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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 KATHY BAZOIAN PHELPS
PURSUANT TO LOCAL CIVIL RULE 7-11
FOR ORDER APPROVING
EMPLOYMENT OF:**

- 19 (1) **DIAMOND McCARTHY LLP, AS
GENERAL COUNSEL;**
- 20 (2) **MILLER KAPLAN LLP AS TAX
ADVISOR; AND**
- 21 (3) **SCHINNER & SHAIN AS
SECURITIES COUNSEL**

22 Date: No Hearing Set
23 Time: No Hearing Set
24 Judge: Edward M. Chen

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

2 On December 4, 2019, this Court entered an Order Appointing A Temporary Receiver (the
3 “Receiver Order”)¹ (Doc. No. 37) and appointed Kathy Bazoian Phelps as the temporary receiver
4 (the “Receiver”) with the full powers of an equity receiver, for Denari Capital, LLC (“Denari”),
5 Travis Capson, and Arnab Sarkar (collectively with Denari, the “Receivership Defendants”) and all
6 of their assets, except as set forth therein. The Receiver Order authorizes the Receiver to retain and
7 employ professionals including but not limited to investigators, attorneys or accountants,
8 appraisers, and other independent contractors and technical specialists of the Receiver’s choice.
9 The Receiver hereby moves the Court (the “Motion”) for an Order approving her employment of:
10 (1) Diamond McCarthy LLP (“Diamond McCarthy”) as her general counsel; (2) Miller Kaplan
11 LLP as her Tax Advisor; and (3) Schinner & Shain as her securities counsel.

12 The Receiver has determined that, in order to perform her duties and obligations under the
13 Receiver Order, she requires the assistance of counsel and an accountant. The Receiver requests
14 that this Court approve her employment of Diamond McCarthy as her general counsel, Miller
15 Kapan as her tax advisors, and Schinner & Shain as her securities counsel. This administrative
16 motion is supported by the Declaration of Kathy Bazoian Phelps (the “Phelps Declaration”). The
17 Receiver conferred with counsel to the Commodity Futures Trading Commission (“CFTC”) and
18 counsel to the Receivership Defendants and is advised that they do not oppose the Motion.

19 **II. Background**

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

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

27 _____
28 ¹ Capitalized terms used but not otherwise defined herein shall have the meanings given to them in
the Receiver Order.

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 **III. Receiver's Need for General Counsel**

5 The Receiver's duties and responsibilities under the Receiver Order depend significantly
6 upon her ability to manage and liquidate commodities and securities and to implement a
7 distribution plan. The Receiver will need the assistance of counsel in order to, among other
8 things: (i) analyze potential assets of the Receivership Entities including, but not limited to, the
9 securities holdings in the Receivership Estate and the best method and appropriate time for
10 liquidating those assets for the benefit of creditors; (ii) evaluate claims filed against the
11 Receivership and file claim objections where necessary and appropriate; (iii) evaluate business
12 transactions that might impact estate assets and the Defendants' shareholder interests in other
13 companies; (v) assist with analyzing the status and action items related to Denari's trading
14 account at a Retail Foreign Exchange Dealer in which Denari engaged in retail forex transactions;
15 and (vi) bring litigation or enter into settlements as may be necessary in connection with
16 recovering assets for the Receivership Estate.

17 Diamond McCarthy began assisting the Receiver immediately upon her receipt of
18 notification of her appointment. As such, she seeks to employ Diamond McCarthy as her general
19 counsel, effective as of December 4, 2019. She believes that Diamond McCarthy's employment is
20 appropriate and in the best interests of the Receivership Estate for several reasons. Upon learning
21 about the case, it was her judgment that she needed to act quickly and seek the assistance of
22 counsel to deal with the immediate legal issues arising in connection with the Receivership
23 Defendants' foreign exchange account and ownership of securities and other assets the value of
24 which may be subject to volatility based upon time and other market factors out of the Receiver's
25 control.

26 Attached to the Phelps Declaration as **Exhibit 1** is the resume of Diamond McCarthy and
27 biographies of the attorneys anticipated to perform the primary legal services on this matter. The
28 qualifications of Diamond McCarthy to serve as the Receiver's counsel are detailed in the

1 supporting Phelps Declaration. In summary, the Receiver anticipates that she will be able to
2 complete most of her administrative duties without legal assistance. To the extent she requires
3 legal counsel, Ms. Giugliano is a partner at Diamond McCarthy with nearly 12 years of
4 experience representing trustees and other fiduciaries. Other members of Diamond McCarthy
5 have experience in receivership and trustee representation as well as securities matters. The
6 Receiver will not record her time for services rendered as Receiver in the services provided as
7 counsel by Diamond McCarthy. The firm has agreed to discount its regular rates by 20% for
8 purposes of this engagement. A schedule of the regular hourly rates for the professionals at the
9 firm are listed in **Exhibit 2**.

10 **IV. Need for Tax Advisor**

11 The Receiver has identified Miller Kaplan as a tax advisor. The Receiver requires the
12 assistance of a tax advisor to assist with tax issues that may arise in the administration of the
13 Receivership Estate including but not limited to preparing and filing tax returns, valuing and
14 liquidating assets of the Receivership Estate, prosecuting claims on behalf of the Receivership
15 Estate, objecting or approving of claims filed against the Receivership Estate, communicating
16 with Denari's investors to the extent necessary to respond to particular tax questions that may
17 arise, and to prepare tax returns. The Receiver may also require tax advice regarding the tax
18 treatment of estate assets and the sale or distribution of securities. Miller Kaplan has agreed to
19 provide its services at the same hourly rates as those provided to SEC fair funds in which Miller
20 Kaplan is appointed as the tax administrator. These discounted SEC rates are less than Miller
21 Kaplan's normal rates as set forth in more detail in its engagement letter attached to the Phelps
22 Declaration as **Exhibit 3**. The qualifications of Miller Kaplan to provide the services in this case
23 are set forth in detail in the Phelps Declaration and **Exhibit 4** attached thereto.

24 **V. Need for Securities Counsel**

25 The Receiver requires the services of securities counsel to advise her regarding the sale or
26 distribution of both the publicly traded stock and the private shares that are property of the
27 Receivership Estate. Schinner & Shain will assist the Receiver in evaluating whether the securities
28 may be sold or distributed and, if so, whether those shares will need to bear a restrictive legend.

1 The services to be performed will entail a review of the circumstances relating to the shares to be
2 sold or distributed, and a review of the underlying transactions by which the Defendants acquired
3 the shares.

4 Schinner has agreed to a public service discount of 10% off of its regular rates as set forth
5 in detail in the engagement letter attached to the Phelps Declaration as **Exhibit 5**. The
6 qualifications of Schinner to provide the requested services are set forth in detail in Exhibit A to
7 Schinner's engagement letter.

8 **VI. The Court Has Broad Supervisory Authority to Approve Employment of the**
9 **Receiver's Professionals**

10 The Court has broad powers to determine what is necessary for the administration and
11 supervision of an equity receivership. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738
12 (9th Cir. 2005) ("A district court's power to supervise an equity receivership and to determine the
13 appropriate action to be taken in the administration of the receivership is extremely broad");
14 *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad
15 deference' to the [district] court's supervisory role"). It is respectfully submitted that the Court
16 should exercise its broad powers to authorize the relief requested in this Motion.

17 **VII. Conclusion**

18 For these reasons, the Receiver respectfully requests that the Court approve her employment
19 of Diamond McCarthy as her general counsel, Miller Kaplan as her tax advisor, and Schinner &
20 Shain as her securities counsel. The Receiver requests all other appropriate relief.

21
22 DATED: January 9, 2020

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