

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2011

5 (Argued: May 16, 2012

Decided: April 3, 2013)

6 Docket Nos. 11-1516-cv(L), 11-1517-cv, 11-1738-cv,
7 11-1741-cv, 11-1859-cv, 11-1879-cv

8 _____
9 COMMODITY FUTURES TRADING COMMISSION,

10 Plaintiff-Appellee-Cross-Appellee,

11 SECURITIES AND EXCHANGE COMMISSION,

12 Plaintiff-Appellee,

13 ROBB EVANS & ASSOCIATES LLC,

14 Receiver-Appellee-Cross-Appellee,

15 - v. -

16 STEPHEN WALSH, PAUL GREENWOOD, WESTRIDGE CAPITAL
17 MANAGEMENT, INC., WG TRADING INVESTORS, LP, WGIA, LLC, WG
18 TRADING COMPANY LP,

19 Defendants,

20 WESTRIDGE CAPITAL MANAGEMENT ENHANCEMENT FUNDS INC.,
21 WGI LLC, K&L INVESTMENTS, ROBIN GREENWOOD, JANET WALSH,

22 Relief Defendants.

1 3M EMPLOYEE WELFARE BENEFIT ASSOCIATION TRUST I,
2 3M EMPLOYEE WELFARE BENEFIT ASSOCIATION TRUST II,
3 3M EMPLOYEE WELFARE BENEFIT ASSOCIATION TRUST III,
4 MINNESOTA MINING AND MANUFACTURING EMPLOYEE
5 RETIREMENT INCOME PLAN TRUST, BLUE CROSS AND BLUE SHIELD
6 ASSOCIATION NATIONAL RETIREMENT TRUST, NORTH DAKOTA
7 STATE INVESTMENT BOARD, SACRAMENTO COUNTY EMPLOYEES'
8 RETIREMENT SYSTEM, SAN DIEGO COUNTY EMPLOYEES
9 RETIREMENT ASSOCIATION, KAISER ALUMINUM & CHEMICAL
10 CORPORATION ASBESTOS PERSONAL INJURY TRUST, ALEXANDER
11 DAWSON FOUNDATION, ALEXANDER DAWSON, INC.,

12 Interested Parties-Appellants-Cross-Appellees,

13 KERN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,

14 Interested Party-Appellee-Cross-Appellant,

15 ACUMENT GLOBAL TECHNOLOGIES, INC., WELLS FARGO & CO.
16 MASTER PENSION TRUST, CBS MASTER TRUST, CARNEGIE MELLON
17 UNIVERSITY, H-E-B BRAND SAVINGS & RETIREMENT PLAN TRUST,
18 HOUSTON MUNICIPAL EMPLOYEES PENSION SYSTEM, OHIO
19 NORTHERN UNIVERSITY, THE TIMKEN COMPANY COLLECTIVE
20 INVESTMENT TRUST FOR RETIREMENT TRUSTS, UNIVERSITY OF
21 PITTSBURGH - OF THE COMMONWEALTH SYSTEM OF HIGHER
22 EDUCATION, VULCAN MATERIALS COMPANY,

23 Interested Parties-Appellees-Cross-Appellees.*
24 _____

25 Before: KEARSE, POOLER, and LIVINGSTON, Circuit Judges.

26 Appeal and cross-appeal from an order of the United States District Court for the
27 Southern District of New York, George B. Daniels, Judge, approving court-appointed receiver's plan
28 for pro rata, net-investment-based distribution of funds recovered from securities-fraud perpetrators
29 and associated entities, and ordering distribution.

30 Affirmed.

* The Clerk of the Court is directed to further amend the official caption to conform with the above.

1 Dan M. Berkovitz, General Counsel, Jonathan L. Marcus,
2 Deputy General Counsel, Nancy R. Doyle, Assistant General
3 Counsel, Commodity Futures Trading Commission,
4 Washington, D.C., submitted briefs for Plaintiff-Appellee-
5 Cross-Appellee.

6 Mark D. Cahn, General Counsel, Michael A. Conley, Deputy
7 General Counsel, Jacob H. Stillman, Solicitor, John W. Avery,
8 Deputy Solicitor, David Lisitza, Senior Counsel, Securities and
9 Exchange Commission, Washington, D.C., submitted a brief
10 for Plaintiff-Appellee.

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16 on the brief), for Receiver-Appellee-Cross-Appellee.

17 RICHARD F. ZIEGLER, New York, New York (Elizabeth A.
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20 Trust I, 3M Employee Welfare Benefit Association Trust II,
21 3M Employee Welfare Benefit Association Trust III,
22 Minnesota Mining and Manufacturing Employee Retirement
23 Income Plan Trust, Blue Cross and Blue Shield Association
24 National Retirement Trust, Sacramento County Employees'
25 Retirement System, and San Diego County Employees
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28 Special Assistant Attorneys General for the State of North
29 Dakota, for North Dakota State Investment Board; Lawrence
30 Leo Ginsburg, Moses & Singer, New York, New York, for
31 Kaiser Aluminum & Chemical Corporation Asbestos Personal
32 Injury Trust; Steven F. Molo, MoloLamken, New York, New
33 York, for Alexander Dawson Foundation and Alexander
34 Dawson, Inc., on the brief), for Interested Parties-Appellants-
35 Cross-Appellees.

36 BENJAMIN G. SHATZ, Los Angeles, California (Manatt,
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41 York, for Acument Global Technologies, Inc., and Wells Fargo

1 & Co. Master Pension Trust; Scott Humphries, Gibbs & Bruns,
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3 Davidson, Buchanan Ingersoll & Rooney, New York, New
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5 Pittsburgh, Pennsylvania, for University of Pittsburgh - Of the
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7 Robson, Shawn Patrick Regan, Hunton & Williams, New York,
8 New York, for Vulcan Materials Company; Hamish P.M.
9 Hume, Boies, Schiller & Flexner, Washington, D.C., Rosanne
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11 CBS Master Trust; Robert A. Bell, Jr., Vorys, Sater, Seymour
12 & Pease, Columbus, Ohio, for Ohio Northern University;
13 Joseph N. Froehlich, Locke Lord, New York, New York, for
14 Houston Municipal Employees Pension System; Steven
15 Paradise, Vinson & Elkins, New York, New York, for H-E-B
16 Brand Savings & Retirement Plan Trust; Jeffrey David Zimon,
17 Benesch Friedlander Coplan & Aronoff, Cleveland, Ohio, for
18 The Timken Company Collective Investment Trust for
19 Retirement Trusts, on the brief), for Interested Parties-
20 Appellees-Cross-Appellees.

21 KEARSE, Circuit Judge:

22 In these two civil enforcement actions for securities fraud--brought, respectively, by
23 the Commodity Futures Trading Commission ("CFTC") and the Securities Exchange Commission
24 ("SEC") against defendants Stephen Walsh and Paul Greenwood, et al., and consolidated by this Court
25 for appeal--various entities that were defrauded by the defendants appeal from a March 21, 2011 order
26 ("Order") of the United States District Court for the Southern District of New York, George B.
27 Daniels, Judge, approving initial pro rata distributions on April 20, 2011, totaling \$815,000,000
28 recovered from defendants and associated entities by receiver Robb Evans & Associates LLC ("Robb
29 Evans" or the "Receiver"), in accordance with the plan proposed by the Receiver ("Plan" or
30 "Receiver's Proposed Initial Distribution Plan"). Interested-Parties-Appellants-Cross-Appellees 3M
31 Employee Welfare Benefit Association Trusts I, II, and III, et al. (collectively, the "3M Benefits
32 Group" or "3M Group"), contend principally that the district court should have rejected the proposed

pro rata distributions because under the Plan, fraud victims who chose allegedly safer investments fare no better than victims whose investments were riskier. Interested-Party-Appellee-Cross-Appellant Kern County Employees' Retirement Association ("KCERA") contends that the district court should have rejected the proposed Plan because it did not provide an adjustment for inflation to compensate longer-term investors. For the reasons that follow, we conclude that the district court did not abuse its discretion in approving the Receiver's Plan, and we therefore affirm the Order.

I. BACKGROUND

The factual background, for purposes of these appeals, is undisputed. For more than 13 years, beginning prior to 1996, defendants conducted their business--which offered various investment vehicles for pursuing an index arbitrage strategy--as a Ponzi scheme. Defendants issued fraudulent account statements to their investors, withdrew invested moneys in order to spend lavishly on themselves, and funded investor withdrawals with moneys received from other investors when there were no earnings. (See United States v. Greenwood, No. 09 Cr. 722 (S.D.N.Y., Transcript of Guilty Plea of Paul Greenwood, July 28, 2010 ("Greenwood Plea Allocution Tr."), at 23-27).) In pleading guilty to securities fraud, wire fraud, conspiracy to commit those offenses, commodities fraud, and money laundering (see *id.* at 5-9, 31), Greenwood admitted, *inter alia*, as follows:

Q. ... "[W]hat is it that you cheated the investors in? ... [W]hat is it that you didn't make return on?

A. On all the money that was lost in . . . investments that were made and didn't produce the returns that we expected them to produce and in money that we took out personally for basically our own use.

Q. That is, you treated these partnerships as your own personal bank account?

1 A. Correct.

2 Q. And you drew as you wished?

3 A. Correct.

4 Q. What is it that you reported to your investors?

5 A. Well, we treated the money that we took out as a loan so we would-

6 -

7 Q. On your own books, you mean?

8 A. On the books of--yes, yes. So we would report to the investors the

9 same rate of return that we earned on the . . . index arbitrage trading.

10 Q. And that was simply flatly untrue?

11 A. Correct.

12 Q. That is, you did not make that money that you reported to investors

13 that you made?

14 A. That's correct.

15 Q. And none of your investors asked for the money?

16 A. When they asked for the money we would give them money back

17 so in some sense--

18 Q. So this was a Ponzi scheme, as it is loosely called?

19 A. Well, sort of, because we actually had--

20 Q. You were using other monies to make up for what you couldn't

21 give?

22 A. That's correct.

23 Q. But, of course, you never could make it up entirely?

24 A. Well, initially we thought we could and as time went on the hole

25 got bigger and bigger and at a point we couldn't.

26 Q. Well, if you were taking money out for yourselves, you could never

27 make it up, right, unless you made huge profits?

1 A. That's correct.

2 Q. And you knew that from the beginning, . . . if you were taking it for
3 personal use?

4

5 A. Early on after the partnership was established and the investors had
6 given us the money, it became apparent we couldn't give back the money we
7 were taking out.

8 (Greenwood Plea Allocation Tr. 24-25.)

9 On February 25, 2009, the CFTC and the SEC commenced the present civil
10 enforcement actions against Greenwood, Walsh, and their related entities, alleging violations of
11 various federal securities laws, seeking disgorgement of the proceeds of the frauds and restitution for
12 the fraud victims, and obtaining a preliminary injunction enjoining any diversion of defendants' assets.
13 The court appointed Robb Evans as temporary receiver of the defendants' assets on that date and
14 continued its appointment as Receiver in an order entered in May 2009. The following descriptions
15 of the fraudulent scheme are taken largely from reports to the district court by Robb Evans in May
16 2009 ("2009 Report" or "Receiver's 2009 Report") and June 2010 ("2010 Report" or "Receiver's 2010
17 Report"), which the parties to these appeals have not disputed.

18 A. Details of the Fraud

19 Greenwood and Walsh created several entities to offer investment vehicles to the
20 pension funds or investment arms of governmental entities and other large institutions. The
21 Greenwood and Walsh entities included defendant Westridge Capital Management, Inc.
22 ("Westridge"), a Delaware corporation; defendant WG Trading Company LP ("WGTC"), a Delaware
23 limited partnership; and defendant WG Trading Investors, LP ("WGTI"), a Delaware limited

1 partnership that was itself a limited partner in WGTC. Greenwood and Walsh were the managing
2 general partners of WGTC and WGTI.

3 Greenwood and Walsh represented to potential investors that Westridge, a registered
4 investment adviser regulated by the SEC, provided various investment vehicles for pursuing an S&P
5 500 index arbitrage strategy that they called an "Enhanced Equity Index" program, and which they
6 described as having outperformed the S&P 500. (See Receiver's 2009 Report at 4-5.) Westridge was
7 to hold approximately 15% of each investor's cash investment in reserve "to support a leveraged
8 futures position" and the investor would direct the remaining 85% of its cash investment to another
9 affiliated entity, usually either WGTC or WGTI. (Id. at 5.) By choosing the former, the investor
10 would become a limited partner in WGTC, a broker/dealer that was subject to independent audits and
11 was regulated by, inter alia, the SEC, the Financial Industry Regulatory Authority ("FINRA"), and
12 the CFTC. (See id.) "WGTC was engaged primarily in computer-directed index arbitrage trading
13 strategies seeking profit opportunities by exploring relationships among stock index futures contracts,
14 stock market indexes upon which the futures contracts were based, the stocks included in the indexes,
15 and the cost (e.g. interest expense) and benefits (e.g. dividend income) of carrying the instruments."
16 (Id. at 7.)

17 Alternatively, the investor could direct the non-reserved 85% of its cash investment
18 to WGTI, a nonpublic entity that was not subject to either independent audits or government
19 regulation, and that issued senior promissory notes. (See 2009 Report at 5.) An investor could
20 become a WGTI noteholder either directly by purchasing those notes or indirectly by purchasing non-
21 voting shares in Westridge Capital Management Enhancement Funds, Inc., a British Virgin Islands
22 company that would purchase the WGTI promissory notes. (See id.) Prospective WGTI investors

1 were told that "the only business of WGTI is to invest in WGTC" (id. at 6), and that "the proceeds of
2 the senior promissory notes issued by WGTI would be sent to WGTC" (id.). Further, prospective
3 investors in WGTI were told that their returns would be indexed to the returns of the limited partners
4 of WGTC:

5 For purposes of determining the interest accruing and payable on the
6 promissory notes, the index was the performance of a hypothetical investment
7 equal in amounts to the principal of the promissory notes invested in the
8 limited partnership interest of WGTC.

9 (Id. at 11.) Thus, WGTI was to earn money when WGTC's trading strategies were successful, and
10 investors in WGTI were told they would profit as WGTC did. Consistent with these representations
11 as to the calculation of earnings, "the returns of investments in WGTI were computed exactly the
12 same as that in WGTC." (Id.)

13 Nonetheless, WGTI investors were also assured that, as senior promissory note holders,
14 their returns would not match those of the WGTC limited partners if WGTC's returns were negative.
15 The WGTI promissory notes, after describing the indexing process as indicated above,

16 provided that, notwithstanding the actual performance of an investment in a
17 limited partnership interest in the Partnership, the Index shall not be less than
18 zero.

19 (3M Benefits Group's objection to the Receiver's motion for approval of Receiver's Proposed Initial
20 Distribution Plan ("3M Objection to Receiver's Plan"), Exhibit B (emphasis ours).) "In other words,
21 the return [that was] promised to the WGTI Noteholders would reflect any positive returns generated
22 by WGTC, but would not reflect any negative returns" (3M Group brief on appeal at 11), i.e., the
23 WGTI noteholders would not lose their investments even if WGTC lost money.

24 Although WGTC and WGTI had been created "as two separate limited partnerships
25 and were presented to their investors as two stand-alone entities" (Receiver's 2010 Report at 1),

1 "WGTC and WGTI in reality were financially inseparable" (id.). The Receiver noted, inter alia, that

- 2 ■ WGTC received funds from WGTI's investors.
- 3 ■ WGTC made payments to or for WGTI's investors.
- 4 ■ WGTC's investors received funds from WGTI.
- 5 ■ WGTC's investors made payments to WGTI.

6 (Id. at 5.) Ironically, WGTC and WGTI "had to be operated as a single entity to support the myth that
7 they were stand-alone entities" (id. at 1), because from January 1, 1996, onward, "neither entity could
8 have survived without the financial support of investor funds raised by the other" (id. at 3; see, e.g.,
9 id. at 7 ("when WGTC was short of funds, WGTI advanced the funds to WGTC"); Receiver's 2009
10 Report at 16 ("WGTI paid \$200 million to a limited partner of WGTC on July 5, 2005, as the WGTC's
11 balance of funds available for immediate use at July 5, 2005 was only approximately \$127 million.")).

12 The Receiver reported that WGTC and WGTI had

13 a long history of . . . com[m]ingling funds, operating with utter disregard for
14 corporate governance, and employing fraudulent accounting practices in an
15 apparent attempt to conceal the true financial condition of the entities from
16 investors, potential investors and, in the case of WGTC, its regulators.

17 (2009 Report at 2; see also 2010 Report at 8 (charting hundreds of millions of dollars that investors
18 had directed to WGTC that were in fact received by WGTI and were only later sent on to WGTC, and
19 charting hundreds of millions of dollars that WGTI paid to WGTC investors, which WGTC did not
20 repay to WGTI for many weeks).)

21 While Greenwood and Walsh, over the life of the fraud, consistently reported to
22 investors that their investments had made gains, the investment entities did not have the earnings they
23 reported (see, e.g., Greenwood Plea Allocation Tr. 24) and were in fact undercapitalized as capital
24 accounts were debited for ordinary losses or expenses (see, e.g., 2009 Report at 8-10, 11-17). For

1 example, when WGTC lost approximately \$121 million from its investments in and financing of a
2 company called Signal Apparel Company (of which Greenwood and Walsh were the directors (see
3 id. at 19)), WGTC charged that loss against WGTI's capital account in WGTC (see 2010 Report at 2,
4 5). When WGTC made employee "advances" to or for Greenwood and Walsh (id.), WGTC also
5 charged those sums to WGTI's capital account, thereby reducing WGTI's investment in WGTC (see
6 id. at 5, 9).

7 Between January 1, 1996, and October 31, 2003, WGTC advances to Greenwood and
8 Walsh totaled approximately \$36 million. (See 2010 Report at 5.) In addition, WGTI, from
9 2002-2009, paid a company owned by Greenwood's wife an estimated \$22 million for the
10 maintenance of the company's 286.2-acre horse farm in Brewster, New York, and its 92 hunter ponies.
11 (See Exhibit Tab 11 to 2010 Report.) In addition, Greenwood and Walsh had a WGTC employee
12 transfer money--ultimately totaling hundreds of millions of dollars--directly from WGTI to the
13 personal bank accounts of Greenwood and Walsh and to third parties to cover their personal
14 expenditures. The personal expenses funded by these transfers included payments to Walsh's ex-wife
15 totaling nearly \$20 million (see 2009 Report at 36); more than \$10 million for Greenwood's wife's
16 hunter-pony farm (see Exhibit Tab 11 to 2010 Report); and Greenwood's purchase, for more than \$3
17 million, of a collection of 1,348 teddy bears (see 2009 Report at 26).

18 Greenwood and Walsh eventually signed promissory notes to reflect the moneys
19 transferred from WGTI to their personal bank accounts. (See 2009 Report at 14.) At the time of the
20 Receiver's first report to the district court, the "outstanding notes receivable due from Mr. Greenwood
21 and Mr. Walsh to WGTI totaled" more than a half billion dollars. (Id.)

1 Given the entities' investment losses and the diversion of investment funds to the
2 personal accounts of Greenwood and Walsh, defendants, in order to report to investors that there were
3 gains, used newly invested money to meet other investors' withdrawal requests. "For example,
4 between January 1, 1999 and February 25, 2009, WGTI had income of \$70.3 million but paid interest,
5 distributions, operating expenses, and other payments totaling to \$381.5 million during that same time
6 period. . . . [T]he cash shortfall during this period was financed by either WGTC's or WGTI's current
7 investors." (Receiver's 2009 Report at 2.) "The shortfall of net earnings allocations to [WGTC and
8 WGTI] investors" totaled "approximately \$651 million" as of 2008, and "could not have been paid
9 without raising additional capital from investors." (Receiver's 2010 Report at 19-20.)

10 When the fraudulent scheme unraveled, defrauded investors asserted claims totaling
11 some \$1.5 billion. (See 2009 Report at 2.) By the time of the proposed initial distribution, the claims
12 total--reflecting investors' investments minus their withdrawals--had been reduced to approximately
13 \$959 million.

14 B. The Receiver's Plan for Initial Distributions

15 The district court approved a claims administration procedure in which (a) investors
16 and other interested persons would be invited to submit to the court proposals for the distribution of
17 money collected by the Receiver from defendants and their associated entities; (b) the CFTC and the
18 SEC would then be allowed to express their views as to an appropriate distribution plan; and (c) the
19 Receiver would then submit its distribution plan. The Receiver gave investors and other interested
20 persons notice of this procedure. In October 2010, distribution proposals were received from
21 numerous defrauded investors; only two investor proposals are at issue on these appeals.

1 The 3M Benefits Group, comprising the limited partners in WGTC who were not
2 associated with Greenwood and Walsh, proposed that since the 3M Group members' capital accounts,
3 as shown in WGTC records when the Receiver was appointed, totaled some \$807 million, it would
4 be fair and reasonable for the Receiver to distribute that sum to the 3M Group (see 3M Group
5 Objection to Receiver's Plan at 23 (describing 3M Group's October 2010 proposal))--leaving only
6 some \$8 million for the WGTI investors. Alternatively, the 3M Group argued that the distributions
7 should not be pro rata and that larger shares should be distributed to the 3M Group than to investors
8 in the unregulated WGTI, in order to reward the 3M Group for its prudence in investing in a regulated
9 entity (referred to as the requested "prudence premium") and in order not to encourage those who
10 invested in unregulated entities by compensating them the same as investors who sought safer
11 investments (described as avoiding the "moral hazard" of causing persons who deliberately minimize
12 their risks to subsidize persons who deliberately take risks). (Id. at 23-25.)

13 KCERA proposed that the Receiver use a "constant dollar" approach, which would
14 distribute larger shares to earlier investors than to more recent investors in order to account for
15 inflation.

16 In December 2010, the CFTC and the SEC jointly submitted a recommendation to the
17 district court, urging it to adopt--at least for the initial distribution of \$815,000,000--"a net investment
18 pro rata distribution plan." (U.S. Commodity Futures Trading Commission's and U.S. Securities and
19 Exchange Commission's Joint Notice of Recommendation for a Distribution Plan ("CFTC/SEC
20 Recommendation" or "Joint Recommendation") at 10.) After quoting some of Greenwood's plea
21 allocation admissions (see CFTC/SEC Recommendation at 16-17), the Joint Recommendation stated
22 that

1 [a] qualitative analysis of the totality of the circumstances shows that
2 Greenwood's and Walsh's fraud had the elements of a Ponzi scheme. Thus, the
3 use of a net investment, pro-rata, distribution plan is "especially appropriate"
4 under such circumstances. See [SEC v.]Credit Bancorp[, Ltd.], 290 F.3d [80,]
5 89 [(2d Cir. 2002)] (affirming use of pro rata distribution plan where "earlier
6 investors' returns are generated by the influx of fresh capital from unwitting
7 newcomers rather than through legitimate investment activity.").

8

9 A net investment approach looks solely at dollars in and dollars
10 out and makes distribution to the victims based on their net contributions. It
11 also demands a return of funds from those investors who received more funds
12 than they contributed, i.e., Ponzi winners, either by offsets or clawback actions
13 against fully redeemed investors.

14 (CFTC/SEC Recommendation at 17; see also id. at 17 n.9. (noting that the Receiver had initiated
15 clawback actions against alleged Ponzi winners).)

16 The CFTC and the SEC stated that their own investigations had confirmed the accuracy
17 of the Receiver's 2009 and 2010 Reports to the court analyzing the evidence as to defendants' fraud.
18 (See CFTC/SEC Recommendation at 6.) Noting that the fraud was "massive [in] scope" (id. at 7) and
19 involved commingling of the accounts and assets of WGTC and WGTI that could not be reliably
20 unraveled (see id. at 17 ("the Defendants' records are unreliable to substantiate customer claims for
21 profits and inadequate to identify the owners of contracts with losses due to the massive fraud,
22 improper commingling, and intentionally deceptive accounting employed by Walsh and
23 Greenwood")), the agencies opposed giving distributional preferences to investors in WGTC over
24 investors in WGTI:

25 The evidence in the record shows that substantial commingling
26 occurred . . . and that the funds held in the various entities were transferred,
27 dissipated, diverted, and/or misappropriated and then other investor funds were
28 used to cover up the fraud. These commingled investor funds were dispersed
29 without regard for corporate formalities or distinctions. This scheme resulted
30 in clients not having their funds held or invested where Defendants represented

1 they would be held or invested. In fact, the government's and Receiver's
2 investigations uncovered that even as the Defendants represented to a client
3 that his or her particular funds would be deposited in WGTI's account, it was
4 actually deposited in WGTC's accounts and vice-versa. Further, it is clear that
5 transactions were run through WGTI's accounts that were not transactions on
6 behalf of WGTI investors and similarly transactions were run through WGTC's
7 accounts that are not transactions on behalf of WGTC investors. Defendants
8 used both WGTI's accounts and WGTC's accounts as if they were
9 interchangeable. This commingling of funds was part and parcel of the
10 mechanism by which the Ponzi scheme to misappropriate clients' funds
11 worked. This evidence of substantial commingling militates against any claim
12 that the assets of any entity, including WGTC or WGTI, are wholly or
13 substantially intact or that any asset is exclusively an asset of either company.

14 (CFTC/SEC Recommendation at 8-9 (emphases added).)

15 The CFTC and the SEC also opposed any suggestion that the Receiver's initial
16 distribution increase long-term investors' shares to account for inflation:

17 The civil agencies believe net investment--dollar in, dollar out--pro rata
18 distribution plan is the best and most fair approach under the circumstances of
19 this Ponzi-scheme case because it yields a substantial recovery for all
20 investors. Some long-term investors have advocated that rather than
21 employing a net investment model, the Court should instead implement a
22 constant dollar approach--adding an inflation adjuster--when calculating an
23 investor's distribution. Although the use of a constant dollar approach may be
24 appropriate in certain instances, the facts of this matter do not, at the outset,
25 warrant its use here. Currently, the Receiver has marshaled sufficient assets
26 so that under a pro rata distribution method, it will distribute to each investor
27 approximately 89% of their net contributions or investment. The CFTC and
28 SEC believe that these funds should be distributed without an inflation
29 adjustment.

30 The SEC and CFTC hope, however, that the Receiver will be able to
31 obtain additional funds through the liquidation of various assets owned by the
32 Defendants and Relief Defendants, as well as through several clawback actions
33 the Receiver has filed. In the event that the Receiver acquires funds to
34 distribute in excess of 100% of the net contributions of investors, the Court
35 may wish to consider ordering a hybrid approach where future distributions in
36 excess of 100% of the net contributions be [sic] calculated on a pro rata basis
37 and adjusted to give effect to inflation.

38 (CFTC/SEC Recommendation at 19-20 (footnote omitted).)

1 In January 2011, the Receiver submitted its Plan to the district court, moving for
2 approval of an initial pro rata distribution of \$815,000,000 to current WGTC and WGTI investors
3 based on each investor's net investment at the time the fraud was discovered (the "Motion"). These
4 distributions were not to include any interest, earnings, or other compensation based on the time value
5 of money. In this initial distribution, each investor would receive approximately 85% of its net
6 investment.

7 Consistent with the Joint Recommendation submitted earlier, the CFTC and the SEC,
8 which noted their "duty in these civil enforcement actions to proceed in the best interests of the public
9 and the defrauded investors" and "to ensure a fair and equitable return of funds to all investors" (U.S.
10 Commodity Futures Trading Commission's and U.S. Securities and Exchange Commission's Brief in
11 Support of Receiver's Proposed Initial Distribution Plan ("CFTC/SEC Endorsement of Receiver's
12 Plan" or "CFTC/SEC Endorsement") at 3), supported the Receiver's proposal:

13 As set forth in the SEC's and CFTC's Joint Notice of Recommendation for a
14 Distribution Plan, the agencies believe that the most fair and equitable method
15 of distribution of the assets held by the Receiver is a net investment pro rata
16 distribution plan.

17 (Id. at 2 (emphasis added).) Stating that the Receiver's proposed distribution "squarely meets" the
18 agencies' goals of distributions "that will most closely afford complete relief" and would further "the
19 salutary purposes of the Commodity Exchange Act and the Federal securities laws" (id.), the
20 CFTC/SEC Endorsement stated:

21 The Receiver's Motion sets forth detailed findings, in pertinent part,
22 that (i) there was significant and extensive commingling of funds between . . .
23 [WGTC] and . . . [WGTI], entities under the control of defendants Paul
24 Greenwood and Stephen Walsh and through which the various investors
25 invested funds, and that neither company could have continued to operate
26 without the other; (ii) the investors of WGTC and WGTI were similarly
27 situated with respect to their relationship with Greenwood and Walsh; and (iii)
28 that WGTC and WGTI were operated as a ponzi scheme.

(Id.) While reiterating the view that the court might wish to consider having a subsequent distribution make some adjustment for inflation in the event that the total funds recovered by the Receiver reached a level exceeding the defrauded investors' total net contributions (see id. at 3 & n.1), the CFTC/SEC Endorsement concluded that the Receiver's proposal for the initial pro rata distribution without any adjustment for inflation was "[t]he fairest and most reasonable approach" (id. at 3).

C. The Decision of the District Court

In March 2011, the district court held a hearing at which the Receiver, the SEC and CFTC, and persons interested in the proposed distributions orally presented their views. (See Hearing Transcript, March 16, 2011 ("Hearing Tr.")) The 3M Benefits Group pursued its contention that persons who invested in regulated entities were entitled to a prudence premium above any pro rata amounts to be distributed to persons who invested in entities that were unaudited and unregulated. (See, e.g., id. at 41-43, 53-54.) The 3M Group contended that investors in WGTC were not situated similarly to investors in WGTI because WGTC was regulated and WGTI was not; that WGTC had been managed largely as Greenwood and Walsh had promised; that the vast majority of the investor funds pilfered and misappropriated by Greenwood and Walsh had been taken from WGTI; and that when the receivership began, the Receiver found much more money at WGTC than at WGTI. (See id. at 39, 37.) The 3M Group argued that "[i]f the WGTI noteholders had not chosen th[e] indirect manner of investing with Walsh and Greenwood, but had insisted on investing in the audited, regulated entity, this fraud could not have occurred in the way it did" (id. at 37-38), and that it was the WGTI investors' "conscious choice . . . to go and put their money at greater risk" that "permitted Walsh and Greenwood to steal their money" (id. at 67). Despite stating that "of course we were

1 defrauded" (id. at 40), counsel for the 3M Group argued "that the looting here did not occur
2 principally out of WGTC" (id. at 40-41), that "the looting occurred in the unregulated, [un]audited
3 entity" (id. at 116), and that Greenwood and Walsh "didn't really steal our money" (id. at 68 (emphasis
4 added)). Counsel stated that when the Receiver was appointed, WGTC records revealed a total of
5 \$807 million in the 3M Group's accounts. (See id. at 56.)

6 The 3M Group argued that it was only because WGTC was a regulated and audited
7 entity "that there was any money to be distributed" to investors. (Hearing Tr. 37.) The district court,
8 however, pointed out that

9 regardless of what the investment vehicle was, [e]veryone was
10 defrauded. . . . [B]oth [groups of investors] lost money because you were
11 defrauded by the same individual who stole your money, and neither one of
12 you could find out for a decade. . . . Your funds were not segregated in a way
13 that I can examine this record and determine that your funds were untouched
14 and the other people's fungible dollars were stolen.

15 (Id. at 38-40.) The 3M Group persisted that it would be "unfair and inequitable [where] people . . .
16 took greater risk and consciously chose to avoid and isolate themselves and distanced themselves
17 from the outfit that actually really did legitimate things, . . . to have them share and share alike" with
18 those who sought to avoid risk. (Id. at 67.)

19 When pressed for specificity as to the amount of its desired premium, the 3M Group
20 suggested that it should receive one-third more than the amount proposed in the Receiver's Plan, both
21 "to vindicate the public policy in favor of regulation and independent auditing" (Hearing Tr. 60) and
22 to avoid the "moral hazard" of "telling the world of investing fiduciaries that it doesn't matter if they
23 explicitly go out of their way to go offshore and put their money in an unregulated entity" (id. at 61).
24 The proposed one-third premium would have given the 3M Group approximately \$75 million more
25 in the initial distribution than the \$225 million it was to receive under the Receiver's Plan (see id.

1 at 60); the one-third figure was randomly chosen, not tied to any identifiable basis (see id. at 60-61).
2 Alternatively, on the hypothesis that only "28 percent" of the WGTI investors' money "actually ended
3 up being managed in the legitimate side of Walsh and Greenwood's business, WGTC" (id. at 61-62),
4 the 3M Group proposed that only 28% of the funds collected by the Receiver should be distributed
5 to the WGTI investors, with 72% being distributed to the WGTC investors. This alternative would
6 have given the 3M Group some \$145 million more than it was to receive under the Receiver's Plan.
7 (See id. at 62.) As its least preferred alternative, the 3M Group proposed that, "[t]o vindicate the
8 importance in the capital markets of regulation and auditing," the 3M Group should be granted a
9 premium of 10% of the total funds recovered by the Receiver, i.e., \$81.5 million, "on top of whatever
10 the pro rata would be." (Id. at 68-69.) The 3M Group conceded that the 10% figure was "equally
11 random to the 33 percent increment." (Id. at 69.) Although counsel for the 3M Group stated that
12 "[w]e are not seeking a penny of earnings" (id. at 63), he acknowledged that he did not mean that "the
13 ceiling should be the amount [the 3M Group's members] contributed" (id. at 66).

14 Also at the hearing, KCERA pressed its contention that the Receiver's initial
15 distribution should use a constant-dollar approach in order to account for inflation, weighting the
16 distribution in favor of those who had longer-term investments than others. KCERA's counsel
17 opposed the prudence premium requested by the 3M Group, stating, inter alia, "we don't as a factual
18 matter know whose money was stolen when, and that is a part of the whole consideration here."
19 (Hearing Tr. 94; see id. at 95 ("As to whose [money] was taken when and how, nobody really
20 knows.").)

21 However, counsel argued, "[t]hat money was stolen all along. And people who were
22 in this investment at an earlier stage, there was more opportunity to steal their funds" (Id. at 95.)

1 Reasoning that the real value of a dollar invested long ago is greater than the value of a dollar invested
2 more recently, KCERA argued that the distribution must include "an inflation adjustment" in order
3 not to "treat the long-term investors dissimilarly from the short-term investors because they have been
4 in longer." (Id. at 97.)

5 Most of the Greenwood and Walsh victims opposed both KCERA's and the 3M
6 Group's distribution proposals. (See, e.g., Hearing Tr. 99, 132.) Counsel for Carnegie Mellon
7 University ("Carnegie Mellon")--an indirect WGTI noteholder--"speak[ing] also on behalf of the other
8 16 investors" that favored the Receiver's Plan (id. at 99), objected to KCERA's inflation-adjustment
9 proposal on the ground that such an adjustment would, before other victims had recovered their net
10 investments, result in a distribution to KCERA of more money than it had invested (see id. at 105-06).
11 As to the 3M Group's prudence premium proposal, counsel disputed the supposition that the WGTI
12 noteholders had sought to distance themselves from regulation, pointing out, inter alia, that the
13 noteholders had "invested in a fund that was advised by Westridge Capital Management, which is a
14 registered investment adviser under the Investment Advisers Act of 1940 . . . and is in fact regulated
15 by the Securities and Exchange Commission." (Id. at 100-01.) Carnegie Mellon argued in favor of
16 the Receiver's proposed pro rata distribution on the ground that the WGTI and WGTC assets had been
17 commingled and the fraud victims were similarly situated. (See id. at 103.)

18 Similarly, counsel for the University of Pittsburgh--a direct WGTI noteholder--argued
19 that

20 [t]he investors are, in fact, similarly situated with respect to this fraud,
21 and the distinctions that Mr. Z[ie]gler [counsel for the 3M Group] urges upon
22 the Court, quite frankly, are cosmetic for purposes of this proceeding.

23 All of the investors were defrauded in the same way, and Mr.
24 Z[ie]gler's group ignores all of the connections among the Westridge
25 defendants and ignores how they were intertwined and how they operated.

1 All of the investors, including all of the clients that Mr. Z[ie]gler
2 represents and my client, had investment management agreements with
3 Westridge Capital Management. They were all invested in the same enhanced
4 equity index strategy. They were all sold by the same folks. They were all
5 operated by the same folks. The entities had the same offices and the same
6 personnel.

7 The[3M Group] seem[s] to somehow assume the integrity of the
8 organizational boundaries between Westridge Trading Co. and Westridge
9 Trading Investors. In fact, we know that's not true.

10 They asked the Court to give weight to the account statements that we
11 know are demonstrably false, and they ignore the unified scheme to defraud
12 that was perpetrated on all of the investors in this room.

13 (Hearing Tr. 109; see id. at 110, 108-09 (stating that the 3M Group's arguments that only investors
14 who were not members of the 3M Group lost money "are based on investor statements that we know
15 are fictitious, that in the words of the SEC and the CFTC are demonstrably false").)

16 After hearing all of the arguments, the district court rejected all of the proposals that
17 differed from that of the Receiver. (See Hearing Tr. 130-33.) Referring to "the issues that we've
18 discussed with regard to both the constant dollar adjustment" advocated by KCERA "and the prudence
19 premium issues" advocated by the 3M Benefits Group, the district court stated that neither adjustment
20 would result in "a fairer distribution for either the most victims or a large number of victims." (Id.
21 at 132.)

22 With regard to the position of the 3M Group, the court found that the record was
23 sufficient "to demonstrate that there was commingling of funds" (id. at 130) and that the investors in
24 WGTC and WGTI

25 were similarly situated in relationship to the fraud, in relationship to the losses,
26 in relationship to the fraudsters, and in relationship to the nature of their
27 investments, so that a net pro rata distribution is equitable. It is a fair and
28 reasonable and an equitable way to make this initial distribution to investors.

1 There clearly was a uniform Ponzi scheme here. . . . From the
2 fraudster's point of view, no distinction was made in terms of who would be
3 the victims, where the money would come from. . . . [W]hat defines the
4 scheme[is] not the nature of the investments, not the nature of the victims, and
5 not the nature of any particular relationship between Westridge or WG Trading
6 that predominates or defines this activity.

7 (Id. at 130-31 (emphases added); see also id. at 38 ("The money was commingled. . . . There may
8 have been circumstances where it was easier to account for in certain places than other places. But
9 there's nothing about . . . the regulations that oversaw" WGTC "that was particularly beneficial"; it
10 took "a decade to uncover this fraud.").)

11 Rejecting the KCERA request for an inflation adjustment, the district court indicated
12 that it viewed such an adjustment as skewing the distribution to favor "a more limited number of
13 investors." (Hearing Tr. 131-32.) The court stated that

14 it may be on the one hand less equitable to those people who had money in the
15 fund earlier [if] they don't get credit for those dollars, adjustment for those
16 dollars. But it is similarly, and therefore balances out, inequitable for those
17 people who . . . are sharing the burden of the entire amount that has been stolen
18 . . . despite the fact that for those people who recently came in they were in the
19 fund at a time when probably the smallest percentage of money was taken if
20 you look at it over the years.

21 (Id. at 96.)

22 The district court noted in addition that

23 [i]t is also important to me that both the SEC and the CFTC and the
24 majority of investors who were trying to see the greatest return on their
25 principal have in the majority backed the receiver's plan of distribution, not
26 because they feel that it is a perfect plan of distribution, but they feel as a
27 choice between this method of distribution and the other methods of
28 distribution that have been suggested that it is the preferable choice for all to
29 maximize the return for the greatest number of investors in a fair and
30 reasonable and equitable manner.

1 (Hearing Tr. 132 (emphasis added).) The court concluded that the Receiver's proposed pro rata initial
2 distribution "most closely mirrors what would be an equal and equitable distribution of the principal
3 contributions of each of the investors." (Id. at 133.)

4 As the March 16 hearing drew to a close, the court stated that it would enter an order
5 within a few days, approving the Receiver's Plan and ordering that the initial distributions be made
6 on the 30th day after the date of the order. (See, e.g., id. at 136.) The court stated that it would not
7 grant a stay of the distribution, and that if any interested party wanted a stay it would need to make
8 a motion in the court of appeals. (See id. at 134, 137-40, 143.)

9 The district court's Order approving the Receiver's Plan and ordering that the initial
10 distributions be made on April 20, 2011, was entered on March 21, 2011. On April 18, the 3M Group
11 filed its notice of appeal and moved in this Court for a "Partial Conditional Stay." The motion was
12 denied.

13 II. DISCUSSION

14 In its appeal, the 3M Group pursues its contention that the district court should have
15 required the Receiver to include in the initial distribution to WGTC investors a prudence premium
16 because they invested in a regulated entity, whereas other investors chose to invest in the allegedly
17 riskier, unregulated entity, WGTI. On the cross-appeal, KCERA pursues its contention that the
18 Receiver's initial distribution should have been calculated in constant dollars in order to account for
19 inflation. For the reasons that follow, we reject both contentions.

1 A district court assessing a receiver's plan for compensation of victims of a fraudulent
2 scheme has "equitable authority . . . to treat all the fraud victims alike (in proportion to their
3 investments) and order a pro rata distribution." SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 88 (2d Cir.
4 2002) ("Credit Bancorp"). "[T]he use of a pro rata distribution has been deemed especially
5 appropriate for fraud victims of a 'Ponzi scheme,'" id. at 89, "where . . . the funds of the defrauded
6 victims were commingled and where victims were similarly situated with respect to their relationship
7 to the defrauders," id. at 88-89.

8 "Fraud is endlessly resourceful and the unraveling of weaved-up sins may sometimes
9 require the grant of a measure of latitude" to a trustee charged with distributing defrauders' assets to
10 fraud victims. In re Bernard L. Madoff Investment Securities LLC, 654 F.3d 229, 238 n.7 (2d Cir.
11 2011) ("In re Madoff"). In any event, a trustee or receiver devising a distribution plan is not required
12 to apportion assets in conformity with misrepresentations and arbitrary allocations that were made by
13 the defrauder, "otherwise, the whim of the defrauder would . . . control[] the process that is supposed
14 to unwind the fraud." Id. at 241.

15 The decision of a district court as to "the choice of distribution plan for [a] receivership
16 estate" is reviewed "for abuse of discretion." Credit Bancorp, 290 F.3d at 87. "A district court has
17 'abuse[d] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous
18 assessment of the evidence,' Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 . . . (1990), or
19 rendered a decision that 'cannot be located within the range of permissible decisions,' Zervos v.
20 Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir.2001)." Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008).
21 In considering whether there has been an abuse of discretion, we review "de novo . . . [the] district
22 court['s] rulings of law," In re Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155, 157 (2d Cir.

2010) (internal quotation marks omitted), and we review factual findings for clear error, see, e.g.,
Cooter & Gell, 496 U.S. at 401 ("[w]hen an appellate court reviews a district court's factual findings,
the abuse-of-discretion and clearly erroneous standards are indistinguishable").

A. The 3M Group's Appeal

The 3M Benefits Group contends that the district court committed legal error by
interpreting the "similarly situated" standard for equitable distributions "as requiring merely that all
claimants were defrauded" (3M Group brief on appeal at 29 (emphasis added)), i.e., by ruling that "the
only relevant feature of the relationship between investor and defrauder is that the investor was
defrauded" (id. at 23). The 3M Group argues that

the District Court did not even address the [3M Group's] argument that moral
hazard would result from allowing investors who purposely chose to isolate
their investment from regulation and auditing to recover the identical degree
as investors who chose the protections of regulation and auditing. To the
extent that the District Court considered the public interest at all, it defined that
interest overly narrowly to include solely the equitable concern for maximizing
overall return to most investors, to the exclusion of any other public interests
or policies. In doing so, the District Court failed to balance all the relevant
equitable considerations as is required to reach a fair and reasonable plan.

(Id. at 24-25 (emphases added).) The 3M Group also contends that the court's factual finding that the
WGTC investors and the WGTI investors were similarly situated was clearly erroneous. (See id.
at 53-59.) None of these contentions has merit.

First, the record does not support the 3M Group's characterization of the district court
as adopting a principle that all investors are similarly situated "merely" when all have been defrauded.
Rather, the court stated that victims may properly be considered similarly situated for purposes of a
pro rata distribution plan when they "were similarly situated in relationship to the fraud, in

1 relationship to the losses, in relationship to the fraudsters, and in relationship to the nature of their
2 investments," in what "clearly was a uniform Ponzi scheme." (Hearing Tr. 130-31.) This ruling was
3 entirely consistent with the principles enunciated in Credit Bancorp, see 290 F.3d at 88-89.

4 Second, we see no indication that the district court either ignored the 3M Group's
5 argument that investors in an unregulated entity deserve less compensation than investors in a
6 regulated entity or considered government regulation in general to be irrelevant. In delivering its
7 decision, the court expressly referred to the discussion of the prudence premium issues during the
8 hearing (see Hearing Tr. 132), and as indicated in the colloquy quoted in Part I.C. above, the court
9 expressed the view that the fact that an entity is regulated does not provide assurance that money
10 invested in it will not be stolen (see, e.g., id. at 37-39, 43-44, 66). That view of the regulation to
11 which WGTC was subject as a broker/dealer, relied on by the 3M Group, is supported by the view
12 of the SEC--one of the regulators--that "[b]roker-dealer regulation is designed to protect brokerage
13 customers, not broker-dealers' owners" (SEC brief on appeal at 10; see id. (the 3M Group members'
14 "limited partnership interests in WGTC . . . made them owners of a broker-dealer" and as such they
15 "do not have a superiority of interest based on protection afforded under the securities laws to
16 customers of registered broker-dealers" (emphases in original))). Thus, although the 3M Group
17 characterizes its members as having prudently "chose[n] the protections of regulation" (3M Group
18 brief on appeal at 24), they chose protections that were designed not for their benefit but for the
19 benefit of others. We see no error in the district court's determination that the mere choices of
20 different investment vehicles did not mean that the two groups of defrauded investors in this case were
21 meaningfully dissimilar, given, inter alia, that both the WGTI and WGTC investors "lost money
22 because [they] were defrauded by the same individual who stole [their] money," and no one, whether

1 they had invested in the regulated or the unregulated entity, "could find out for a decade" (Hearing
2 Tr. 39).

3 We are not persuaded to reach the contrary conclusion by SEC v. Enterprise Trust Co.,
4 559 F.3d 649 (7th Cir. 2009) ("Enterprise Trust"), on which the 3M Group relies for the proposition
5 that victims of fraud should be awarded different percentages of their losses "'on the basis of the
6 nature of the risk explicitly assumed by the client'" (3M Group brief on appeal at 36 (quoting SEC v.
7 Enterprise Trust Co., No. 08-cv-1260, 2008 WL 4534154, at *2-3 (N.D. Ill. Oct. 7, 2008) (emphasis
8 ours))). The 3M Group's reliance on Enterprise Trust is misplaced for several reasons.

9 To begin with, the Seventh Circuit in Enterprise Trust did not purport to state
10 overarching legal principles as to circumstances in which a pro rata distribution plan would not be
11 within the proper bounds of discretion. Rather, it simply ruled that the district court in that case had
12 not abused its discretion in approving the layered, non-pro rata, distribution plan presented to it. See
13 559 F.3d at 652.

14 Further, the factual circumstances of Enterprise Trust were quite different from those
15 here. The fraud victims in that case included not only investors who had opened "managed accounts"
16 for which Enterprise Trust was supposed to purchase securities, but also "customers [who] used
17 Enterprise only for custodial services (that is, to hold securities that the customers had purchased)." 559 F.3d at 650 (emphases added). Plainly, those two groups were not similarly situated, as the
18 custodial customers did not enter into any agreement that entailed a market or trading risk. Thus, the
19 Seventh Circuit noted that
20

21 [t]he receiver had three principal reasons to give a preference to the
22 custodial investors: first, they did not authorize Enterprise to change or pledge
23 their assets in any way; second, they were in the dark about the fact that
24 Enterprise had used their assets as collateral (while the investors in managed

1 accounts knew, or could have learned from reading the statements Enterprise
2 sent them, that risky investments had been made in their accounts); third, if
3 [Enterprise Trust's principal manager's] strategy had succeeded, the investors
4 in managed accounts (and [the manager] himself) would have reaped [all of]
5 the gains. Because they had been subjected to involuntary and uncompensated
6 risk, the receiver concluded, the custodial investors deserved a larger cut of the
7 remaining pie

8 559 F.3d at 652.

9 None of the Enterprise Trust rationales for a layered distribution is applicable to the
10 present case. As the district court noted here, the members of the 3M Group did not have custodial
11 accounts. (See Hearing Tr. 45.) Rather, they bought limited partnerships in WGTC precisely for the
12 purpose of achieving market gains through WGTC's index arbitrage strategy. The investors in WGTI
13 likewise, though taking the different route of directly or indirectly purchasing senior notes issued by
14 WGTI, sought market gains through the index arbitrage strategy of WGTC. And each group of
15 investors was to profit if the WGTC strategy was successful.

16 The 3M Group also argues that, apart from the custodial accounts, the Enterprise Trust
17 court approved disparate distributions between investors in the managed accounts. (See 3M Group
18 brief on appeal at 36-37.) However, that disparity was based on the facts that some investors had
19 imposed restrictions on how their accounts were to be managed, whereas others had given Enterprise
20 Trust "carte blanche." 559 F.3d at 652. That difference has no analog here. The record does not
21 indicate that any of WGTC's limited partners--whether WGTI or members of the 3M Group--placed
22 any constraints on WGTC's pursuit of the index arbitrage strategy.

23 Further, the manner in which defendants operated WGTC and WGTI--consistent with
24 the market-gains goal of both groups of investors--was to show the investors in each group equivalent
25 returns on their respective investments. Thus, the "investment documents" given to WGTI investors

1 stated that "the interest payable" on the promissory notes would be calculated on the hypothesis that
2 their principal had purchased "a limited partner interest of WGTC." (Receiver's 2009 Report at 6.)
3 And in fact thereafter, "the returns o[n] investments in WGTI" and the returns of investments in
4 WGTC "were computed exactly the same." (Id. at 11.)

5 Thus, we also find inapt the 3M Group's citation of the principle that "[e]quality
6 among creditors who have lawfully bargained for different treatment is not equity but its opposite"
7 (3M Group brief on appeal at 34 (quoting Chemical Bank New York Trust Co. v. Kheel, 369 F.2d
8 845, 848 (2d Cir. 1966) (Friendly, J., concurring) (emphasis ours))). Counsel for the 3M Group,
9 disclaiming any notion that the WGTC investors had contracted for different market risk, stated that
10 its members had sought, by investment in a regulated entity, to avoid the risks of mismanagement and
11 fraud. But the decision to seek gains through investing in a regulated entity was not tantamount to
12 a bargain for different "treatment." Both groups of investors sought the same treatment: receipt of
13 gains from the WGTC index arbitrage strategy.

14 Moreover, the premise of the 3M Group's moral hazard argument is that the WGTI
15 investors "purposely chose to isolate their investment from regulation" (3M Group brief on appeal
16 at 24; see also id. at 41, 43; Hearing Tr. 67 ("consciously chose to avoid and isolate themselves and
17 distanced themselves from the outfit that actually really did legitimate things" (emphasis added))).

18 The record belies the accuracy of this premise. First, both WGTC and WGTI had been marketed as
19 being under the umbrella of Westridge, which was itself a regulated entity. The WGTI investors, like
20 the WGTC investors, committed 15% of their investments to Westridge. Second, Greenwood and
21 Walsh

22 promoted the structure of the Westridge Group with Westridge as a registered
23 investment advisor, regulated by the SEC and with WG Trading as a

broker/dealer regulated by the SEC, FINRA, CFTC, NFA, DOL, which was
subject to independent annual audits.

(2009 Report at 5 (attaching as Exhibit Tab 2 "Page one from the Westridge Power Point presentation").) The profits sought by the WGTI investors were, explicitly, to be generated by the index arbitrage strategy employed by WGTC, the same regulated entity in which the 3M Group became limited partners seeking profits from WGTC's use of that strategy. And thereafter, every statement of account sent by defendants, "whether or not the investment was a limited partnership interest with WGTC, a direct note placement with WGTI, or an indirect note placement through stock ownership in one of the two BVI companies," bore the following heading: "Scheduled below is an analysis of the changes in your capital account in **WG Trading Company LP.**" (2009 Report at 6-7 (bolding in original statement).) Finally, at least one set of investment documents in the record shows that, far from distancing itself from WGTC, a WGTI investor not only received a WGTI promissory note but also entered into a letter agreement with Greenwood, Walsh, Westridge, WGTI, and WGTC containing, inter alia, representations, agreements, and covenants by WGTC and signed by, inter alia, WGTC (see, e.g., Attachment 4 to Declaration of Patricia Gomersall, a CFTC Senior Futures Trading Investigator, dated February 27, 2009). Given all of the above facts, we see no error in the district court's refusal to credit the 3M Group's characterizations of the WGTI investors as attempting to isolate themselves from WGTC.

Nor was the district court required to accept the 3M Group's argument that it should receive a premium on the basis that the Receiver found much more money at WGTC than at WGTI (see, e.g., Hearing Tr. 37). The Receiver observed that WGTC and WGTI had "a long history" (2009 Report at 2; see also Greenwood Plea Allocution Tr. 24-27) of not only commingling funds, but also "employing fraudulent accounting practices in an apparent attempt to conceal the true financial

1 condition of the entities from," among others, their investors (2009 Report at 2). Thus, WGTC
2 received money from WGTI's investors; WGTI received money from WGTC's investors; WGTC
3 made payments to or for WGTI's investors; WGTI made payments to WGTC's investors. (See
4 Receiver's 2010 Report at 5 & Exhibit Tabs 1, 1A.) At the behest of WGTI, WGTC made employee
5 advances to Greenwood and Walsh and charged WGTI's capital account. When WGTC lost \$121
6 million by financing and investing in Signal Apparel Company, WGTC charged those losses against
7 the capital account of WGTI. (See 2010 Report at 2, 5.) And "when WGTC was short of funds,
8 WGTI advanced the funds to WGTC" (id. at 7); "neither entity could have survived without the
9 financial support of investor funds raised by the other" (id. at 3). "WGTC allocated actual yearly
10 earnings to its limited partners based on an arbitrary earnings rate and then allocated the remaining
11 income or loss to WGTI." (2009 Report at 2 (emphasis added).) Given the long history of
12 commingling, defendants' operation of WGTC and WGTI as if they were a single entity, and
13 defendants' employment of fraudulent accounting practices, the record supported the view of the
14 CFTC and the SEC that the assets of WGTC and WGTI could not be reliably unraveled. Acceptance
15 of the 3M Group's argument that the court should grant its requested premium on the theory that the
16 financial records found by the Receiver were accurate would, in the words of In re Madoff, let "the
17 whim of the defrauder . . . control[] the process that is supposed to unwind the fraud," 654 F.3d at 241.

18 Lastly, we note that although the 3M Group characterized market risk as "inevitabl[e]"
19 (Hearing Tr. 44), the record suggests that prospective investors chose the WGTI senior-promissory-
20 note route as a means of limiting the risk of market loss, given that the terms of those notes stated that
21 "the return promised to the WGTI Noteholders would reflect any positive returns generated by
22 WGTC, but would not reflect any negative returns" (3M Group brief on appeal at 11). That provision

1 in the notes did indeed create a difference between the WGTI noteholders and the limited partners in
2 WGTC who had no such protection against losses. But, as the SEC points out, "it is difficult to see
3 why such a provision would be reason to give preferential treatment to the WGTC claimants rather
4 than the notes company claimants" (SEC brief on appeal at 12 n.4 (emphasis in original)).

5 In sum, the record demonstrates that the WGTC and the WGTI investors had the same
6 goal of profiting from WGTC's index arbitrage strategy; that both groups of investors were solicited
7 as investors by the same defendants; that both groups had agreements with Westridge and with
8 WGTC; that both groups were treated economically the same in defendants' arbitrary account
9 statements; that the assets of WGTC and WGTI were commingled and were run as a massive Ponzi
10 scheme for more than a decade; that the 3M Group as well as the investors in WGTI were defrauded;
11 and that the commingled assets could not be unraveled reliably. We conclude that the district court
12 neither made an error of law nor made erroneous factual findings in determining that, in the material
13 respects, the investors in WGTC and WGTI were similarly situated.

14 Finally, we see no basis for any suggestion that the district court's approval of the
15 Receiver's pro rata distribution plan was beyond the range of permissible decisions. As the investors
16 in both entities were permissibly found to be similarly situated, it was well within the district court's
17 equitable authority to reject the 3M Group's requested premium distributions. Under the Receiver's
18 pro rata distribution plan, each member of the 3M Group, like each WGTI investor, was to receive
19 approximately 85% of the net amount it had invested. Giving the 3M Group any of the premiums it
20 requested would have meant that the distributions to the other fraud victims would be reduced to
21 64-76% of their net investments, while the 3M Group members would receive more money than they
22 had invested--their largest requested premium presenting them with a profit of nearly 40%. It was

1 well within the district court's discretion to conclude that, as a matter of equity, some of the similarly
2 situated victims should not profit at the expense of the other victims.

3 B. The KCERA Cross-Appeal

4 KCERA, while observing, in opposition to the appeal by the 3M Group, that the district
5 court has broad discretion to adopt any distribution that is fair and reasonable (see KCERA brief on
6 appeal at 13), and that the district court correctly held that the funds in this case should be distributed
7 pro rata, given that the funds were commingled and the investors were similarly situated (see, e.g.,
8 id. at 14-16), pursues on its cross-appeal the contention that the pro rata distributions should have
9 been adjusted for inflation to compensate long-term investors such as KCERA (see id. at 25). We see
10 no abuse of discretion in the district court's approval of the Receiver's Plan without requiring the
11 requested inflation adjustment.

12 KCERA has not cited any authority that supports the proposition that an inflation
13 adjustment is required as a matter of law when there is to be a distribution of assets to a group of
14 similarly situated victims and those assets are insufficient to make all of the victims whole. Although
15 KCERA argues that "the Supreme Court has made clear [that] to satisfy the goal of treating 'similarly
16 situated creditors similarly' by applying sound 'objective economic analysis,' creditors should receive
17 compensation for 'the time value of their money,'" (KCERA brief on appeal at 27 (quoting Till v. SCS
18 Credit Corp., 541 U.S. 465, 477 (2004) (emphasis in brief))), Till involved a bankruptcy case and a
19 statutory provision, 11 U.S.C. § 1325(a)(5), "[t]he text of [which wa]s consistent with the view that
20 the appropriate discount rate [for use in a bankruptcy cramdown proceeding] should reflect . . . the
21 time value of money," 541 U.S. at 483 n.25 (internal quotation marks omitted). There is no such
22 statutory provision governing enforcement actions such as those at issue here.

1 Nor are the other cases cited by KCERA as requiring calculations to account for the
2 time value of money applicable here. They involved such issues as the adequacy of a state tax refund
3 or, in private civil actions, the proper calculation of the amount of damages needed to make the
4 claimant whole. None of them involved governmental enforcement actions in which there are
5 numerous victims and insufficient assets to provide complete compensation.

6 KCERA's argument that "the SEC repeatedly urg[ed] an inflation adjustment in the
7 Madoff litigation" (KCERA brief on appeal at 25) is beside the point. The inflation issue was not
8 ruled on in the bankruptcy court in that litigation, see In re Madoff, 654 F.3d at 234, and this Court
9 expressly declined to opine as to whether such an adjustment should be made, see id. at 235 n.6.

10 Finally, we note that the distribution at issue on these appeals is the "Receiver's
11 Proposed Initial Distribution Plan" (emphasis added). As the CFTC and the SEC stated in the district
12 court, it is possible that the Receiver will recover additional funds in, for example, its pending
13 clawback actions against investors who had withdrawn their entire investments prior to the
14 commencement of these enforcement actions (see, e.g., CFTC/SEC Recommendation at 17 n.9)--some
15 of whom were likely paid using newly invested funds that defendants received from other investors.
16 The agencies have taken the position that, although there should be no adjustment for inflation at this
17 stage since the funds that the Receiver had collected were insufficient to make all of the victims
18 whole, an inflation adjustment may become appropriate if the clawback actions result in the Receiver's
19 collecting more than 100% of the net amounts invested by the victims. (See id. at 19-20; CFTC/SEC
20 Endorsement of Receiver's Plan at 3 & n.1.)

21 In the event that the Receiver does recover sufficient funds to provide all of the fraud
22 victims with more than their respective net investments, the district court will be free to consider
23 whether to approve an inflation adjustment if the Receiver proposes one, or to consider whether to

require such an adjustment if it is not proposed. In the present circumstances, we see no abuse of discretion in the district court's refusal to require such an adjustment in the initial distribution.

CONCLUSION

We have considered all of the contentions of the 3M Group and KCERA in support of their respective appeals and have found them to be without merit. The March 21, 2011 Order of the district court is affirmed.