

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,

**MOTION TO (1) AUTHORIZE RECEIVER TO PROCEED WITH
DISTRIBUTION TO INVESTORS IN ACCORDANCE WITH ATTACHED
SCHEDULE OF PROPOSED ALLOWED CLAIM AMOUNTS AND PROPOSED
DISTRIBUTION AMOUNTS AND TO APPROVE ATTACHED SCHEDULE, (2)
APPROVE DISTRIBUTION BEING MADE ON PRO RATA BASIS SOLELY TO
INVESTORS, (3) APPROVE CALCULATING CLAIMS ON NET BASIS, (4)
ALLOW CERTAIN LATE SUBMITTED CLAIMS, AND (5) FOR RELATED
RELIEF REGARDING CLAIMS AND DISTRIBUTION**

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: (i) authorize Receiver to proceed with distribution to investors in accordance with attached Schedule of Proposed Allowed Claim Amounts and Proposed Distribution Amounts and approve attached schedule, (ii) approve

distribution being made on a pro rata basis solely to investors, (iii) approve calculation of claims on net basis, (iv) allow certain late submitted claims, and (v) grant related relief regarding claims and the proposed distribution.

BACKGROUND

SEC Action and Appointment of Receiver

1. On February 2, 2006, the Securities and Exchange Commission commenced this action (“SEC Action”), and thereafter, in November 2006 filed its Amended Complaint alleging that Defendant Edward S. Digges, Jr. (“Digges”) and his affiliates engaged in a fraudulent securities “Ponzi” scheme that raised over \$22 million from approximately 300 investors. A copy of the SEC’s Amended Complaint is attached hereto as Exhibit “1.”

2. 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. A copy of the Receiver Order is attached as Exhibit “2.”

Nature of the Scheme

3. The Receiver will set out below a brief description of the scheme. An understanding of the basic scheme and how all investors were victimized in a similar manner is important in evaluating the Receiver’s requests that all investors be treated alike regardless of which entity they invested through, that the distribution be on a pro rata basis to investors only, and that investor claims be calculated on a net basis taking the total amount invested and reducing the claim for the total amount received back.

4. Digges, a recidivist violator and disbarred attorney who has served jail time for a prior fraud, perpetrated this scheme along with several confederates by convincing hundreds of investors that they were investing in point of sale credit card terminals. As set forth in more detail below, and in the attached affidavit (see Exhibit "3") of the Receiver's forensic accountant, Soneet Kapila, in reality, the investment was nothing more than a Ponzi scheme that paid earlier investors with later investors' money. Although actual credit card terminals were purchased and a portion of them were placed with merchants, the enterprise was never economically viable. When the scheme collapsed, investors lost millions.

5. Specifically, from at least April of 2003 until February of 2006, certain of the Receiver Entities sold more than \$22 million in investments in point of sale credit card terminals.

6. The investments were structured so that an investor would "purchase" one or more credit card terminals from one of the Receiver Entities for \$5,000.00 each and simultaneously would enter into a lease-back arrangement with another Receiver Entity. Under the lease-back arrangement, the investor was to receive lease payments of \$50 per month per terminal representing a 12% rate of return for five (5) years. The lease agreement required the Receiver lease-back entity to repurchase the credit card terminals from the investors for \$5,000 each at the conclusion of the five (5) year period and sometimes sooner.

7. The credit card terminals were to be placed with merchants to generate residual revenues for the venture. Presumably, the residual revenues

would fund payment of the monthly lease obligations and the repurchase obligations. In reality, and unbeknownst to investors, the majority of terminals were never placed and those that were, on average, were not earning sufficient revenues to even meet the \$50 per month lease obligations let alone reserve sufficient monies for the required repurchase of the terminals.

8. Indeed, “[t]he venture operated at a deficit from its inception in November 2002, and this deficit widened as time progressed because the residual payments from terminals that were actually placed with merchants were fractional when compared to the investor lease obligations.” See Kapila Affidavit attached hereto as Exhibit “3” (“Kapila Affidavit”), at Exhibit C¹, ¶ 16.

9. Further, the only meaningful source of funds available to make the lease payments and for the repurchase of terminals was the proceeds from the sale of new terminals to investors. Kapila Affidavit, pp. 10-11. The stream of monthly lease payments to investors created the illusion of a profitable business venture. Investors were never told that lease obligations would be paid primarily from sales to other investors.

Change of Entities after Maryland Cease and Desist Order

10. At the inception, Nexstar Communications LLC (“Nexstar”) was the selling entity and POSA, LLC (“Posa”) was the lease-back entity.

11. However, this changed after the state of Maryland issued a cease and desist order in November 2003 against Nexstar and POSA based on violations of the Maryland securities laws. Although the entities engaged in the

¹ Exhibit C to the attached Kapila Affidavit is a prior affidavit of Mr. Kapila dated November 10, 2006. Whenever the term “Kapila Affidavit” is used in this Motion, it refers to the August 15, 2008 Kapila Affidavit, which contains various exhibits, including the prior November 10, 2006 affidavit of Mr. Kapila.

“sale lease-back”² scheme changed after the Maryland cease and desist order, the underlying nature of the scheme did not.

12. In particular, shortly after being served with the Maryland cease and desist order, TMT Management Group, LLC (“TMT Management Group”), a Delaware entity, became the “seller” and took the place of Nexstar, and POSA TMT, LLC (“Posa TMT”) a newly formed Delaware LLC, became the “lease-back” entity, taking the place of POSA.

13. Despite this change in entities to Delaware entities, the nature of the scheme did not change. The venture continued selling investors investments in point of sale credit card terminals for \$5,000 each with a simultaneous lease-back by a related entity for a monthly return of \$50 per terminal, equating to 12%. As was the case before the change in entities, investors were to receive back the original \$5,000 per terminal at the end of five (5) years.

14. Regarding the change to Delaware entities, Chris Haug, the venture’s Chief Financial Officer, stated:

“Despite the use of Delaware entities for the sale and leaseback, the venture continued the same as before with the sale/leaseback of credit card terminals to investors and efforts to place those terminals with merchants. The management and employees remained the same. The terminals continued to be purchased from the same supplier. IRA Resources in California continued on as the IRA custodian that we used to facilitate the use of investors individual retirement account funds to purchase into the program. The only difference was that we had the investor packages sent to Orlando, Florida and processed in Orlando, and

² The terms sale, lease, lease-back and the like are used in this Motion because that is the terminology that the individuals orchestrating the scheme used to characterize the transactions. Despite the existence of actual credit card terminals and the paperwork and terminology used in the documentation of the transactions, the Receiver does not believe that there were true “sales” or “leases”, but rather, as alleged by the SEC, this case involves the sale of investment contracts in violation of the federal securities laws.

the non-IRA investors would send their checks to Orlando and the general procedure was to have those checks deposited in Orlando.”

See Haug Affidavit attached hereto as Exhibit “4”, at ¶ 10.

15. Indeed, Digges in an e-mail to the IRA custodian -- IRA Resources --, described the change in entities as merely a “structural” change, suggesting that the reason for the change was that Delaware does not have sales taxes. In explaining the “structural” change to Delaware entities, Digges made it clear that the venture was continuing. In the e-mail, Digges wrote: “... the TMT Sale/Leaseback Investment Program continues to develop & progress well as FY2003 concludes & FY2004 commences.” Digges explained that the new paperwork that would result from the change to Delaware entities would “... look only slightly different.” Digges concluded his e-mail by stating:

“Thus, inasmuch as we already had in place TMT Management Group, LLC, a Delaware company has [sic] the specific venture manager here under the overall oversight of The Televest Group, we’ve decide [sic] to simply have the sale of the TMTs be made by that Delaware entity & then leased back to POSA TMT, LLC—also, a Delaware company--&, additionally, while in the process of ‘Delaware-tizing’ (if such be a word)??) we’re now going to proceed forward utilizing Delaware LLCs for the IRA investment purposes as well.”

16. Not surprisingly, Diggers’ e-mail omits any mention of the Maryland cease and desist order.

17. In addition to the Nexstar/POSA and the TMT Management Group/POSA TMT phases of the venture, by May of 2005 or shortly thereafter, the venture began using TMT Equipment Company, LLC as the “selling” entity while continuing to use POSA TMT as the “lease-back” entity. Despite the appearance of TMT Equipment in the paperwork, the essentials of the scheme

and the parties in control of operations and financial transfers remained the same.³

18. There is yet an additional entity -- TMT International. Although TMT International is not a Receiver Entity, as with the other entities, it was part of the same general scheme and was orchestrated and operated by the same individuals. While entities such as Nexstar and TMT Management Group were used for sales to domestic investors, TMT International was used for sales to international investors, primarily investors from Colombia.⁴ As with the sales to domestic investors after issuance of the Maryland cease and desist order, the "lease-back" entity for sales to international investors was also POSA TMT, one of the Receiver Entities. Thus, since at least one Receiver Entity had direct obligations to the TMT International investors, there can be no serious dispute that the TMT International investors have claims in the Receivership. It also appears that TMT Management Group may have been used as the designated "seller" on many if not all of the international sales.

Commingling of Monies through Massive Transfers Involving Related Entities

19. Throughout the venture, monies were commingled by virtue of numerous transfers through a vast maze of Receiver Entities and other related entities. These convoluted transfers may have been used, in part, to obscure the fact that monies received from the sales to investors were being used to make

³ It is also not entirely clear that use of TMT Management Group ceased entirely despite the appearance of TMT Equipment during this latter time frame.

⁴ There were far fewer sales to the international investors. In addition, the total dollar amount of sales to international investors is a small fraction of the total dollar amount of sales to all investors. This is also reflected in the claims totals where the total dollar amount of allowed claims of TMT International investors is a small fraction of the total dollar amount of allowed claims of all investors.

lease payments to investors, one of the classic hallmarks of a Ponzi scheme. As observed by Mr. Kapila: “The insiders [which consists of Receiver Entities and other related entities] constantly made circuitous transactions between in excess of 130 bank accounts. The transfers show no foundation of a legitimate business purpose. The excessive number of entities and massive number of transfers between the entities simply serves to obscure the transactions and ultimate disposition of investor funds.” Kapila Affidavit (Exhibit 5) at p. 11 under Section entitled “Circuitous Transfers Between Insiders. (bracketed explanatory noted added). See also November 10, 2006 Affidavit of Mr. Kapila attached as Exhibit “C” to the August 15, 2008 Kapila Affidavit. at paragraphs 22-29.

Claims Procedure Order and Claims Process/Distribution Amount Authorized

20. By Order dated February 25, 2008, this Court granted, in part, the Receiver’s Motion for an Order Approving Claims Procedures and Establishing Claims Deadlines for Claimants (“Claims Procedure Order”) (Doc. 195).

21. The Claims Procedure Order set forth detailed claims procedures and approved an initial distribution amount of \$1 million.⁵

22. Pursuant to the Claims Procedure Order, the Receiver mailed almost three-hundred (300) claims forms to investors, and notified them that all Claim Forms must be postmarked no later than May 16, 2008. Additionally, the

⁵ In the Motion (Doc. 149) granted in part by the Claims Procedure Order, the Receiver requested that the distribution be made solely to the defrauded investors. At the time of the Motion, based on the funds available for distribution at the time, the proposed distribution amount was to be \$600,000, which was part of the proceeds of the \$1.3 million settlement with the Golodetz Related Parties. Subsequently, based on the Receiver’s recommendation in his Status Report (Doc. 194), the Court approved a distribution of \$1 million rather than the \$600,000 previously proposed. Putting aside the increase in the distribution amount, since the Claims Procedure Order granted the Motion “in part”, it is not entirely clear whether the Court also approved the request that the distribution be made solely to investors. Out of an abundance of caution, this Motion requests that the Court make clear that the Receiver is authorized to make the distribution solely to investors.

Receiver filed Receiver's Notice of Mailing and Publication pursuant to the Court's February 25, 2008 Order (Doc. 196).

23. In response to the mailing of the Claim Forms, the Receiver received more than two-hundred and fifty-five (255) claims from investors. As set forth in more detail below, after the claims deadline had passed, additional claims forms were submitted by investors ("Late Claims") who had been unaware of the claims process or had extenuating circumstances for not having timely submitted their claims forms. In at least one instance, the investor had passed away and the son of the investor who became the executor of his father's estate was not aware that he was required to submit a claim.

24. The Receiver and the Receiver's law firm staff individually analyzed each investor's claim. Furthermore, the Receiver sent out approximately ninety (90) claim objections, many of which were limited objections based on discrepancies in the claims figures, particularly the dollar amount received back by the investor; a number of claims objections were directed to the need for additional documentation such as death certificates, letters of administration, trust documents, and the like because many of the investors are elderly. Most of the Late Claims were for claim amounts that were consistent with the amounts shown on the bank reconstruction.

25. In response to Receiver claims objections, the Receiver received more than eighty (80) responses, a number of which effectively agreed with the claim amount recommended by the Receiver. Other investors did not respond. Later in this Motion, the Receiver requests that the claims of investors who failed

to respond be treated in accordance with the Receiver's recommendations.

26. With very limited exceptions, the Receiver was able to resolve all claims disputes with investors who submitted responses in opposition to the Receiver's claims recommendations. The Receiver was unable to resolve the claims dispute with investor Roberta Lowe and submitted that dispute to the Court for resolution. The Court entered an Order (Doc. 201) directing Ms. Lowe to show cause why her claim should not be allowed in the amount recommended by the Receiver. When Ms. Lowe did not respond, the Receiver filed a Motion (Doc. 204) to set Ms. Lowe's claim in the amount recommended by the Receiver in his claim objection. On October 2, 2008, the Court entered an Order (Doc. 205) setting Ms. Lowe's claim at \$55,900, in accordance with the Receiver's recommendation.

27. The Receiver had previously resolved a claims objection and response regarding a claim from a Colombian investor, Peter Gutierrez, who was also a broker. The resolution was verbal. Since the resolution was predicated on a settlement, the Receiver proceeded to document the settlement so that it could be submitted to the Court for approval. In accordance with the verbal settlement, the Receiver sent a proposed Settlement Stipulation to Mr. Gutierrez to be executed. Mr. Gutierrez, through a representative, recently advised the Receiver that he is in agreement with the Settlement Stipulation and will be executing and returning the Stipulation shortly. Once the Stipulation has been received the Receiver will submit it to the Court for resolution. Since the proposed Stipulation merely disallows Mr. Gutierrez' claim in exchange for a

release of any claim the Receiver has in connection with his receipt of the disclosed broker's commission, the Receiver believes that approval of the Stipulation will be a perfunctory matter. The Receiver believes so since the Receiver has not been pursuing damage claims against brokers and the only reason the Receiver considered bringing one against Mr. Gutierrez was the fact that he had submitted a claim for recovery in the Receivership.

28. Based on the Receiver's extensive claims analysis and review, resolution of claims objections, and treatment of objected to claims in accordance with the Receiver's recommendations set forth in the claim objection, the Receiver has prepared a Schedule of Proposed Allowed Claim Amounts and Proposed Distribution Amounts attached hereto as Exhibit "5" (the "Schedule" or "Attached Schedule").

Request for Approval of Late Claims Submissions

29. The Receiver requests that the Court approve the late submissions by or on behalf of investors to the extent that they were received as of the date of this Motion. The late claims for which approval is sought appear to be valid investor claims and are unobjectionable. The investors who submitted claims after the claims submission deadline either did not receive notice or had other extenuating circumstances, including one instance where the investor was elderly and passed away before the claims process had begun. The investor's son, who is also the executor of his father's estate, was unaware that a claim had to be submitted. The change in distribution percentage by including these otherwise valid claims is relatively minimal. In addition, since the claims were

submitted to the Receiver prior to submission of the Schedule setting forth the proposed allowed claim amounts and distribution amounts for Court approval, and prior to any distribution, inclusion of these late claims will not disrupt the orderly claims process.

Request for Disallowance of Peter Gutierrez Claim

30. The Receiver requests that Mr. Gutierrez' claim be disallowed in accordance with the Settlement Stipulation to be executed by Mr. Gutierrez and then submitted to the Court for approval. The Schedule has Mr. Gutierrez' claim listed at -0-, which is the same as having his claim disallowed.

Request regarding Objected to Claims for which no Response was Submitted

31. In accordance with the claims procedure established by this Court, the Receiver requests that all objected to claims be treated in accordance with the recommendation set forth in the Receiver's claim objection where the investor did not submit a response.

32. The Claims Procedure Order provided that the "Receiver shall inform investors that their responses to objections must be postmarked no later than July 18, 2008." Order at paragraph 7. In each claims objection sent to investors, the Receiver advised the investor, in bold print and all capital letters that **"FAILURE TO SEND YOUR RESPONSE TO CLAIM OBJECTION TO THE RECEIVER, POSTMARKED BY NO LATER THAN JULY 14, 2008, WILL RESULT IN YOUR CLAIM BEING REDUCED TO THE PROPOSED ALLOWED AMOUNT OF YOUR CLAIM (AMOUNT STATED), AS RECOMMENDED BY THE RECEIVER."** (Emphasis in original claim objections).

33. In those instances where the Receiver recommended that the investor's claim be disallowed, a similar conspicuously displayed disclosure was made, with the added notice that failure to timely respond would result in the investor's claim being disallowed. Where the investor's proposed allowed claim amount is listed at -0-, this is the same as a disallowance of that claim.

34. Since investors who did not respond to the claims objections were on notice that their claims would be reduced or disallowed in accordance with the Receiver's recommendation if they did not timely respond, the Receiver requests that the Court provide in its Order on this Motion that all objected to claims which were not responded to shall be treated in accordance with the Receiver's recommendations set forth in the claims objections. The Receiver has treated all such claims in this manner in the attached Schedule.

Request that distribution be made on a pro rata basis

35. In order to treat similarly victimized investors in the same manner, the Receiver requests that the distribution be made pro rata based on the allowed claim amounts set forth in the attached Schedule. Under a pro rata distribution, all investors holding allowed claims are treated the same in that each will receive the same percentage distribution on his or her allowed claim amount. The distribution percentage is calculated by dividing the approved distribution amount -- \$1 million -- by the total allowed amount of all investor claims -- \$14,958,238, resulting in a distribution percentage of 6.6853. Under this method, investors with allowed claims will receive the same proportional distribution as all other investors with allowed claims.

Disregarding Entities in Making Pro Rata Distribution to Investors

36. The distribution is proposed to be made on a pro rata basis regardless of which entity was used for the sale or lease-back to a particular venture since, as set forth above, all investors holding allowed claims were victimized in a similar manner. The change in entities did not change the substance of the scheme and did not change the on-going venture. The change was precipitated by the Maryland cease and desist order and was done in an effort to circumvent that order. From the Receiver's vantage point, it was nothing more than a corporate machination employed to extend the life of a fraudulent scheme.

37. In addition, as set forth above, monies were comingled by virtue of massive transfers between related entities. Indeed, proceeds from the sales to investors from the later phase of the scheme were used to pay lease payments of investors in an earlier phase of the scheme.

Request that Allowed Claim Amounts be Calculated on a net basis

38. In addition, in calculating the allowed claim amounts of the claims of all investors, the Receiver has taken the total amounts invested and deducted the total amounts received back to arrive at the net claim amounts. By doing so, investors who received more lease payments have their claim amounts reduced more whereas investor who received less in the way of lease payments have their claims reduced less.

39. Using net claim amounts as the allowed claim amounts recognizes that the ultimate issue in this case is how much investors will lose rather than

how much they might profit. As discussed in the Kapila affidavits, the reality is that the source of the funds used to make lease payments was primarily monies received from other investors. Under the circumstances, it is unrealistic to view amounts previously received as profits rather than a reduction of the investor's ultimate loss.

40. In addition, use of the net claim amount method helps reduce the inequality that results from the fact that some of the investors invested earlier and therefore received more lease payments and lost somewhat less money on a percentage basis⁶ than those who invested later and therefore would have received less lease payments and would have suffered even greater losses relative to the amount invested. Since the distribution is only a percentage of the allowed claim amounts, use of the net claim amounts does not fully eliminate the disparity between early and late investors. However, in consideration of the equities, it does reduce the disparity to some degree.

Request that Distribution be Limited to Investors Only

41. Since this case was filed by the SEC based on an alleged securities scheme to defraud investors around the country, many of whom are elderly, and given the very limited funds available for distribution compared to the total amount of allowed investor claims, the Receiver believes that it is most equitable that the monies available for distribution be distributed to the investors.

⁶ The losses are discussed on a percentage basis because you could have instances where a later investor might receive back a larger amount in lease payments than an earlier investor where the later investor invested a much larger amount than the earlier investor. Nonetheless, on a relative basis, the later investor would have lost more.

42. The Receiver also notes that a portion of the Receiver's \$1.3 million settlement with the Golodetz Related Parties was based on the sale of the credit card terminals and related placements to the Golodetz Related Parties. Notice of the proposed settlement was sent out to all known investors. As previously noted, investors were led to believe that they owned the credit card terminals. Indeed, as part of the "sale" packages, investors were given documents entitled "certificate of title" for the credit card terminals. In moving for approval of the settlement with the Golodetz Related Parties, the Receiver noted that even if the investors could be said to have title to the terminals, it made far more sense for the investors to have the Receiver sell the terminals rather than send one or more credit card terminals to investors around the country, and have them attempt to find a way to sell the terminals themselves. The Receiver believes that the above circumstance represents an additional ground for having the proceeds of the distribution go solely to investors in accordance with the attached Schedule.

43. In addition, apart from some residual revenue and the Golodetz related settlement, the other monies recovered by the Receiver in this matter have come primarily from litigation settlements. The Receiver's litigation claims were predicated largely on theories, which although not seeking recovery for the fraud itself, were largely predicated on the fact that a fraud had occurred and then tracing the proceeds of the fraud into the hands of various defendants. For example, in the Receiver's fraudulent transfer and unjust enrichment claims, the Receiver would support the claim that the transfers were intentionally fraudulent

on the fact that the monies raised from investors were the proceeds of a fraudulent Ponzi scheme. The Receiver had also found a number of cases that hold that the finding of a Ponzi scheme, in itself, is sufficient to demonstrate fraudulent intent with regard to transfers in furtherance of the scheme.

44. Thus, in this Receivership, repatriating a portion of the monies raised from investors is a fair and equitable outcome. Since the distribution percentage is less than seven percent (7%), investors are certainly not receiving any windfall or unfair advantage. Rather, this distribution merely reduces their losses by a very modest amount.

Request for Authority to Proceed with Distribution in Accordance
with Attached Schedule, and to Approve Attached Schedule

45. As set forth above, the attached Schedule contains the final proposed claim amounts based on the Receiver's extensive claims analysis and review, resolution of claims objections, and treatment of objected to claims in accordance with the Receiver's recommendations set forth in the claims objections. Where a claim has not been objected to, the Schedule reflects that claim in the amount set forth in the investor's claim. The Schedule is limited to investor claims that were submitted to the Receiver, including the timely submitted claims and the Late Claims submitted as of the date of this Motion.

46. In addition, corresponding to each investor allowed claim amount is a proposed distribution amount, which is the allowed claim amount after the distribution percentage has been applied to it. The distribution percentage is calculated by dividing the distribution amount of \$1 million by the total allowed

claim amounts of \$14,958,238, which yields a distribution percentage of 6.6853⁷. The distribution percentage is then applied to each investor's allowed claim amount, as reflected on the attached Schedule, to calculate the distribution that will be made to each investor.

47. The Receiver requests that the Court approve the attached Schedule, including the proposed allowed claim amounts and proposed distribution amounts set forth on the Schedule. Further, the Receiver requests that the Court authorize him to move forward with the previously authorized \$1 million⁸ distribution in accordance with the attached Schedule. The Receiver notes that distribution to the IRA investors will be preceded by the Receiver sending IRA investors election forms relating to withholding under the Internal Revenue Code. The Receiver is required to withhold 10% from distributions to IRA investors unless they elect not to have the monies withheld.

Request that Distribution in Receivership be Limited to
Investors that submitted their Claims prior to the date of this Motion

48. The Schedule is limited to those investors who submitted claims as of the date of this Motion. Since proper notice of the claims procedure and claims deadline was mailed to all known investors and was posted on the Receivership web site, it is appropriate to bar the claims of those investors who have failed to submit their claims prior to this Motion. As previously noted, the

⁷ The actual distribution percentage was a minute fraction less but was rounded up at the ten thousandths place, thus resulting in a slightly higher actual distribution amount of \$1,000,003.07 rather than \$1,000,000.00.

⁸ As set forth at note 7 above, the Receiver is actually requesting authority for a distribution of a slightly higher distribution amount of \$1,000,003.07 based on the \$3.07 differential created as a result of rounding off the distribution percentage at the ten-thousandths place.

Claims Procedure Order required investors to submit their claims with a postmark of no later than May 16, 2008.

49. The known investors who have not submitted their claims are listed on Exhibit 6 attached to this Motion. The Receiver requests that the Order on this Motion specify that the investors listed on Exhibit 6, and any other investors that have not submitted claims prior to the date of this Motion, shall not have any claim or right to distribution in the Receivership.

MEMORANDUM OF LAW

50. 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).

51. 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.

52. 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 of the \$1 million authorized by this Court. A primary purpose of equity receiverships is to promote the orderly and efficient administration of the receiver estate for the benefit of the creditors. *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th 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).

53. 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).

Calculation of Claims on Net Claim Basis

54. The Receiver has calculated allowed claims on a net claim approach, that is, deducting amounts received by an investor from the amount invested to arrive at a net claim. As set forth previously, the lease payments

received by investors were not “profits” but rather the proceeds of a Ponzi scheme where funds from new investors were used to pay returns to prior investors. See Kapila Affidavit at pp. 10, 11. This created the illusion of a profitable business venture. The reality was that it was a losing venture from its inception. Kapila Affidavit at p. 10, third full paragraph.

55. As discussed in more detail in paragraphs 38-40 above, under the circumstances of this case, the net claim approach is fair and equitable. See *Commodity Futures Trading Commission v. Franklin*, 652 F. Supp. 163, 169 (W.D.Vir. 1986), rev’d on other grounds sub nom., 875 F.2d 76 (4th Cir. 1989) (district court found that by subtracting “profits” before determining pro rata share, the “fake profits” are properly treated as “merely redistributed capital.”). See generally, *Teletronics, Ltd. V. Kemp*, 649 F.2d 1237, 1241 (7th Cir. 1981) (where funds were obtained by fraud, “...to allow some investors to stand behind the fiction that [the] Ponzi scheme had legitimately withdrawn money to pay them ‘would be carrying the fiction to a fantastic conclusion’” (quoting *Cunningham v. Brown*, 265 U.S. 1, at 13).

Pro Rata Distribution

56. In addition, for the reasons stated in paragraphs 35-37 above, having the distribution made on a pro rata basis so that each investor receives a proportional share of the distribution amount is fair and equitable. Indeed, in a number of SEC equity receiverships courts have approved or affirmed pro rata distributions even where some investors attempt to use tracing and similar theories to elevate their claims over the claims of the other defrauded investors.

See, e.g., *SEC v. Elliott*, 953 F.2d 1560, 1569-1570; *U.S. v. Real Property*, 89 F.3d 551, 553 (9th Cir. 1996); *SEC v. Credit Bancorp, Ltd.*, 2000 WL 1752979, *14-*15 (S.D.N.Y. November 29, 2000), aff'd, 290 F.3d 80 (2nd Cir. 2002); *SEC v. Merrill Scott & Associates, Ltd.*, 2007 WL 26981 at *2, *5, *6.

57. In this case, no investors have asserted any tracing or similar theories to attempt to assert a claim over a portion of the funds being distributed. Therefore, there should be little dispute that a pro rata distribution is the most appropriate method for making the distribution here. In *SEC v. Elliott*, the Eleventh Circuit found convincing the premise that where all investors have been defrauded and occupied the same legal status, investors should share in the fund “proportionately to their lost investments.” 953 F.2d at p. 1570 (quoting from district court’s decision in *Commodity Futures Trading Commission v. Franklin*, 652 F. Supp. 163 at 168 (W.D.Va. 1986), which was reversed on other grounds by *Anderson v. Stephens*, 875 F.2d 76 (4th Cir. 1989).

Distribution to Investors Only

58. Likewise, it is fair and equitable that the distribution be limited to investors only as was done in *SEC v. Merrill Scott & Associates, Ltd.*, 2007 WL 26981 at *2. In that case, apart from payment of administrative expenses and tax claims, the only parties that would receive a portion of the partial distribution being proposed were investors on a pro rata basis. The court noted that the partial distribution that was approved contemplated no distribution beyond the first three classes, with class one and two being the administrative expense and

tax claims, respectively, and class three being the claims of the non-insider investors.

59. The reasons for limiting distribution to the defrauded investors are discussed in detail in paragraphs 41-44 above.

Disregarding Corporate Entities in Making Distribution

60. For the reasons more particularly stated in paragraphs 11-16, and 36 and 37 above, all investors were defrauded in a similar manner and the change in entities appeared to be nothing more than a subterfuge to extend the scheme. Moreover, all of the entities were controlled by the same parties and monies were commingled between Receiver Entities and other related entities through a massive number of transfers. The transfers were all orchestrated from the same office, by the same individual, and at the direction of the same individual. Accordingly, the distribution should be made on a pro rata basis to all investors regardless of which entity was the “seller” or “lease-back” entity with regard to a particular investor.

61. In addition, the monies being distributed have been generated primarily by prior litigation settlements, which did not distinguish between the various Receiver Entities. A portion of the proceeds of one of those settlements was allocated to the sale of the credit card terminals and related placements. The credit card terminals were the subject of what have been characterized as sale/lease-back transactions with investors discussed previously, and would have included terminals for which asserted bills of sale were given to investors

from the “seller” entities used in all three phases of the scheme – Nexstar, TMT Management Group, and TMT Equipment.

62. Despite Digges’ creative use of entities, the substance remains the same – all investors were defrauded as part of a common scheme relating to transactions characterized as the sale/lease-back of credit card terminals. Consistent with this fact, the Receiver was appointed as receiver for all of the Receiver Entities, and the Court’s freeze order froze the assets of all entities owned or controlled by Digges, without regard to the confines of the corporate structures that Digges created.

63. Accordingly, the distribution should be made to investors without regard to the entities involved. See generally *CFTC v. Eustace*, 2008 WL 471574 at *5 (E.D.Pa. February 19, 2008) (over objection, court approved receiver’s proposal for pro rata distribution to investors regardless of which fund they invested in).

Excluding from Distribution Investors who did not Submit Claims
and Reducing or Disallowing Claim per Receiver’s Recommendations

64. Since “efficient and orderly categorization” of investor claims is needed to determine the nature and extent of investors’ claims to receivership assets, it is proper for a district court to establish reasonable deadlines for submitting claims and for responding to any objections to their claims. *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986). Accordingly, it is appropriate for this Court to exclude from distribution those investors who did not previously submit claims.

65. For the same reasons, it is appropriate for the Court to reduce or disallow claims in accordance with the Receiver's claims objections where the investor has failed to timely respond to the claims objection.

Allowance of Previously Submitted Late Claims

66. For the reasons discussed in paragraph 29 above, the Court should permit the Late Claims to be considered and included in the Distribution, which the Receiver has done in the attached Schedule.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court grant the relief requested in this Motion.

Date: November 19, 2008
Fort Lauderdale, FL

Respectfully submitted,

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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 19th day of November, 2008 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 on all known investors and will file a supplemental certificate of service. The Receiver will redact the home address information of the investors.

Conferral

The Receiver will file a supplemental certificate of conferral with the SEC once the SEC has had an opportunity to fully consider the Motion and provide feedback to the Receiver. Although the SEC is not an opposing party, the SEC is the agency charged with enforcing the federal securities laws and its views regarding the proposed distribution should be given careful consideration and great weight.

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