

1 CHRISTOPHER D. SULLIVAN (148083)
csullivan@diamondmccarthy.com
2 DIAMOND MCCARTHY LLP
150 California Street, Suite 2200
3 San Francisco, CA 94111
Phone: (415) 692-5200

4 *Counsel to Temporary Receiver*
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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11
12 COMMODITY FUTURES TRADING
13 COMMISSION,

14 Plaintiff,

15 v.

16 DENARI CAPITAL LLC, TRAVIS CAPSON,
AND ARNAB SARKAR,

17 Defendants.
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Case No. 19-cv-07284-EC

**NOTICE OF MOTION AND MOTION BY
RECEIVER KATHY BAZOIAN PHELPS
FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT OF CLAIM ASSERTED BY
INVESTOR GREGORY CAPSON**

*Memorandum of Points and Authorities and
Supporting Declaration Filed Concurrently*

Date: October 1, 2020
Time: 1:30 p.m.
Place: Courtroom: 5
450 Golden Gate Ave
San Francisco, CA
Judge: Edward M. Chen



1 PLEASE TAKE NOTICE THAT on October 1, 2020, at 1:30 p.m., in Courtroom 5 of the
2 above-titled Court located at 450 Golden Gate Ave., San Francisco, California, Kathy Bazoian
3 Phelps, the Court-appointed temporary receiver herein (the “Receiver”) for Denari Capital, LLC
4 (“Denari”), Travis Capson (“Capson”), and Arnab Sarkar (“Sarkar” and, collectively, the
5 “Receivership Defendants”) will and hereby does move for entry of an order granting her motion
6 (the “Motion”) to approve the Receiver’s settlement of the claim asserted by investor claimant
7 Gregory Capson (“Claimant”).

8 **Procedural Requirements:** If you oppose all or part of the relief requested in this Motion,
9 you are required to file your written opposition with the Office of the Clerk, United States District
10 Court, 450 Golden Gate Ave., San Francisco, California 94102, and serve the same on the
11 undersigned within fourteen (14) days from the filing of this motion, pursuant to the Court’s Order.
12 IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the above date, the Court
13 may grant the requested relief without further notice.

14 If you wish to receive a hard copy of the Motion by regular mail, please contact Kathy
15 Bazoian Phelps by email to kphelps@diamondmccarthy.com or by regular mail at Diamond
16 McCarthy, 1999 Avenue of the Stars, Suite 1100, Los Angeles, CA 90067.

17 **Meet and Confer:** The Receiver has met and conferred with the Commodity Futures
18 Trading Commission (“CFTC”), Claimant, and counsel to the Receivership Defendants prior to
19 filing this pleading and they have no objection to the relief requested herein.

20 **Relief Requested in Motion.** The Motion seeks entry of an order approving a settlement by
21 and between the Receiver and Claimant resolving Claimant’s timely submitted proof of claim.
22 Rather than engage in protracted and costly litigation, the Receiver and Claimant have entered into
23 an agreement, subject to Court approval, which provides Claimant with certain non-cash assets, in
24 full and final satisfaction of his claim. The Motion is made on grounds that, in the Receiver’s
25 business judgment, the proposed settlement is reasonable and in the best interests of the estate.

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1 This Motion is supported by the Notice of Motion and Motion, the accompanying
2 Memorandum of Points and Authorities, the Declaration of Kathy Bazoian Phelps and Exhibits filed
3 herewith, and all the papers and files in this matter. The Receiver hereby files her Motion.
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5 DATED: August 27, 2020

DIAMOND McCARTHY LLP

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7 By /s/ Christopher D. Sullivan
8 Christopher D. Sullivan
9 Counsel to Temporary Receiver
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MEMORANDUM OF POINTS AND AUTHORITIES

Kathy Bazoian Phelps, temporary receiver herein (the “Receiver”) for Denari Capital LLC (“Denari”), Travis Capson (“Capson”), and Arnab Sarkar (“Sarkar” and, collectively, the “Receivership Defendants”), hereby files this Motion for Order Approving Settlement of Claim Asserted by Gregory Capson (the “Motion”), seeking entry of an order approving a settlement by and between the Receiver and Gregory Capson (“Claimant”) resolving the proof of claim submitted by Claimant.

I. INTRODUCTION

The Receiver has entered into a Settlement Agreement (the “Agreement”) subject to the Court’s approval, with Claimant, resolving Claimant’s proof of claim. A copy of the Agreement is annexed as Exhibit “1” to the Declaration by the Receiver in support of the Motion (the “Phelps Declaration”).

Under the Agreement, the Receiver will cause the Receivership Estate (defined below) to transfer to Claimant 200,000 shares in National Gold Mining Co. (“National Gold”), a privately held corporation, which owns patented and unpatented mining claims, in full and final satisfaction of his claim. Claimant will not receive a distribution of cash on account of his claim. The Agreement allows the Receiver to avoid potentially protracted and costly litigation regarding Claimant’s proof of claim, which could delay her administration of the Receivership Estate and ability to obtain approval of a proposed plan of distribution (the “Plan”) filed concurrently with this Motion. And by distributing shares to Claimant, the Receivership Estate is able to preserve additional cash to distribute to other holders of allowed claims. The Agreement is contingent upon, among other things, Court approval of this Motion and the Plan.

The Receiver has conferred with the CFTC, counsel to the Receivership Defendants, and Claimant who each do not oppose the Motion.

II. STATEMENT OF FACTS

1. On November 5, 2019, the CFTC filed a Complaint (Doc. No. 1) against the Receivership Defendants, alleging that, since at least 2012, the Receivership Defendants have



1 fraudulently solicited and accepted at least \$8,300,000.00 from approximately twenty-eight
 2 participants, whose funds were subsequently commingled in a pooled investment scheme that
 3 included leveraged or margined off exchange foreign currency transactions.

4 2. On December 4, 2019, this Court entered an order (Doc. No. 37) (“TRO”) appointing
 5 the Receiver as temporary receiver and granting her full powers of an equity receiver over all funds,
 6 property and assets belonging to, being managed by or in the possession of or control of the
 7 Receivership Defendants (the “Receivership Estate”). In addition, among other things, the TRO
 8 provides that the Receiver is authorized to “[i]nitiate, defend, compromise, adjust, intervene in,
 9 dispose of, or become a party to any actions or proceedings in state, federal or foreign court that the
 10 . . . Receiver deems necessary and advisable to preserve or increase the value of the Receivership
 11 Estate” TRO, ¶24(e).

12 3. On February 6, 2020, the Court entered an Amended Order (Doc. No. 47) (“Bar Date
 13 Order”) establishing a claims bar date of April 6, 2020 (the “Claims Bar Date”).

14 4. On April 29, 2020, the Receiver filed the Receiver’s First Status Report (Doc. No.
 15 56) covering the period from her appointment through March 31, 2020.

16 5. On March 3, 2020, Claimant submitted to the Receiver a Proof of Claim (the “Proof
 17 of Claim”) asserting a claim against the Receivership Estate, broken down as follows: (i)
 18 \$350,000.00 in unpaid principal, comprised of \$100,000.00 original equity invested, and a deposit
 19 on February 9, 2019 in the amount of \$250,000.00; (ii) \$208,000.00 in unpaid expected profit or
 20 interest; and (iii) rights to the ownership of 200,000 shares of National Gold (the “Asserted National
 21 Gold Shares”). The Proof of Claim also provided that Claimant received interest payments from
 22 Denari in the aggregate amount of \$37,666.00.

23 6. On March 30, 2020, Claimant provided the Receiver with information supplementing
 24 the Proof of Claim, and supporting a larger claim against the Receivership Estate. Among other
 25 things, Claimant provided: (i) a copy of a check in the amount of \$90,000.00 by Claimant to Denari
 26 with written language by Claimant indicating that the funds were to be used to purchase National
 27 Gold shares on Claimant’s behalf; and (ii) evidence that in or about 2012, certain real property was
 28 transferred by Claimant to the Receivership Defendants with a value in excess of \$1 million. In or

1 about February 2013, the Receivership Defendants took possession of that real property, and caused
2 monthly payments to be made to Claimant. The accounting of the exact value contributed to the
3 Receivership Defendants and the exact value transferred by the Receivership Defendants to
4 Claimant is not presently known to the Receiver, but based upon the information available, the
5 Receiver believes that the amount of Claimant’s claim is likely substantially larger than the amounts
6 set forth in the Proof of Claim.

7 7. In response, the Receiver asserts that although Claimant is entitled to an allowed
8 claim against the Receivership Estate as a result of various transactions by and between Claimant
9 and Denari, Claimant is not necessarily entitled to the Asserted National Gold Shares, because none
10 of the Receivership Estate National Gold Shares are in Claimant’s name, and were not segregated
11 for Claimant’s benefit. The Receiver also believes that the value of 200,000 National Gold shares
12 may exceed the distribution Claimant is entitled to receive as an allowed claim under the Plan from
13 the Receivership Estate based upon the current submitted amount of the Proof of Claim

14 8. The Receivership Estate, through Denari, holds an 87% interest in Sierra Gold, LLC
15 (“Sierra Gold”), a Nevada limited liability company. The sole assets of Sierra Gold are 400,000
16 shares of National Gold (the “Indirectly Held National Gold Shares”). In addition to Sierra Gold’s
17 400,000 shares in national Gold, Denari owns 77,593 shares of National Gold and Capson owns
18 80,000 shares in National Gold, which are now part of the Receivership Estate (the “Directly Held
19 National Gold Shares”).

20 9. Concurrent with this Motion, the Receiver filed, among other things, the Plan and a
21 motion to approve the Plan. Pursuant to the terms of the Plan, the Receiver proposes to transfer the
22 Directly Held National Gold Shares to Claimant, in lieu of a cash distribution, and pursuant to the
23 terms of the Agreement. In addition, the Receiver proposes to transfer the Indirectly Held National
24 Gold Shares to certain investor claimants, including in part Claimant, who elected to receive
25 National Gold Shares in lieu of a cash distribution and in full satisfaction of their claims.
26 Accordingly, Claimant will receive 200,000 National Gold Shares in full satisfaction of his claim.
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LLP

1 **III. TERMS OF THE AGREEMENT**

2 Without modifying the terms, the Agreement provides generally as follows:

- 3 1. **Preconditions.** The Agreement is contingent upon: (i) approval of the Agreement by the
4 Court; and (ii) approval of the Plan that includes the distribution to Claimant as
5 contemplated by the Agreement.
- 6 2. **The Allowed Claim.** Claimant shall have a valid, unsecured, allowed claim against the
7 Receivership Estate (the “Allowed Claim”) that shall be satisfied solely by the transfer of
8 all the Receivership Estate’s Directly Held National Gold Shares (157,593 shares), and
9 42,407 of the Indirectly Held National Gold Shares, for a total of 200,000 National Gold
10 shares. Claimant shall not have any other claims against the Receivership Estate, or any
11 of the Receivership Defendants. The Allowed Claim shall represent any and all amounts
12 owed to Claimant by the Receivership Defendants or the Receivership Estate.

13 **IV. THE AGREEMENT IS IN THE BEST INTERESTS OF THE ESTATE**

14 The Receiver believes in her business judgment that the Agreement is fair, reasonable, and
15 is in the best interest of the Receivership Estate. There are “no federal rules [that] prescribe a
16 particular standard for approving settlements in the context of an equity receivership; instead a
17 district court has wide discretion to determine what relief is appropriate.” *Gordon v. Dadante*, 336
18 F. App’x 540, 549 (6th Cir. 2009). Nevertheless, courts in federal receiverships often look to the
19 following factors, which pertain to compromises reached in bankruptcy actions, when examining a
20 proposed settlement: the probability of success in the litigation; the difficulties, if any, to be
21 encountered in collection; the complexity of the litigation and the expense, inconvenience, and
22 delay associated therewith; and the paramount interest of creditors. *See SEC v. Ruderman*, No. CV
23 09-02974, 2011 WL 5857452, at *3 (C.D. Cal. Nov. 21, 2011) (considering these factors in
24 approving receivership settlement). Because compromises are favored in bankruptcy actions,
25 courts generally give deference to a trustee’s business judgment and approve settlements that are
26 negotiated in good faith and are “reasonable, fair, and equitable.” *Ruderman*, 2011 WL 5857452,
27 at *3.

28 The settlement terms set forth in the Agreement are in the best interests of the Receivership
Estate because they resolve the Proof of Claim in a manner that is satisfactory to the Receiver,
Claimant, and the CFTC without the need for protracted and expensive litigation, which would
reduce cash available for distribution. If the Receiver were forced to litigate the issues raised in



1 the Settlement Agreement, it might result in an unfavorable outcome for the Receivership Estate.
2 *See Ruderman*, 2011 WL 5857452, at *4 (explaining uncertainty of outcome of litigation
3 “weigh[ed] heavily” in favor of approval of settlement reached by receiver). If Claimant
4 established to the Court that he is entitled to more than the value of the 200,000 National Gold
5 Shares he is receiving in the settlement, both the National Gold shares and cash available to other
6 investor claimants could be depleted. And even if the Receiver were successful in objecting to
7 Claimant’s Proof of Claim, the expense could also reduce the cash available to distribute to other
8 holders of allowed claims. Settling this claim in lieu of litigation enables the Receiver to continue
9 administering the Receivership Estate and to advance a plan of distribution.

10 Additionally, Claimant’s acceptance of National Gold shares in full and final satisfaction of
11 his claim preserves cash for the Receivership Estate and enables the Receiver to make a more
12 meaningful distribution to holders of allowed claims under the Plan. Claimant’s acceptance of
13 National Gold shares, a non-cash asset, preserves cash for those investor claimants seeking a cash
14 disbursement. Allowing this settlement will allow the Receiver to deploy the limited cash of the
15 Receivership Estate in the most efficient manner.

16 As noted above, the Receiver has filed concurrently with this Motion, other motions
17 advancing her administration of the Receivership Estate including the proposed Plan and a motion
18 to approve the Plan. The Agreement is contingent upon not only upon Court approval of the
19 Agreement, but also the Plan. Thus, the Agreement is beneficial to the Receivership Estate in that
20 it does not compel the Receiver to commit 200,000 National Gold shares in full and final
21 satisfaction of Claimant’s claim, unless the Plan is approved, and the Receiver’s proposed
22 distribution scheme goes forward. The Receiver believes that the transactions contemplated by
23 these motions work together to achieve the most optimal outcome for the Receivership Estate.

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1 **V. CONCLUSION**

2 The Agreement is in the best interests of the Receivership Estate for the reasons set forth
3 above. The Receiver respectfully requests that the Court approve the Agreement attached to the
4 Phelps Declaration as Exhibit “1”, that the Court approve the form and manner of notice of the
5 Motion, and requests all other appropriate relief.
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8 DATED: August 27, 2020

DIAMOND McCARTHY LLP

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10 By /s/ Christopher D. Sullivan
Christopher D. Sullivan
Counsel to Temporary Receiver
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