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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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12 SECURITIES AND EXCHANGE
COMMISSION,

13 Plaintiff,

14 v.

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

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ORDER ESTABLISHING CLAIMS
PROCEDURES, SETTING CLAIMS BAR
DATE, AND APPROVING NOTICES AND
CLAIM FORMS**

Date: November 7, 2008
Time: 1:30 p.m.
Ctrm: 10
Judge: Hon. Dana M. Sabraw

1 Thomas F. Lennon ("Receiver"), Court-appointed permanent receiver for Tuco Trading,
2 LLC ("Tuco"), submits this memorandum of points and authorities in support of his motion for
3 order establishing claims procedures, setting claims bar date, and approving notices and claim
4 forms (the "Motion").

5 I. INTRODUCTION

6 The Receiver requests that the Court approve a proposed process by which class B
7 members of Tuco ("Members") and all other creditors may assert claims against the Tuco
8 receivership estate and, if necessary, have their claims adjudicated by the Court. The proposed
9 process includes (a) giving notice to all Members and other creditors, (b) setting a deadline for the
10 submission of claims to the Receiver ("Claims Bar Date"), (c) a mechanism for review and, where
11 appropriate, objection to claims by the Receiver or the SEC, (d) the opportunity for Members and
12 other creditors to be heard regarding Receiver or SEC objections to their claims, and (e) resolution
13 of disputed claims by the Court.

14 Pursuant to this Court's Order Authorizing Interim Distribution entered on July 24, 2008,
15 all Members and other creditors that submitted a distribution form have received distributions of
16 40%, with the exception of two Members, for whom there are unresolved issues regarding their
17 accounts. Although the interim distribution process was not the appropriate time to put disputes
18 regarding claim amounts before the Court, Members and other creditors that disagreed with their
19 interim distribution amount (and therefore, their claim amount) made their positions known to the
20 Receiver. The Receiver believes that there is a limited number of claims that will be disputed and
21 that Members and creditors with disputes are aware of them. Additionally, the Receiver believes
22 that all Members and other creditors have been identified, given notice of the case and directed to
23 the Receiver's website for information.

24 For these reasons, and in the interest of minimizing administrative expense and delay, the
25 Receiver proposes a streamlined claims process whereby each Member or other creditor will
26 receive notice of (a) the Receiver's proposed allowed amount of their claim, (b) the opportunity
27 and obligation to submit a claim only if they disagree with the Receiver's proposed allowed
28 amount, and (c) the Claims Bar Date, which would be approximately 30 days from receipt of the

1 notice, after which claims will be deemed untimely and disallowed. This notice will go directly to
2 each Member and creditor and will state the Receiver's proposed amount of their claim. Members
3 and creditors will only be required to submit a claim if they disagree with the proposed allowed
4 amount stated on the notice they receive.

5 A general notice of the claims process and Claims Bar Date (without any claim amounts
6 listed) will also be posted on the Receiver's website. Failure to submit a claim to the Receiver by
7 the Claims Bar Date will result in the Member or creditor being barred from (a) disputing the
8 Receiver's proposed allowed amount of their claim, and (b) asserting any other claims against the
9 Tuco receivership estate. The Receiver believes that this process will afford Members and
10 creditors due process, while minimizing the expense and delay associated with administering
11 claims.

12 **II. PROCEDURAL BACKGROUND**

13 On March 4, 2008, the Securities and Exchange Commission ("SEC") filed its Complaint
14 and Ex Parte Motion for Temporary Restraining Order and Orders: (1) Freezing Assets;
15 (2) Appointing a Temporary Receiver; (3) Requiring Accountings; (4) Prohibiting the Destruction
16 of Documents, (5) Granting Expedited Discovery; and (6) Order to Show Cause re Preliminary
17 Injunction and Appointment of a Permanent Receiver. On March 5, 2008, the Court issued a
18 Temporary Restraining Order and Orders: (1) Appointing a Temporary Receiver; (2) Requiring
19 Accountings; (3) Prohibiting the Destruction of Documents, (4) Granting Expedited Discovery;
20 and (5) Order to Show Cause re Preliminary Injunction and Appointment of a Permanent Receiver
21 ("TRO"). The Receiver, the SEC and the Defendants sought clarification of the TRO, which was
22 provided in the Court's Supplement to the TRO ("Supplement"), entered on March 6, 2008.

23 On March 14, 2008, the SEC filed the Consents of Tuco and Frederick, and a Joint Motion
24 for Judgment as to Defendants Tuco and Frederick and Orders: (1) Freezing Tuco's Assets,
25 (2) Appointing a Permanent Receiver for Tuco; and (3) Prohibiting the Destruction of Documents
26 ("Judgment"). The Court entered the Judgment on March 17, 2008.

27 On March 19, 2008, in response to the Receiver's application, the Court entered an Order
28 in Aid of Receivership: (1) Allowing Notice by Email to Members; (2) Providing that

1 Commissions Earned or Payable to Frederick are Property of the Receivership Estate;
2 (3) Authorizing the Receiver to Enter into a Temporary Transaction with GLB Trading, Inc.; and
3 (4) Granting Ancillary Relief ("Order in Aid"). On July 24, 2008, the Court entered an Order
4 Authorizing Interim Distribution, approving an interim distribution of up to 40% of Member and
5 creditor claims. Since that time, all but a few Members and creditors have received interim
6 distributions.

7 **III. ARGUMENT**

8 **A. This Court has Broad Equitable Discretion to Establish Procedures for the** 9 **Administration of Claims**

10 It is well settled that district courts supervising federal equity receiverships have broad
11 discretion to adopt appropriate procedures to administer the assets of, and claims asserted against
12 the receivership estate. SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005);
13 S.E.C. v. Hardy, 803 F.2d 1034 (9th Cir. 1986); S.E.C. v. Universal Financial, 760 F.2d 1034,
14 1037 (9th Cir. 1985). The Ninth Circuit recently explained with respect to a distribution plan
15 proposed by Thomas Lennon as Receiver in that matter:

16 A district court's power to supervise an equity receivership and to
17 determine the appropriate action to be taken in the administration of the
18 receivership is extremely broad. The district court has broad powers and
19 wide discretion to determine the appropriate relief in an equity
20 receivership. The basis for this broad deference to the district court's
supervisory role in equity receiverships arises out of the fact that most
receiverships involve multiple parties and complex transactions. A district
court's decision concerning the supervision of an equitable receivership is
reviewed for abuse of discretion.

21 Capital Consultants, 397 F.3d at 738 (citations omitted); see also Commodities Futures Trading
22 Comm'n. v. Topworth Int'l, Ltd.; 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad
23 deference' to the court's supervisory role, and 'we generally uphold reasonable procedures
24 instituted by the district court that serve th[e] purpose' of orderly and efficient administration of
25 the receivership for the benefit of creditors."). Accordingly, this Court can approve the procedures
26 set forth herein.

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1 **B. Summary Procedures Should Be Used For the Administration of Claims**

2 Receivership courts have the general power to use summary procedures in allowing,
3 disallowing, and subordinating the claims of creditors. United States v. Arizona Fuels, 739 F.2d
4 455, 458 (9th Cir. 1984); S.E.C. v. Hardy, 803 F.2d at 1040 (summary proceeding to approve
5 categorization scheme re investors' claims was reasonable; fair notice and a reasonable
6 opportunity to respond was given); S.E.C. v. Elliot 953 F.2d 1560, 1571 (11th Cir. 1992)
7 (summary claim determinations upheld where claimants cannot demonstrate their rights would
8 have been better protected by a fuller proceeding).

9 Summary procedures should be used here to adjudicate the amounts and priority of claims
10 asserted against the Tuco receivership estate. Members and other creditors are aware of the
11 Receiver's proposed allowed amount of their claims due to the interim distribution process.
12 Members and creditors that disagree with the Receiver's calculation of their claims have made
13 their positions known to the Receiver. Members and creditors will receive notice and have the
14 opportunity to be heard regarding their claims. Of course, where appropriate, the Court can order
15 that additional discovery, briefing and/or hearing on any particular claim dispute be conducted.
16 Using plenary proceedings for the adjudication of claims would unnecessarily consume the limited
17 assets of the receivership estate.

18 **C. Notice of the Claims Process**

19 Pursuant to the Order in Aid, notices of proceedings in this case have been provided to
20 Members in email form. Email has been an efficient and effective way of providing notice to
21 Members. The Members regularly use email. Indeed, in conducting their trading activity at Tuco,
22 each Member used sophisticated trading software to monitor the markets and place trade orders.
23 Tuco also used Instant Messaging to communicate with Members about trading issues. Many
24 Members have communicated with the Receiver already via email. The Receiver proposes that
25 notice of the claims process be provided to Members by email.

26 The Receiver proposes that notice of the claims process be provided to other known
27 creditors by mail, which is the form of notice the Receiver has used for non-Member creditors
28 throughout the case. With respect to potential unknown creditors, the Receiver believes that

1 posting notice on his website is the best and most efficient manner in which to provide notice.
2 Although notice by publication is sometimes used in receivership cases, the Receiver believes that
3 publication would not be a worthwhile use of estate resources under these circumstances.
4 Members are located throughout the country and the world. Known creditors are also located
5 throughout the country. Publication notice to an international audience would be a substantial
6 expense. The most effective way of giving such notice would most likely be by Internet, which is
7 the method proposed by the Receiver in posting notice on his Tuco webpage. Indeed, if an
8 unknown creditor were to "google" the phrase "SEC v. Tuco Trading", the Receiver's Tuco
9 webpage would appear in the top 6 search results.

10 Furthermore, the Receiver believes that all Members and other creditors have already been
11 identified through his forensic accounting and investigation. This case has been pending for over
12 six months. The Receiver has sent various notices and information to the full Member and
13 creditor body. His staff has maintained an up-to-date list of contact information for Members and
14 creditors. His Tuco webpage has been up and running since the outset of the case. The likelihood
15 that unknown creditors exist is low. For these reasons, the Receiver proposes that unknown
16 creditors be given notice of the claims process by posting the Claims Package (discussed below
17 and attached as Exhibit A) on the Receiver's Tuco webpage.

18 **D. Claims Bar Date**

19 The Receiver requests that the Court set a date approximately 30 days from entry of the
20 order on this Motion as the deadline by which all claims must be received by the Receiver.
21 Although a relatively short period, the Receiver believes that 30 days is sufficient time for those
22 that dispute the Receiver's proposed allowed amount of their claims to submit a claim. As noted
23 above, the Receiver's proposed allowed amount of claims is already known to Members and other
24 creditors from the interim distribution process. Those with disputes regarding their claim amounts
25 have generally known about them since late July/early August when the vast majority of interim
26 distributions were processed. Although it requires providing supporting documentation,
27 submitting a claim is not a complex or lengthy process. Accordingly, the Receiver proposes a
28 Claims Bar Date approximately 30 days from the date of entry of the Court's order on this Motion.

- 1 5. Approving the use of the Receiver's Tuco webpage for notice of the claims process
2 to any and all unknown creditors;
- 3 6. Setting a Claims Bar Date approximately 30 days from entry of the order on this
4 Motion;
- 5 7. Approving the Claim Package; and
- 6 8. Granting such other relief as the Court deems just and proper.

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8 Dated: September 22, 2008

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MALLORY & NATSIS LLP

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10 By: /s/ David L. Osias

11 DAVID L. OSIAS
Attorneys for Receiver Thomas F. Lennon

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