

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
NO. 3:13-CV-196

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

JAMES HARVEY MASON,

Defendant, and

THE JHM FOREX ONLY POOL (f/k/a
THE JHM FOREX ONLY POOL, LP), and
FOREX TRADING AT HOME,

Relief Defendants.

**RECEIVER'S MOTION (I) FOR
AUTHORITY TO MAKE FINAL
DISTRIBUTION AND TO ESTABLISH
DISTRIBUTION AMOUNTS AND
(II) FOR AUTHORITY TO PAY
SOCIAL SECURITY FUNDS TO THE
COURT REGISTRY**

Joseph W. Grier, III, the duly appointed receiver in this case (the "Receiver"), through counsel, hereby presents this *Receiver's Motion (I) for Authority to Make Final Distribution and to Establish Distribution Amounts and (II) for Authority to Pay Social Security Funds to the Court Registry* (this "Motion") and respectfully shows the Court the following in support:

INTRODUCTION

1. Through this Motion, the Receiver seeks authority to distribute to Customers a total of \$205,000.00 so as to ensure that all Customers will have received—either through pre-receivership withdrawals, the initial Receivership distribution and/or Receiver's proposed distribution, or a combination of the three—a total return of 33.66%¹ of their deposits to the Defendants. This proposal reflects implementation of the "rising tide" distribution method previously approved by the Court.

¹ The 33.66% "rising tide watermark" is rounded to the hundredth of a percent for ease of reference in this Motion. The actual figure, rounded to the twelfth decimal place, is: 0.336649491855.

PROCEDURAL AND FACTUAL BACKGROUND

2. On March 27, 2013, the U.S. Commodity Futures Trading Commission (the “CFTC”) filed a civil complaint (Doc. No. 1) against James H. Mason as Defendant and The JHM Forex Only Pool (f/k/a The JHM Forex Only Pool, LP) and Forex Trading At Home as Relief Defendants (collectively, “Defendants”), initiating case number 3:13-cv-196 (the “CFTC Action”), in the U.S. District Court for the Western District of North Carolina (the “Court”).

3. Also on March 27, 2013, the Court entered a *Statutory Restraining Order* in the CFTC Action, providing for a temporary injunction as to Defendants and appointing the Receiver (Doc. No. 11) (the “Temporary Receivership Order”). The Temporary Receivership Order directs the Receiver to take custody, control and possession of all funds, property and other assets in the possession or control of Defendants and to perform all acts necessary to hold, manage and preserve the value of such assets (collectively, the “Receivership Estate”). *See* Doc. No. 11, at 7. On April 22, 2013 the Court entered its *Order to Clarify the Scope of the Receivership Estate to Include Certain Trust Assets* (Doc. No. 17) to also include assets of The JHM Trust as part of the Receivership Estate. On May 22, 2013, the Court entered its *Order of Preliminary Injunction*, creating a preliminary injunction and confirming the appointment and the powers and duties of the Receiver (Doc. No. 22) (the “Receivership Order”).

4. On September 2, 2014, the Court entered its *Order Approving (1) Claims Verification and Notice Procedures and (2) Reserving Issues Concerning Distribution Method and Distribution Procedure* (Doc. No. 94) (the “Claims Procedures Order”). Pursuant to the Claims Procedures Order, the Court adopted a process: (a) through which Defendant’s customers (“Customers”) could assert claims against the Receivership Estate by submitting a

“Claim Verification Form”²; (b) the Receiver would review each claim submitted and recommend appropriate treatment of each claim to the Court; and (c) the Court would make a final determination on the allowance of claims. *See* Doc. No. 94, at 2–5.

5. On October 14, 2014, the Court entered its *Order Approving Distribution Method and Distribution Procedure* (Doc. No. 107) (the “Distribution Procedures Order”), whereby the Court adopted a “rising tide” distribution method for calculating the appropriate distribution, if any, to each Customer holding an allowed claim. In addition, the Distribution Procedures Order directs the Receiver to: (a) make distributions payable via checks written to the names listed on the Claim Verification Form submitted by the applicable Customer; (b) send distribution checks to the addresses listed on the Claim Verification Form; and (c) file a motion for approval of any interim or final distribution on a fourteen-day notice period. *See* Doc. No. 107, at 6.

6. On April 23, 2015, the Court entered its *Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief* (Doc. No. 161) (the “Consent Order”), whereby Defendant Mason, through the entity Defendants, is found to have, *inter alia*: (a) misrepresented the risks associated with trading in off-exchange foreign currency contracts to Customers; (b) failed to disclose to Customers a prior felony conviction for fraud committed in connection with commodity trading; (c) reported false profits to Customers; (d) misappropriated Customer deposits for Defendant Mason’s own personal use and enjoyment; and (e) misappropriated Customer deposits for the purpose of making “Ponzi payments” to other Customers. *See* Doc. No. 161, at 8–10.

7. In addition, the Consent Order concludes that the Defendants have no legitimate ownership interest in the Receivership Estate assets collected by the Receiver, which assets

² To be allowed, claims must have been delivered to the Receiver on or before October 20, 2014, unless the Receiver, for cause, granted a specific Customer an extension of time to submit a claim. *See* Doc. No. 94, at 3–4.

“rightfully belong[] to the Defendant’s defrauded investors.” *Id.* at 10.

8. Further, the Consent Order imposes a “Restitution Obligation” on Defendant Mason in the amount of \$3,880,000.00, plus post-judgment interest. *See id.* at 15–16. The Consent Order contemplates that the Receiver would distribute the Receivership Estate assets to Customers in partial satisfaction of the Restitution Obligation. *See id.* at 16.

9. In addition, to date, the Receiver has collected a net of \$14,263.63 in social security benefits paid to Defendant Mason by the Social Security Administration (the “SSA”), as summarized by the table appearing immediately below.

Date	Gross Benefits Collected	Transfer Fee	Net Benefits Deposited
2/24/15	\$704.50	\$1.50	\$703.00 ³
2/24/15	\$4,001.50	\$1.50	\$4,000.00 ⁴
8/18/15	\$5,712.00	\$1.50	\$5,710.50 ⁵
10//15	\$1,947.63	\$0.00	\$1,947.63
11/11/15	\$1,904.00	\$1.50	\$1,902.50
Total	\$14,269.63	\$6.00	\$14,263.63

Pursuant to that certain *Order* entered in this action on September 5, 2014 (the “Social Security Order”), “Mason’s Social Security benefits . . . are not receivership assets.” *See* Doc. No. 97 at page 4 of 4. The SSA has asserted that a portion of the \$14,263.63 represents an overpayment to Defendant Mason refundable to the SSA; however, to the Receiver’s knowledge, the SSA is yet to determine the exact amount of the alleged overpayment. Defendant Mason, through counsel, has expressed an interest in acquiring the balance of the Social Security benefits collected by the Receiver that are not otherwise due to be refunded to the SSA. In addition, pursuant to the asset

³ In Exhibit B (Doc. No. 157-2) to the *Receiver’s Seventh Report* filed on April 15, 2015 (Doc. No. 157) and in Exhibit B (Doc. No. 169-2–169-3) to the *Receiver’s Eighth Report* filed on November 2, 2015 (Doc. No. 169), the Receiver reported as income the gross amount shown in the table above for the two deposits on February 24, 2015 and corresponding expenses for the transfer fees. However, in that same report, the Receiver reported as income the net amount shown in the table above for the August 18, 2015 deposit and did not note the corresponding transfer fee as an expense.

⁴ *See supra*, n. 3.

⁵ *See supra*, n. 3.

forfeiture provisions in Defendant Mason's guilty plea documents and judgment entered in the criminal case against him, the U.S. Department of Justice (the "DOJ") has indicated that it would seek to collect whatever portion of the Social Security benefits collected by the Receiver that are not due to be refunded to the SSA in lieu of such funds being paid to Defendant Mason.

10. On June 16, 2015, the Court entered its *Order Approving Receiver's Recommendations Regarding Claims* (Doc. No. 165) (the "Final Claims Order"), whereby the Court made a final determination on the allowance of claims submitted by Customers.

11. In accordance with the duties imposed by the Temporary Receivership Order and the Receivership Order, the Receiver took control of the Receivership Estate assets and has preserved the value of the same.

12. On July 7, 2015 the Court entered its *Order Authorizing Receiver to Make First Interim Distribution* (Doc. No. 168) authorizing the distribution of \$900,000.00 in Receivership assets to Customers. Thereafter distributions were made according to this Order.

13. As of February 17, 2016, the Receiver is holding the sum of \$244,822.06 in the Receivership Estate's bank account (the "Funds").

14. In this Motion, the Receiver proposes that \$205,000.00 of the Funds be distributed to Customers on a pro-rata basis so as to ensure that each Customer will have received 33.66% of the Customer's deposits back, either through pre-receivership withdrawals, the first interim distribution, the distribution that the Receiver proposes herein, or a combination of the three. After the distribution, it is anticipated that the assets of the Receivership Estate will be completely depleted.

15. In addition, through this motion the Receiver proposes to pay into the Court Registry the \$14,263.63 in Defendant Mason's Social Security benefits that the Receiver has

collected but are not assets of the receivership.

RELIEF REQUESTED

16. Through this Motion, the Receiver seeks an order authorizing the Receiver to make distributions to Customers as detailed on the chart appearing as Exhibit A. The Receiver believes that such an order is necessary and appropriate to carry out the Receiver's duties under the Temporary Receivership Order and the Receivership Order and would otherwise reflect the best interests of Customers.

17. Exhibit A provides the following information:

- Column 1 — the account number assigned to Customers by Defendants or the Receiver⁶;
- Column 2 — the amount of funds deposited by each Customer into Defendants' scheme, labeled as Pre-Receivership Contributions;
- Column 3 — the amount of funds withdrawn by each Customer before the imposition of the receivership, labeled as Pre-Receivership Distributions;
- Column 4 — the amount previously distributed to each Customer by the Receiver, which as of this date is \$900,000.00 for all Customers; and
- Column 5 — the amount that the Receiver proposes to disburse to each Customer pursuant to this Motion, labeled as Current Distribution Amount.

18. Again, this final distribution is calculated to bring all Customers to a 33.66% rising tide watermark, such that, after the distributions are completed, each Customer holding an allowed claim against the Receivership Estate will have received back from Defendants and / or the Receiver at least 33.66% of the funds that the Customer invested with Defendants.

19. To clarify, any Customer who received pre-receivership withdrawals (or "Pre-Receivership Distributions") in excess of 33.66% of the Customer's deposits (or "Pre-

⁶ All Customers holding allowed claims against the Receivership Estate previously received confirmation of their account number and claim amounts via letters sent by the Receiver to the addresses listed on all Claim Verification Forms.

Receivership Contributions”) will not receive funds from the Receiver through this final distribution. Any Customer who received pre-receivership withdrawals / distributions in an amount less than 33.66% of the Customer’s deposits / contributions will receive the difference between (i) the amount equal to 33.66% of Pre-Receivership Contributions and (ii) the amount equal to the sum of the Customer’s total pre-receivership withdrawals plus the funds previously distributed to each Customer by the Receiver.

20. In the opinion of the Receiver, the distribution amounts proposed in this Motion are consistent with the “rising tide” distribution method previously approved by the Court. *See* Doc. No. 107, at 4–6.

21. In addition, because \$14,263.63 of the funds held by the Receiver represent amounts paid to Defendant Mason as social security benefits, those funds cannot be distributed by the Receiver to Customers, as explained by the Court in the Social Security Order. Furthermore, the Receiver: (a) has not received a definitive figure from the SSA as to the portion of such funds that the SSA asserts should be refunded to the SSA; and (b) is unable to resolve whether Defendant Mason or the DOJ has a superior claim to the remaining portion of such funds. Based on the foregoing, the Receiver proposes to pay the \$14,263.63 to the Court Registry.

22. In addition to those parties receiving automatic electronic notice of this Motion through the United States District Court, Western District of North Carolina electronic case filing system, the Receiver, contemporaneously with the filing of this Motion, is emailing copies of this Motion to the SSA, the DOJ, and the attorneys representing Defendant Mason with narrative text explaining the request herein for authority to pay the funds derived from Defendant Mason’s social security benefits into the Court Registry.

NOTICE

23. If you do not want the Court to approve this Motion, or if you want the Court to consider your views, then on or before **March 28, 2016**, you or your attorney must file with the Court a written response explaining your position. The response must be filed electronically with the U.S. District Court for the Western District of North Carolina, www.ncwd.uscourts.gov. If you are an individual who is not represented by an attorney, under certain circumstances, you may deliver your response to the Clerk of the United States District Court, 401 West Trade Street, Charlotte, NC 28202. On or before the date stated above for filing your written response, you must also mail (101 N. Tryon St., Ste. 1240, Charlotte, NC 28246), fax (704/332.0215) or email (masonreceivership@grierlaw.com) a copy of your written response to “Joseph W. Grier, III, Receiver.”

24. If the Court schedules a hearing, you or your attorney must attend the hearing, which will be held at a time and date which will be noticed only to any party who files a response, at the United States District Court, 401 West Trade Street, Charlotte, NC 28202. If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief the Receiver requests and may enter an order approving the Motion.

WHEREFORE, the Receiver requests that the Court enter an Order:

- (1) Granting this Motion;
- (2) Authorizing the Receiver to make an aggregate final distribution of \$205,000.00 to Customers in accordance with the Distribution Procedures Order and Final Claims Order, as detailed more fully in Exhibit A attached hereto;
- (3) Authorizing the Receiver to pay \$14,263.63 to the Court Registry, representing the sum collected by the Receiver from payments made to Defendant Mason as

social security benefits; and

- (4) Granting such further relief as is just and proper.

Respectfully submitted, this 8 day of March, 2016.

/s/ Michael L. Martinez

Michael L. Martinez (State Bar No. 39885)

Anna S. Gorman (State Bar No. 20987)

Grier Furr & Crisp, PA

101 North Tryon Street, Suite 1240

Charlotte, North Carolina 28246

Phone: 704.375.3720

Fax: 704.332.0215

mmartinez@grierlaw.com

Attorneys for the Receiver

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
NO. 3:13-CV-196

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

JAMES HARVEY MASON,

Defendant, and

THE JHM FOREX ONLY POOL (f/k/a
THE JHM FOREX ONLY POOL, LP), and
FOREX TRADING AT HOME,

Relief Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing *Receiver's Motion (I) for Authority to Make Final Distribution and to Establish Distribution Amounts and (II) for Authority to Pay Social Security Funds to the Court Registry* were served by electronic notification on those parties registered with the United States District Court, Western District of North Carolina electronic case filing system to receive notices for this case, unless otherwise noted below.

Barry R. Blankfield (bblankfield@cftc.gov)
Joseph A Konizeski (jkonizeski@cftc.gov)
Jennifer E. Smiley (jsmiley@cftc.gov)
Commodity Futures Trading Commission

John A. Fagg, Jr. (johnfagg@mvalaw.com)
Frank E. Schall (frankschall@mvalaw.com)
Moore & Van Allen PLLC
Attorneys for James Harvey Mason

Customers
Via email and online publication

The JHM Forex Only Pool and
Forex Trading At Home
c/o James Harvey Mason
PID: 0000425831
P.O. Box 34429
Charlotte, NC 28234-4429
Via U.S. Mail

Amy N. Houthouser (amyh@mcintoshlawfirm.com)
Prosser D. Carnegie (sandy@mcintoshlawfirm.com)
The McIntosh Law Firm
Attorneys for the Secured Claimants

This is the 8 day of March, 2016.

/s/ Michael L. Martinez

Michael L. Martinez
Grier Furr & Crisp, PA
101 North Tryon Street, Suite 1240
Charlotte, NC 28246