receiver") in the above-captioned enforcement action. The Court has considered the Motion, and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion [ECF # ____] is GRANTED.
2. The claims identified as allowed in Exhibit A to the Motion are hereby confirmed as allowed;
3. The allowed claim amounts as determined by the Receiver and as set forth in Exhibit A to the Motion, are hereby approved;
4. The Receiver is authorized to reserve funds sufficient to make an initial distribution for Mr. Magendzo's entire claim value, on a *pro rata* basis, in the amount provided in Exhibit A to the Motion; and
5. The Receiver is authorized to make an initial distribution totaling \$5,000,000.00 to claimants holding allowed claims on a *pro rata* basis and to the Chilean liquidation in the approved amount as proposed in the Motion, in the amounts provided in Exhibit A to the Motion.

DONE AND ORDERED in chambers at Miami, Florida, this ____ day of March, 2019.

MARCIA G. COOKE
United States District Judge

Copies to furnished to:
Lauren F. Louis, U.S. Magistrate Judge
Counsel of record

EXHIBIT A

Claim Number	Claim Amount	Proposed Allowed Claim Amount	Proposed Pro Rata Distribution
1	\$ 646,667	\$ 646,667	\$ 158,692.08
2a	\$ 360,000	\$ -	
2b	\$ 200,000	\$ -	
3 (objection pending)	\$ 100,000	\$62,642 proposed allowed (\$37,358 disputed)	(Reserve \$24,540.00)
4	\$ 300,000	\$ 277,500	\$ 68,098.50
5	\$ 136,645	\$ 1,600	\$ 392.64
6	\$ 735,000	\$ -	
7	\$ 200,000	\$ 200,000	\$ 49,080.00
8	\$ 1,100,000	\$ 1,100,000	\$ 269,940.00
9	\$ 424,124	\$ -	
10	\$ 100,000	\$ 100,000	\$ 24,540.00
11	\$ 1,300,000	\$ 1,300,000	\$ 319,020.00
12	\$ 100,000	-	
13	20% ownership interest in Next U Ventures, LLC	Settled Liquidator Claim	
14	20% ownership interest in Next Track Ventures, LLC	Settled Liquidator Claim	
15	\$ 60,000	\$ 60,000	\$ 14,724.00
16	\$ 100,000	\$ 100,000	\$ 24,540.00
17	\$ 195,000	\$ 72,750	\$ 17,852.85
18	\$ 100,000	\$ 92,500	\$ 22,699.50
19	\$ 250,000	\$ 250,000	\$ 61,350.00
20	\$ 300,000	\$ 300,000	\$ 73,620.00
21	\$ 300,000	\$ -	
22	\$ 1,300,000	\$ -	
23	\$ 850,000	\$ 850,000	\$ 208,590.00
24	\$ 323,000	\$ -	
25	\$ 472,655	\$ 452,894	\$ 111,140.19
26	\$ 2,800,000	\$ 2,800,000	\$ 687,120.00
27	\$ 1,858,733	Settled Liquidator Claim	
28	\$ 82,500	Settled Liquidator Claim	
29	\$ 1,200,000	Settled Liquidator Claim	
30	\$ 379,500	Settled Liquidator Claim	
31	9.9% ownership interest in Onix Capital LLC	Settled Liquidator Claim	
32	42% ownership interest in Next Chat Ventures, LLC	Settled Liquidator Claim	

Claim Number	Claim Amount	Proposed Allowed Claim Amount	Proposed Pro Rata Distribution
33	46% ownership interest in Deep Ocean, LLC	Settled Liquidator Claim	
34	63% ownership in Next Pay Ventures, LLC	Settled Liquidator Claim	
35	\$ 100,000	\$ 100,000	\$24,540.00
36	CLP 165,000,000	\$ -	
37	\$ 24,000	\$ 24,000	\$5,889.60
38	\$ 75,000	\$ 72,750	\$17,852.85
39	\$ 30,000	\$ 28,200	\$6,920.28
40	41% ownership in Next Cab Ventures, LLC	Settled Liquidator Claim	
41	20% ownership in Next Call Ventures, LLC	Settled Liquidator Claim	
42	29% ownership in Next Chat Ventures, LLC	Settled Liquidator Claim	
43	\$ 100,000	-	
44	\$ 96,590	-	
45	\$ 20,000	\$ 20,000	\$ 4,908.00
46	€ 12,000.00	-	
47	Equity Investments in Deep Ocean, Next Chat, Next Pay and Progressive Power	-	
48	\$ 400,000	\$ 400,000	\$ 98,160.00
49	\$ 305,406	\$ 305,406	\$ 74,946.63
50	59% ownership interest in Progressive Power, LLC	Settled Liquidator Claim	
51	\$ 1,276,373	Settled Liquidator Claim	
52	\$ 515,247	Settled Liquidator Claim	
53	\$ 300,200	Settled Liquidator Claim	
54	\$ 1,165,000	Settled Liquidator Claim	
55	\$ 33,000	Settled Liquidator Claim	

Claim Number	Claim Amount	Proposed Allowed Claim Amount	Proposed Pro Rata Distribution
56	\$ 315,000	Settled Liquidator Claim	
57	\$ 360,000	Settled Liquidator Claim	
58	\$ 1,000,000	Settled Liquidator Claim	
59	\$ 300,000	Settled Liquidator Claim	
60	\$ 22,500	Settled Liquidator Claim	
61	\$ 680,398	Settled Liquidator Claim	
62	\$ 18,561,000	Settled Liquidator Claim	
63	\$ 6,913,000	Settled Liquidator Claim	
64	\$ 275,250	Settled Liquidator Claim	
65	90.1% ownership in Onix Capital LLC	Settled Liquidator Claim	
66	\$ 642,000	\$ -	
67	\$ 1,000,000	\$ 1,000,000	\$ 245,400.00
68	\$ 1,000,000	\$ -	
69	\$ 100,000	\$ 100,000	\$ 24,540.00
70	\$ 88,400	\$ -	
71	\$ 100,000	\$ -	
72	\$ 2,515,000	\$ 2,515,000	\$ 617,181.00
73	\$ 194,100	-	
74	\$ 200,000	\$ 200,000	\$ 49,080.00
75	\$ 100,000	\$ 100,000	\$ 24,540.00
76 (supp. BVI claim)	\$ 15,000.00	\$ 15,000.00	\$ 3,681.00
		Total Maximum Allowed Claims w/o Liquidators' Claims= \$13,584,266.62	Total Pro Rata Distribution Allotment = \$3,309,039.12
			Total Funds to be Reserved = \$24,540.00

Claim Number	Claim Amount	Proposed Allowed Claim Amount	Proposed Pro Rata Distribution
Calculation for \$5,000,000.00 Distribution	Chilean Liquidator Receives 1/3 of \$5,000,000 or \$1,666,666.67	Remaining Allowed Claimants Receive 2/3 of \$5,000,000 or \$3,333,333.33	The pro rata percentage is: $\$3,333,333.33 / \$13,584,266.62 = .2454$ or 24.54%