

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

COMMODITY FUTURES TRADING COMMISSION, )

Plaintiff, )

C.A. No. 81-1070-MLW

v. )

U.S. INVESTMENT CO., LTD., ET AL., )

Defendants. )

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IN RE EDMUND EUGENE FLEMING )

NANCY GREEN FLEMING, )

Relief Defendants. )

**COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF THE COMMISSION'S  
MOTION TO APPROVE THE PROPOSED DISTRIBUTION PLAN**

The United States Commodity Futures Trading Commission ("Commission") respectfully submits this memorandum of law, in support of the Commission's motion to approve the proposed distribution of the total funds of \$192,524 held by the Clerk of the District Court and the National Futures Association ("NFA"), the Court-appointed Monitor, for the benefit of the former investors of United States Investment Company, Ltd. ("USIC").

**I. Facts**

In May 2000, the Commission filed a motion to hold Edmund Eugene Fleming ("Fleming") in contempt of the Court's Order dated April 10, 2000 and corrected as of April 14, 2000 (the "April 2000 Order").<sup>1</sup> The Court's April 2000 Order found that Fleming had violated his fiduciary duty as Receiver and directed him to restore to the USIC receivership the \$912,592

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<sup>1</sup> See Docket entry 126.

he misappropriated from the USIC estate.<sup>2</sup> The Commission's motion alleged that Fleming was in civil contempt of the Court's April 2000 Order by failing to make all reasonable efforts to pay \$912,592 as required by the Court's April 2000 Order.

In May 2003, the parties entered into a settlement and agreement resolving the Commission's motion.<sup>3</sup> This settlement and agreement resulted in funds of \$176,569 paid to the Clerk of the Court for the benefit of the USIC estate. In addition, the NFA is holding \$15,593 in funds representing the remaining corpus of the USIC receivership account. This results in total funds of \$192,524 plus accrued interest available to be distributed to the USIC former investors.

The Commission proposes an equal distribution of the total funds held for the benefit of the former USIC investors.<sup>4</sup> Because the amount each former USIC investor lost cannot be determined, the Commission proposes an equal distribution instead of a *pro rata* distribution.<sup>5</sup> Under the Commission's distribution plan, therefore, the total funds of \$192,524 plus accrued

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<sup>2</sup> See Docket entry 118.

<sup>3</sup> See Consent Order to Resolve All Outstanding Proceedings.

<sup>4</sup> It is impossible to reconstruct the amount of money each former USIC investor had deposited and lost with USIC since the USIC receivership records of the former USIC investor's investments with the firm are lacking complete information. This conclusion was reached by Jon H. Fudeman, CPA ("Fudeman"), hired by the Superseded Receiver Edmund E. Fleming to ascertain each former investor's pro-rata share of the USIC estate. In the October 23, 1995 financial analysis prepared by Fudeman, he determined that there were "substantial gaps" in the records available to determine the amount of money each former USIC investor had deposited and lost with USIC. Fuderman's analysis was submitted to the Court on or about December 7, 1995. See Docket entry 15, Fudeman financial analysis at p.4, attached to Fleming's Report on USIC and the Receivership.

<sup>5</sup> See Declaration of Stephen Jay Obie in Support of Commission's Motion to Approve Proposed Distribution of Receivership Funds dated February 13, 2002, Docket entry 230. The destruction of the Commission's working files and original USIC records on September 11, 2001 during the terrorist attack on the World Trade Center made it virtually impossible to determine the amount of money each former USIC investor had deposited and lost with USIC.

interest would be divided equally among the 588 former USIC investors, resulting in each former USIC investor receiving approximately \$327.42.

The Commission's distribution plan provides for former USIC investors to receive notice of the proposed distribution plan and provides for an opportunity to object. The Commission proposes to notify former USIC investors by mailing, to the last-known address of each former USIC investor, a copy of the Commission's motion papers to approve its proposed distribution plan, the proposed cover letter, a distribution claim form and an envelope addressed to the Commission.<sup>6</sup> The postage involved in submitting the claim form to the Commission will be paid by the claimant because of varying postage amount due based on the weight of the submission. Copies of these motion papers, the cover letter and distribution claim form will also be available on the Commission's USIC website.<sup>7</sup> The Commission will also update its telephone hotline to inform callers about the Commission's proposal. Upon submission of proper documentary proof and approval by the Court, an heir or assign of a former USIC investor will receive that former investor's share.

Under the Commission's proposal, objections to the distribution plan must be served and filed within sixty days from the Court's approval of the Commission's proposal to distribute the total funds held for the benefit of the USIC former investors. The Court then shall rule on these objections and make any required modifications to the Commission's distribution plan. Any

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<sup>6</sup> The Commission believes that there were 588 former USIC investors. *See* Docket entry 28, Initial Report of Receiver. The Commission has been actively updating an address list previously compiled by Successor Receiver A. Hugh Scott, which contained 433 names and addresses. The Commission has current contact information for approximately 250 investors.

<sup>7</sup> To notify the approximately 150 former USIC investors for whom no contact information is available, the Commission proposes to post these motion papers and cover letter on its USIC website. The Commission proposes to divide the total funds of \$192,524 by 588, the total number of former USIC investors thus reserving approximately 150 shares in case former USIC investors -- for whom the Commission currently has no contact information -- come forward to claim a share.

funds which remain unclaimed six months after the Court order distribution of the total funds held for the benefit of the former USIC investors will be distributed in a second distribution among the former USIC investors who have filed distribution request forms. If any funds remain after this second distribution, the funds will be forwarded the United States Treasury as soon as practicable.

## II. LEGAL ANALYSIS

Courts have broad powers to devise reasonable procedures to aid in the orderly and efficient administration of receiverships.<sup>8</sup> The Court has discretion to use summary proceedings so long as parties are provided notice and an opportunity to be heard.<sup>9</sup> The fundamental principle governing adoption of a distribution plan is that it should be equitable and fair, with similarly situated investors treated alike.<sup>10</sup> “What is equitable and fair will depend on the circumstances.”<sup>11</sup>

The Commission’s proposed distribution plan is appropriate given the unique circumstances presented here in a receivership that has lasted over two decades. First, the

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<sup>8</sup> *Liberte Capital Group v. Capwill*, 229 F.Supp.2d 799 (N.D. Ohio 2002). See *CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115-17 (9<sup>th</sup> Cir. 2000); *SEC v. Elliott*, 953 F.2d 1560, 1569 (11<sup>th</sup> Cir. 1992).

<sup>9</sup> *SEC v. Basic Entergy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6<sup>th</sup> Cir. 2001) (while summary proceeding promotes judicial efficiency, claimants must still be afforded due process). See *SEC v. Elliott*, 953 F.2d at 1566-67; *CFTC v. Topworth*, 205 F.3d at 1113.

<sup>10</sup> See *SEC v. Elliott*, 953 F.2d at 1569 (disallowing tracing on equitable grounds despite claims of remedy under a contractual theory); *United States v. Real Property Located at 13328 and 13324 State Highway 75 N.*, 89 F.3d 551, 553-54 (9<sup>th</sup> Cir. 1996) (tracing fictions should not be utilized under circumstances involving multiple victims and commingled funds. Instead, the equities demand that all victims of the fraud be treated equally); *In re PaineWebber Ltd. Partnership Litigation*, 171 F.R.D. 104, 133 (S.D.N.Y.) (weighing each class members claim nearly an impossible task and permits alternative methods of disbursement) *aff’d* 117 F.3d 721 (2d Cir. 1997).

Commission's distribution plan provides for notice. Not only will the Commission be mailing these motion papers, the proposed cover letter, and distribution claim form to the former USIC investors for whom it has a last-known address, but the Commission also will make those papers publicly available on its USIC website in an attempt to notify those former investors for whom no contact information is available. The Commission will also update its telephone hotline to inform callers about the Commission's proposal. Furthermore, the Commission's distribution plan also provides former USIC investors with an opportunity to object.

Second, the Commission's distribution plan also treats investors fairly by providing for each investor to receive an equal share of the total funds. Under the Commission's distribution plan, the corpus will be divided by 588, the number of known former USIC investors. While the Commission would have preferred to propose a plan that distributed property ratably, such a proposal could not be devised given the lack of adequate customer records here.<sup>12</sup> The Commission's distribution plan provides ample time for all former USIC investors to claim their share of the distribution, even those investors for whom the Commission lacks adequate contact information. Furthermore, the Commission's proposal to distribute the corpus equally is fair given that the total funds held for the benefit of the USIC former investors represents only a percentage of the money the former USIC investors should have received from the USIC estate.

In order to ensure that the former USIC investors are adequately compensated from the total funds held for the benefit of the former USIC investors, the Commission's proposed distribution plan provides that any funds that remain unclaimed six months after the Final Distribution Date will be equally divided and distributed among the former USIC investors who

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<sup>11</sup> *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80 (2d Cir.2002).

<sup>12</sup> *See CFTC v. Topworth*, 205 F.3d at 1116; *see also* Docket entry 15, Fudeman financial analysis at p.4, attached to Fleming's Report on USIC and the Receivership.

have filed distribution claim forms. Only at that point, will any remaining funds be forwarded to the U.S. Treasury.

**III. CONCLUSION**

For all the foregoing reasons, the Commission respectfully requests that the Court approve the Commission's distribution plan.

Dated this 13<sup>th</sup> day of June, 2003  
New York, New York

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