

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

CASE NO. 6:06-cv-137-Orl-31DAB

EDWARD S. DIGGES, JR.,  
NEXSTAR COMMUNICATIONS, LLC,  
TMT EQUIPMENT COMPANY, LLC,  
TMT MANAGEMENT GROUP, LLC,  
POSA, LLC, POSA TMT, LLC, TELEVEST  
COMMUNICATIONS, LLC, TELEVEST  
GROUP, LLC, SPIN DRIFT, LLC,

Defendants,

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**RECEIVER'S MOTION TO (I) AMEND ORDER (DOC. 210) GRANTING THE  
RECEIVER'S MOTION (DOC. 207) TO PROCEED WITH A DISTRIBUTION  
TO INVESTORS AND FOR RELATED RELIEF, AND (II) TO LIMIT NOTICE  
TO OF THIS MOTION TO (A) SEC, (B) INVESTORS WHOSE CLAIMS  
HAVE CHANGED OR BEEN ADDED AND (C) WEBSITE POSTING**

James D. Silver, as Receiver ("Receiver") for NEXSTAR COMMUNICATIONS, LLC, TMT EQUIPMENT COMPANY, LLC, TMT MANAGEMENT GROUP, LLC, POSA, LLC, POSA TMT, LLC, TELEVEST GROUP, LLC, SPIN DRIFT, LLC, and TELEVEST COMMUNICATIONS, LLC ("Receiver Entities"), by and through his undersigned counsel, requests that the Court amend its December 24, 2008 Order (Doc. 210) to: (i) add the claims of certain investors to the Schedule of Proposed Allowed Claim Amounts and Distribution Amounts ("Schedule"); (ii) modify certain information on the Schedule to more accurately set forth the allowed claim amounts and names of

certain investors; (iii) approve the Amended Schedule that the Receiver is in the process of completing and will file within the next week; (iv) authorize the distribution amount to increase from \$1,000,003.07 to \$1,024,200.85 in order to accommodate the addition of certain claims and the increase in certain claims, as will be set forth on the Amended Schedule; and (v) authorize the Receiver, at his discretion, to approve potential additional claims to the extent that such additions would not cause the distribution amount to increase by more than \$25,000 beyond the amounts set forth above.

The Receiver further requests that notice of this Motion be limited to the Securities and Exchange Commission, investors whose claims or related information will be added or changed on the Amended Schedule, and to posting of the Motion on the Receiver's web site. The Receiver will serve the Motion, together with the Amended Schedule to be filed, once the Amended Schedule has been filed.

### **BACKGROUND**

1. The Receiver filed his Motion (Doc. 207) to proceed with a distribution solely to investors and for various relief related to the proposed distribution (the "Distribution Motion"). By Order (Doc. 210) ("Order on Distribution Motion") dated December 24, 2008, the Court granted the Distribution Motion.

2. The Receiver is requesting the above relief to correct certain errors on the Schedule that have been brought to the Receiver's attention and to allow for the claims of certain additional investors who recently contacted the Receiver

to request that their claims be added to the Schedule. In addition, there are a number of deceased investors and the Receiver and his staff have been working diligently to determine who has ownership of the investment for purposes of the distribution. Further, corrections are being made to the names listed as the owners of certain of the claims to more accurately reflect in whose name or names each claim is held. Specifically, after sending the Distribution Motion to investors, the Receiver began receiving letters, e-mails, and telephone calls from investors. Generally speaking, the investors would ask why their names were not on the Schedule and would ask that they be included in the up-coming distribution.

3. In response to the above inquiries and requests, the Receiver checked the Receivership records to determine whether there was a record of a claim having been received from the inquiring investor. In most instances, the Receiver was unable to locate any record of having received a claim. In one instance, the Receiver did have a claim on file for the investor but the claim was inadvertently not included on the Schedule.

4. Several of the investors who contacted the Receiver in response to the Distribution Motion indicated that they may have inadvertently sent their claim to proposed class action counsel rather than to the Receiver. Some were elderly or sick and could not recall whether they had previously submitted a claim. Some insisted that they had previously submitted a claim even though the Receiver has no record of it.

5. Some investors called to ask that the schedule be corrected to more accurately list the name or names of the investors. In a couple of instances involving related investors, the claim of one investor was included but the claim of the other related investor was inadvertently omitted. These issues also caused the Receiver to audit the claim files in an effort to determine whether there were any other errors in the listing of whose name or names the claim is held.

**Receiver's Recommendation to Add Certain Claims  
and Increase certain Allowed Claim Amounts**

6. The Receiver recommends allowing and adding the claims of all of the affected investors, whose claims will be treated in accord with an Amended Schedule which the Receiver is in the process of completing and which will be filed hereafter. The Receiver notes that there were some errors on the Receiver's part that need to be corrected and require that the Schedule be amended. These changes will result in some increase in the total allowed claim amounts. Since the Schedule needs to be amended in any event, the Receiver believes that the burden of further amending the Schedule now to include the claims of the other affected investors is not great relative the administrative burden and expense to the Receivership of potentially having to litigate and sort out the issues of whether the other affected investor claims should be added to the Schedule such that they will be permitted to participate in the distribution.

7. In addition, making the requested changes will not have a major financial impact on the Receivership. If the distribution percentage is left the same, as the Receiver proposes, making the changes proposed in the Amended

Schedule will require that the total distribution amount increase by only \$24,197.78. The Receiver has sufficient funds on hand, after deducting for on-going and anticipated estimated expenses, and outstanding liabilities, to increase the distribution by the foregoing amount. The Receiver is further requesting additional authority for an additional \$25,000 increase, if, in the Receiver's sole discretion, the addition of certain claims is deemed justified and appropriate. The Receiver intends to limit this, to the extent practicable, to claims of which the Receiver has some notice and is in the process of investigating.

**Receiver's Recommendation to Increase Distribution Amount Rather than Decrease Distribution Percentage**

8. The Receiver proposes to increase the distribution amount rather than recalculate a new pro rata distribution percentage to address the increased total claim amount, as will be set forth in the Amended Schedule. Increasing the distribution amount benefits investors by eliminating the need to decrease the current distribution percentage and ultimately, the amount to be distributed to each investor.

9. Increasing the total amount to be distributed rather than reducing the distribution percentage is also beneficial in that it will minimize the administrative burden of having to field the numerous inquiries from the many investors that would surely result if they were to receive a further motion, particularly one reducing the amount to be distributed to them. Although the reduction would be relatively small, it would nonetheless be likely to prompt a large number of inquiries. Worse yet, it could prompt additional individuals to come forward and attempt to make late claims and reopen the claim process,

thus further increasing the administrative expense and burden of dealing with such issues.

**Receiver's Position Regarding any Future Late Claims**

10. While the Receiver, by seeking amendment of the Distribution Order and approval of the Amended Schedule, once it is filed, is seeking to permit inclusion of additional claims, at some point, the process must be brought to a close. In the future, given all of the notices previously given in this case regarding claims, as well as the posting of these notices on the Receiver's web site, the Receiver in all but the most compelling of cases, will recommend against allowing additional claims that have not been submitted or otherwise brought to the Receiver's attention as of the filing of this Motion, or which the Receiver is not already on notice of as of the date of this Motion.

**Request to Limit Notice**

11. The Receiver requests that the Court limit notice of this Motion to the Securities and Exchange Commission, the investors whose claims have changed or been added by virtue of the Amended Schedule, and to posting on the Receiver's web site. As noted above, the financial impact to the Receiver Estate from the changes requested by this Motion is relatively minimal. In addition, the investors who had allowed claims on the original Schedule will not have those claims reduced nor will they have their distribution amounts reduced as a result of the relief requested in this Motion.

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The actual distribution percentage was a minute fraction less but was rounded u

12. Finally, any benefit of noticing investors whose claims and distribution amounts have not changed in the Amended Schedule will be outweighed by the confusion of sending nearly 300 investors a further Motion regarding distribution and the administrative burden that will result from the Receiver and his staff having to field the numerous inquiries that would result. In addition, such a large mailing would risk having further individuals attempt to make late claims, thus further delaying the effective closure of the claims process and this Receivership. As recognized by the Ninth Circuit in *SEC v. Hardy*, 803 F.2d 1034, 1038, 1039 (9<sup>th</sup> Cir. 1986), the rights of receivership creditors "... must be balanced against the need for expeditious administration of the receivership." *Hardy* at p. 1039.

#### **MEMORANDUM OF LAW**

13. It is well settled that this Court has broad powers and wide discretion to determine relief in equity receiverships. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). This wide discretion derives from inherent powers of equity courts to fashion relief. *Id.* at 1567. The *Elliott* court applied equitable principles in determining issues relating to how the funds of the receivership would be distributed. *Id.* at p. 1570 (court recognized that since all former securities owners occupied same legal position, it would not be equitable to give some favorable treatment).

14. On February 14, 2006, this Court entered its Order Granting Permanent Injunction, Freezing Assets, Appointing a Receiver, and Ordering Other Ancillary Relief ("Receiver Order") in the SEC Action. *Receiver Order* at

VII. Pursuant to the Receiver Order, the Receiver was given the power to “...efficiently administer and manage the Receiver Estate...”, including without limitation, the power to “...to take custody, control and possession of all the funds, property, premises, leases, and other assets of or in the possession or under the direct or indirect control of the Receiver Estate....,” and “to take such other action as may be approved by this Court.” *Receiver Order* at VIII.

15. The requests made in this Motion are in furtherance of the powers granted in the Receiver Order to efficiently administer the Receiver Estate and are necessary to enable an orderly and equitable distribution in this matter. *SEC v. Hardy*, 803 F.2d 1034, 1038 (9<sup>th</sup> Cir. 1986). As the *Hardy* court recognized, the rights of receivership creditors “... must be balanced against the need for expeditious administration of the receivership.” *Hardy* at p. 1039. Moreover, in overseeing a receivership, a district court must make rules that are both practical and equitable. *Id.* (citation omitted).

16. Because the Receiver is a fiduciary and officer of this Court, the Court may give some weight to the “...Receiver’s judgment of the most fair and equitable method of distribution.” *CFTC v. Eustace*, 2008 WL 471574 at \*5 (E.D.Pa. February 19, 2008) (approving receiver’s pro rata distribution plan and recognizing at \*6 that the receiver is not representing a particular group of investors or claimants but rather proposes a plan that is most fair to all groups of investors).

## **CONCLUSION**

For the foregoing reasons, the Receiver respectfully requests that that the Distribution Order be amended in the manner requested in this Motion and that the Court authorize the Receiver to increase the distribution amount to \$1,024,200.85 and to proceed with the distribution in accordance with the Amended Schedule that the Receiver is in the process of completing and will hereafter be filing. The Receiver further requests to allow additional claims, in his sole discretion, as he may deem appropriate and justified, to the extent that such additional claims will not necessitate a further increase in the distribution amount of more than \$25,000.

## **Conferral**

The Receiver has conferred with the SEC regarding this Motion and the SEC supports the relief requested.

Date: January 9, 2009  
Fort Lauderdale, FL

Respectfully submitted,

s/William R. Scherer, III \_\_\_\_\_  
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Attorneys for Receiver

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been uploaded this 9<sup>th</sup> day of January, 2009 to the Court's CM/ECF system which will send a notice of electronic filing to the following counsel of record:

**William Hicks, Esq., Robert K. Gordon, Esq., M. Graham Loomis, Esq., and Jack Westrick, Esq.**

Atlanta Regional Office, Securities and Exchange Commission  
3475 Lenox Road N.E., Suite 1000  
Atlanta, Georgia 30326-1232

The Receiver will also serve this Motion, together with the Amended Schedule which will be filed within the next week, on the investors whose claims are being added or changed in any way as a result of this Motion and the Amended Schedule. A supplemental certificate of service will be filed when this service is made.

s/William R. Scherer, III  
WILLIAM R. SCHERER, III