IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ALBERT E. PARISH, Jr., PARISH ECONOMICS, LLC and SUMMERVILLE HARD ASSETS, LLC Defendants.	CIVIL ACTION NO. 2:07-919-DCN

RECEIVER'S MOTION TO APPROVE PLAN FOR CLAIMS ADMINISTRATION AND DISTRIBUTION OF PROCEEDS AND
MEMORANDUM OF LAW IN SUPPORT THEREOF

S. Gregory Hays, Receiver for the Defendants Albert E. Parish, et. al. (collectively "Parish") hereby moves that this Court approve the proposed Plan for Claims Administration and Distribution of Proceeds attached hereto as Exhibit "A" (the "Plan"). In support of this Motion, the Receiver shows the Court as follows:

INTRODUCTION

Consistent with his responsibilities for administering the assets of the Receiver Estate, the Receiver has developed a process for the analysis and administration of the claims of Parish's investors and other creditors, along with a plan for the ultimate distribution of the monies in the Receiver Estate. This is a sensitive and complicated task for which there are no set rules. The ultimate objective is to provide for a fair and equitable allocation of Parish's assets to those who were damaged as a result of the fraudulent conduct that gives rise to this case. While this process has been ongoing since the early days of this Receivership, the proposed process has

now been formalized and is delineated in the proposed Plan.

The money in the Receiver Estate is not sufficient to make full restitution to all damaged investors and other creditors. When the Receiver took control of Parish's assets, the financial circumstances were dire:

- There was relatively little cash on hand;
- There was approximately $5 million owed to secured creditors, who held mortgages on the various Parish residences and other real property;
- There were thousands of items of personal property in multiple locations, with no system of organization or identification;
- The records related to individual investors and to the assets were incomplete and wholly unreliable; and,
- The identities of persons and entities indebted to Parish and the amounts of such indebtedness were likewise largely undocumented.

In the ensuing two years, assets have been liquidated, mortgages and other financial liabilities have been resolved, and several significant recoveries have been obtained from third-parties. As a result of these efforts, the Receiver anticipates being able to make an initial distribution to investors and creditors in excess of $5 million. A smaller, final distribution will likely follow when the remaining assets have been sold and a determination of the tax liability is resolved.

For numerous reasons, it is imperative that the claims process be conducted in an orderly, efficient and fair manner, with each investor and creditor having the opportunity to challenge the Receiver's decisions. Moreover, the ultimate distribution must be fair and equitable under the circumstances of this case. The Receiver believes that the proposed Plan accomplishes each of

these objectives. Accordingly, the Receiver requests that the Plan be approved and that the proposed claims administration process and payment methodology be binding on all interested parties, including investors and other creditors of the Receiver Estate.

FACTUAL BACKGROUND

The results of the Receiver Team's investigation and other activities are set forth in the three Interim Reports filed with the Court on April 12, 2007 (Doc. No. 27), May 3, 2007 (Doc. No. 66), and March 14, 2008 (Doc. No. 182). Other specific activities, such as recoveries from third-parties, have been the subject of other filings and hearings before this Court. Therefore, there is no reason for a full factual recitation of Parish's investment scheme or the Receiver Team's activities here. A summary of the facts relevant to this Court's review and approval of the Plan should suffice.

1. The Parish Investment Pools Were, In Fact, A Ponzi Scheme.

Parish promoted and purported to maintain at least four "investment pools" known as the Hedged Income Pool; the Stock Pool; the Commodity Futures Pool; and the Hard Asset Pool.[1] As indicated by their respective names, each of the investment pools purportedly was designed to invest in specific types of assets – i.e., bonds, stocks, futures and "hard assets." From the early 1990's until the scheme collapsed in 2007 when this action was filed, Parish raised in excess of $100 million from more than 600 different investors.

The investment pools were not in existence at the time of the Receiver's appointment, and there is virtually no evidence that investors' monies were ever segregated by "pool" or investor account. Over time, Parish did maintain a few traditional commodities and securities trading accounts; however, there was relatively little money in those accounts at the time of the

[1] Summerville Hard Assets appears to have been formed as another "hard asset pool" for higher amounts of investment, and there is some evidence that Parish created a "loan pool," but had no investors in that pool.

Receiver's appointment. Moreover, the available evidence indicates that most deposits of investors' monies into any securities or commodities trading accounts were made many years ago and the total amounts deposited were very, very small compared to the amounts invested with Parish. There was very little trading activity in the accounts, and the vast majority of this activity occurred well before 2000. There is no evidence of significant profits from any of these trading activities. Soon after his appointment, the Receiver withdrew all monies from the only three active accounts, which totaled $209,839.

Several bank accounts were maintained in the name of Parish Economics, LLC ("Parish Economics") all under the control of Albert E. Parish. In general, investors' funds were deposited into these bank accounts and commingled with other investors' deposits. These monies were used for a variety of purposes, including: payments to investors of illusory profits and/or returns of principal; purchases of "hard assets" (i.e., fountain pens, watches, art, jewelry, antique silver, coins, etc.); Parish's personal expenses (such as clothing, cars, etc.); real property acquisition, construction and improvement (and, eventually, mortgage payments); loans to individuals and small businesses; life insurance premiums; and, investments in various real estate and business ventures.

There is no evidence that any significant profits were derived from any of the investments or other Parish "business activities." The result is that the investment pools were operated as a Ponzi scheme – i.e., payments of "profits" to investors, as well as withdrawals of principal, were funded with money derived from later investors/investments.

2. <u>Parish Did Not Maintain Reliable Records</u>.

Obviously, fixing the amount of each claimant's loss is an important aspect of the claims administration process. The Receiver Team's ability to determine precisely the amount of money each investor invested with and received from Parish is difficult for a number of reasons.

First, the investment scheme was operated for well over ten years. Second, there are a significant number of disbursements to third-parties from the Parish bank accounts that were made on behalf of investors, purportedly from their own accounts, but were not allocated to the investor for whom the payment was made. These payments range from monthly utility bills to automobile purchases. Finally, Parish did not maintain an accounting or other bookkeeping system. Other than banking records, there are very few financial records of any kind, and many of those that can be found are inaccurate or clearly fraudulent (e.g., investors' account statements).

In an effort to ameliorate the effect of these issues, the Receiver Team constructed a financial database (the "Funds Tracing Database") that is principally based on records obtained from the various banks where Parish maintained accounts. However, because banks do not maintain records for more than seven years, the Receiver has very few bank records for the time period prior to mid-2000. The Funds Tracing Database includes nearly 16,000 financial transactions, which have been analyzed and "allocated" to various receipt and expense categories in order to determine how investors' monies were used. As a part of this process, Albert E. Parish reviewed the Funds Tracing Database and provided information, especially regarding disbursements, which has proven useful in understanding how money was used.

The Receiver Team believes that the Funds Tracing Database is a reliable tool that will be very beneficial in making determinations regarding financial issues from mid-2000 forward. For the period prior to mid-2000, investors' records and other available source materials will be critically important to the claims administration process.

3. **The Claims Administration Process Is Well Underway.**

Beginning in April 2007, the Receiver provided claim forms to all known individuals and entities who appeared to have invested in the Parish investment pools. The claim form also was posted on the Receiver's website. Later, similar claim forms were provided to Parish's other known creditors. In an order dated June 14, 2007, this Court established July 31, 2007 as the deadline for submission of a claim with the Receiver ("the bar date").

479 investor claim forms were submitted to the Receiver. In addition, a relatively small number of other creditors filed claims. The claims of a very few investors (e.g., Charleston Southern University), along with a number of the largest creditors, have been resolved in the course of the receivership. The Receiver Team is now engaged in a review of each of the remaining investor claims in an effort to make a precise determination of: the amounts invested by each claimant; and the amounts, if any, paid to or on behalf of each claimant.

Although the detailed review of investors' claims is ongoing, it appears that the overall circumstances are as follows:

- The investor claimants invested approximately $88.8 million with Parish.
- Approximately 170 of the investor claimants received payments from Parish totaling approximately $28.8 million.
- The cumulative net loss – i.e., cash invested minus cash received – suffered by all investor claimants is approximately $60 million.
- The cumulative amount of all unresolved "non-investor" claims is approximately $1.1 million.

The Receiver Team recognizes that there are investors who did not file claims. The working assumption is that these investors suffered very little, if any, loss, and some may have

actually profited from their investments with Parish. While there are no readily apparent large "Ponzi winners," the Receiver Team will continue to analyze the available evidence to determine whether there are circumstances that would justify the expense of pursuing "claw-back" claims against any such "winners."

SUMMARY OF THE PLAN

The Plan is straightforward. In sum, it provides for a claims determination and summary dispute resolution process. Once this process is completed and the claim amounts have been approved by the Court, the Receiver will make an initial payment to all claimants entitled to receive money from the Receiver Estate. If and when the remaining assets have been liquidated, a final payment will be made and the Receivership will be closed.

Once the review is completed, the Receiver will provide written notice, a "Claim Determination Notice," to each investor claimant that provides the Receiver Team's determination of:[2]

(a) The identity of the allowed claimant;

(b) the investor's total amount invested ("Actual Investment Amount");

(c) the total amount received by the investor ("Amount Previously Received"), directly or indirectly, from Parish; and,

(d) a calculation of the percentage of that investor's total investment that was returned by Parish (i.e., (b) divided by (a)).

In addition, the Notice will identify any other issues that may be important to the resolution of the investor's claim. A similar notice will be provided to "non-investor" creditors.

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[2] Attached hereto as Exhibit B, is an example of a Claim Determination Notice.

Any investor or creditor who disagrees with the Receiver's determination will have the opportunity to dispute the Receiver's decision by submitting a written objection to the Receiver. The Receiver will endeavor to resolve these disputes by agreement. Any disputes that cannot be resolved will be submitted to this Court for adjudication in a summary proceeding. In resolving any dispute, the claimant will have the burden of proof with respect to establishing the amounts invested and the amounts received.

When all disputes have been resolved (or earlier, if appropriate), the Plan provides that the Receiver will make payment to investor claimants based upon the "rising tide" method of calculating loss. In effect, the Amounts Previously Received by investors are treated as returns of principal and included in the calculation of total return. Under this method, investors who received no payments from Parish will receive larger pro rata distributions from the Receiver Estate than those who did receive payments from Parish. In fact, some investor claimants will receive no distribution from the Receiver Estate because of the relatively large percentage of their investment already paid to them by Parish. The "rising tide" methodology, as well as another payment methodology, is thoroughly discussed below.

It is important to understand that in analyzing and approving claims and making payments, all prior payments from Parish to investors are treated as returns of principal, rather than payments of "profits." Moreover, the dates of investment and receipt of payment do not affect any calculation. No distinction is made between investments in one pool versus another. However, as a general rule, discrete investors are treated separately, so that separate investments made by related investors are treated separately. Hence, a husband and a wife or an individual and that individual's IRA having separate accounts are treated as discrete investors. Finally, absent extraordinary circumstances, the allowed claim amount of "non-investor," or creditor

claimants will equal the principal amount owed by Parish to that creditor claimant (the "Actual Loss Amount"), and those claims will be paid in the same pro rata amount as investor claims.

ARGUMENT AND CITATION OF AUTHORITY

This Court has "extremely broad" powers and "wide discretion" to administer this equity receivership and in the fashioning of appropriate forms of relief. See e.g., S.E.C. v. Capital Consultants, LLC, 397 F. 3d 733, 738 (9th Cir. 2005); S.E.C. v. Basic Energy & Affiliated Res., Inc., 273 F. 3d 657, 668 (6th Cir. 2001); S.E.C. v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992), *rev'd in part on other grounds*, 998 F. 2d 922 (11th Cir. 1993); S.E.C. v. Hardy, 803 F.2d 1034 (9th Cir. 1986). The processes approved by a court and used in the administration of claims and distribution of proceeds in an equitable receivership are given great deference and may be disturbed on appeal only upon the showing of an abuse of discretion. See Elliott, 953 F.2d at 1567, 1569-70; Hardy, 803 F. 2d at 1037-38.

In cases such as this, where the cumulative amount of the loss exceeds the funds available for distribution to all claimants, the court is obligated to devise an equitable system of distribution with the goal of treating each victim of the investment fairly and as nearly equal as is possible. See U.S. v. Cabe, 311 F. Supp. 2d 501, 504 (D.S.C. 2003). "In deciding how receivership assets should be distributed to defrauded investors, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly-situated investors or customers treated alike." S.E.C. v. Funding Res. Group, 2002 U.S. Dist. LEXIS 1666, *12 (N.D. Tex. Jan. 31, 2002) (quotations omitted). Equity demands equal treatment of victims in a factually similar case. See e.g., Capital Consultants, 397 F. 3d at 738-739; S.E.C. v. Drucker, 318 F. Supp. 2d 1205, 1206 (N.D. Ga. 2004); U.S. v. Real Prop. Located at 13328 and 13324 State Highway 75 N., 89 F. 3d 551, 553 (9th Cir. 1996). Since

investors generally occupy the same legal position as other investors, equity should not permit one investor a preference over another investor, for "equality is equity". Elliott, 953 F. 2d at 1570 (*quoting* Cunningham v. Brown, 265 U.S. 1 (1924)).

The task of formulating a proper distribution plan is a sensitive undertaking because a plan that is "equitable" might not necessarily be popular with all investors. Essentially, a receiver and an investor have the same goal, which is to maximize the distribution to investors. S.E.C. v. TLC Invs. and Trade Co., 147 F. Supp. 2d 1031, 1041-42 (C.D. Cal. 2001). Yet, as one court has observed:

> [T]his is a case in which numerous victims of a fraud have competing claims to a limited receivership res. The relief sought by [certain investors] would come at the direct expense of the other . . . victims. . . . [T]he Receiver at once represents the interests of all and none of the [investors]---To the extent that the Receiver has the interest of all in mind, he is the adversary of the individual customer - whose concern is only for the return of his deposits.

S.E.C. v. Credit Bancorp, Ltd., 2000 U.S. Dist. LEXIS 17171 at * 61 (S.D.N.Y. November 29, 2000) (internal quotations omitted), *rev'd on other grounds*. The court in Credit Bancorp further observed that "[o]f course, where the assets of the receivership estate are insufficient to afford full recovery to all victims, any given plan is likely to be viewed more favorably by certain victims than others depending on how they fare under that plan . . . An equitable plan is not necessarily a plan that everyone will like." Id. at * 94-95.

I. The Claims Determination Process And Loss Calculation Method Set Forth In The Plan Are Fair And Comport With The Requirements Of Due Process.

In effect, the Plan provides that the gross amount of each investor's loss is equal to the total amount invested with Parish. Payments made by Parish are treated as returns of principal, regardless of how they were described by Parish or understood by the investor at the time. No effort has been made to trace the proceeds of any individual investment, nor has the date of an investment or payment been taken into account in calculating the amount of an investor's loss.

Investors have been provided with notice of the Receiver's filing of this Plan and will have an opportunity to object to its adoption by this Court.[3] If the Plan is approved, each claimant will be provided with written notice of the Receiver Team's ultimate determination of the amounts relevant to that particular claim. If a claimant disagrees, a summary process is proscribed for the resolution of the dispute. It will be the claimant's burden to show that the Receiver Team's determination is not correct. Basic Energy, 273 F. 3d at 661. Finally, claims will be paid only upon approval by this Court.

A. Treating Prior Payments of "Profits" as Returns of Principle is Appropriate.

In general, courts supervising a federal equity receivership have adopted a "net investment" approach in determining the amounts lost by investors. Accordingly, the Plan proposed by the Receiver employs this approach by treating prior payments by Parish as returns of principal rather than payment of profits. Courts have consistently recognized that this is appropriate in cases such as this one in which payments to investors were made using fresh capital from later investors rather than through legitimate investment activity. See e.g. generally, Cabe, 311 F. Supp. 2d at 509; Cunningham v. Brown, 265 U.S. 1 (1924). As one court has explained:

> The rationale for a net investment approach is twofold. First, it is in the nature of a Ponzi scheme that customer returns are generated not from legitimate business activity, but, rather, through the influx of resources from new customers. "Since all the 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." . . . Thus, permitting customers to retain such gains comes at the expense of the other customers. Second, recognizing claims to profits from an illegal financial scheme is contrary to public policy because it serves to legitimate the scheme.

[3] Attached as Exhibit C is the Notice of Motion, which will be mailed to all investors and other creditors that filed claims in this matter, the Internal Revenue Service and any interested state taxing authorities.

Credit Bancorp, 2000 U.S. Dist. LEXIS 17171 at * 136-37 (quoting Cunningham, 265 U.S. at 13) (internal citations omitted).

Clearly, those investors who received prior payments from Parish are, in relative terms, in a better position than those who did not. As the district court in the Capital Consultants case observed, "[a]lthough they have not received the benefit of their bargain in the nature of promised returns, they are in a better situation than others who will not recover their principal." S.E.C. v. Capital Consultants, Inc., 2002 U.S. Dist. LEXIS 27399 at * 7 (D. Or. Dec. 4, 2002). Hence, it is fair to ignore the concept of "profits" in determining the amount of an investor's loss and to treat any payment made by Parish as a return of principal.

B. The Claim Determination and Dispute Resolution Procedures are Fair and Afford Investors with Due Process.

The Receiver recognizes (and the Plan contemplates) that claimants may have some due process rights in connection with the claims administration procedure used to determine the amount of allowed claims. Even so, "there are no specific standards or rules" setting forth precisely what rights claimants would have to participate in such a proceeding. See TLC Invs., 147 F. Supp. 2d at 1034. The basic principle is that due process requires notice to claimants and an opportunity to be heard regarding the formulation and execution of an equitable distribution plan. See generally, Elliott, 953 F.2d at 1566. The Receiver's Plan complies with these fundamental requirements.

All claimants are being provided with notice and an opportunity to be heard and object to the proposed Plan. In addition, if the Plan is approved and adopted, each claimant will receive notice of the Receiver Team's determination of the allowed amounts of that claimant's claim. Any claimant who disagrees with the Receiver Team's determination will have an opportunity to dispute this determination and, ultimately, would be entitled to have disputed issues decided by

this Court in a summary proceeding.[4] A substantially similar procedure has been held to adequately protect claimants' due process rights in a federal equity receivership. See TLC Investments, 147 F. Supp. 2d at 1037.

The use of summary proceedings to determine appropriate relief is widely accepted as a permissible way to resolve claim disputes in a receivership and is within the jurisdiction of this Court so long as those affected are afforded adequate notice and an opportunity to be heard. Basic Energy , 273 F.3d at 668; Elliot, 953 F.2d at 1566-1567 (holding that the use of summary proceedings is appropriate so long as the parties are provided with notice and an opportunity to be heard when the facts are in dispute); S.E.C. v. Credit Bancorp, Ltd., 2000 U.S. Dist. LEXIS 22961 at *11-12 (S.D.N.Y. July 25, 2000) ("[i]ncluded within the court's powers in administering the receivership estate and fashioning appropriate equitable relief is the discretion to use summary proceedings, so long as those affected are afforded adequate notice and an opportunity to be heard"); Hardy, 803 F. 2d at 1040 (approving a claims procedure where all claimants were given reasonable notice and opportunities to be heard).

Summary proceedings not only are permissible in this context, but may actually be preferable because the use of such proceedings reduces the time necessary to settle disputes, decreases litigation costs and prevents further dissipation of the assets of the Receiver Estate. See Elliott, 953 F.2d at 1566; S.E.C. v. Wencke, 783 F. 2d 829, 837 (9th Cir. 1986). In this way, the use of summary proceedings furthers the Receivership's primary purpose to promote the orderly and efficient administration of the estate for the benefit of Claimants. See, e.g., Hardy, 803 F.2d at 1037-40. "Indeed, summary proceedings have the salutary effect . . . of preventing

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[4] The Plan provides that a claimant is entitled to an evidentiary hearing only if there are disputed facts that must be decided in connection with fixing an allowed amount in a particular claim. See Elliot, 953 F.2d at 1566-67.

further dissipation of the receivership assets through unnecessary litigation costs and promoting judicial efficiency." Credit Bancorp, 2000 U.S. Dist. LEXIS 22961 at *11-12.

The claims administration process set forth in the Plan provide for the fair, expeditious and cost efficient resolution of disputes, which is important not only to objecting investors and creditors, but to all claimants who may be required to await payment pending the resolution of these disputes. Clearly, the claim determination and dispute resolution provisions of the Plan meet any and all requirements of due process.

II. The Payment Method Provided In The Plan Is The Most Fair And Equitable Distribution Of The Remaining Assets In The Receiver Estate.

In deciding how the assets of the Receiver Estate should be paid out to aggrieved investors and other creditors, "[n]o specific distribution scheme is mandated so long as the distribution is 'fair and equitable.'" S.E.C. v. P.B. Ventures, 1991 WL 269982 at *2 (E.D. Pa. 1991). However, what is "fair and equitable" for one investor may be perceived as "unfair and inequitable" to another.

Courts administering equity receiverships have recognized that when, as here, there is "a small pie and many disappointed investors," there is an inherent conflict among investors. Commodity Futures Trading Comm'n v. Hoffberg, 1993 U.S. Dist. LEXIS 15173, at * 4 (N.D. Ill. Oct. 27, 1993); See also, TLC Investments, 147 F. Supp. 2d at 1041-2 (recognizing that in any situation in which the pie is limited, each individual desiring a slice of that pie is, in a sense, adverse to others also wanting a slice of the pie); S.E.C. v. Credit Bancorp Ltd., 194 F.R.D. 457, 462-3 (S.D.N.Y. 2000), *rev'd on other grounds* ("[c]ertain . . . customers have made rather clear their individual desires that 'Peter' not be robbed to pay 'Paul' because of any fraud perpetrated by [the receivership entity] . . . However . . . it is not altogether clear at this point who are the 'Peters" and who are the 'Pauls' in this affair"). Hence, an equitable plan will not necessarily be

better for each and every investor than any other plan since each investor will fare differently under different plans. Id.

A. The "Rising Tide" and "Net Loss" Methods

In developing the Plan, the Receiver Team analyzed two methods for making distributions to aggrieved investors: (1) pro-rata payments based on the "Rising Tide" calculation; and (2) pro-rata payments based on "Net Loss." Both have been found to be fair and equitable in other receiverships.[5] The fundamental difference between these two methods is the way that prior payments are treated and accounted for in determining amounts to be distributed from the Receiver Estate to investor claimants.

With respect to any individual Parish investor, the outcomes under these two methods will vary. In many instances, the variances are significant. Therefore, it is impossible to select a method that will likely be perceived as "fair and equitable" by every investor. As more fully explained below, the Receiver believes that the "Rising Tide" distribution method should be used here.

1. Rising Tide Method

In Commodity Futures Trading Comm'n v. Equity Fin. Group, 2005 U.S. Dist. LEXIS 20001 at * 83 (D.N.J. September 2, 2005), the Court adopted and named the "Rising Tide" distribution method, which allows investors to retain previously received funds, but credits those withdrawals against individual investors' pro-rata distributions from the receivership. In effect, an individual investor's loss is deemed to be the gross amount actually invested in the scheme. Payments received by the investor prior to the scheme's collapse are treated as "distributions" on

[5] While there are myriad possible approaches that might be devised for making a distribution, these two methods are the most widely accepted. Other methods have been considered on occasion but generally have been rejected with little or no discussion by the courts. See e.g., Commodity Futures Trading Comm'n v. Equity Fin. Group, 2005 U.S. Dist. LEXIS 20001 at * 18-19 (D.N.J. September 2, 2005).

par with the distributions to be made by the Receiver, so that prior amounts paid by Parish are credited against (i.e., subtracted from) the amount that would otherwise be paid from the Receiver Estate. Under this method, investors who received prior payments are entitled to receive a smaller pro-rata payment from the Receiver Estate than those who received no prior payment. Moreover, investors who previously received payments exceeding their pro rata amount of the total distribution will receive no distribution from the Receiver Estate.

The "Rising Tide" formula for calculating an individual investor claimant's distribution from the Receiver Estate is as follows:

> (Claimant's Actual Investment *divided by* Aggregate Amount Invested by all Claimants) *MULTIPLIED BY* (the Amount Available for Distribution) *MINUS* (Amount Claimants Previously Received).

Importantly, in order to determine the amount to be distributed to each claimant, this calculation is made repeatedly as the amounts available for distribution are applied on a claimant by claimant basis. Said another way, this calculation will not result in a disbursement of all of the funds available for distribution with just one iteration. It must be performed repeatedly – i.e., the "rising tide" – until the funds available for distribution are fully applied. Under no circumstance would investors who actually lost money with Parish be required to return any portion of prior payments to the Receiver Estate, even if they receive no additional distribution from the Receiver Estate.

Other courts considering this method have deemed it to be appropriate under similar circumstances. See e.g., Hoffberg, 1993 U.S. Dist. LEXIS 15173 (favoring "Rising Tide" over "Net Loss" method); Cabe, 311 F. Supp. 2d at 509 (favoring "Rising Tide," holding that persons who have been previously repaid by the defendants should receive a reduced amount so that the total amount they receive both for the receivership distribution and from the earlier repayment

from the defendants would roughly equal the amount they would have received from a pro rata distribution had they not received any money during the scheme from the defendants); Commodity Futures Trading Comm'n v. Skorupskas, 1988 U.S. Dist. LEXIS 18649 at *5-7 (E.D. Mich. August 22, 1988) (favoring "Rising Tide" over "Net Loss" method).

2. "Net Loss" Method

Under the "Net Loss" method of distribution, an investor's loss is calculated to be the difference between the amount invested in the scheme and the amounts received prior to the scheme's collapse. Investors are then paid the pro rata portion of the receivership assets based on this "net loss" calculation. The "Net Loss" formula for calculating an individual investor claimant's distribution from the Receiver Estate is as follows:

> [(Amount Invested by Claimant *minus* Amount Previously Received from Parish) *divided by* Aggregate Net Amount Lost by All Claimants] *MULTIPLIED BY* Amount Available for Distribution from Receiver Estate

Unlike the "Rising Tide" analysis, any investor claimant who actually lost money as a result of the Parish scheme would receive a distribution from the Receiver Estate.

The "Net Loss" method was adopted in Capital Consultants, 397 F. 3d at 737, which referred to this calculation as a "money-in-money-out" formula. A similar formula was also approved in Commodity Futures Trading Comm'n v. Franklin, 652 F. Supp. 163, 170 (W.D. Va. 1986) *rev'd on other grounds*, Anderson v. Stephens, 875 F. 2d 76 (4th Cir. 1989).

However, the "Net Loss" method, and the Franklin opinion in particular, have been criticized by other courts. For example, the court in Skorupskas found the reasoning of the Franklin opinion to be "somewhat opaque" and determined that the "Rising Tide" method was a more fair method of distribution. Skorupskas, 1988 U.S. Dist. LEXIS 18649 at * 6-7. The Skorupskas court reasoned that since any "profits" (i.e., prior payments to investors) actually were part of the res, adoption of the "Net Loss" method would result in those investors who

insisted on cashing out their "profits" receiving more from the res than their proportionate share based on their total investment and thereby, in effect, permitting those investors to defeat the goal of a pro rata distribution. Id.; See also, Equity Financial Group, 2005 U.S. Dist. LEXIS 20001 at *85 ("[T]he net investment theory which would require the Court to subtract any withdrawals from an investor's total cash investment prior to calculating each investor's pro rata share, would result in certain investors receiving back more than such investor's proportionate share of investments"). In addition, the court in Hoffberg explained as follows:

> [W]e note that the court in Franklin was operating under an incorrect assumption: that investors who had not previously received money would receive the same return under either of the formulas. See Franklin, 652 F. 2d at 170 . . . [T]hat assumption is incorrect because the pot of money to be divided is a fixed amount. If more people are to receive money from it, as provided by the second formula [i.e., "Net Loss" method] investors who had not previously received money will receive less than they would under the first formula [i.e. "Rising Tide"].

Hoffberg, 1993 U.S. Dist. LEXIS 15173 at *8.

B. A Comparison Of The Results Of The "Rising Tide" and "Net Loss" Methods Under The Circumstances Of This Case Weighs In Favor Of Using The "Rising Tide" Method.

In reaching his decision to recommend that the "Rising Tide" method be adopted here, the Receiver was particularly persuaded by the following:

- The majority of the investor claimants did not receive any payment from Parish – i.e., their entire investment was lost.
- The monies Parish used to make payments to investors were monies invested with Parish by other investors.
- Many of the investors who did receive payments from Parish actually collected a relatively large portion of their original investment prior to the collapse of the scheme.

- The total amount of money – i.e., the initial payment plus the smaller final payment – to be distributed from the Receiver Estate (likely between $8 million and $9 million) is approximately 13% to 15% of the net amount lost by all claimants.

The Receiver, along with the members of the Receiver Team, believe that in these circumstances, the "Rising Tide" method is more fair and more equitable to investors, generally, than is the "Net Loss" method.

A comparison of four hypothetical investors is instructive. While these examples are overly simple compared to many of the circumstances of this case, they are representative of the investor claims, generally. Assume the following:

"Investor A": Investor A invested $100,000 with Parish in 2000. She has withdrawn all of her "profits" each year, which totaled $80,000. Thus, Investor A was paid $80,000 by Parish and, according to her account statement, she had an account balance of $100,000 at the time that the scheme collapsed.

"Investor B": Investor B also invested $100,000 Parish in 2000. He did not make regular withdrawals from his account, but Albert E. Parish purchased a Lexus for him in 2003 using profits earned in his account. The purchase price of the car was $20,000. According to his account statement, he had earned total of $70,000 in profits, some of which were used to purchase the car. According to his account statement, his account balance was represented to be $150,000 at the time that the scheme collapsed.

"Investor C": Investor C invested $100,000 with Parish in 2003. He chose to make no withdrawals and "rollover" his "profits" every year. Thus, he received no payment from Parish. According to his account statement, he had earned $50,000 in profits, so that his account balance was represented to be $150,000 at the time that the scheme collapsed.

"Investor D": Investor D invested $100,000 with the Parish in late 2006. Her "profits" were small and she withdrew no money. According to Parish's account statement, her account balance was represented to be $102,000 at the time that the scheme collapsed.

While the review of all claims is not yet complete, the Receiver Team has developed a model based on the factual circumstances in this case to apply to the four hypothetical investors in an effort to provide the Court, as well as claimants, with a basic understanding of the differences in the results under the "Rising Tide" and "Net Loss" methods. Again, it must be emphasized that ***this model is for demonstrative purposes only. While the Receiver Team has tried to provide a fairly accurate picture, several circumstances could affect the ultimate calculations.*** With this important caveat, applying both "Rising Tide" and "Net Loss" calculations to the hypothetical investors would yield the following results:

	Investor A	Investor B	Investor C	Investor D
Total Investment	$100,000	$100,000	$100,000	$100,000
Amount Received From Parish	$ 80,000	$ 20,000	$0	$0
Account Balance Per Statement	$100,000	$150,000	$150,000	$102,000
Net Amount Lost	$ 20,000	$ 80,000	$100,000	$100,000
Distribution Amount Under "Rising Tide"	$0	$ 5,0000	$ 25,000	$ 25,000
Percentage of Investment Returned Under "Rising Tide"	80%	25%	25%	25%
Distribution Amount Under "Net Loss"	$ 2,0000	$ 8,000	$ 10,000	$ 10,000
Percentage of Investment Returned Under "Net Loss"	82%	28%	10%	10%

Under the "Net Loss" method, each hypothetical investor would receive something. However, Investor A (who was almost certainly paid by Parish using monies invested by Investors B, C and D) would have received a total of $82,000 compared to Investor B's $28,000 total, and the $10,000 received by Investors C and D. While Investor A still received more of "the res" under the "Rising Tide," she would not be entitled to receive money from the remaining assets of the Receiver Estate because she received so much previously. The other three investors would each collect approximately 25% of their total investment, though Investor B's payment from the Receiver Estate would be reduced by the amount of the purchase price of the car that he previously received from Parish.

Using the "Rising Tide" calculations under the demonstrative model, investors who received no payments from Parish would receive approximately 25% of the amount lost in the initial distribution from the Receive Estate. Investors who received payments from Parish totaling *less than* 25% of that investor's investment would receive some payment, while those who previously received 25% *or more* of their investment in payments from Parish will receive nothing.[6] If and when additional monies are available for distribution, the calculations would be made in the same way. It is possible that claimants who received nothing in the initial distribution would receive some payment in the final distribution simply because the percentage "benchmark" will increase slightly. While whether this is deemed "fair and equitable" will likely depend on an individual investor's individual circumstance, the Receiver and other members of the Receiver Team believe that this is the best possible result under the circumstances.

[6] This percentage may change upon: (a) the Receiver's completion of the analysis of the remaining claims, and (b) the resolution of any disputes related to the Receiver's claim determinations that have been performed to date that result in different allowed claim amounts.

III. Tax Issues.

For several years, Albert E. Parish caused Parish Economics to issue Internal Revenue Service ("IRS") Schedule K-1's, Partner's Share of Income, Deductions, Credits etc. ("K-1's") to many of the individual investors that intended to invest money with him and/or Parish Economics, and for certain of those years, caused IRS Form 1065, U.S. Return of Partnership Income, to be filed by Parish Economics. Early in this case, the Receiver amended 2004 K-1's to remove the phantom income. However, the Receiver and the professionals working with him have now determined that Parish's prior practice was incorrect because Parish Economics did not constitute a "partnership" as that term is defined for federal income tax purposes. At the heart of the well-established rules concerning the definition of "partnership" for tax purposes is the Supreme Court's decision in Commissioner v. Culbertson, 337 U.S. 733 (1949), in which the Court stated that whether a partnership is created depends on whether the alleged partners really and truly intended to join together for the purposes of carrying on business and sharing the profits or losses or both. It is evident that this essential element was missing in the case of Parish Economics and that Parish Economics was not a partnership for tax purposes. As such, no partnership tax returns or K-1s should have been filed or issued, and there should be no penalties for failure to file or issue such returns for those particular years. Instead, any income or loss associated with Parish's investments should have been reported on the individual tax returns filed by Albert E. Parish.

Accordingly, the Receiver expects to file IRS Forms 1040, individual income tax returns, for Parish for the years 2007, 2008 and possibly 2010. In filing such individual income tax returns for Parish, the Receiver's analysis is that the receipt of proceeds from the sale of certain of the assets of Parish and Parish Economics, as well as the settlement payments received from Charleston Southern University and Legare & Bailey did not result in taxable income to Parish,

with respect to which the Receiver would be required to pay tax liabilities.

While the Receiver believes that his analysis is correct, he will submit a request to the IRS to privately rule on the issues, which ruling will allow the Receiver to be certain that the IRS concurs with his position. Until these issues are resolved, the Receiver will reserve from distribution funds sufficient to satisfy any tax liability and/or penalties. If, as expected, the IRS concurs with the Receiver's position that there is no tax liability and/or penalties, the reserved funds will be available to investors and creditors in a subsequent distribution.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests this Court enter an Order approving the proposed Plan for Claims Administration and Distribution of Proceeds and adopting its provisions as governing the claims administration and distribution procedures governing this case.

Respectfully submitted this 30th day of April, 2009.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ALBERT E. PARISH, Jr., PARISH ECONOMICS, LLC and SUMMERVILLE HARD ASSETS, LLC Defendants.	CIVIL ACTION NO. 2:07-919-DCN

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2009, I electronically filed the ***Receiver's Motion To Approve The Plan For Claims Administration and Distribution of Proceeds and Memorandum of Law in Support Thereof*** with the Clerk of this Court using the CM/ECF system, which will automatically send email notification of such filing to all case parties via email.

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