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8 Temporary Receiver

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 COMMODITY FUTURES TRADING
13 COMMISSION,

14 Plaintiff,

15 v.

16 DENARI CAPITAL LLC, TRAVIS
17 CAPSON, and ARNAB SARKAR,

18 Defendants.

Case No. 19-cv-07284-EC

**ADMINISTRATIVE MOTION BY
RECEIVER PURSUANT TO LOCAL
CIVIL RULE 7-11 FOR ENTRY OF
ORDER:**

- (1) **ESTABLISHING CLAIMS BAR DATE;**
- (2) **APPROVING FORM AND MANNER OF NOTICE;**
- (3) **APPROVING PROOF OF CLAIM FORM AND SUMMARY PROCEDURES; AND**
- (4) **ESTABLISHING THE NET INVESTMENT METHODOLOGY FOR CLAIMS**

Date: No Hearing Set
Time: No Hearing Set
Judge: Edward M. Chen

1 Kathy Bazoian Phelps, the Court-appointed temporary receiver herein (the “Receiver”) for
2 Denari Capital, LLC (“Denari”), Travis Capson, and Arnab Sarkar (collectively with Denari, the
3 “Receivership Defendants”) hereby files this *Administrative Motion Pursuant to Local Civil Rule*
4 *7-11 for Entry of an Order (i) Establishing Claims Bar Date; (ii) Approving Form and Manner of*
5 *Notice; (iii) Approving Proof of Claim Form and Summary Claims Procedure; and (iv)*
6 *Establishing the Net Investment Methodology for Claims* (the “Motion”).

7 **I. Introduction and Basis for the Motion**

8 The Receiver brings this Motion to address issues generally relating to the establishment
9 of a claims bar date (the “Claims Bar Date”) for investors and creditors of the Receivership
10 Defendants’ estate (the “Receivership Estate”). The Motion seeks approval of the form and
11 manner of notice to creditors and investors regarding the bar date and the proof of claim form.
12 The Receiver is advised that there are investor and creditor claims of one or more of the
13 Receivership Defendants, and believes it is in the best interest of the Receivership Estate to
14 establish a claims bar date by which all claimants must assert any claims they have against the
15 Receivership Estate to allow the Receiver to evaluate and process those claims for the purpose
16 of recommending an eventual distribution plan to the Court. Accordingly, the Receiver requests
17 entry of an order: (i) establishing a deadline by which all creditors must file claims against the
18 Receivership Estate; (ii) approving the form and manner of notice thereof; (iii) approving the
19 proof of claim form and summary claims procedures; and (iv) Establishing the Net Investment
20 Methodology for Claims (the “Bar Date Order”).

21 **II. Background**

22 On November 5, 2019, the CFTC filed a Complaint (Doc. No. 1) against the Receivership
23 Defendants, alleging that, since at least 2012, the Receivership Defendants have fraudulently
24 solicited and accepted at least \$8,300,000.00 from approximately twenty-eight participants,
25 whose funds were subsequently commingled in a pooled investment scheme that included
26 leveraged or margined off exchange foreign currency (“forex”) transactions.

27 According to the Complaint, the pooled and commingled funds were deposited into a
28 Denari bank account and used for, among other things, forex trading, real estate investments,

1 securities transactions, and satisfaction of personal expenses. According to the Complaint, as of
2 July 2019, Denari owed its participants more than \$5,200,000.00, which it did not have sufficient
3 funds or assets to satisfy.

4 On December 4, 2019, this Court entered the Receiver Order (Doc. No. 37) and granted
5 the Receiver full powers of an equity receiver over all funds, property and assets belonging to,
6 being managed by or in the possession of or control of the Receivership Entity. In addition,
7 among other things, the Receiver Order provides that the Receiver has been granted specific
8 powers to make such payments and disbursements from the funds and assets taken into custody,
9 control, and possession or thereafter received by her, and to incur, or authorize the making of,
10 such agreements as may be necessary and advisable in discharging her duties as permanent
11 receiver.

12 **III. Claims Process for Receivership Entities**

13 The Receiver seeks to initiate a process for claims filing and allowance for the
14 Receivership Estate so that investors and creditors can file claims on which the Receiver can
15 propose an equitable distribution plan in this case. The Receiver believes it is appropriate to
16 seek Court approval of a claims bar date and summary claims procedure, as set forth below, and
17 the related Notice and Claim Form attached to the Phelps Declaration as **Exhibits “1” and “2.”**
18 *See Phelps Decl. at ¶5.* The Receiver believes the procedure described in **Exhibit “3”** to the
19 Phelps Declaration will minimize expense and delay and maximize distributions to claimants.
20 *See Phelps Decl. at ¶5.*¹

21 The Receiver requests the Court enter an order establishing a Claims Bar Date of
22 approximately 60 days from the entry of the Bar Date Order for all claimants holding claims
23 against the Receivership Estate arising as of the appointment of the Receiver (December 4,
24 2019) in any way out of any of the Receivership Defendants’ activities, and of any kind or

25
26 ¹ The claims filing and allowance procedures, and related procedures for which approval is requested in
27 this Motion, address only the procedure for the filing of pre-receivership claims against the Receivership
28 Estate, and the allowance of the dollar amount of the claims filed through these procedures. This Motion
does not address the classification, priority, treatment, or payment of the claims filed against the
Receivership Entities for purposes of any subsequent plan of distribution of the assets of the estate that
may be proposed.

1 nature, whether founded on contract, tort or other grounds, and whether liquidated or
2 unliquidated, contingent or fixed, matured or unmatured, legal or equitable, disputed or
3 undisputed. Failure by any investor or creditor to file a claim in accordance with the procedures
4 by the Claims Bar Date will result in the claim being forever barred against the Receivership
5 Estate and shall discharge the Receivership Defendants and the Receivership Estate for any
6 liability for payment of the claim, unless a late filed claim is expressly allowed by the Court
7 upon the filing of a noticed motion demonstrating excusable neglect for the untimely filing of
8 the claim.

9 **IV. Claims Bar Date and Summary Claims Procedure is Warranted**

10 In order to execute her duties under the Receivership Order, the Receiver must identify
11 the potential claims against, and liabilities of, the Receivership Estate. The implementation of
12 the Claims Bar Date and related procedures is necessary to allow the Receiver to determine the
13 liabilities of the Receivership Estate and administer the assets for the benefit of the investors
14 and creditors. These processes are vital to ensure the available assets are maximized through
15 streamlined claims filing and allowance procedures, and distributed to claimants holding only
16 valid, timely claims. To that end, the Receiver seeks entry of the Bar Date Order.

17 It is well-settled a receivership court has the “general power to use summary procedure
18 in allowing, disallowing, and subordinating claims of creditors.” *See S.E.C. v. Hardy*, 803 F.2d
19 1034, 1037 (9th Cir. 1986) (“[A] district court’s power to supervise an equity receivership and
20 to determine the appropriate action to be taken in the administration of the receivership is
21 extremely broad.”). *See also S.E.C. v. Pension Fund of Am. L.C.*, 377 F. App’x 957, 961 (11th
22 Cir. 2010) (instructing an equity court’s use of summary proceedings when granting relief is
23 “appropriate”); *United States v. Ariz. Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984); *F.T.C. v.*
24 *Crittenden*, 823 F. Supp. 699, 702 (C.D. Calif. 1993). Such procedures “avoid formalities that
25 would slow down the resolution of disputes” by “promot[ing] judicial efficiency and reduc[ing]
26 litigation costs to the receivership.” *Hardy*, 803 F.2d at 1040. Moreover, summary procedures
27 are appropriate where, as here, creditors and potential creditors receive “adequate notice and a
28 reasonable opportunity to respond.” *Crittenden*, 823 F. Supp. at 702. Moreover, the proposed

1 procedure is consistent with the Bankruptcy Code's process for determining claims. *See*
2 11 U.S.C. § 502(a); FED. R. BANKR. P. 9014; *see also* L.R. 66-8. Consistent with these
3 authorities, the foregoing claims procedure is warranted in this case.

4 Because the "primary purpose of equity receiverships is to promote orderly and efficient
5 administration of the estate . . . for the benefit of creditors," courts routinely establish claims bar
6 dates and claims procedures in receivership actions to identify claimants and creditors and to
7 analyze their claims in a timely and cost-efficient manner. *Id.*; *see also S.E.C. v. Billion*
8 *Coupons, Inc.*, 2009 WL 2143534, at *4 (D. Haw. July 13, 2009) (citing the court's broad
9 discretion in receivership actions in approving bar date and claims procedure); *S.E.C. v. Alanar,*
10 *Inc.*, 2009 WL 1664443, at *3-4 (S.D. Ind. June 12, 2009) (same).

11 In the interests of administrative efficiency and cost, the Receiver requests authority to
12 make compromises regarding the allowance of claims without further Court order, within the
13 framework set forth in Phelps Declaration, Exhibit "3." Providing the Receiver some flexibility
14 to address smaller claims with compromises without the estate incurring the expense and delay of
15 law and motion proceedings to approve such compromises will reduce administrative expenses
16 and the burden on the Court. It provides a practical and reasonable solution while mandating
17 Court approval for more significant claims resolved by settlement. Pursuant to this authority, the
18 Receiver believes it is reasonable and necessary that the procedures set forth in Exhibit "3" and
19 the forms attached as Exhibits "1" and "2" to the Phelps Declaration be approved by the Court.

20 **V. The Net Investment Method To Allow Investor Claims Is Appropriate.**

21 The Receiver proposes to fix the amount of investor claims by utilizing the net
22 investment methodology of calculation of those claims. The Ninth Circuit has upheld a "net
23 investment" methodology for approving claim amounts. *See, e.g., CFTC v. Topworth Int'l, Ltd.*,
24 205 F.3d 1107 (9th Cir. 1999). The net investment calculation fixes the amount of the investors'
25 claim as "the total amount deposited by the claimant with the Receivership Entities less amounts
26 returned to such claimant by the Receivership Entities and less any illegal trading profits
27 reinvested by or credited to such claimant." *Id.* at 1115. *See also SEC v. Stinson*, 2015 U.S. Dist.
28 LEXIS 1817, at *9 (E.D. Penn Jan. 8, 2015) ("The net investment method is a well-accepted

1 method of distributing receivership assets, and fulfills the important goal of equitably
2 compensating all similarly situated investors.”); *SEC v. Huber*, 702 F.3d 903, 907 (7th Cir
3 2012); *CFTC v. Barki, LLC*, 2009 U.S. Dist. LEXIS 112998 (W.D.N.C. Nov. 12, 2009);
4 *Broadbent v. Advantage Software, Inc.*, 415 F. App’x 73, 79-80 (10th Cir. 2011) (affirming
5 district court’s decision to permit receiver to offset Ponzi scheme investor’s claim against the
6 estate against outstanding royalty payments owed by investor to receivership entity because in
7 doing so, court was treating investors like all other similarly situated claimants).

8 The Receiver seeks to use the net investment method of calculation to determine the
9 allowed amount of investors’ claims. The Receiver therefore requests Court approval of a
10 methodology to offset payments made to the investors against the amount that they invested.
11 Once the claim amounts are filed and determined and the Receiver has liquidated assets of the
12 Receivership Estate, the Receiver intends to file a distribution plan setting forth the priorities, if
13 any, that she proposes for purposes of distributing funds based upon the allowed amount of the
14 claims and the available funds. Courts have recognized the two-step process regarding claims:
15 one step to fix the amount of the claim; and another step to determine the distribution to be made
16 on account of the claim. *See e.g., CFTC v. Mason*, 2014 U.S. Dist. LEXIS 14770 (W.D. N.C.
17 Oct. 14, 2014). The *Mason* court approved the first step of the “net investment method” of
18 calculation as follows: “Step 1: Actual Dollars Invested — Pre-Receivership Withdrawals = Net
19 Investment”; *see also SEC v. Illarramendi*, 2013 U.S. Dist. LEXIS 172119, at *5-6 (D. Conn.
20 Dec. 6, 2013) (“Under the Net Investment Method, a claimant's Allowed Amount is the
21 principal balance deposited with the Receivership entities reduced by any funds the claimant has
22 previously received, including interest, earnings, and return of principal or capital.”).

23 **VI. CONCLUSION**

24 WHEREFORE, the Receiver respectfully requests entry of an order: (i) establishing a
25 claims bar date for all pre-receivership claims against the Receivership Estate; (ii) approving the
26 form and manner of the notice thereof; (iii) approving the Claim Form and summary claims
27 procedure; (iv) establishing the net investment methodology for allowance of investor claims
28 and (v) for all other appropriate relief.

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Dated: January 21, 2020

DIAMOND McCARTHY LLP

By: /s/ Kathy Bazoian Phelps
Kathy Bazoian Phelps
Temporary Receiver