

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

EMILIO FRANCISCO, et al.,

Defendants.

Case No.: SACV 16-02257-CJC(DFMx)

**ORDER GRANTING RECEIVER’S
MOTION FOR APPROVAL OF
PROPOSED DISTRIBUTION PLAN
AND AUTHORIZATION TO
PROCEED WITH INTERIM
DISTRIBUTION AND CLOSING
TASKS [Dkt. 364]**

I. INTRODUCTION

This case involves a receivership resulting from an enforcement action brought by the SEC. The SEC alleged that Defendants Emilio Francisco and various entities he controlled defrauded over 130 investors out of approximately \$9.5 million in connection

1 with offerings that purportedly qualified under the EB-5 Immigrant Investor Program.
2 (Dkt. 1 [Complaint, hereinafter “Compl.”] ¶ 3.) The Court subsequently appointed
3 Thomas Seaman (“the Receiver”) as permanent receiver of the corporate Defendants
4 (“Receivership Entities”). (Dkt. 36.) Before the Court is the Receiver’s motion for an
5 order for approval of the Receiver’s proposed distribution plan and authorization to
6 proceed with interim distribution and closing tasks. (Dkt. 364 [hereinafter “Mot.”].)
7 For the following reasons, the Receiver’s motion is **GRANTED**.

8 9 **II. BACKGROUND**

10 11 **A. SEC Enforcement Action**

12
13 According to the Complaint, Defendants engaged in a fraudulent scheme involving
14 offerings that purportedly qualified for the EB-5 Immigrant Investor Program. (Compl.
15 ¶ 3.) The EB-5 Immigrant Investor Program sets aside visas for foreigners who invest in
16 commercial enterprises in the United States that create jobs and meet other conditions.
17 (*Id.* ¶ 22.) Defendants solicited investors, who were primarily in China, to invest in EB-5
18 projects, such as assisted living facilities, restaurants, and a production facility. (*Id.*
19 ¶¶ 25, 31–32, 43.)

20
21 From January 2013 to September 2016, Defendants raised approximately \$72.05
22 million from over 130 investors through offerings in these EB-5 projects. (*Id.* ¶ 26.)
23 Defendants allegedly made a number of misrepresentations associated with these
24 offerings. For instance, Defendants told investors that they would not use capital
25 contributions for operational, administrative, or other expenses. (*Id.* ¶¶ 50–51.)
26 Defendants, however, diverted these funds to other purposes, including allegedly
27 misappropriating at least \$9.5 million to finance Francisco’s luxury lifestyle. (*Id.* ¶ 56.)
28

1 On December 27, 2016, the SEC filed this enforcement action against Emilio
2 Francisco and the Receivership Entities. (Dkt. 1.) The Court issued a temporary
3 restraining order and subsequently granted the SEC’s motion for a preliminary injunction
4 on January 23, 2017. (Dkts. 17, 36.) The SEC also filed a related enforcement action
5 against Robert Ferrante, Francisco’s partner in the Receivership Entities. *See SEC v.*
6 *Ferrante, et al.*, No. 18-cv-01758 (C.D. Cal.). On October 4, 2018, the Court entered
7 final judgment against Francisco in this case. (*See* Dkt. 301.)

8
9 **B. The Receiver’s Administration of Claims**

10
11 In conjunction with the preliminary injunction, the Court appointed the Receiver to
12 take ownership and liquidate the assets of the Receivership Entities to satisfy the claims
13 of creditors. (Dkt. 36.) Since then, the Receiver has administered the Receivership
14 Entities’ assets, including selling properties, settling non-investor creditor claims, and
15 filing lawsuits on behalf of Receivership Entities.¹

16
17 On May 4, 2018, the Court approved a procedure for the Receiver to verify and
18 validate the claims of investors in the Receivership Entities and non-investor creditors
19 (the “Claims Procedure” and “Claims Procedure Order”). (Dkt. 254.) Using this
20 procedure, the Receiver validated 138 investor claims for a total of \$66,340,000. (Dkt
21 364-1 [Declaration of Thomas A. Seaman, hereinafter “Seaman Decl.”] ¶ 9.) The
22 Receiver also validated claims from non-investor creditors for \$147,695. (*Id.*) The
23 Receiver then filed a motion for the Court to approve allowed claims for all investor and
24 non-investor creditors. (Dkt. 323.)

25
26
27
28 ¹ The Receiver also filed two actions against insiders of the Receivership Entities. The Court has entered judgment in favor of the Receiver in a lawsuit against Neil Richardson, a former employee of the Receivership Entities. *See Seaman v. Richardson, et al.*, No. 18-cv-00538-CJC(DFMx) (C.D. Cal.).

1 On May 13, 2019, the Court issued an order approving the Receiver’s proposed
2 allowed claims (the “Allowed Claims Order”). (Dkt. 340.) Each investor’s allowed
3 claims were calculated based on a “Money In, Money Out” (“MIMO”) analysis: the
4 amount of money invested by each investor claimant, minus any distribution or refund
5 made to that investor. (*Id.* at 6–7.) The Allowed Claims Order approved and
6 incorporated by reference a list of investor claims for a total of \$66,340,000. (*Id.*; Dkt.
7 323-2 Ex. A [Declaration of Thomas A. Seaman (March 6, 2019), hereinafter “Seaman
8 March Decl.”].) The Court also approved the Receiver’s proposal for allowed non-
9 investor claims, including claims from state and federal taxing entities. (Dkt. 340 at 6–7.)
10 Specifically, the Court allowed non-investor claims that were supported by the
11 Receivership Entities’ records and documentation from the claimant and that reflected
12 goods or services which were of value to the Receivership Entities. (*Id.*) The Court
13 disallowed non-investor claims for interest, consequential damages, or attorneys’ fees,
14 and denied the claims of specific non-investor creditors based on the Receiver’s
15 objections. (*Id.* at 7–17.) The Allowed Claims Order approved and incorporated by
16 reference a list of non-investor claims for a total of \$147,695.02. (*Id.*; Seaman March
17 Decl. Ex. B.)

18
19 **C. The Receiver’s Proposed Distribution Plan and Closing Tasks**

20
21 Since the Allowed Claims Order was issued, the Receiver has liquidated nearly all
22 the assets of the Receivership Entities. (Seaman Decl. ¶ 3.) To date, the Receiver has
23 recovered \$16,989,832.36 and currently holds \$11,287,932.55, with additional recovery
24 expected from forthcoming real property sales. (*Id.* ¶¶ 6–7.) In the instant motion, the
25 Receiver recommends making an interim distribution of \$9.378 million to claimants.
26 (Mot. at 9; Seaman Decl. ¶¶ 6, 7; Seaman Decl. Ex. A at 3 [Proposed Order, hereinafter
27
28

1 “Prop. Order”].² The Receiver recommends establishing a cash reserve of \$1,550,000
2 for “future administrative expenses, estimated taxes, and other contingencies.”³ (Mot. at
3 9; Seaman Decl. ¶¶ 6, 7.) Based on the total allowed claims of \$66,487,695, this
4 distribution will allow claimants to recover 14.1% of their losses. In the motion before
5 the Court, the Receiver seeks an order approving this plan (the “Distribution Plan”).
6 (Mot. at 6–10.)

7
8 “[T]he Distribution Plan generally provides for (a) pooling of receivership estate
9 assets, (b) payment of priority or administrative claims, and (c) pro rata distributions
10 from the pool to all holders of allowed claims (investors and non-investors).” (*Id.* at 12.)
11 Pro rata payments will be based on the Allowed Claims Order. (Dkt. 340.) The
12 Distribution Plan also provides that the Court retains exclusive jurisdiction “to resolve all
13 matters relating to the Distribution Plan and receivership case in the event such issues
14 arise after the Distribution Plan is approved and the case is closed.” (Mot. at 12.)

15
16 The motion also seeks authorization to make an interim distribution of \$9.378
17 million. (Mot. at 10–12.)⁴ Finally, it seeks authorization to complete the remaining tasks
18 of the Receivership, including selling the remaining real and personal property of the
19 Receivership Entities, collecting two outstanding receivables, filing state and federal tax
20
21
22

23 ² At one point in the instant motion, the Receiver references an interim distribution of \$9.9 million.
24 (Mot. at 14.) The Court assumes this was a drafting error.

25 ³ The proposed amount of the cash reserve is inconsistent throughout the Receiver’s motion and attached
26 filings. It is variously listed as \$1,550,000, (Mot. at 9; Seaman Decl. ¶¶ 6, 7), \$1,500,000, (Prop. Order
27 at 2), and \$1,400,000, (Mot. at 14). The Court assumes \$1,550,000 is the correct amount.

28 ⁴ The proposed \$1,550,000 cash reserve and \$9,378,000 interim distribution accounts for \$10,928,000 of
the Receiver’s current holdings of \$11,287,932.55. This leaves \$359,932.55 unaccounted. (See Mot. at
9 (“[T]he Receiver recommends establishing a reserve of \$1,550,000 to pay future administrative
expenses, estimated taxes, and other contingencies. This will leave \$9.378 million for an interim
distribution to claimants.”).) The Court assumes that the Receiver will include any undistributed funds
in the cash reserve.

1 returns, and preparing a final accounting (collectively “Closing Tasks”). (*Id.* at 6.)⁵ The
2 Receiver estimates the Closing Tasks will be completed in approximately twelve months
3 and will cost \$150,000. (Seaman Decl. ¶¶ 3, 7.) Once the Closing Tasks are completed,
4 the Receiver will file a motion to make a final distribution, destroy records, pay the final
5 administrative expenses, discharge the Receiver and close the receivership. (*Id.*) The
6 SEC has filed a Statement of Non-Opposition to the Distribution Plan. (Dkt. 366.)
7

8 **III. DISCUSSION**

9

10 A district court “has broad powers and wide discretion to determine the appropriate
11 relief in an equity receivership.” *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986)
12 (quoting *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir. 1978)). This broad
13 authority is based on the complexity of most receiverships and the number of parties
14 involved. *Id.* A primary purpose of equity receiverships is “to promote orderly and
15 efficient administration of the estate by the district court for the benefit of creditors.” *Id.*
16 at 1038.

17 **A. Pooling of Receivership Estate Assets and Pro Rata Distribution**

18

19
20 The Distribution Plan pools receivership assets and distributes recovered funds on
21 a pro rata basis. (Prop. Order at 2–3.) Claimants’ pro rata shares are determined by the
22 amount of their allowed claims relative to the total of all allowed claims. (*Id.*) Investor
23 and non-investor claimants are treated identically. (*Id.*) The identities and allowed claim
24 amounts of all claimants are set out in the Court’s Allowed Claims Order. (Dkt. 340
25 (incorporating by reference Seaman March Decl. Exs. A, B).) The Receiver asserts that a
26

27
28 ⁵ The remaining property to be sold are “located at and commonly known as Professional Loading Services, 3616 Eastside Highway, Stevensville, Montana” (the “Montana Property”), and the two outstanding receivables “arise out of the Phoenix and Tucson sale transactions.” (Seaman Decl. ¶ 3.)

1 pro rata distribution of pooled assets is equitable and efficient given the comingling of
2 funds between the Receivership Entities and the impossibility of unwinding those funds.

3
4 The Court finds the proposal to pool receivership assets and make pro rata
5 distributions reasonable. A distribution plan based on tracing or unwinding
6 investments—even if feasible—would be inequitable. In this situation, “whether an
7 investor is able to trace his or her funds is a matter of luck: for example, a defendant’s
8 records happen to be intact for that investor, or a defendant has not yet spent that
9 investor’s funds. That mere fortuity, however, is not viewed an equitable basis to favor
10 some claims over others, particularly where doing so would harm other investors.” *SEC*
11 *v. Bivona*, 2017 WL 4022485, at *7 (N.D. Cal. Sept. 13, 2017). District courts routinely
12 approve pro rata distributions to equitably resolve claims and avoid rewarding certain
13 claimants based on happenstance. *See id.*; *United States v. Real Prop. Located at 13328*
14 *and 13324 State Highway 75 North*, 89 F.3d 551 (9th Cir. 1996); *In re N. Am. Coin &*
15 *Currency Ltd.*, 767 F.2d 1573 (9th Cir. 1985).

16
17 It is also reasonable to treat investor and non-investor claimants alike. The Court’s
18 Claims Procedure Order imposed significant limits on non-investor claims, barring
19 claims based on interest, consequential damages, or attorneys’ fees. (Dkt. 254.) It also
20 gave non-investor claimants the burden of proving the validity of their claim. (*Id.*) With
21 these limitations, it is equitable to allow non-investor claimants to recover on a pro rata
22 basis. *See SEC v. Total Wealth Mgmt., Inc.*, 2018 WL 4353151 (S.D. Cal. Sept. 11,
23 2018) (approving a similar distribution plan). The Court has not received any objections
24 to the Distribution Plan from claimants, and the SEC agrees that, under these
25 circumstances, pro rata distribution “is the most equitable way to distribute the
26 assets.” (Dkt. 366 at 1.) Overall, the structure of the Distribution Plan promotes an
27 orderly, fair, and efficient administration of claims.

1 **B. Administrative Costs and Fees**

2
3 Under the proposed Distribution Plan, the Receiver will continue to periodically
4 file for approval and partial payment of fees incurred by the Receiver and his
5 professionals. (Prop. Order at 2–3.) All other administrative costs will be paid in the
6 ordinary course. (*Id.*) Fees and costs will continue to take priority over payments to
7 claimants. (*Id.*) The Receiver will continue to request periodic approval of 100% of fees,
8 but payment of only 80% (for the Receiver’s counsel) and 90% (for other fees). (Mot. at
9 11.) The withheld portion of fees will be released at the close of the receivership. (*Id.*)

10
11 The Court finds the Receiver’s proposal for administrative costs and fees is
12 reasonable. “As a general rule, the expenses and fees of a receivership are a charge upon
13 the property administered.” *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994). Since
14 the receivership’s inception in January 2017 through April 2019, the Receiver’s fees total
15 \$1,260,683.50, or approximately 8% of the nearly \$17 million recovered. (Dkt. 357 at 8.)
16 The Receiver has discounted his personal hourly rate from \$400 to \$375. (*See id.*) The
17 reasonableness of receivership fees depends on the “economy of administration, the
18 burden that the estate may be able to bear, the amount of time required, . . . and the
19 overall value of the services to the estate.” *In re Imperial 400 Nat’l, Inc.*, 432 F. 2d 232,
20 237 (3d Cir. 1970). The Court has routinely found the Receiver’s fees reasonable. (*See*,
21 *e.g.*, Dkt. 361.) Here, the Court finds that the proposal for administrative costs and fees
22 will promote an orderly, fair, and efficient administration of claims.

23
24 **C. Interim Distribution, Closing Tasks, and Retention of Jurisdiction**

25
26 Finally, the Receiver seeks authorization to make the proposed interim distribution
27 of \$9.378 million and to execute the Closing Tasks. The Distribution Plan provides clear
28

1 procedures for interim payments and for resolving uncashed distributions. (Prop. Order
2 at 3–4.) The Receiver will make payments “as soon as practicable” after the
3 Court approves the Plan. (*Id.*) The interim distribution allows the Receiver to establish a
4 cash reserve to cover contingent liabilities, including professional fees held back pending
5 a final accounting, future administration costs, and projected tax liabilities. (Mot. at 9.)
6 The Closing Tasks include selling the remaining real and personal property of the
7 Receivership Entities, collecting outstanding receivables, filing state and federal tax
8 returns, and preparing a final accounting. (*Id.* at 6.) The Receiver estimates the Closing
9 Tasks will be completed in approximately twelve months and will cost \$150,000.
10 (Seaman Decl. ¶¶ 3, 7; Prop. Order at 3.) Finally, the Distribution Plan provides that the
11 Court will retain exclusive jurisdiction over all matters related to the Plan and the
12 receivership case, including the authority to modify or resolve disputes related to the
13 Distribution Plan, to approve remaining fee applications, and to consider the Receiver’s
14 closing motions and enter a final decree closing the receivership. (Prop. Order at 5.)

15
16 The Court finds the Receiver’s proposal for an interim distribution and Closing
17 Tasks reasonable. The interim distribution will allow claimants to receive payments
18 quickly and efficiently, and the proposed cash reserve promotes an orderly resolution of
19 the receivership. *See Hardy*, 803 F.2d at 1038. The Court has not received any
20 objections related to the interim distribution from claimants, and the SEC asserts that
21 “these are reasonable and prudent steps.” (Dkt. 366 at 1.)

22
23 //

24 //

25 //

26 //

27 //

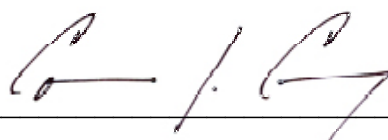
28

1 **V. CONCLUSION**

2
3 For the foregoing reasons, the Receiver's motion is **GRANTED**. The Court
4 hereby:

- 5
6 1. **APPROVES** the Distribution Plan attached as Exhibit A to the Declaration
7 of Thomas A. Seaman, located at Dkt. 364-1, with the clarification that the
8 cash reserve shall be **\$1,550,000**;
- 9
10 2. **AUTHORIZES** the Receiver to implement the Distribution Plan, including
11 but not limited to, making the proposed interim distribution to claimants
12 with allowed claims as set out in Exhibits A and B to the March 6, 2019,
13 Declaration of Thomas A. Seaman, located at Dkt. 323-2; and
- 14
15 3. **AUTHORIZES** the Receiver to carry out the Closing Tasks set out in the
16 Declaration of Thomas A. Seaman, located at Dkt. 364-1, including, but not
17 limited to, selling the remaining real and personal property of the
18 Receivership Entities, collecting outstanding receivables, filing state and
19 federal tax returns, and preparing a final accounting.

20
21
22 DATED: September 20, 2019



23
24 CORMAC J. CARNEY

25 UNITED STATES DISTRICT JUDGE