

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 7
)
PEREGRINE FINANCIAL GROUP, INC.,) Case No. 12-27488
)
Debtor.) Honorable Judge Carol A. Doyle
)
) Hearing Date: March 18, 2020
) Hearing Time: 10:00 a.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **March 18, 2020 at 10:00 a.m.**, the undersigned shall appear before the Honorable Judge Carol A. Doyle, in Courtroom 742, 219 South Dearborn Street, Chicago, Illinois, and then and there present the **Trustee's Motion for Entry of an Order Authorizing Additional Interim Distributions on Allowed 4d Customer Claims**, at which time you may appear if you deem fit.

Respectfully submitted,

Ira Bodenstein, not personally, but as chapter 7 trustee for the estate of Peregrine Financial Group, Inc.

Dated: February 21, 2020

By: /s/ Allen J. Guon
One of his attorneys

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In re:) Chapter 7
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PEREGRINE FINANCIAL GROUP, INC.,) Case No. 12-27488
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TRUSTEE’S MOTION FOR ENTRY OF AN ORDER AUTHORIZING ADDITIONAL INTERIM DISTRIBUTIONS ON ALLOWED 4D CUSTOMER CLAIMS

Ira Bodenstein, not personally, but as chapter 7 trustee (“Trustee”) for the estate of Peregrine Financial Group, Inc. d/b/a PFG Best (“Debtor”), pursuant to 11 U.S.C. §§ 105(a) and 766 and 17 C.F.R. §§ 190.01 *et seq.*, requests the entry of an order authorizing and approving up to a 72.16% interim distribution to the holders of Allowed 4d Claims (defined below). In support of this motion, the Trustee respectfully states as follows:

PRELIMINARY STATEMENT

1. The relief requested in this motion furthers the Trustee’s statutory duties to “collect and reduce to money the property of the estate ... and close such estate as expeditiously as is compatible with the best interests of parties in interest,” 11 U.S.C. § 704(a)(1), by allowing the Trustee to make an additional distribution to the Debtor’s futures customers. The entry of an order by this Court approving relief sought herein will (i) allow for an additional incremental interim distribution of 9.16% to holders of Allowed 4d Claims who have received all previous distributions and (ii) establish a sufficient reserve to ensure payment of allowed administrative expenses.

BACKGROUND

A. The Debtor’s Bankruptcy Case

2. On July 10, 2012 (“Petition Date”), the Debtor filed a voluntary case under Chapter 7 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (“Bankruptcy Code”), thereby

commencing the above-entitled case (“Case”).

3. On July 11, 2012, the Trustee was appointed as the successor chapter 7 trustee of the Debtor by the Office of the United States Trustee, has accepted his appointment, and is the permanent trustee of the Debtor.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a “core proceeding” within the meaning of 28 U.S.C. §§ 157(b)(2)(A) and (O).

B. Overview of the Debtor’s Business and Claimants

8. Prior to the Petition Date, the Debtor was registered as futures commission merchant (“FCM”) with the CFTC and operated a futures brokerage customer business pursuant to its FCM registration. The Debtor also had separate business lines for foreign exchange customers, physical precious metals customers and over-the-counter precious metals derivatives customers. As of the Petition Date, the Debtor had over 24,000 aggregate customer accounts over all of its lines of business, including approximately 17,000 futures customer accounts.

9. The CFTC filed a lawsuit in the United States District Court for the Northern District of Illinois (“District Court”) alleging that the Debtor and its founder, Wasendorf, committed fraud, futures customer-funds violations and made false statements (“Lawsuit”). In connection with the Lawsuit, on July 10, 2012, the District Court entered an Order Appointing a Temporary Receiver. Shortly thereafter, the Debtor commenced the Case – a commodity broker liquidation under subchapter IV of chapter 7 of the Bankruptcy Code.

10. The United States of America also instituted separate criminal proceedings against Wasendorf. In those proceedings, the governmental obtained a judgment against Wasendorf in the

amount of \$212 million. The judgment represented the amount that Wasendorf misappropriated from the Debtor's customer segregated bank account ("Customer Seg Account"). The Customer Seg Account is the bank account where the Debtor was required to hold the funds of 4d Customers under the CFTC's regulations.

1. *Futures Customer Business*

11. The Debtor's futures customers include commodity futures customers, i.e., customers with accounts opened for the purpose of trading futures or options on futures on a U.S. futures exchange under Section 4d of the Commodity Exchange Act ("4d Customers").¹ 7 U.S.C. § 6d. The Debtor's futures customers also include foreign futures customers, i.e., customers with accounts opened for the purpose of trading futures or options on futures on an exchange located outside of the U.S. under CFTC Rule 30.7 ("30.7 Customers"). 17 C.F.R. § 30.7. Additionally, the Debtor's futures customers included customers with delivery accounts, i.e., accounts denominated as such at the Debtor and through which deliveries of physical commodities occur under expiring futures contracts ("Delivery Customers," and together with 4d Customers and 30.7 Customers, the "Futures Customers").

12. The Court approved the Trustee's recognition of separate account classes of 4d Customers, 30.7 Customers and Delivery Customers pursuant to the *Order Approving Recognition of Futures, Foreign Futures and Delivery Account Classes of Customers* entered on March 20, 2013 [Dkt. 598].

2. *Forex and Metals Businesses*

13. In connection with its FCM registration, the Debtor also carried foreign exchange

¹ Since the commencement of the Case, many 4d Customers have assigned their claims to third parties. For the purposes of this motion, all holders of claims under Section 4d of the Commodity Exchange Act are referred to as 4d Customers.

(i.e., forex) trading accounts for customers, who were principally “retail” in nature (“Forex Customers”), through which such customers traded various types of forex contracts directly with the Debtor as their counterparty.²

14. The Debtor also had precious metals business lines with two sets of customers thereunder (together, “Metals Customers”). First, the Debtor entered into over-the-counter (“OTC”) precious metals derivatives contracts with certain Metals Customers through which such customers traded “rolling spot” contracts on various precious metals directly with the Debtor as their counterparty.³ Second, certain Metals Customers of the Debtor held physical precious metals in their accounts, along with cash balances for the acquisition of physical precious metals.

C. Overview of Subchapter IV of the Bankruptcy Code and the Part 190 Rules

15. Section 766(h) of the Bankruptcy Code provides that the trustee in a commodity broker liquidation proceeding “shall distribute *customer property* ratably to *customers* on the basis and to the extent of such customers’ allowed *net equity claims*, and in priority to all other claims” except for certain administrative expenses. 11 U.S.C. § 766(h) (emphasis added). Pursuant to the Commodity Exchange Act, Congress authorized the CFTC to enact regulations to implement commodity broker liquidations under subchapter IV of chapter 7. 7 U.S.C. § 24. The CFTC enacted those regulations in 17 C.F.R. §§ 190.01 *et seq.* (“Part 190 Rules”).

16. The Part 190 Rules, among other things, (a) further define what constitutes “customer property,” (17 C.F.R. § 190.08); (b) establish a system of account classes for *pro rata* distributions of said customer property (17 C.F.R. §§ 190.01(a), 190.05(a)(2)); and (c) provide a

² Additional detail on the Debtor’s forex business was set forth in the *Trustee’s Motion to Approve Procedures for Fixing Pricing and Claim Amounts in Connection with the Termination and Liquidation of Foreign Exchange Customer Agreements*, filed on July 27, 2012 [Dkt. 49].

³ Additional detail on the Debtor’s OTC metals business was set forth in the *Trustee’s Motion to Approve Procedures for Fixing Pricing and Claim Amounts in Connection with the Termination and Liquidation of Precious Metals Derivatives Customer Agreements*, filed on August 3, 2012 [Dkt. 66].

formula for calculating the “net equity” of a customer’s claim (17 C.F.R. § 190.07).

17. The distribution scheme under Subchapter IV of the Bankruptcy Code requires an understanding of several key terms defined under in the Bankruptcy Code and the Part 190 Rules. First, § 761(9)(A) of the Bankruptcy Code generally defines a “customer” of an FCM as an entity that holds a claim against the FCM on account of or arising out of a “commodity contract.”⁴ 11 U.S.C. § 761(9)(A); *see also* 17 C.F.R. § 190.01(k) (adopting § 761(9) as the “customer” definition under the Part 190 Rules). A “commodity contract” with respect to an FCM is defined as a “contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade.” 11 U.S.C. § 761(4)(A); *see also* 17 C.F.R. § 190.01(h) (adopting § 761(4) as the “commodity contract” definition under the Part 190 Rules).

18. Importantly, the Futures Customers all hold claims against the Debtor on account of “commodity contracts” and, therefore, are “customers” under § 761(9) of the Bankruptcy Code and the Part 190 Rules. The Forex Customers and Metals Customers, however, do not hold claims against the Debtor on account of “commodity contracts” and therefore, are not “customers” within the meaning of § 761(9) of the Bankruptcy Code and the Part 190 Rules. *See Secure Leverage Grp., Inc. v. Bodenstein (In re Peregrine Fin. Grp., Inc.)*, 558 B.R. 226, 243 (N.D. Ill. 2016), *aff’d sub nom.* 866 F.3d 775 (7th Cir. 2017), *as amended* (Aug. 8, 2017).

⁴ The complete definition of “customer” in § 761(9)(A) of the Bankruptcy Code is as follows:

- (i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such futures commission merchant’s business as a futures commission merchant from or for a commodity contract account of such entity; or
- (ii) entity that holds a claim against such futures commission merchant arising out of—
 - (I) the making, liquidation, or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;
 - (II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or
 - (III) the making or taking of delivery on such a commodity contract. . . .

19. Second, § 761(10) of the Bankruptcy Code defines “customer property” as follows:

Cash, a security, or other property, or proceeds of such cash, security, or property, received, acquired, or held by or for the account of the debtor, from or for the account of a customer -

11 U.S.C. § 761(10); *accord* 17 C.F.R. § 190.08(a)(1)(i)(A); *Peregrine*, 866 F.3d at 776 (“customer property” includes “funds received in connection with a commodity contract”).

20. Third, “net equity” is defined by the Bankruptcy Code, in relevant part, as:

- (A) the balance remaining in such customer's accounts immediately after--
 - (i) all commodity contracts of such customer have been transferred, liquidated, or become identified for delivery; and
 - (ii) all obligations of such customer in such capacity to the debtor have been offset[.]

11 U.S.C. § 761(17). When calculating the claim of a FCM’s customer, the Bankruptcy Code requires that the allowed claim be the final position and ending balance after liquidation. 11 U.S.C. § 766(h)(A).

21. Accordingly, “customers” of an FCM liquidating under subchapter IV of the Bankruptcy Code share *pro rata* in the applicable pool of customer property held by the failed FCM to the extent of such customers allowed net equity claim. 11 U.S.C. § 766(h).

THE CLAIMS RECONCILIATION PROCESS

22. To date, approximately 14,180 proofs of claim have been filed in the Case asserting over \$738 million claims against the Estate. Rust-Omni, the notice and claims agent (“Claims Agent”) appointed by the Court, maintains the official claims register.

A. The Claims Bar Dates Established by the Court

23. By order dated September 26, 2012 (“First Bar Date Order”), this Court fixed November 16, 2012, as the last day to file a proof of claim in the Case (“Original Bar Date”) for all the Debtor’s customers and creditors and January 11, 2013 (“Governmental Bar Date”) as the

last day to file a proof of claim in the Case for all governmental units.

24. In accordance with the First Bar Date Order, notice of the Original Bar Date and the Governmental Bar Date and customer and general creditor claim forms were served on all known claimants [Dkt. 234]. By order dated November 14, 2012, this Court extended the Original Bar Date to December 14, 2012 [Dkt. 281].

25. By order dated January 23, 2013, the Court established March 15, 2013 (“Affected Creditor Bar Date”), as the last date for claimants who were first identified on the Debtor’s Amendment to Schedule F filed on January 18, 2013 to timely file proofs of claim [Dkt. 371]. On or about January 25, 2013, the Trustee served notice of the Affected Bar Date to all known claimholders [Dkt. 401].

B. Remaining Claims Asserted Against the Estate

26. There are a variety of types and priorities of claims asserted against the Estate in the Case including (a) Administrative Claims, (b) Futures Customer claims, (c) priority claims, and (d) general unsecured pre-petition claims. The following identifies the nature and extent of the remaining unpaid claims asserted against the Debtor and the Estate:

1. *Administrative Claims*

27. Administrative claims (“Administrative Claims”) include “the actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1)(A). Section 503 identifies various types of Administrative Claims, the most common of which include expenses incurred post-petition to operate, preserve or maintain the business or assets of the debtor or the case, including wage claims and the costs of goods and services (“Operational Costs”). 11 U.S.C. § 503(b)(1)(A)(i). In addition, the claims of professionals employed pursuant to § 327 of the Bankruptcy Code for compensation and reimbursement of expenses rendered after the Petition Date and awarded by a bankruptcy court under § 330 of the Bankruptcy Code (“Professional

Fees”) constitute Administrative Claims. 11 U.S.C. § 503(b)(2).

28. The Operational Costs incurred in the Case have largely been paid in the ordinary course of the Trustee’s liquidation efforts or pursuant to Court order. The Trustee has incurred and paid approximately \$5.8 million in Operational Costs, which generally consists of payroll, rent, utilities, storage and bank fees. The Trustee has also paid approximately \$22.9 million in Trustee compensation and Professional Fees allowed to nine (9) firms that provided professional services for the benefit of the Estate. The Trustee has held back the amount of \$150,000 owed to six (6) professional firms pending the filing and approval of fee applications.⁵ The Trustee estimates that Professional Fees needed to bring the Case to its ultimate conclusion will be approximately \$3.0 million (including additional Trustee’s compensation to be paid under §§ 330 and 326 of the Bankruptcy Code). The Trustee estimates that unpaid Administrative Claims will total \$3,150,000.

2. *Futures Customer Claims*

29. As discussed above, the Trustee is obligated to distribute customer property ratably to Futures Customers “on the basis and to the extent of such customers’ allowed net equity claims, and in priority to all other claims” except for certain administrative expenses. 11 U.S.C. § 766(h). In order to comply with his obligations, the Trustee and his professionals have reconciled all claims filed by Futures Customers with the Debtor’s books and records on both a customer-by-customer basis and an account-by-account basis.

30. As of the filing of this motion, (a) approximately 7420 4d Customer claims have been allowed totaling approximately \$367 million (“Allowed 4d Claims”) and (b) approximately

⁵ Pursuant to the Fee Procedures Order [Dkt. 85] entered by the Court on August 9, 2012, professionals submit monthly invoices to the applicable service list, and in the absence of an objection, the Trustee pays 80% of the requested fees and 100% of the requested expenses. The remaining 20% of fees is referred to as the “Holdback Amount.” Thereafter, the professionals file interim fee applications seeking allowance of all of the requested fees and expenses and payment of the Holdback Amount.

600 30.7 Customer claims have been allowed totaling approximately \$28 million (“Allowed 30.7 Claims,” and together with the Allowed 4d Claims, the “Allowed Futures Claims”).⁶ All Allowed Futures Claims are identified on the Trustee’s website at www.pfgchapter7.com.

31. Pursuant to a series of orders entered by this Court, the Trustee has distributed approximately \$28 million to 30.7 Customers and Delivery Customers and distributed approximately \$229 million to 4d Customers (“Prior Distributions”). To date, 4d Customers have received a 63% distribution entirely from customer property. 4d Customers currently have remaining net equity claims in an aggregate unpaid amount of approximately \$138 million.

3. *Priority Claims*

32. Section 507(a) of the Bankruptcy Code provides that certain claims are entitled to a statutory priority in payment (“Priority Claims”). 11 U.S.C. § 507(a). In the Case, creditors have asserted significant priority claims under §§ 507(a)(4),(5) and (8) of the Bankruptcy Code.

1. Employee Priority Claims

33. Employee Priority Claims under §§ 507(a)(4) and (5) of the Bankruptcy Code provide that certain claims for prepetition wages, salaries, commissions, vacation, sick leave, and employee benefit related contributions be accorded priority in payment in an amount not to exceed \$11,750 for each individual employee to the extent such amounts accrued within 180 days of the petition date. 11 U.S.C. §§ 507(a)(4),(5).

34. Pursuant to the *Final Order (A) Approving The Settlement Under Fed. Bankr. R. 7023 And Fed. Bankr. R. 9019; And (B) Approving Class Counsel’s Fees And Expenses* [Dkt. 5506] (“Settlement Order”), the Court allowed the class claim filed by Ronald Kotulak, as class

⁶ The Allowed Futures Claims include proofs of claim filed by Futures Customers that have discrepancies with the Debtor’s books and records of less than \$1,000. The Trustee has determined, in his business judgment, that those proofs of claim should be allowed as filed after taking into account the fees and expenses that would be incurred if the Trustee were to object to those proofs of claim.

representative of the certified class (“Allowed Class Claim”) of former employees of the Debtor and its affiliates (“Class Members”) in the amount of \$1,850,000.

35. The Court allowed the Allowed Class Claim as an unsecured priority claim, pursuant to §§ 507(a)(4) and (5) of the Bankruptcy Code, in full and total satisfaction of all claims of the Class Members related to the allegations asserted therein and the termination of the Class Members’ employment with the Debtor and its affiliates. The Trustee has already commenced distributions to the Class Members pursuant to the terms of the Settlement Order. Accordingly, all allowed Priority Claims under §§ 507(a)(4) and (5) of the Bankruptcy Code will be paid in full.

2. Priority Tax Claims

36. Section 507(a)(8) of the Bankruptcy Code provides a lower priority for allowed unsecured claims of governmental taxing authorities for certain specified prepetition tax obligations of the Debtor (“Priority Tax Claims”). Governmental taxing authorities have asserted approximately \$15.8 million in non-duplicative Priority Tax Claims against the Estate, of which approximately \$15 million is attributable to the IRS (“IRS Priority Claim”) and \$0.8 million is attributable to other taxing authorities. The majority of the IRS Priority Claim is based on alleged unpaid income tax attributable to “phantom” income generated by the Debtor on account of the funds Wasendorf stole from the Customer Seg Account between 2009 and 2012.

4. General Unsecured Claims

37. The remaining timely filed claims against the Estate, including the claims of Forex Customers and Metals Customers, are pre-petition general unsecured claims (collectively, “General Unsecured Claims”). Although the General Unsecured Claims have not been reconciled, it appears that approximately 2,939 proofs of claims are asserting non-duplicate, timely filed General Unsecured Claims in the approximate amount of \$94.2 million. This figure also includes \$9.4 million general unsecured claim for penalties attributable to the IRS Priority Claim.

THE ASSETS OF THE ESTATE

38. The Estate currently has approximately \$39.7 million on hand, of which \$8.8 million is customer property and the balance is non-customer property. The customer property is comprised of (i) \$7.2 million held in the Customer Seg Account (“4d Seg Funds”) and (ii) \$1.6 million held in another segregated account holding the funds of 30.7 Customers (“30.7 Seg Funds”).

39. After accounting for the remaining customer property held by the Estate, the 4d Customers will have remaining net equity claims in an aggregate amount of approximately \$129 million that cannot be paid from customer property (“4d Deficiency Claims”). Accordingly, the 4d Deficiency Claims in the Case will be substantial.

40. Non-customer property (“Non-Seg Funds”) in the total amount of \$30.9 million is comprised of approximately (i) \$2.6 million held in the Debtor’s “House Account,” which was originally funded with assets transferred from the Debtor’s operating non-customer funds accounts and certain additional funds held in other non-customer accounts, (ii) \$0.5 million is held in accounts containing remaining the liquidation proceeds of precious metals accounts and uncashed funds from the previously approved Physical Precious Metals, GSAP Precious Metals and Forex settlements, and (iii) \$27.8 million is held in an account containing the liquidation proceeds of Forex accounts.

RELIEF REQUESTED

41. By this motion, Trustee seeks authority to make a final cash distribution in an aggregate amount up to a 72.16% of all Allowed 4d Claims (“Proposed Distribution(s)”). With respect to holders of Allowed 4d Claims that received all Prior Distributions, the proposed incremental distributions will 9.16%. Holders of Allowed 4d Claims that did not receive the full

amount of their Prior Distributions will receive their pro rata share of the undistributed portion of all Prior Distributions. The Trustee also will continue to make 100% distributions to holders of Allowed 30.7 Claims that did not previously receive their distributions.

42. The Proposed Distributions to 4d Customers will require approximately \$36 million. In order to make the Proposed Distribution, the Trustee requests authority to use \$7.2 million of 4d Seg Funds, \$1.6 million of 30.7 Seg Funds and \$27.2 million of Non-Seg Funds. Of the foregoing funds, the Trustee estimates that approximately \$3.1 million in 4d Seg Funds, \$0.2 million in 30.7 Seg Funds, and \$3.7 million Non-Seg Funds will remain in the Estate as a reserve (“Reserved Funds”) for (i) undeliverable distributions for Allowed Futures Claims (“Undeliverable Futures Distributions”), (ii) undeliverable proceeds from Court approved settlements with certain Forex Customers and Metals Customers (“Undeliverable Settlement Distributions,” and together with the Undeliverable Futures Distributions, the “Undeliverable Distributions”), and (iii) estimated Administrative Claims. The Reserved Funds will be sufficient to satisfy the Undeliverable Distributions and estimated Administrative Claims.

A. The Proposed Distributions to Allowed 4d Claims

43. The Trustee has determined that the Proposed Distributions sought herein are prudent, consistent with the Bankruptcy Code and the Part 190 Rules and provides prompt and fair treatment to as many Futures Customers as possible.

44. As explained above, “customers” of an FCM liquidating under subchapter IV of the Bankruptcy Code share *pro rata* in the applicable pool of “customer property” held by the failed FCM. 11 U.S.C. § 766(h). Pursuant to the Part 190 Rules, a trustee liquidating a commodity broker, such as the Debtor, has a duty to use best efforts to effect the transfer of open customer contracts and equity. *See* 17 C.F.R. § 190.02(e)(1), referencing 17 C.F.R. § 190.06(e) and (f). The Trustee

also has a duty to allocate and distribute customer property ratably to Futures Customers on the basis of their net equity claims. 17 C.F.R. § 190.08; 11 U.S.C. § 766(h).

45. With respect to the Allowed 4d Claims, the Proposed Distributions may also be approved as “partial distribution(s)” made “pursuant to a preliminary plan of distribution approved by the court” under § 190.08(d)(5) of the Part 190 Rules. 17 C.F.R. § 190.08(d)(5). Moreover, the Part 190 Rules permit the CFTC, in appropriate cases and to protect the public interest, to authorize such transfers as it has here. 17 C.F.R. § 190.06(h) (“Notwithstanding any other provision of this section, in appropriate cases and to protect the public interest, the Commission may: (1) [p]rohibit the transfer of customer accounts; or (2) [p]ermit transfers of accounts which do not comply with the requirements of this section.”). The Bankruptcy Code and the Part 190 Rules therefore recognize that the Trustee may make a partial distribution to the Futures Customers in order to effectuate the prompt transfer of customer funds in furtherance of the goal of an expeditious and fair liquidation of customer property for the benefit of Futures Customers.

46. In addition, § 105(a) of the Bankruptcy Code authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

B. Distribution of 30.7 Seg Funds to Satisfy Allowed 4d Claims

47. The Trustee also seeks authority to use a portion of the 30.7 Seg Funds to satisfy Allowed 4d Claims. As discussed above, § 766 of the Bankruptcy Code provides that the trustee in a commodity broker liquidation proceeding “shall distribute customer property ratably to customers on the basis and to the extent of such customers’ allowed net equity claims, and in priority to all other claims” except for certain administrative expenses. 11 U.S.C. § 766(h). As such, “customers” of an FCM liquidating under subchapter IV of the Bankruptcy Code share *pro*

rata in the applicable pool of “customer property” held by the failed FCM. 11 U.S.C. § 766(h).

48. Under the Part 190 Rules, the CFTC provided that the pools of “customer property” are separated by “account class” and shared only by customers falling within each particular account class. 17 C.F.R. § 190.08(c)(1).⁷ Each account class “will constitute a separate estate of the customer class and the account class to which it is allocated.” *Id.*; *see also* 17 C.F.R. § 190.07(c). In other words, distributions to Futures Customers are *pro rata* by account class rather than *pro rata* across all Futures Customers of the Debtor. 17 C.F.R. § 190.08(c)(1).

49. To the extent that customer property belonging to a particular account class cannot be allocated to that class, any remaining customer property must then be allocated to the estates of the remaining account classes of Futures Customers. 17 C.F.R. § 190.08(c)(2). In such a situation, the Part 190 Rules establish a comprehensive distribution scheme for allocating customer property from one account class to the separate estates of the other account classes “until the public customer claims of each account class are paid in full.” 17 C.F.R. § 190.08(c)(2)(iii).

50. Here, the only remaining class of Futures Customers that has not been “paid in full” is the class of 4d Customers. This Court previously approved the Trustee’s recognition of the separate account classes of 4d Customers, 30.7 Customers and Delivery Customers [Dkt. 598]. The Trustee satisfied the Delivery Customer account class in full in the early stages of the Case. All Allowed 30.7 Claims have either been paid in full or sufficient funds have been reserved to satisfy any unpaid Allowed 30.7 Claims. 4d Customers, however, have only received 63% of their Allowed 4d Claims. Accordingly, the only remaining account class that has not been paid in full is that of 4d Customers.

⁷ 17 C.F.R. § 190.08(c)(1) provides in relevant part that, subject to certain limitations for non-public customer accounts, “property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, must be allocated to the customer estate of the account class for which it is segregated or to which it is readily traceable.”

51. Pursuant to 17 C.F.R. § 190.08(c), all remaining 30.7 Seg Funds remaining after satisfaction of all Allowed 30.7 Claims must be distributed to 4d Customers until all Allowed 4d Claims are paid in full. 17 C.F.R. § 190.08(c)(2). The Trustee's Proposed Distribution is consistent with 17 C.F.R. § 190.08(c)(2) since all excess 30.7 Seg Funds (after satisfaction of all Allowed 30.7 Claims) will distributed to holders of Allowed 4d Claims prior to payment of all other claims except administrative expenses. 11 U.S.C. § 766(h).

C. Distribution of Non-Seg Funds to Satisfy Allowed 4d Claims

52. The Trustee also seeks authority to use a portion of the Non-Seg Funds to satisfy Allowed 4d Claims. In the Case, the Deficiency Claim of the 4d Customers will exceed the sum of all amounts held in the Customer Seg Account and the 30.7 Seg Account by approximately \$129 million.

53. Since there is a shortfall of customer property to pay all Allowed 4d Claims, the Part 190 Rules require all other Estate assets are to be treated as customer property and must be paid to 4d Customers. 7 C.F.R. § 190.08(a)(1)(ii)(J) (hereinafter, "Rule 190.08"). Rule 190.08 provides that where there is a shortfall in customer property, all other estate property is to be treated as customer property and paid to customers until customers' aggregate net equity claims are paid in full. This rule requires that customers receive a first priority position in all estate property, other than with respect to certain Administrative Claims under § 766 of the Bankruptcy Code, until all customer claims have been paid in full. Accordingly, the CFTC asserts under the Part 190 Rules no claims, other than administrative claims, may be paid by the Estate because the allowed 4d Customer claims will not be paid in full.

54. A contrary approach with respect to the 4d Deficiency Claims is informed by § 766(j)(2) of the Bankruptcy Code. Section 766(j)(2) of the Bankruptcy Code, which governs the

treatment of customer property, provides that “if a customer is not paid the full amount of such customer’s allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726.” 11 U.S.C. § 726(j)(2); *see also In re Griffin Trading Co.*, 245 B.R. 291 (Bankr. N.D. Ill. 2000) vacated 270 B.R. 882 (N.D. Ill. 2001). The *Griffin* analysis requires that 4d Deficiency Claims be treated as general unsecured claims, and must be paid *pari pasu* with all other general unsecured claims. The Trustee is unaware of any other decisions that addresses 4d Deficiency Claims. Accordingly, the appropriate treatment of 4d Deficiency Claims remains an unresolved legal issue.

55. The relief requested by the Trustee in this motion complies with Rule 190.08. The Trustee’s proposed distribution avoids the risks, delays and expense of litigation with the CFTC over the 4d Deficiency Claims. The resolution of such litigation (after years of appeals) will likely result in either: (a) the 4d Customers and holders of Administrative Claims receiving all of the Estate’s remaining assets and Priority Claims and general unsecured creditors receiving nothing or (b) all Administrative Claims and Priority Claims receiving payment in full and all 4d Deficiency Claims and all other general unsecured claims receiving an estimated distribution of \$11.9 million.⁸

56. The relief sought in this motion presents a less expensive and an more expedient way to resolve any disputes respecting the 4d Deficiency Claims. There are roughly \$129 million of 4d Deficiency Claims. Under Rule 190.08, there will be no funds available to pay any class of creditors other than 4d Customers. Under *Griffin*, the 4d Deficiency Claims and the other General

⁸ This amount is calculated as follows: Remaining Non-Seg Funds (\$30.9 million) less Administrative Claims (\$3.2 million) less priority claims (\$15.8 million) equals \$11.9 million. The IRS Priority Claim, as well as any and all other Priority Claims, if allowed or allowable, must be paid in full before any funds would be available to pay general unsecured creditors. In this scenario, the IRS and other taxing authorities will be largest beneficiary with a distribution in excess of \$15.8 million at the expense of all 4d Customers. While the IRS may voluntarily subordinate its Priority Tax Claims for the claims of other equal priority taxing authorities, junior priority claims or general unsecured claims.

Unsecured Claims would potentially receive an estimated 5.3% distribution (\$11.9 million divided *pari passu* with \$223.2 million in total general unsecured claims) after all likely appeals with the CFTC are resolved.

D. Related Relief In Connection with The Distributions

57. As authorized under prior distribution orders, the Trustee again seeks approval to use a deposit account at Union Bank for the purpose of making the Proposed Distributions (“Union Bank Account”). The Trustee intends to transfer 4d Seg Funds, 30.7 Seg Funds and Non-Seg Funds in an amount sufficient to fund the Proposed Distributions from the Trustee’s accounts into a Union Bank Account to fund the Proposed Distributions. The Trustee estimates that the Proposed Distributions will require approximately \$36 million to be transferred to the Union Bank Account.

58. The Trustee proposes to make the Proposed Distributions directly to the holders by check utilizing the services of the Claims Agent. Importantly, Union Bank and the Claims Agent identified a number of attempts to negotiate counterfeit checks that were presented for payment at Union Bank in connection with the Prior Distributions. In response, Trustee intends to make a number of precautions to prevent fraudulent activity.

59. First, the Trustee requests authority to implement a “positive pay” payment system for the Proposed Distributions which will allow the Claims Agent to authorize the payment of each check upon presentment to Union Bank. Second, the check stock and the Trustee’s facsimile signature will be provided to the Claims Agent. The Trustee will review the check run against the distribution spreadsheet and authorize the Claims Agent to issue the distribution checks. Once issued, the Claims Agent will destroy the facsimile signature, return any unused check stock to the Trustee and provide the Trustee with a declaration verifying the foregoing.

60. In the event that a holder is unable to negotiate the check received from Claims

Agent, the Trustee requests authority to wire transfer the funds to the holder's bank account. All costs and expenses incurred by the Estate related to cancelling a check and either (i) initiating a wire transfer or (ii) reissuing a check will be paid for by the applicable claimant and deducted from the Proposed Distribution. In order to reduce administrative expenses, the Trustee requests authority to withhold, in his sole discretion, any Proposed Distribution if (x) the amount to be distributed on account of an Allowed 4d Claim is less than \$100 or (y) the Prior Distributions were either returned to the Claims Agent as undeliverable or have not been negotiated by the holder of such Allowed 4d Claim.

61. With respect to a Proposed Distribution to any holder that is either (i) not negotiated by the holder within ninety (90) days of the date of the check or (ii) undeliverable by virtue of a bad address, bad transfer instructions or any other reason that prevents the Trustee from properly transferring the Proposed Distribution to the holder, the Trustee, in his sole discretion, may either (i) resend the Proposed Distribution, less any applicable stop payment fees, to the holder once an updated address or transfer instructions are provided or (ii) withhold such Proposed Distribution until the Court authorizes a subsequent distribution to such holder. If a dispute arises as to the identity of a holder who is to receive a Proposed Distribution, the Trustee may, in his sole discretion, withhold the Proposed Distribution until the disposition thereof can be determined by the Bankruptcy Court or by written agreement among the interested parties to such dispute.

62. In addition, the Trustee requests that the Court establish 11:59 p.m. (CST) on February 20, 2020, as the record date for the Proposed Distributions ("Record Date"). The Trustee requests that he have no obligation to recognize transfers of any claims occurring after the Record Date for the Proposed Distribution. The Proposed Distribution checks will be mailed to the holder at the address contained in the Proof of Claim as of the Record Date.

63. The Trustee submits that the Proposed Distributions are fair and reasonable, consistent with the Bankruptcy Code and the Part 190 Rules, and will mitigate the harm suffered by the Futures Customers by providing them with access to some or all of their assets during the claims administration process. Accordingly, it is reasonable and appropriate to authorize the Trustee to make the Proposed Distributions as requested herein.

NOTICE

64. Notice of this Motion has been given to: (a) the Office of the United States Trustee; (b) the CFTC; (c) all persons of entities that timely filed Priority Claims and General Unsecured Claims against the Estate; and (d) all parties who have filed a request for service of notices in this Case. The Trustee has also posted a notice of the Motion on the Trustee's website (www.pfgchapter7.com).

WHEREFORE, the Trustee respectfully requests that this Court enter an order, substantially in the form attached hereto: (a) authorizing the Trustee to distribute the Estate's remaining funds to the 4d Customers except for the Reserved Funds; and (b) granting such other and further relief as is just and proper.

Respectfully submitted,

Ira Bodenstein, not personally, but as chapter 7 trustee for the estate of Peregrine Financial Group, Inc.

Dated: February 21, 2020

By: /s/ Allen J. Guon
One of his attorneys

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

In Re:) BK No.: 12-27488
PEREGRINE FINANCIAL GROUP, INC.,)
)
) Chapter: 7
) Honorable Carol A. Doyle
)
)
Debtor(s))

**ORDER AUTHORIZING ADDITIONAL INTERIM DISTRIBUTIONS ON ALLOWED 4D
CUSTOMER CLAIMS AND GRANTING RELATED RELIEF**

Upon consideration of the motion (“Motion”) of Ira Bodenstein, not personally, but as chapter 7 trustee (“Trustee”) for the estate of Peregrine Financial Group, Inc. d/b/a PFG Best (“Debtor”), pursuant to 11 U.S.C. §§ 105(a) and 766 and 17 C.F.R. §§ 190.01 et seq., seeking the entry of an order authorizing and approving up to a 72.16% interim distribution to holders of Allowed 4d Claims (all capitalized terms not defined herein shall have the meanings ascribed thereto in the Motion); the Court having core jurisdiction to hear and determine the Motion; the Court having held a hearing on this matter on March 18, 2020 (“Hearing”); no party having filed an objection to the relief sought in the Motion or objected to such relief at the Hearing; appearing that there is good cause to grant the relief requested based on the legal and factual bases set forth in the Motion and by counsel at the Hearing; it is ORDERED:

1. The Motion is granted. The Trustee is authorized to make cash distributions in an amount up to a 72.16% distribution to the holders of Allowed 4d Claims (“Distribution(s)”). With respect to holders of Allowed 4d Claims that received all Prior Distributions, the incremental distributions will be 9.16%. For the purposes of this Order, Allowed 4d Claims shall include only those proofs of claim filed by 4d Customers that have been reconciled and deemed allowed by the Trustee; it being understood that Allowed 4d Claims shall not include proprietary accounts, as defined in the CFTC Regulation 1.3(y), pursuant to the Debtor’s books and records.

2. Pursuant to Rule 190.08, the Trustee is authorized to use up to \$7.2 million of 4d Seg Funds, \$1.6 million of 30.7 Seg Funds and \$27.2 million of Non-Seg Funds from the account containing the liquidation proceeds of Forex accounts (collectively, the “Distributable Funds”) to make the Distributions to holders of Allowed 4d Claims (“Holder(s)”). The Trustee is authorized to use a deposit account at Union Bank for the purpose of making the Distributions (“Union Bank Distribution Account”). The Trustee is further authorized to transfer the Distributable Funds into the Union Bank Distribution Account to make the Distributions. The Trustee is authorized pay all costs and expenses incurred in connection with the implementation of a “positive pay” payment system for the Distributions.

3. The Trustee is authorized to make the Distributions directly to the Holders by check utilizing the services of the Claims Agent. Alternatively, in the event that a Holder is unable to negotiate the check received from Claims Agent, the Trustee is authorized to wire transfer the funds to the applicable Holder’s bank account. All costs and expenses incurred by the Estate in connection with the cancellation of a check and either (i) initiating a wire transfer or (ii) reissuing a check (collectively, the “Bank Fees”) shall be paid for by the applicable Holder and the Trustee is authorized to deduct the

Bank Fees from the Distribution. The Trustee may, in his sole discretion, withhold any Distribution if (x) the total amount to be distributed on account of an Allowed 4d Claim is less than \$100 or (y) a Prior Distribution was either returned to the Claims Agent as undeliverable or was not negotiated by the Holder.

4. With respect to a Distribution to any Holder that is either (i) not negotiated by the Holder within ninety (90) days of the date of the check or (ii) undeliverable by virtue of a bad address, bad transfer instructions or any other reason that prevents the Trustee from properly transferring the Distribution to the Holder, the Trustee, in his sole discretion, may either (a) resend such Distribution, less any applicable stop payment fees, to the Holder once an updated address or transfer instructions are provided or (b) withhold such Distribution until the Court authorizes a subsequent distribution to such Holder. If any dispute arises as to the identity of a Holder who is to receive a Distribution, the Trustee may, in his sole discretion, withhold the Distribution until the disposition thereof can be determined by this Court or by written agreement among the interested parties to such dispute.

5. The record date for the Distributions shall be 11:59 p.m. (CST) on February 20, 2020 ("Record Date"). As of the Record Date, the claims register is closed and the Trustee shall have no obligation to recognize transfers of any claims occurring after the Record Date for the purposes of the Distributions. The Trustee is authorized to mail Distribution checks to each Holder at the address contained in the proof of claim as of the Record Date.

6. Nothing in this Order shall modify the Trustee's authority to make distributions to holders of Allowed 30.7 Claims pursuant to the Order Granting Trustee's Motion for An Order (1) Authorizing up to 100% Distribution on Allowed 30.7 Customer Claims and an Interim Distribution on Allowed 4d Customer Claims and (2) Authorizing the Allocation of Certain Settlement Proceeds to the 4d Customer Estate [Dkt. No. 3256].

7. The Trustee is authorized to retain the Reserved Funds for the purpose of satisfying the Undeliverable Distributions and estimated Administrative Claims. In making the Distributions authorized under this Order, the Trustee is not be required to establish a reserve for (i) any Futures Customers that did not timely file a proof of claim as required by any applicable bar date order entered in this case, (ii) any Priority Claims, or (iii) any General Unsecured Claims.

8. As evidenced by the certificates of service filed with the Court, (i) proper, timely, adequate and sufficient notice of the Motion has been provided, (ii) such notice was reasonable, sufficient and appropriate under the circumstances of the case and reasonably calculated to reach and apprise all holders of claims affected by the relief requested in this Order; and (iii) no other or further notice of the Motion is required.

Enter:

Dated:

United States Bankruptcy Judge

Prepared by:

Allen J. Guon (#6244526)
Fox Rothschild LLP
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Chicago, IL 60654