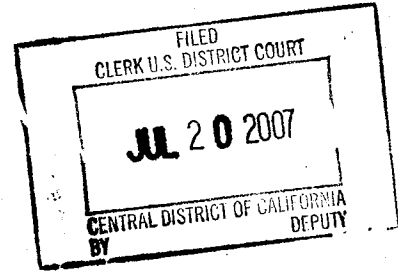


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10 Attorneys for Plaintiff
11 Commodity Futures Trading Commission

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 COMMODITY FUTURES TRADING) Case No. CV 03-0833 DSF(Mcx)
15 COMMISSION,)
16) MOTION FOR A SUMMARY
17 Plaintiff,) PROCEEDING APPROVING
18 vs.) PROPOSED UPDATED
19 BEN OUYANG., et al.,) DISTRIBUTION PLAN;
20) MEMORANDUM OF POINTS AND
21 Defendants.) AUTHORITIES IN SUPPORT;
22) PROPOSED ORDER
23)
24) DATE: No hearing scheduled
25) TIME: No hearing scheduled
26) COURT: Courtroom of the Hon. Dale
27) S. Fischer
28)

29 TO: ALL PERSONS WHO HAVE SUBMITTED CLAIMS FOR RESTITUTION,
30 AND TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD,

31 PLEASE TAKE NOTICE that Plaintiff Commodity Futures Trading Commission
32 moves for an order: (1) providing that the current proposed updated distribution plan

1 pending before the Court be decided without an evidentiary hearing.

2 MEMORANDUM OF POINTS AND AUTHORITIES

3
4 I

5 INTRODUCTION

6 The Court's June 27, 2005, Order Establishing Restitution Claims Process,
7 required Plaintiff to use its best efforts to identify and notify customers of
8 Defendants Ouyang or Victco to submit claims for restitution to be paid out of the
9 Defendants' frozen assets. Thereafter, claims were to be analyzed by Plaintiff for
10 the purpose of creating a proposed distribution plan.
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12

13 Plaintiff completed the claims process and on May 30, 2006, submitted a
14 proposed distribution plan allowing some claims and disallowing others.
15 Subsequently, objections and comments to the proposed distribution plan, along
16 with late claims, were received and on September 25, 2006, Plaintiff filed all of
17 the submissions with the Court. On November 21, 2006, Plaintiff's Response to
18 Claimants' Objections, which included a proposed updated distribution plan, was
19 filed with the Court and served on all potential claimants.
20
21
22

23 II

24 PROCEDURAL HISTORY

25 The Commission filed this injunctive action on February 5, 2003. The
26 Commission's Complaint alleged that the Defendants violated Section 4(a) of the
27 Commodity Exchange Act (the "Act"), 7 U.S.C. § 6(a) (2002), which prohibits the
28

1 offer or sale of off-exchange commodity futures contracts, and Sections 4b(a)(i) -
2 (iii) of the Act, 7 U.S.C. §§ 6b(a)(i) - (iii) (2002), which prohibits fraud in
3 connection with commodity futures contracts. Upon the filing of the action, the
4 Hon. Nora Manella issued a Statutory Restraining Order freezing the assets of the
5 Defendants.
6

7
8 On March 11, 2005, a Consent Order of Permanent Injunction and Ancillary
9 Relief (“Consent Order”) was entered against Defendants Ben Ouyang (“Ouyang”)
10 and Victco Financial Services, Inc. (“Victco”).¹ The Consent Order includes a
11 monetary award against Ouyang and Victco requiring them to make restitution to
12 their customers. Specifically, Paragraph 21 of the Consent Order provides that the
13 “[frozen] funds shall be distributed to Defendants’ customers ...in accordance with
14 a plan of recommended distribution, when approved by the Court, following
15 summary proceedings held in accordance with principles of equity.” *See generally*
16 *CFTC v. Topworth Intern., Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 1999) (affirming
17 district court’s approval of distribution plan).
18
19
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21 The National Futures Association (“NFA”), serving as “Monitor” pursuant to
22 Paragraph 19 of the Consent Order, is presently holding \$1,040,980.62 in funds that
23 were frozen in Ouyang’s and Victco’s accounts, primarily at Gain Capital, Inc. and
24
25
26

27 ¹ On March 8, 2004 the Court entered a Final Order of Default Judgment Against Defendant Yuen
28 Kwóng “Anthony” Wong d/b/a IBF Capital Limited Company.

1 FXCM, both registered futures commission merchants.²

2
3 On June 27, 2005 the Court entered its Order Establishing Restitution
4 Claims Process, which required Plaintiff to mail a letter and claim form to
5 potential claimants on or before August 15, 2005. The Order further established a
6 deadline of November 15, 2005 for Defendants' customers to submit their claims.
7
8 Plaintiff was then required to analyze claims for the purpose of proposing a
9 distribution plan.

10
11 On May 30, 2006, Plaintiff filed with the Court a proposed distribution plan.
12 On July 20, 2006, the Court entered an Amended Order Approving Distribution
13 Plan setting various additional deadlines. By August 18, 2006, Plaintiff was
14 required to mail a letter containing its Motion for a Proposed Distribution Plan,
15 along with exhibits, to all claimants who submitted a claim pursuant to the claims
16 process established by the Court. Plaintiff's letter prominently referenced
17 September 15, 2006, as the deadline when objections or comments to the plan
18 were required to be submitted. Plaintiff met the August 18, 2006 deadline.
19
20

21 Upon receipt of any objections or comments to the plan, Plaintiff was
22 required to file them with the Court no later than September 22, 2006. Plaintiff
23 met this September 2006 deadline.
24

25 After mailing to claimants the proposed distribution plan, Plaintiff received
26

27 ² The NFA is not acting in the capacity of a receiver but merely holding frozen funds in escrow
28 which it will distribute to the Defendants' customers in accordance with a distribution plan as

1 objections, comments and late claim forms to its proposed distribution plan from
2 more than 60 individuals. On September 25, 2006, Plaintiff filed with the Court
3 claimants' objections, comments and late claims.
4

5 On November 21, 2006, Plaintiff filed and served its Responses to
6 Claimants' Objections To Proposed Distribution Plan. Attached to Plaintiff's
7 response was a Supplemental Declaration from Linda Santiago along with a
8 Proposed Updated Distribution Plan.
9

10 III

11 ARGUMENT

12
13 A. The Court Has Broad Discretion to Rule on the Proposed Updated
14 Distribution Plan without a Hearing

15 As noted in Plaintiff's previous filings, district courts are afforded "broad
16 deference" in their supervision of investor distribution plans, and they are
17 authorized to use summary proceedings to resolve conflicting claims to investment
18 proceeds. *CFTC v. Topworth Intern., Ltd.*, 205 F.3d at 1115. "The basis for this
19 broad deference to the district court's supervisory role in equity receiverships arises
20 out of the fact that most receiverships involve multiple parties and complex
21 transactions." *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). Therefore,
22 "reasonable administrative procedures, crafted to deal with the complex
23 circumstances of each case, will be upheld." *Id.* at 1038. *See also, SEC v. Capital*
24 *Consultants, LLC*, 397 F.3d 733 (9th Cir. 2005).
25
26
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1 Viewed in their entirety, the claims notification procedures utilized in this
2 case were reasonable, fair and subject to principles of due process.³ The
3 procedures afforded all potential claimants opportunities to submit claims along
4 with supporting documents, and objections or comments to the proposed
5 distribution plan. Pursuant to the Court's June 27, 2005 Order, Plaintiff sent a
6 letter and claim form to more than 400 potential claimants. Claim forms were sent
7 to persons who invested money with Victco and to those who also invested with
8 Money World Financial Service ("Money World").⁴ When letters were returned to
9 Plaintiff as "undeliverable," Plaintiff re-sent letters whenever forwarding
10 addresses were obtainable. Moreover, Plaintiff was contacted by individuals who
11 heard (by word-of-mouth or otherwise) about the claims process but who had not
12 received a claim form. In these instances, Plaintiff forwarded these claimants a
13 letter and claim form and included them in the claims process.
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18 In total, Plaintiff received and analyzed 152 claims. Of this total, 62
19 potential claimants were identified as Victco customers. Plaintiff then filed its
20 proposed distribution plan containing various exhibits, including a declaration
21
22

23 ³ *SEC v. American Capital Inv., Inc.*, 98 F.3d 1133, 1146 (9th Cir. 1996) ("For claims of
24 nonparties to property, summary proceedings satisfy due process so long as there is adequate
notice and opportunity to be heard.") (abrogated on other grounds).

25 ⁴As previously represented to the Court, evidence discovered in the course of the investigation
26 and litigation of this matter showed that some of Victco's customers and brokers subsequently
27 formed a retail foreign currency operation in Texas through an entity called Money World
28 Financial Service ("Money World"). Because of the overlap between Money World and Victco
personnel, and because some Victco customers also invested in and sustained losses through their
Money World investments, Plaintiff also sent out letters and claim forms, in an excess of caution,

1 from Linda Santiago, a California State licensed Certified Public Accountant and
2 an Auditor with the Commodity Futures Trading Commission. The plan proposed
3 a distribution of more than ninety two cents on the dollar (\$0.92 out of every
4 \$1.00) to former Victco customers. Pursuant to the Court's July 20, 2006 Order,
5 the proposed distribution plan was served on everyone who submitted a claim, and
6 a deadline was set to provide claimants an opportunity to submit any objections or
7 comments anyone had to the plan.
8
9

10 Plaintiff received objections, comments and late claims from over 60
11 claimants whose cumulative submissions exceeded 500 pages. Plaintiff reviewed
12 each page and filed them with the Court. Following Plaintiff's review and
13 analyses of claimants' objections and comments, Plaintiff filed and served its
14 Responses To Claimants' Objections to Proposed Distribution Plan on November
15 21, 2006. In its response, which was based on Plaintiff's review of claimants'
16 submissions, Plaintiff included a supplemental declaration of Linda Santiago in
17 which Ms. Santiago recalculated and adjusted the recommended allowable claim
18 of claimant Bertha Galindo. The recalculation only slightly affected the proposed
19 distribution plan. Thus, Plaintiff's November 21st response also includes a
20 Proposed Updated Distribution Plan, which is the plan Plaintiff now respectfully
21 requests the Court to approve.
22
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26 The claims procedure plan established in this case is the type envisioned in
27
28

to all known Money World customers.

1 *Hardy*. All claimants were afforded a fair opportunity to submit claims and
2 objections to the plan and they received copies of all of the Plaintiff's relevant
3 filings and were kept apprised of the progress in this matter. Based on the above,
4 Plaintiff respectfully submits that the Court should exercise its broad discretion to
5 summarily rule on the Proposed Updated Distribution Plan without a hearing.
6

7
8 B. Court has all Relevant Evidence Before It Necessary to Rule on the Plan

9 In addition to the procedures followed in this case, the Court has all the
10 relevant evidence before it required to rule on the Proposed Updated Distribution
11 Plan. As previously noted, Plaintiff's plan includes a 3-page declaration by Ms.
12 Santiago indicating how she put the distribution plan together and the types of
13 documents she reviewed in doing so. Additionally, Plaintiff filed two exhibits
14 listing the amounts invested by the 62 Victco claimants and the recommended
15 allowable claims for each of them. If called for a hearing, Plaintiff would simply
16 rely on its previous submissions to the Court as they contain all of the relevant
17 evidence. A hearing is, therefore, unnecessary to rule on the proposed distribution
18 plan.
19
20
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22 C. Reference to Hearing in Plaintiff's Papers

23 In some of Plaintiff's filings, reference is made to a hearing in which the
24 Court would rule upon the proposed distribution plan and claimants' objections.
25 To be clear, this was not a request for a hearing by Plaintiff. Instead, Plaintiff
26 contemplated that if the Court felt that it necessary to resolve an outstanding issue,
27
28

1 then a hearing would have to be held and, of course, Plaintiff would participate.
2 In its earlier filings, Plaintiff did not mean to suggest that a hearing was requested
3 or otherwise required.
4

5 To date, the Court has not indicated any unresolved issues requiring a
6 hearing. Indeed, in its June 14, 2006 Order, the Court ordered Plaintiff to address
7 six specific issues. Plaintiff timely filed and served its response to the Court's
8 June 14th Order. As Plaintiff has not heard further from the Court regarding these
9 six issues and since no new issues have been raised by the Court, Plaintiff has
10 satisfactorily addressed the Court's concerns. Presently, Plaintiff is unaware of
11 any unresolved issues pending in this matter. Thus, a hearing is not necessary.
12
13

14 IV

15 CONCLUSION

16
17 The claims process has been thorough and fair. Potential claimants have
18 waited patiently throughout this process and are now entitled to closure. They
19 deserve to receive restitution as proposed by Plaintiff without further delay.
20

21 Additionally, a hearing at this juncture would not produce any new
22 evidence; instead, a hearing would further delay the process and undermine the
23 "orderly and efficient administration" of the Proposed Updated Distribution Plan.⁵
24 Individual claimants would feel compelled to incur additional travel and lodging
25 costs merely to repeat what they have already produced in prior submissions to
26
27

28 ⁵ *Topworth*, 205 F.3d at 1115; *See also S.E.C. v. Wencke*, 783 F.3d 829, 837 (9th Cir. 1986).

1 Plaintiff and the Court.

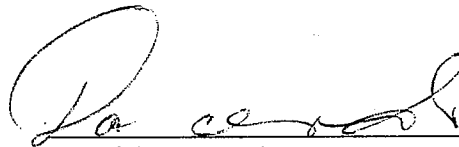
2 Moreover, counsel for Defendants does not object to this motion or the
3 Proposed Updated Distribution Plan.
4

5 Finally, Plaintiff respectfully requests that the Court stay a decision on this
6 Proposed Order for 21 days to allow Plaintiff an opportunity to serve it on all
7 persons who have submitted a claim.
8

9 Therefore, Plaintiff respectfully requests that the Court grant this motion
10 and rule on the Proposed Updated Distribution Plan without a hearing.
11
12

13 Respectfully submitted,

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15
16 Dated: July 19, 2007



17 David Acevedo
18 Attorney for Plaintiff
19 Commodity Futures Trading Commission
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9 Commodity Futures Trading Commission

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 COMMODITY FUTURES TRADING) Case No. CV -03-0833 DSF (Mcx)
13 COMMISSION,)
14) [PROPOSED] ORDER APPROVING
15) PROPOSED UPDATED
16 Plaintiff,) DISTRIBUTION PLAN
17)
18 vs.)
19) DATE: No hearing scheduled
20 BEN OUYANG, et al.,) TIME: No hearing scheduled
21) COURT: Courtroom of the Hon. Dale
22 Defendants.) S. Fischer
_____)

23 This matter came before the Court on the Motion of Plaintiff Commodity
24 Futures Trading Commission (“CFTC”) for an Order Approving the Proposed
25 Updated Proposed Distribution Plan without an evidentiary hearing. The Court,
26 having considered the Motion and the Memorandum of Points and Authorities
27 finds and orders as follows:

I.

FINDINGS

1
2
3 1. Pursuant to the Court's June 27, 2005 Order Establishing Restitution
4 Claims Process (the "Claims Process Order"), Plaintiff employed its best efforts to
5 identify customers of Defendants Ben Ouyang ("Ouyang") and Victco Financial
6 Services, Inc. ("Victco") (collectively, "Defendants"), along with Money World
7 Customers, and notified them, via letter and claim form, of their right to submit
8 claims for restitution to be paid out of the Defendants' frozen assets. The claims
9 letter sent by Plaintiff prominently referenced a November 15, 2005 deadline for
10 submission of restitution claims by Defendants' customers. In its order, the Court
11 stated that customers whose claim forms were not received by Plaintiff by
12 November 15, 2005 were to be barred from recovering any restitution payments in
13 connection with this action.

14 2. The National Futures Association ("NFA"), serving as "Monitor"
15 pursuant to Paragraph 19 of the Consent Order of Permanent Injunction and
16 Ancillary Relief ("Consent Order"), entered by the Court on March 11, 2005, is
17 presently holding \$1,040,980.62 in funds that were frozen in Defendants' accounts
18 at Gain Capital, Inc. and FXCM, both futures commission merchants registered with
19 the CFTC.

20 3. Pursuant to the Claims Process Order, Plaintiff mailed letters and
21

1 claim forms to approximately 400 potential claimants. Plaintiff received 152
2 potential claims in response.

3 4. Pursuant to the Claims Process Order, Plaintiff analyzed those 152
4 claims. Plaintiff determined that 62 of the claimants were Defendants' customers
5 and identified allowable claims for Defendants' 62 customers amounting to
6 \$1,122,804.44.

7 5. On May 30, 2006, Plaintiff filed with the Court a Motion For a
8 Proposed Distribution Plan ("Motion For Distribution") with exhibits and the
9 declaration of Linda Santiago ("Ms. Santiago"), a licensed Certified Public
10 Accountant and Auditor employed by Plaintiff. Plaintiff's motion set forth each of
11 the 62 claimant's recommended allowable claim, each claimant's percentage of
12 total recommended allowable claims, and the proposed amount to be distributed to
13 each claimant from the presently available funds on a *pro rata* basis.

14 6. On July 19, 2006, the Court entered an Amended Order Approving
15 Proposed Distribution Plan ("July 19th Order"). Pursuant to the July 19th Order,
16 Plaintiff mailed a letter enclosing a copy of the Motion For Distribution to all 152
17 claimants who filed claims pursuant to the Claims Process Order. Plaintiff's letter to
18 claimants prominently referenced a September 15, 2006 deadline by which time
19 claimants were to submit, in writing, comments on or objections to the Motion For
20 Distribution.

21 7. Pursuant to the Court's July 19th Order, Plaintiff filed with the Court on
22

1 September 25, 2006, all comments and objections to the Motion For Distribution
2 that were received by Plaintiff.

3 8. On November 21, 2006, and pursuant to the Court's July 19th Order,
4 Plaintiff filed its Responses to Claimants' Objections to Proposed Distribution Plan.
5 In its response, Plaintiff also filed a supplemental declaration of Ms. Santiago and a
6 Proposed Updated Distribution Plan, which recalculated the recommended
7 allowable claim of one of the 62 claimants.

8 9. The claims notification procedures utilized in this case were thorough
9 and subject to principles of due process.¹ The procedures afforded all potential
10 claimants timely opportunities to submit claims with supporting documents, and
11 objections or comments to the proposed distribution plan submitted by Plaintiff.
12 Based on the objections and comments received, Plaintiff submitted its Proposed
13 Updated Distribution Plan which recalculated the recommended allowable claim
14 of one of the 62 claimants, and only slightly modified the proposed claims for the
15 remaining 61 claimants.

16 Accordingly, IT IS HEREBY ORDERED AS FOLLOWS:

17 II.

18 ORDER

19 10. An evidentiary hearing on the Proposed Updated Distribution Plan

20 ¹ *SEC v. American Capital Inv., Inc.*, 98 F.3d 1133, 1146 (9th Cir. 1996) ("For claims of
21 nonparties to property, summary proceedings satisfy due process so long as there is adequate
22 notice and opportunity to be heard.") (abrogated on other grounds).

1 filed by Plaintiff on November 21, 2006, is unnecessary and, therefore, the plan is
2 approved in its entirety.

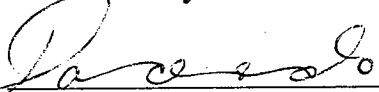
3 11. It is further ordered that the NFA, serving as "Monitor" pursuant to
4 Paragraph 19 of the Consent Order, and which is presently holding \$1,040,980.62 in
5 funds that were frozen in Defendant Ouyang's and Victco's accounts at Gain
6 Capital, Inc. and FXCM, distribute said funds in accordance with the Proposed
7 Updated Distribution Plan.

8 IT IS SO ORDERED.

9 Dated: _____, 2007

10 UNITED STATES DISTRICT JUDGE

11
12
13 Presented by:

14 

15 David Acevedo
16 Attorney for Plaintiff
17 Commodity Futures Trading
18 Commission
19
20
21