

1 DAVID L. OSIAS (BAR NO. 091287)  
DEBRA A. RILEY (BAR NO. 151925)  
2 TED FATES (BAR NO. 227809)  
ALLEN MATKINS LECK GAMBLE  
3 MALLORY & NATSIS LLP  
501 West Broadway, 15th Floor  
4 San Diego, California 92101-3541  
Phone: (619) 233-1155  
5 Fax: (619) 233-1158  
E-Mail: dosias@allenmatkins.com  
6 driley@allenmatkins.com  
tfates@allenmatkins.com

7 Attorneys for Receiver Thomas F. Lennon  
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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
11

12 SECURITIES AND EXCHANGE  
COMMISSION,

13 Plaintiff,

14 v.

15 TUCO TRADING, LLC and  
16 DOUGLAS G. FREDERICK,

17 Defendants.  
18

Case No. 08-CV-00400 DMS (BLM)

**EX PARTE APPLICATION FOR ORDER  
APPROVING SETTLEMENT BETWEEN  
RECEIVER AND T3 CAPITAL, LLC**

19 Thomas F. Lennon ("Receiver"), the court-appointed permanent receiver for Tuco Trading,  
20 LLC ("Tuco"), hereby applies, on an ex parte basis, for an order approving the settlement between  
21 the Receiver and T3 Capital, LLC (the "Application").

22 **I. INTRODUCTION**

23 As noted in the Receiver's First Interim Report, in his testimony before the SEC and in  
24 interviews with the Receiver, Defendant Douglas G. Frederick ("Frederick") stated that Tuco  
25 holds a ten (10%) percent ownership interest in Tuco class B member T3 Capital, LLC ("T3"). T3  
26 is a limited liability company headquartered in New York.

27 T3 had a unique relationship with Tuco in that Tuco did not charge T3 any commissions  
28 for its trading activity. Rather, due to the substantial volume of shares traded by T3, Tuco

1 received the benefit of lower rates from Lightspeed, the software trading platform used by T3.  
2 Therefore, Tuco was able to earn more from the trading activity of its other class B members  
3 ("Members") that used Lightspeed because of its relationship with T3.

4 The Receiver investigated the ownership interest claim asserted by Frederick and learned  
5 that there was no written agreement between Tuco and T3 regarding an ownership interest in T3.  
6 T3 denied that Tuco had such an interest and asserted that even if it did, Tuco would owe T3 more  
7 than the ownership interest was worth because (a) Tuco would have been obligated to cover ten  
8 (10%) percent of T3's costs of operation, and (b) T3 has no market value and is currently going  
9 through restructuring.

10 Subject to Court approval, The Receiver and T3 agreed to settle the ownership claim for a  
11 payment of \$10,000 from T3 along with certain representations and warranties regarding T3's  
12 financial condition. The settlement agreement is attached as Exhibit A to the Declaration of  
13 Thomas F. Lennon filed herewith ("Lennon Declaration"). The settlement is expressly  
14 conditioned on the veracity of T3's representations and warranties regarding its financial  
15 condition. T3 and the Receiver entered into a separate confidentiality agreement covering the  
16 financial representations and warranties.

17 The Receiver circulated the Application and the Lennon Declaration to the SEC and  
18 Frederick before filing. The SEC stated that it does not oppose the Application. Frederick stated  
19 that he takes no position with respect to the Application.

## 20 **II. ARGUMENT**

21 The proposed settlement with T3 is in the best interests of the Tuco receivership estate in  
22 light of the merits of the Receiver's and T3's respective positions, the limited amount at stake, and  
23 the delay and costs of litigating and enforcing a judgment against T3.

24 A federal equity receiver's power to compromise claims is subject to court approval. As  
25 noted by the Ninth Circuit in S.E.C. v. Hardy, 803 F.2d 1034 (9th Cir. 1986), "[a] district court's  
26 power to supervise an equity receivership and to determine the appropriate action to be taken in  
27 the administration of the receivership is extremely broad." With regard to settlements entered into  
28 by a federal equity receiver, the district court's supervisory role includes reviewing and approving

1 those settlements in light of federal court policy to promote settlements before trial. See Fed. R.  
2 Civ. P. 16(c), Advisory Committee Notes.

3 Federal courts of equity often look to bankruptcy law for guidance in the administration of  
4 receivership estates. See SEC v. Capital Consultants, LLC, 397 F.3d 733, 745 (9th Cir. 2005);  
5 SEC v. American Capital Investments, Inc., 98 F.3d 1133, 1140 (9th Cir. 1996); SEC v. Basic  
6 Energy & Affiliated Resources, 273 F.3d 657, 665 (6th Cir. 2001). A bankruptcy court may  
7 approve a compromise of claims asserted by or against the estate if the compromise is "fair and  
8 equitable." Woodson v. Fireman's Fund Insurance Co. (In re Woodson), 839 F.2d 610, 620 (9th  
9 Cir. 1988). The approval of a proposed compromise negotiated by a court-appointed fiduciary "is  
10 an exercise of discretion that should not be overturned except in cases of abuse leading to a result  
11 that is neither in the best interest of the estate nor fair and equitable for the creditors." In re MGS  
12 Marketing, 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

13 The Court has great latitude in approving compromises. In passing on the proposed  
14 compromise, the Court should consider the following:

- 15 a. The probability of success in litigation;
- 16 b. The difficulties, if any, to be encountered in the matter of collection;
- 17 c. The complexity of the litigation involved and the expense,  
18 inconvenience, and delay necessarily attending; and
- 19 d. The paramount interest of the creditors and a proper deference to their  
reasonable views in the premises.

20 Woodson, 839 F.2d at 620.

21 Here, Frederick has claimed that there was an oral understanding between Tuco and T3  
22 that Tuco would own ten (10%) percent of T3. The alleged understanding was never put in  
23 writing. If the ownership interest was established, the oral agreement could include countervailing  
24 obligations of Tuco to contribute to T3's costs of operations. Furthermore, the ownership interest,  
25 if established, has little or no value based on the representations and warranties provided to the  
26 Receiver by T3 pursuant to a confidentiality agreement. The settlement is conditioned on the  
27 veracity of these representations and warranties. If they contain any material misstatements or  
28 omissions, the releases in the settlement in favor of T3 will be null and void. Finally, obtaining

1 and enforcing a judgment against T3 would require a substantial expenditure of estate resources  
2 with a limited probability of collection due to T3's financial condition. Accordingly, the proposed  
3 settlement with T3 is in the best interests of the Tuco receivership estate in light of the merits of  
4 the Receiver's and T3's respective positions, the limited amount at stake, the delay and costs of  
5 litigating and enforcing a judgment against T3, and the limited probability of collecting on the  
6 judgment.

7 **III. CONCLUSION**

8 For the foregoing reasons, the Receiver requests entry of an order approving the settlement  
9 agreement between the Receiver and T3 attached to the Lennon Declaration as Exhibit A.

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Dated: September 16, 2008

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By: /s/ David L. Osias  
DAVID L. OSIAS  
Attorneys for Receiver Thomas F. Lennon