

1 DAVID R. ZARO (BAR NO. 124334)
 2 JOSHUA A. DEL CASTILLO (BAR NO. 239015)
 3 MATTHEW D. PHAM (BAR NO. 287704)
 ALLEN MATKINS LECK GAMBLE
 4 MALLORY & NATSIS LLP
 865 South Figueroa Street, Suite 2800
 5 Los Angeles, California 90017-2543
 Phone: (213) 622-5555
 Fax: (213) 620-8816
 E-Mail: dzaro@allenmatkins.com
 6 jdelcastillo@allenmatkins.com
 mpham@allenmatkins.com

7 Attorneys for Receiver
 8 GEOFF WINKLER

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

12 SECURITIES AND EXCHANGE
 13 COMMISSION,

14 Plaintiff,

15 v.

16 RALPH T. IANNELLI and ESSEX
 CAPITAL CORP.,

17 Defendants.

Case No. 2:18-cv-05008-FMO-AFM

NOTICE OF MOTION AND MOTION
 OF RECEIVER, GEOFF WINKLER,
 FOR ORDER: (1) APPROVING
 PROPOSED DISTRIBUTION PLAN;
 (2) APPROVING RECOMMENDED
 TREATMENT OF CLAIMS; AND
 (3) AUTHORIZING DISTRIBUTIONS
 ON ALLOWED CLAIMS

[Declaration of Geoff Winkler and
 [Proposed] Order submitted concurrently
 herewith]

Date: January 20, 2022
 Time: 10:00 a.m.
 Ctrm: 6D
 Judge Hon. Fernando M. Olguin

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TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	I. INTRODUCTION.....6
4	II. RELEVANT FACTUAL BACKGROUND7
5	III. THE PROPOSED DISTRIBUTION PLAN8
6	IV. RECEIVER'S RECOMMENDED TREATMENT OF CLAIMS10
7	A. Stipulated Claims Should Be Allowed In The Amounts
8	Calculated By The Receiver And Agreed To By The
9	Claimants.....10
10	B. Claim Numbers 030 And 004, Of Creditors J. Gally And
11	K. Van Deventer, Should Be Treated As A Priority
12	Investor Claims11
13	C. Disputed Or Disallowed Claims Should Be Allowed In
14	The Amount Of The Receiver's Calculations, Or
15	Disallowed Entirely, Where Appropriate12
16	D. Claims Of Taxing Entities And Non-Investor Creditors
17	Should Be Allowed, But Subordinated To Investor Claims
18	Recommended For Allowance.....13
19	V. ARGUMENT13
20	A. The Court Should Approve The Distribution's Plan
21	Reliance On The Rising Tide Methodology14
22	B. The Receiver's Recommended Treatment Of Claims
23	Should Be Approved.....15
24	1. This Court Enjoys Broad Discretion to Approve the
25	Receiver's Requested Relief15
26	2. The Receiver's Recommended Treatment of the
27	Disputed Claims is Appropriate and Consistent with
28	Applicable Law.....16
	3. The Receiver has Satisfied the Process Established
	by this Court to Evaluate Claims.....17
	C. Subordination Of Taxing Entity And Other Non-Investor
	Claims Is Appropriate Here17
	VI. CONCLUSION18

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3 **Cases**

4 CFTC v. Wilson,
 2013 WL 3776902, *7 (S.D. Cal. July 17, 2013)..... 14

5

6 First Empire Bank-New York v. FDIC,
 572 F.2d 1361 (9th Cir. 1978)..... 16

7 FTC v. Ameridebt, Inc.,
 373 F.Supp.2d, 558 (D. Md. 2005) 17

8

9 FTC v. Crittenden,
 823 F.Supp. 699 (C.D. Cal. 1993)..... 17

10 Lundell v. Anchor Constr. Specialists, Inc.,
 223 F.3d 1035 (9th Cir. 2000)..... 16

11

12 Revere Copper & Brass, Inc. v. Adriance Machine Works, Inc.,
 76 F.2d 876 (2d Cir. 1935)..... 16

13 SEC v. Capital Consultants, LLC,
 397 F.3d 733 (9th Cir. 2005)..... 16

14

15 SEC v. Elliot,
 953 F.2d 1560 (11th Cir. 1992)..... 15, 16

16 SEC v. Hardy,
 803 F.2d 1034 (9th Cir. 1986)..... 15, 16

17

18 SEC v. Huber,
 702 F.3d 903 (7th Cir. 2012)..... 14

19 SEC v. Private Equity Mgmt. Group, Inc.,
 2012 U.S. Dist. LEXIS 195213, *22-23 (C.D. Cal. September
 20 28, 2012)..... 18

21 SEC v. Stephenson Equity Util. Co.,
 138 F.Supp.2d 512 (S.D.N.Y. 2001)..... 18

22

23 SEC v. Topworth Int'l, Ltd.,
 205 F.3d 1107 (9th Cir. 1999)..... 16

24 SEC v. Wencke,
 622 F.2d 1363 (9th Cir. 1980)..... 15

25

26 United States v. Arizona Fuels Corp.,
 739 F.2d 455 (9th Cir. 1984)..... 16

27 United States v. Cabe,
 311 F.Supp.2d 501 (D.S.C. 2003)..... 14

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Page(s)

Rules

Local Rule 7-3	5
Local Rule 66-8	16

1 **TO ALL INTERESTED PARTIES:**

2 **PLEASE TAKE NOTICE THAT** on January 20, 2022 at 10:00 a.m., in
3 Courtroom 6D of the above-entitled Court, located at 350 West First Street, Los
4 Angeles, California 90012, Geoff Winkler (the "Receiver"), the Court-appointed
5 permanent receiver for Defendant Essex Capital Corporation ("Essex") and its
6 subsidiaries and affiliates (collectively, with Essex, the "Receivership Entities"), will
7 and hereby does move for an order: (1) approving the Receiver's proposed plan for
8 distribution (the "Distribution Plan") of receivership assets; (2) approving the
9 Receiver's recommended treatment of claims against the Receivership Entities; and
10 (3) authorizing the Receiver to make distributions to holders of allowed claims, in
11 accordance with the terms of the Distribution Plan.

12 This Motion is based upon the authority conferred upon the Receiver pursuant
13 to this Court's September 9, 2019 Order Regarding Permanent Injunction (ECF
14 No. 113), as well as the attached Memorandum of Points and Authorities, the
15 concurrently filed Declaration of Geoff Winkler, and the documents and pleadings
16 already on file in this action, and upon such further oral and documentary evidence
17 as may be presented at time of hearing on the Motion.

18 **This Motion is made following the conference of counsel for the**
19 **remaining parties pursuant to L.R. 7-3, which took place on November 30,**
20 **2021.**

21
22 Dated: December 21, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO
JOSHUA A. DEL CASTILLO
MATTHEW D. PHAM

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25
26 By: /s/ Joshua A. del Castillo
JOSHUA A. DEL CASTILLO
Attorneys for Receiver
GEOFF WINKLER

27
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 By this Motion, Geoff Winkler (again, the "Receiver"), the Court-appointed
4 permanent receiver for Defendant Essex Capital Corporation (again, "Essex") and
5 its subsidiaries and affiliates (collectively, with Essex, the "Receivership Entities" or
6 "Entities") respectfully moves for an order from this Court: (1) approving the
7 Receiver's proposed plan for distribution (again, the "Distribution Plan") of
8 receivership assets; (2) approving the Receiver's recommended treatment of claims
9 against the Receivership Entities; and (3) authorizing the Receiver to make
10 distributions to holders of allowed claims, in accordance with the terms of the
11 Distribution Plan. Put simply, by this Motion, the Receiver seeks to secure Court
12 approval of the methodology underlying his proposed Distribution Plan, as well as
13 approval of his recommended treatment of investor and non-investor claims against
14 the Receivership Entities, and authorization to commence distributions, as provided
15 for in the Distribution Plan, to holders of allowed claims.

16 As discussed in greater detail, below, the Distribution Plan developed by the
17 Receiver seeks to achieve the most equitable outcome possible for investor and non-
18 investor creditors of the Receivership Entities alike, and to ensure that those priority
19 creditors (largely, defrauded investors in the Receivership Entities) who suffered the
20 greatest proportional losses as a result of their investments in (or contributions to)
21 the Receivership Entities are collectively brought to a proportional, equitable
22 "baseline" before distributions to relatively less affected investors are commenced.
23 The Receiver believes that the application of this so-called Rising Tide method of
24 distribution is the most appropriate means of apportioning limited receivership funds
25 among creditors who suffered varying degrees of harm as a result of the business
26 and financial activities.

27 By this Motion, the Receiver also requests that the Court exercise its broad
28 discretion in administering the estate of the Receivership Entities (the "Estate") to

1 approve the Receiver's recommended treatment of claims, which recommendations
2 have been agreed to by the overwhelming majority of claimants, and to authorize the
3 Receiver to commence distributions to holders of allowed claims in accordance with
4 the Distribution Plan.

5 **II. RELEVANT FACTUAL BACKGROUND.**

6 The Plaintiff Securities and Exchange Commission (the "Commission")
7 commenced the above-referenced securities enforcement action on June 5, 2018,
8 alleging, among other things, that Defendant Ralph Iannelli, through the
9 Receivership Entities, perpetrated a Ponzi investment scheme. (See ECF No. 1.)
10 The Court appointed the Receiver, on motion by the Commission, on December 21,
11 2018, upon entry of its Order Regarding Preliminary Injunction and Appointment of
12 a Permanent Receiver (the "Appointment Order"). (See ECF No. 66.) Pursuant to
13 the terms of the Appointment Order, the Receiver was vested with exclusive
14 authority and control over the Receivership Entities and empowered to, among other
15 things, marshal the Entities' available assets and perform an accounting of the
16 Entities' business and financial affairs. The Receiver's appointment, authority,
17 duties, and powers were reaffirmed by the Court in its September 6, 2019 Order
18 Regarding Permanent Injunction. (See ECF No. 113.)

19 On April 20, 2020, as his accounting of the Entities' business and financial
20 activities was nearing completion, the Receiver stipulated with the Commission to
21 establish the claims procedures by which claims against the Receivership Entities
22 could be submitted to the Receiver, and an associated bar date by which all such
23 claims were due. (See ECF No. 168.) The Court entered the stipulation and
24 approved the Receiver's claims processing proposals on July 31, 2020, as reflected
25 in its Order Granting Stipulation for Order: (1) Establishing Claims Procedures; and
26 (2) Setting Claims Bar Date (the "Procedures Order"). (See ECF No. 179.) The
27 Procedures Order provided, in pertinent part, that, after completing his Money-
28 In/Money-Out ("MIMO"), or netting analysis, the Receiver would contact each

1 creditor whom he believed suffered a net loss, identify his calculation of that loss,
2 and permit the creditors to either (a) accept the Receiver's calculation, which would
3 then become the creditor's claim amount; or (b) dispute the calculation, and timely
4 provide the Receiver with documents in support of the disputed amount, which
5 would then be reviewed by the Receiver prior to a final calculation being made.
6 (Id.) Prospective claimants who did not respond to the Receiver's communications
7 by the Court-established November 30, 2020 bar date would be deemed to have
8 accepted the Receiver's calculation of their claims. (Id.)

9 Thereafter, the Receiver timely submitted the requisite claim calculations and
10 claim forms to the Entities' creditors. See concurrently filed Declaration of Geoff
11 Winkler ("Winkler Decl.") ¶ 3. A total of seventy-two (72) investor and non-
12 investor claims were timely submitted to the Receiver, in the aggregate amount of
13 \$49,728,517.83. (Id. at ¶ 4.) Of these, the Receiver recommends fifty-seven (57)
14 for allowance, in whole or in part. Of these, a total of fifty-four (54) claimants
15 ultimately agreed to and accepted the Receiver's valuation of their respective claims,
16 reflecting an acceptance rate of over 94%. (Id. at ¶ 5.) Indeed, only three (3)
17 claimants challenged the Receiver's valuation of their respective claims. (Id.) The
18 remainder reflect investor claims the Receiver recommended for disallowance, or
19 partial allowance. These claims, and the Receiver's recommended treatment thereof,
20 are addressed below. The Receiver completed his processing of all claims-related
21 materials on or around July 31, 2021, and thereafter commenced developing his
22 Distribution Plan. (Id. at ¶ 6.)

23 **III. THE PROPOSED DISTRIBUTION PLAN.**

24 Certain critical facts were discovered during the Receiver's processing of
25 investor and creditor claims. Together, the investor creditors¹ of the Estate invested
26

27 ¹ For the purposes of this Motion, the Receiver is including within the population
28 of investor creditors a transactional creditor who extended \$1.5 million in credit
to Essex in the form of a seller-carryback loan in connection with Defendant
Iannelli's purchase of a Carpinteria, California lumber yard, with a partner. The

1 in or contributed a total of \$100,977,530.13 to the Receivership Entities. (Winkler
2 Decl. ¶ 7.) In the pre-receivership period, a total of \$61,530,774.82 was returned to
3 these investors and creditors, reflecting a return of approximately 60.9% of principal
4 investments/contributions, meaning that collective net losses totaled
5 \$39,336,755.31. (Id.)

6 Not all investors were equal, however. Individual claimants invested or
7 contributed amounts ranging from \$50,000 to over \$23 million, with an average
8 investment or contribution of \$1.7 million. (Id. at ¶ 8.) However, investors
9 experienced returns ranging from 0% (meaning that no portion of their investments
10 were returned during the pre-receivership period) to over 95%. (Id.) Because the
11 Ponzi scheme perpetrated though the entities depended, in part on deferring
12 payments to investors as they came due – often in the form of "rolling over" the
13 investment into a new one – investors experienced significantly differing outcomes
14 as a result of the timing of their investments, the amounts invested, and the amounts
15 due. (Id.) Indeed, investor outcomes were vastly disparate, both with respect to
16 individual returns in proportion to individual investments or contributions, and in
17 strict dollar terms – a difference compounded by the fact that a handful of investors
18 constituted a significant portion of total investments in the Receivership Entities.
19 (Id.) By way of simple example, the top half of claimants (in dollar terms) saw an
20 average of approximately 67% of their principal returned, while the bottom half
21 received only approximately 22%. (Id.)

22 As a consequence of the above, the Receiver has determined, in his
23 reasonable business judgment, that a strict *pro rata* distribution would be inequitable
24 here, and would favor high-dollar claimants who already fared relatively better as
25 compared to their lower-dollar contemporaries. (Id. at ¶ 9.) In order to ensure that
26 some minimal level of returns can be guaranteed across all investor claimants, the
27

28 Receiver is also including a claimant whose claim arises from a pre-receivership
settlement agreement. These transactions are addressed in greater detail, below.

1 Receiver recommends applying a modified Rising Tide distribution methodology.
2 The Rising Tide method aims to ensure equitable distributions across claimants with
3 vastly different pre-receivership recovery rates. Put simply an application of the
4 Rising Tide method will permit the Receiver to bring all investor claimants with
5 allowed claims to a roughly equivalent rate of loss, thereby ensuring that no investor
6 claimant is, proportionally, significantly better or worse off than any other.

7 Here, the Receiver proposes employing a hybrid Rising Tide approach,
8 whereby the first 50% of funds to be distributed² are distributed among the least
9 "whole" investor group, in order to restore them to a more equitable loss "floor", the
10 second 50% of available funds are subsequently distributed on a strict *pro rata*
11 basis, after accounting for the first round of distributions. (Id. at ¶ 10.) The
12 Receiver believes his Distribution Plan, based upon this Rising Tide hybrid
13 approach, will most equitably compensate those investors who, proportionally,
14 suffered the largest losses as a result of their investments in, or contributions to, the
15 Receivership Entities, while ensuring that the largest claimants, as determined by
16 MIMO, are affirmatively able to participate in, and receive, distributions of
17 available funds. (Id.) On the basis of his analysis, the Receiver believes that his
18 Distribution Plan will yield a return approximately 6% better on average, compared
19 to the standard net-investment (MIMO) approach to distributions. (Id.)

20 **IV. RECEIVER'S RECOMMENDED TREATMENT OF CLAIMS.**

21 **A. Stipulated Claims Should Be Allowed In The Amounts Calculated**
22 **By The Receiver And Agreed To By The Claimants.**

23 As noted above, an overwhelming majority of claimants agreed with the
24 Receiver's valuation of their claims, executing claim forms reflecting their
25

26 ² To the extent that the Receiver determines that, in addition to whatever final
27 distributions are made pursuant to the Distribution Plan, an initial distribution on
28 allowed claims can be made, in a specific amount, the Receiver will so advise the
Court of such contemplated initial distribution amount, on or before the Reply
deadline for the instant Motion, along with estimates of any contemplated
subsequent distribution(s), if available.

1 acceptance of his calculations. The Receiver's recommended treatment of claims is
2 fully described in the claims register attached as **Exhibit 1** to the concurrently filed
3 Declaration of Geoff Winkler, and the Receiver recommends that those claims be
4 allowed, as priority claims, in the amounts identified therein.³

5 **B. Claim Numbers 030 And 004, Of Creditors J. Gally And K. Van**
6 **Deventer, Should Be Treated As A Priority Investor Claims.**

7 The Receiver recommends that two non-investor claims be treated as an
8 investor claim, and afforded the same priority as investor claims. First, as reported
9 in some of the Receiver's previous submissions to the Court, Essex assumed a
10 repayment obligation pursuant to a promissory note dated January 14, 2016 (the
11 "Gally Note") in the initial amount of \$1.5 million issued to Essex by James Gally,
12 in connection with Defendant Ralph Iannelli's purchase (with a co-venturer) of a
13 lumber yard in Santa Barbara County (the "Lumber Yard"). While Essex received
14 no benefit from this purchase, at the time it was consummated, the Gally Note
15 reflects a genuine extension of consideration by Mr. Gally, which the Receiver has
16 determined, in his reasonable business judgment, is akin to the consideration
17 extended by the Entities' investors. Accordingly, the Receiver recommends that the
18 Gally claim be treated as a priority investor claim, in the amount of \$1,046,316.44,
19 reflecting the unpaid principal balance of the Gally Note.

20 Likewise, and while Mr. Van Deventer's claim does not arise from an
21 investment, it is related to a legitimate, pre-receivership payment obligation relating
22 to the Receivership Entities' operations, in this case in the form of a settlement.
23 Specifically, Mr. Van Deventer entered into a June 2018 settlement with Essex for
24 which a remaining \$75,000 remains unpaid. Mr. Van Deventer submitted a claim in
25

26
27 ³ In order to preserve claimant anonymity, claims are identified by numbers only.
28 The Receiver will timely advise all claimants of their claim numbers in order to
permit any claimant who wishes to object to the Receiver's recommended
treatment of his, her, or its claim an opportunity to do so.

1 the amount of \$78,068.60, which the Receiver recommends be treated as a priority
2 investor claim, in the amount of the face value of the claim, or \$75,000.00.

3 **C. Disputed Or Disallowed Claims Should Be Allowed In The Amount**
4 **Of The Receiver's Calculations, Or Disallowed Entirely, Where**
5 **Appropriate.**

6 As noted above, out of the seventy-two (72) timely claims transmitted to the
7 Receiver, fifty-four (54) claimants agreed to the Receiver's recommended treatment
8 of their claims, which are recommended for allowance in the full amount of the
9 Receiver's calculation, as reflected in **Exhibit 1** to the Receiver's declaration. A
10 further three (3) claims are recommended for allowance in-part, largely as a result of
11 the claims having included requests for payment of disallowed claim components,
12 including interest, fees, or because the totality of the claim could not be
13 substantiated based on the available records. **Claim numbers 004, 025, and 026**
14 **are recommended for allowance, in-part.** In addition, a small number of claims
15 are recommended for denial, on the grounds that all or a portion of the claim was
16 unsubstantiated, or that the claimant already received a return of 100% of the face
17 value of his or her entire principal investment in the Receivership Entities. **The**
18 **claims recommended for denial are claim numbers 018, 023, 031, 038, 052, 064,**
19 **072, 073, and 076.**

20 As discussed in greater detail below, in evaluating his recommendations, the
21 law favors deferring to the Receiver's business judgment. This is particularly so
22 where a claim is recommended for partial allowance or disallowance (denial), on the
23 basis of the claimant's failure to prove-up his or her claim. The law places the
24 burden *on the claimant* to establish a valid claim against the Estate, *not on the*
25 *Receiver* to establish why that claim is improper or inaccurate. Accordingly, the
26 Receiver respectfully requests that this Court partially allow those claims he has
27 recommended partial allowance, and deny those claims he has recommended for
28 denial, as set forth above.

1 **D. Claims Of Taxing Entities And Non-Investor Creditors Should Be**
2 **Allowed, But Subordinated To Investor Claims Recommended For**
3 **Allowance.**

4 As addressed in greater detail in Section V(C), below, the Receiver holds the
5 funds he has recovered during the pendency of the receivership in constructive trust,
6 principally for the benefit of investors. Given the Ponzi-like nature of the business
7 and financial activities of the Receivership Entities, and that it is unlikely that even
8 investor claims will be able to be repaid, in full, the Receiver recommends that any
9 claims for repayment against the Receivership Entities from state of federal taxing
10 institutions, or non-investor creditors whose claims were not recommended for
11 treatment as priority investor claims, be subordinated to the claims of the Entities'
12 investors until such priority investor claims are paid, in full.

13 As of the date of this Motion, and in addition to any outstanding taxing entity
14 claims, which the Receiver will treat as valued at face value, the Receiver has
15 identified only one (1) viable non-investor claim, claim number 036, which claim he
16 recommends for allowance in full, as reflected in **Exhibit 1** to his declaration, but
17 which he also recommends be subordinated, along with all taxing entity claims, until
18 such time as all investor claims are paid in full.

19 **V. ARGUMENT.**

20 The Court should approve the Receiver's proposed Distribution Plan. As
21 reflected above, the Distribution Plan achieves the most equitable outcome for
22 creditors of the Receivership Entities, given the vast disparities in harms suffered by
23 claimants. It does so by applying the so-called Rising Tide methodology –
24 commonly approved by the courts where the injuries to the victim class are
25 proportionally disparate, or where the application of a strict, *pro rata* or net
26 investment, approach to distribution would, as here, inequitably benefit one class or
27 sub-class of creditors over others.

28

1 **A. The Court Should Approve The Distribution's Plan Reliance On**
2 **The Rising Tide Methodology.**

3 As noted above, were the Receiver to apply a strict, *pro rata* or net
4 investment approach to distributions, a very small subset of creditors would stand to
5 benefit inequitably as compared to all others. The Rising Tide method does not rely
6 exclusively on the Receiver's MIMO calculations. Instead, after using MIMO to
7 determine the amount of each creditor's net losses (as the Receiver has done here), it
8 seeks to address the wide disparities experienced by Entity creditors, some of whom
9 have already recovered a significant portion of their principal investment in or
10 financial contribution to the Entities, and others of whom have recovered very little,
11 or nothing. By way of example, one single claimant represents, 20.4% of the
12 outstanding value of all claims against the Receivership Entities, and yet has already
13 recovered, in the pre-receivership period, approximately 66% of its principal
14 investment. Given that there are creditors at the other end of the spectrum, whose
15 claim represents less than 1% of all claims, on a valuation basis, and who has not
16 recovered any of its principal investment amount, privileging the already relatively
17 "successful" investor over others who have not been as fortunate does not advance
18 the receivership's equitable goals.

19 The Rising Tide method has been endorsed by courts as a fair and equitable
20 method of distributing receivership assets in fraud cases, especially where it results
21 in only a small percentage of investors not sharing in the distribution. See, e.g.,
22 SEC v. Huber, 702 F.3d 903, 906-907 (7th Cir. 2012); United States v. Cabe, 311
23 F.Supp.2d 501, 509 (D.S.C. 2003); CFTC v. Wilson, 2013 WL 3776902, *7 (S.D.
24 Cal. July 17, 2013).

25 In Huber, the Seventh Circuit compared the Rising Tide method to other
26 claims administration methods, finding that rising tide "appears to be the method
27 most commonly used (and judicially approved) for apportioning [fiduciary estate]
28 assets." 702 F.3d at 906; see also Wilson, 2013 WL 3776902, at *7 ("the Court

1 concludes the Rising Tide Method is the most equitable remedy available"). Here,
2 the amounts, on a percentage of funds invested basis, that investors received back
3 vary widely. In order to ensure that investors are treated as equitably as possible,
4 therefore, investors must be brought to an equitable recovery rate "base line" before
5 additional distributions, over and above that "base line" should be made. The only
6 means of accomplishing this is to apply the Rising Tide methodology to the
7 Receiver's contemplated distributions on allowed investor claims.

8 **B. The Receiver's Recommended Treatment Of Claims Should Be**
9 **Approved.**

10 1. This Court Enjoys Broad Discretion to Approve the Receiver's
11 Requested Relief.

12 Federal courts presiding in equity over a fiduciary estate *res* are vested with
13 wide discretion to enter orders approving the claims process and the plan for
14 disposition of those assets. "The power of a district court to impose a receivership
15 or grant other forms of ancillary relief does not in the first instance depend on a
16 statutory grant of power from the securities laws. Rather, the authority derives from
17 the inherent power of a court of equity to fashion effective relief." SEC v. Wencke,
18 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of" court-created
19 fiduciary estates "is to promote orderly and efficient administration of the estate by
20 the district court for the benefit of creditors." SEC v. Hardy, 803 F.2d 1034, 1038
21 (9th Cir. 1986). As the appointment of fiduciaries is authorized by this Court's
22 equitable powers, so too is any distribution of assets to be undertaken equitably and
23 fairly. SEC v. Elliot, 953 F.2d 1560, 1569 (11th Cir. 1992).

24 Moreover, district courts have broad power to determine the appropriate
25 method of administering a fiduciary estate. As the Ninth Circuit has explained:

26 A district court's power to supervise an ... [estate] ... and to
27 determine appropriate action to be taken in the administration of the
28

1 [estate] is extremely broad. The district court has broad powers and
2 wide discretion to determine the appropriate relief...

3 SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005); see also
4 SEC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court
5 affords 'broad deference to the [district] court's supervisory role' and 'we generally
6 uphold reasonable procedures instituted by the district court that serve th[e] purpose'
7 of orderly and efficient administration of the [estate] for the benefit of creditors").

8 District courts overseeing receivership estates have the general power to
9 employ summary procedures in allowing, disallowing, and subordinating the claims
10 of creditors. United States v. Arizona Fuels Corp., 739 F.2d 455, 458 (9th Cir.
11 1984); Hardy, 803 F.2d at 1040 (summary proceeding to approve categorization
12 scheme for investors' claims was reasonable; fair notice and a reasonable
13 opportunity to respond was given); SEC v. Elliot, 953 F.2d 1560, 1571 (11th Cir.
14 1992) (summary claim determinations upheld where claimants cannot demonstrate
15 their rights would have been better protected by an extended proceeding). As part
16 of its oversight, the Court may "make rules which are practicable as well as
17 equitable." Hardy at 1039, quoting First Empire Bank-New York v. FDIC, 572 F.2d
18 1361, 1368 (9th Cir. 1978).

19 2. The Receiver's Recommended Treatment of the Disputed Claims
20 is Appropriate and Consistent with Applicable Law.

21 With respect to the disputed claims, this Court's Local Rules provide that the
22 Estate should be administered "as nearly as possible in accordance with the practice
23 of the administration of estates in bankruptcy." See L.R. 66-8. Accordingly, as in a
24 bankruptcy case, it is a *claimant's* burden to establish a valid claim against the
25 Estate, not the Receiver's burden to establish why that claim is improper or
26 inaccurate. See Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039
27 (9th Cir. 2000); Revere Copper & Brass, Inc. v. Adriaance Machine Works, Inc., 76
28 F.2d 876, 878 (2d Cir. 1935) (claimants failed to sustain burden of proving claims

1 against receivership). Here, as reflected above, the holders of disputed claims failed
2 to provide the Receiver with documentation sufficient to establish the accuracy of
3 their claim amounts, or to convince the Receiver that his records, and therefore his
4 resultant calculation of their claims, was inaccurate. In the absence of such
5 documentation, the Receiver respectfully submits that the Court should adopt his
6 recommended treatment of the disputed claims.

7 3. The Receiver has Satisfied the Process Established by this Court
8 to Evaluate Claims.

9 As to all claims, disputed or otherwise, the Court has already established the
10 rules for the Receiver's proposed claims submission, review, and analysis process,
11 as reflected in the Procedures Order, and required by the Hardy and First Empire
12 Bank courts. That process has now been completed. Accordingly, the relief
13 requested in this Motion does not require the Court to revisit the procedural
14 underpinnings of the claims process, including the method by which the Receiver
15 reviewed and calculated claims, but merely to exercise its broad discretion in,
16 appropriately, deferring to the results of that process and approving the Receiver's
17 recommended treatment of claims. The Receiver respectfully requests that it do so,
18 and approve the Receiver's recommended treatment of claims.

19 **C. Subordination Of Taxing Entity And Other Non-Investor Claims Is**
20 **Appropriate Here.**

21 Where, as here, a fiduciary is appointed by a court at the behest of a federal
22 agency, the funds recovered by that fiduciary are ordinarily held in constructive trust
23 for the victim class that agency is charged with protecting. As a practical matter,
24 this means that taxing entity, trade creditor, and other unsecured, non-investor
25 claims are subject to subordination, to the extent they are allowed at all. See, e.g.,
26 FTC v. Crittenden, 823 F.Supp. 699, 703 (C.D. Cal. 1993) (estate funds held in
27 constructive trust distributed to former customers regardless of effect on IRS
28 claims); FTC v. Ameridebt, Inc., 373 F.Supp.2d, 558, 565 (D. Md. 2005) (under the

1 doctrine of constructive trust, "even if the IRS ha[d] placed liens on Defendants'
2 assets, those liens would not attach to property that was wrongfully obtained from
3 consumers"); SEC v. Private Equity Mgmt. Group, Inc., 2012 U.S. Dist. LEXIS
4 195213, *22-23 (C.D. Cal. September 28, 2012) ("Furthermore, the Court concludes
5 that considerations of expedience and of preserving [estate] funds for distribution to
6 the defrauded investors ... favor" treating a court-established res as held in
7 constructive trust for investors); SEC v. Stephenson Equity Util. Co., 138 F.Supp.2d
8 512, 532 (S.D.N.Y. 2001) ("A constructive trust is a powerful remedy, as it cuts off
9 the rights of general creditors as well as the rights of the United States").

10 Here, the Commission's Complaint was filed to address the Ponzi investment
11 scheme perpetrated through the Entities, which almost uniquely victimized
12 investors. Accordingly, the Receiver respectfully submits that he holds the funds he
13 has recovered to-date in constructive trust for the benefit of investors, and that all
14 other claims against the Receivership Entities should be subordinated until such
15 time as all allowed investor claims are paid, in full.

16 **VI. CONCLUSION.**

17 For the foregoing reasons, the Receiver respectfully requests this Court to
18 enter an Order:

- 19 1. Approving the Receiver's proposed Distribution Plan;
- 20 2. Approving the Receiver's recommended treatment of claims against the
21 Receivership Entities, including as reflected on **Exhibit 1** to the Declaration of
22 Geoff Winkler, filed concurrently herewith;
- 23 3. Authorizing the Receiver to make distributions to holders of allowed
24 claims, in accordance with the terms of the Distribution Plan, at the earliest
25 appropriate opportunity, on a schedule and in amounts to be determined in the
26 Receiver's reasonable business judgment; and

27 \\\

28 \\\

1 4. Granting such other and further relief as the Court deems necessary and
2 appropriate.

3
4 Dated: December 21, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO
JOSHUA A. DEL CASTILLO
MATTHEW D. PHAM

7 By: /s/ Joshua A. del Castillo

8 JOSHUA A. DEL CASTILLO
9 Attorneys for Receiver
GEOFF WINKLER

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PROOF OF SERVICE

Securities and Exchange Commission v. Ralph T. Iannelli and Essex Capital Corporation
USDC, Central District of California – Case No. 2:18-cv-05008-FMO-AFM

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 865 S. Figueroa Street, Suite 2800, Los Angeles, California 90017-2543.

On **December 21, 2021**, I caused to be served on all the parties to this action addressed as stated on the attached service list the document entitled: **NOTICE OF MOTION AND MOTION OF RECEIVER, GEOFF WINKLER, FOR ORDER: (1) APPROVING PROPOSED DISTRIBUTION PLAN; (2) APPROVING RECOMMENDED TREATMENT OF CLAIMS; AND (3) AUTHORIZING DISTRIBUTIONS ON ALLOWED CLAIMS**

OFFICE MAIL: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

OVERNIGHT DELIVERY: I deposited in a box or other facility regularly maintained by express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelope(s) or package(s) designed by the express service carrier, addressed as indicated on the attached service list, with fees for overnight delivery paid or provided for.

HAND DELIVERY: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

ELECTRONIC MAIL: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

E-FILING: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on **December 21, 2021** at Los Angeles, California.

/s/ Martha Diaz
Martha Diaz