

ROBB EVANS & ASSOCIATES LLC
Temporary Receiver of
Longboat Global Funds Management, LLC, et al.
11450 Sheldon Street
Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
Facsimile No.: (818) 768-8802

Commodity Futures Trading Commission v. Longboat Global Funds Management, LLC
CASE No. 05-CV-2142 PJH

**Petition for Instructions and Report of Assets of Receivership; Motion for
an Order to Seek Transfer of Receivership Property; Proposed Order; and
Declaration of Kenton B. Johnson**

Filed December 14, 2005

1 Linda J. Candler, CA Bar No. 181805
Linda_candler@robbevans.com
2 Robb Evans and Associates LLC
11450 Sheldon Street
3 Sun Valley, CA 91352
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4 818-768-8100 (Receiver)
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fax: 818-768-8802 (Receiver)

6 Attorneys for
7 Robb Evans & Associates LLC
Receiver
8
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
12

13 COMMODITY FUTURES TRADING)
14 COMMISSION,)

15 Plaintiff,

16 vs.

17 ROBERT JOSEPH BEASLEY,
18 LONGBOAT GLOBAL FUNDS
19 MANAGEMENT, LLC,

20 Defendants.
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23

Case No.: No. 05-2142 PJH

**PETITION FOR INSTRUCTIONS
AND REPORT OF ASSETS OF
RECEIVERSHIP; MOTION FOR
AN ORDER TO SEEK TRANSFER
OF RECEIVERSHIP PROPERTY;
PROPOSED ORDER; AND
DECLARATION OF KENTON B.
JOHNSON**

Date: January 25, 2006
Time: 9:00 a.m.
Place: Courtroom 3, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102
(Hon. Phyllis J. Hamilton)

24
25 TO THE HONORABLE PHYLLIS J. HAMILTON, UNITED STATES
26 DISTRICT COURT JUDGE, AND TO ALL PARTIES AND THEIR
27 ATTORNEYS OF RECORD:
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1 PLEASE TAKE NOTICE that on January 25, 2005, at 9:00 a.m. in
2 Courtroom 3 of the United States District Court for the Northern District of
3 California located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California
4 94102, Robb Evans & Associates LLC, Receiver in the above-captioned case, will
5 present its Petition for Instructions and Motion for an Order for Transfer of
6 Receivership Asset to the Receiver.

7 Pursuant to L.R. 66-5, the Receiver, Robb Evans and Associates LLC,
8 submits this Petition for Instructions regarding an asset of the receivership. In
9 support of this request, a member of Robb Evans & Associates LLC, Kenton D.
10 Johnson, submits the attached declaration.

11 This Petition for Instructions will be served on all interested parties and will
12 be posted on the Receiver's website at
13 <http://www.robbevans.com/html/longboat.html>, where it may be reviewed in its
14 entirety. A copy of the Declaration and accompanying exhibits will be provided to
15 any interested party upon receipt of a request therefore which may be directed to:
16 Robb Evans & Associates LLC, Attn: Cherrie Eustaquio, 11450 Sheldon Street,
17 Sun Valley, CA 91352 telephone: (818) 768-8100, facsimile: (818) 768-8802. Any
18 person or entity opposing this Motion must timely file with the Court and serve
19 upon the Receiver, whose name and address appear in the upper left-hand corner of
20 the first page of this Motion, a written opposition which complies in all respects
21 with the rules of this Court. Failure to timely file an opposition may be deemed by
22 the Court to be consent to the granting of the Receiver's Motion. If no party objects
23 to the Motion, the Receiver is willing for the Court to consider it without oral
24 argument.

25 For the reasons set forth in the attached declaration, the Receiver respectfully
26 requests an order directing the Receiver to petition the United States District Court
27 for the Northern District of Illinois for the transfer of an asset of Piranha Capital,
28 L.P., to wit: an account held at Pershing LLC with a balance of \$1,000,000.00, to

1 the Receiver pending the outcome of the proceedings against the defendants in this
2 case and further orders of this Court regarding distribution of receivership assets to
3 the investors.

4 Dated this 14th day of December, 2005

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8 Linda J. Candler
9 Attorney for Receiver
10 Robb Evans and
11 Associates LLC
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[PROPOSED] ORDER

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The Petition for Instructions and Motion of Robb Evans & Associates LLC, Receiver in the above-captioned case, for an Order Authorizing the Receiver to Seek the Transfer of a Receivership Asset came on regularly for hearing on January 25, 2006, in Courtroom 3 of the above-referenced Court, the Honorable Phyllis J. Hamilton, United States District Judge, presiding. Linda Candler, Esq. appeared on behalf of the Temporary Receiver, Robb Evans & Associates LLC; other parties appeared as reflected in the Court's record.

The Court, having reviewed the Petition and Motion and all papers filed in support thereof, hereby rules as follows:

IT IS HEREBY ORDERED:

1. The Motion and Petition for Instructions is granted in its entirety.
2. The Receiver is authorized to file a petition in the United States District Court for the Northern District of Illinois seeking the transfer of the account of Piranha Capital L.P. held with Pershing LLC that is currently subject of an attachment order in that district.
3. The Receiver shall hold all funds transferred as a result of such Petition in trust pending further orders of this Court for approval of claims and distribution of assets to the investors.

Dated: _____

PHYLLIS J. HAMILTON
United States District Judge

1 Linda J. Candler, CA Bar No. 181805
 Linda candler@robbevans.com
 2 Robb Evans and Associates LLC
 11450 Sheldon Street
 3 Sun Valley, CA 91352
 206-621-7165 (Candler)
 4 818-768-8100 (Receiver)
 fax: 206-621-7128 (Candler)
 5 fax: 818-768-8802 (Receiver)
 6 Attorney for Robb Evans & Associates LLC
 7 Receiver

8
9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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12
13 COMMODITY FUTURES TRADING)
14 COMMISSION,)

Case No.: No. 05-2142 PJH

15 Plaintiff,

DECLARATION OF KENTON D. JOHNSON IN SUPPORT OF PETITION FOR INSTRUCTIONS

16 vs.

17 ROBERT JOSEPH BEASLEY,
18 LONGBOAT GLOBAL FUNDS
19 MANAGEMENT, LLC,

20 Defendants.
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25 I, Kenton D. Johnson, declare as follows:

26 1. I am a member of Robb Evans and Associates LLC. On August 19,
27 2005, Robb Evans and Associates LLC was appointed Receiver over the assets of
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1 Longboat Global Funds Management, LLC.

2 2. I make this application in support of the Receiver's Report of Assets
3 and Petition for Instructions. As set out below, the Receiver has identified a
4 \$1,000,000.00 deposit that is an asset of Piranha Capital, LP.

5 3. I have reviewed documents showing that four investors of Piranha
6 Capital, L.P. filed a lawsuit in Cook County, Illinois, on October 15, 2004 against
7 Piranha Capital, L.P., Longboat Global Funds Management, LLC, Longboat Global
8 Advisors, L.L.C., and Robert Joseph Beasley. The plaintiffs alleged fraud and
9 breach of contract, and claimed that defendants Piranha Capital and its general
10 partner, Longboat Global Funds Management, LLC, failed to honor their requests
11 for redemption dated July 7, 2004. The plaintiffs claimed that their redemption
12 demands, totaling \$1,426,841.52, were due on or before September 10, 2004.

13 4. In connection with that lawsuit, the plaintiffs, Thomas F. Gradel, Sarah
14 Gradel, Thomas Mazza, and James X. Maude sought and obtained an ex parte
15 Attachment Order on October 27, 2004. A copy of that Order is attached as
16 Exhibit 1. The plaintiffs' attachment order was for the amount of one million
17 dollars (\$1,000,000.00) and was executed against an account held by Piranha
18 Capital, LP at Pershing LLC.

19 5. The defendants filed a Motion to transfer the case to Federal Court, and
20 the case was transferred to the United States District Court for the Northern District
21 of Illinois on January 7, 2005. It is filed as Case No. 05 C 0078 and is assigned to
22 Judge Wayne R. Anderson.

23 6. Following the transfer to Federal Court, the defendants moved to vacate
24 the Attachment Order on January 21, 2005. That Motion was denied on April 7,
25 2005. A copy of this Order is attached as Exhibit 2. On May 6, 2005, the Court
26 amended the Order to permit Piranha Capital to withdraw the amounts above
27 \$1,000,000.00 and the sum of \$179,301.82 was wire transferred to the defendants'
28 counsel, Gardner, Carton and Douglas on or about May 23, 2005. A copy of the

1 Amended Order is attached as exhibit 3. A copy of the wire transfer is attached as
2 Exhibit 4. The Receiver's counsel has been advised by Gardner, Carton and
3 Douglas that this sum was applied to outstanding attorney's fees.

4 7. The plaintiffs have filed a Motion for Summary Judgment in the
5 Illinois action and that motion is pending. The defendants have opposed the
6 Motion, and have alleged that there is a 45-day waiting period for redemptions,
7 pursuant to the terms of the contract, and this period does not include weekends.
8 The defendants allege that, as a result, the 45-day time period did not expire prior to
9 the filing of the complaint filed by the National Futures Association on September
10 20, 2004, after which no further redemptions could be made.

11 8. The Receiver has filed a copy of the Preliminary Injunction and Order
12 appointing Receiver with the United States District Court for the Northern District
13 of Illinois.

14 9. Upon receipt of instructions from this Court, the Receiver will file a
15 Motion in the Illinois action seeking to take control of the funds held by Piranha
16 Capital LP that are the subject of the restraint order in that action, on the grounds
17 that such funds are property of the receivership and should be transferred to the
18 Receiver or held in trust pending further orders from this Court regarding
19 distribution of assets.

20 I declare under penalty of perjury that the foregoing is true and correct and
21 that this declaration was executed this 14th day of December 2005 at Sun Valley,
22 California.

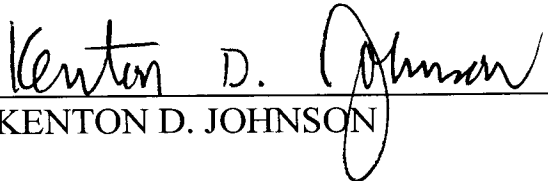
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25 KENTON D. JOHNSON
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EXHIBIT "1"

Handwritten initials

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

THEODORE F. GRADEL,
SARAH GRADEL,
THOMAS A. MAZZA,
JAMES K. MAUDE,

Plaintiffs,

v.

PIRANHA CAPITAL, L.P.,
LONGBOAT GLOBAL FUNDS MANAGEMENT,
LLC,
LONGBOAT GLOBAL ADVISORS, L.L.C., and
ROBERT JOSEPH BEASLEY,

Defendants,

and

BANC OF AMERICA SECURITIES LLC,
PERSHING LLC, and
FIDELITY INVESTMENTS,

Garnishees.

S.P.

No. 04 L 11694

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ORDER OF ATTACHMENT

This matter coming to be heard on Plaintiff's Emergency Motion for Attachment of assets owed to defendant Piranha Capital, L.P. by garnishees Banc of America Securities LLC, Pershing LLC, and Fidelity Investments, up to an amount not to exceed \$1,000,000, the Court having competent jurisdiction over each of the Garnishees, the Plaintiffs having filed a Complaint for a money claim exceeding \$20.00 against defendant Piranha Capital, L.P. with the Clerk of the Court, it appearing in an affidavit that the defendant Piranha Capital, L.P. is not a resident or citizen of the State of Illinois or maintains offices in the State of Illinois, the Plaintiffs having procured a bond for twice the amount requested to be attached, and Piranha Capital, L.P.'s property held by the named Garnishees in the State

04211694

of Illinois, thus satisfying the prima facie elements of section 4-101 of the Illinois Code of Civil Procedure, 735 ILCS 5/4-101:

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IT IS HEREBY ORDERED that:

1. The Order of Attachment entered by this Court dated October 18, 2004, is hereby vacated and Plaintiffs will provide garnishees to that Order, Refco LLC and Credit Suisse First Boston (USA), Inc., a copy of this Order. 4253

4285

2. The Sheriff or any private person over 18 years of age and not a party to the action shall serve one or more of the aforementioned Garnishees a summons for garnishment ordering the Garnishee(s) to hold any cash and securities belonging to Piranha Capital, L.P. for an amount up to \$1,000,000 and answer to what may be held by them for Piranha Capital, L.P. on or before November 1, 2004.

3. The Sheriff or any private person over 18 years of age and not a party to the action may serve a Garnishee not served in paragraph one above a summons for garnishment ordering the Garnishee(s) to hold any cash and securities belonging to Piranha Capital, L.P. for an amount up to \$1,000,000, less any moneys held by one or more of the other Garnishees served in this matter, and answer to what may be held by them for Piranha Capital, L.P. on or before the third day after service of the garnishee summons.

4. The Clerk of the Court shall cause the publication of this order as described in section 4-127 of the Code of Civil Procedure, 735 ILCS 5/4-127, and mail a copy of this Order to defendant Piranha Capital, L.P.

5. Pursuant to section 4-114 of the Code of Civil Procedure, 735 ILCS 5/4-114, a certified copy of this Order may be served as a summons upon defendant Piranha Capital, L.P.

6. Defendant Piranha Capital, L.P. shall appear and answer the complaint of the Plaintiffs on or before November 26, 2004 or, at Piranha Capital, L.P.'s option, to appear at any time prior thereto and move the court to set a hearing on the Order for the attachment or affidavit. 4234

7. Pursuant to Plaintiffs' motion made pursuant to section 2-202(a) of the Code of Civil Procedure, 735 ILCS 5/2-202(a), the Plaintiffs are given leave to have any private person over 18 years of age and not a party to the action serve the Garnishees in this matter with the garnishment summons. 4251


JUDGE

HENDERSON & LYMAN
175 West Jackson, Suite 240
Chicago, Illinois 60604
312-986-6960
Firm ID No. 34832

Judge Ronald F. Bartkiewicz
ENTERED

OCT 27 2004

Circuit Court - 193

EXHIBIT “2”

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Wayne R. Andersen	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 0078	DATE	APRIL 7, 2005
CASE TITLE	Gradel, et al. v. Piranha Capital, et al.		

DOCKET ENTRY TEXT:

Motion [5-1] is denied.

[For further details see text below.] Docketing to mail notices.

STATEMENT

The motion by Defendant Piranha Capital, L.P. to vacate attachment order [5-1] is denied. The funds may only be disbursed upon order of the Court. A copy of this Order should be served upon Pershing L.L.C. It is so ordered.

W. R. Andersen

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EXHIBIT “3”

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THHODORE F. GRADEL,)
SARAH GRADEL)
THOMAS A. MAZZA,)
JAMES X. MAUDE)

Plaintiffs,)

v.)

PIRANHA CAPITAL, L.P.,)
LONGBOAT GLOBAL FUNDS)
MANAGEMENT, LLC,)
LONGBOAT GLOBAL ADVISORS, LLC,)
AND ROBERT JOSEPH BEASLEY,)

Defendants.)

CASE No. 05 C 00078

Hon. Wayne Andersen

Magistrate Judge Ashman

CS

ORDER CLARIFYING COURT'S APRIL 7, 2005 ORDER

Defendant Piranha Capital, L.P. ("Piranha") has moved for clarification of the Court's April 7, 2005 Order (the "April 7 Order") to confirm that the "funds" referred to in the April 7 Order, for which a Court order must be obtained prior to disbursement, applied only to amounts up to \$1,000,000 in funds in Piranha's account at Pershing LLC (the "Pershing Account"). Upon consideration of Piranha's Motion for Clarification, to which plaintiffs did not object, the Court has determined to grant the Motion.

Accordingly, it is hereby ordered that Piranha's Motion for Clarification is granted and the Court confirms that Piranha may disburse funds from its Pershing Account in excess of the \$1,000,000 funds attached in the Pershing Account without further order of the Court.

IT IS SO ORDERED.

Dated: May 6, 2005



Honorable Wayne R. Andersen

CS

EXHIBIT “4”

Northern Trust

Treasury Passport

Product Category - Detail By Account New Detail Only

BANK: TNT

ACCOUNT: 30180594

GARDNER CARTON AND DOUGL

WIRES CREDITS

195 WIRE IN #152167 BY FWR#005138 021000018 ID=FTS0506233040400 BANK OF NEW YORK *FTR*ORG=A021000018 BANK OF NEW YORK NEW YORK CITY NEW YORK ORG=#VLD012581 PERSHING CAPITAL LP 2 N TAMMAM TRAIL SUITE 1200 OBKW PERSHING LLC US 1 PERSHING PLAZA JERSEY CI TY, NJ 07399 SRF=FTS0506233040400 BSI=#BNF#VLD01258 BSK-D0030180594 GARDNER CARTON AND DOUGLAS LLC ATTN:KEVIN KURNIK 191 N. WACKER DR #3700 CHICAGO, IL 60606-1696 BNF=#30180594 GARDNER CARTON DOUGLASS LLP RECEIVED FROM FRB AT 14:43 CT ON 05/23/05

179,301.82

05/23/05
LONGBOAT

WIRES TOTALS FOR ACCOUNT 30180594

CREDIT COUNT: 1

\$179,301.82



1 Linda J. Candler, CA Bar No. 181805
linda_candler@robbevans.com
2 Robb Evans and Associates LLC
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6 Attorneys for
7 Robb Evans & Associates LLC,
Receiver

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
12

13 COMMODITY FUTURES TRADING)
14 COMMISSION,)

15 Plaintiff,

16 vs.

17 ROBERT JOSEPH BEASLEY,
18 LONGBOAT GLOBAL FUNDS
19 MANAGEMENT, LLC,

20 Defendants.
21
22

Case No.: No. 05-2142 PJH

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR INSTRUCTIONS
AND REPORT OF ASSETS OF
RECEIVERSHIP**

23
24 Comes now the Receiver, Robb Evans and Associates LLC, through counsel,
25 and hereby submits this Memorandum of Points and Authorities in support of its
26 Petition for Instructions concerning an asset of the receivership.
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I.

**THE COURT HAS BROAD AUTHORITY TO APPROVE
AND IMPLEMENT CLAIMS ALLOWANCE PROCEDURES AND
DISTRIBUTION PLANS FOR RECEIVERSHIP ASSETS**

On August 19, 2005, Robb Evans & Associates LLC (“REA” or “Receiver”) was appointed as Temporary Receiver in the within action pursuant to a “Consent Order of Preliminary Injunction and Other Equitable Relief” (“Order”). Pursuant to the terms of the Order, REA was appointed as Temporary Receiver for Defendant Longboat Global Funds Management, LLC (“Longboat”) and any affiliates or subsidiaries solely with respect to matters involving Piranha Capital, L.P. (“Piranha”), and all of the funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by them with the full powers of an equity Receiver, except as limited by the terms of the Order.

The August 19, 2005 Order directed the Receiver, in part, to do the following things:

- Take exclusive custody, control and possession of all the funds, property, mail documents, books, records and other assets of, in the possession of, or under the control of the Longboat, that relate to Piranha, wherever situated...(.) The Receiver shall have full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, effects, land, leases, documents, books, records, work papers, and records of accounts, including computer-maintained information, and other papers of the defendants relating to Piranha, including documents related to customers, clients or limited partners of Piranha whose interests are now held by or under the direction, possession, custody or control of Longboat...(:)
- Preserve, hold and manage all receivership assets, and perform all acts necessary to preserve the value of those assets, in order to prevent any loss, damage or injury to customers or clients;
- Collect all money owed to Longboat arising out of its position as general Partner of Piranha;

- Initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions or proceedings in state, federal or foreign court necessary to preserve or increase the assets of Longboat relating to Piranha or to carry out his or her duties pursuant to this Order ... (;)

In this case, the largest liquid asset, an investment account held by Piranha Capital LP, with Pershing LLC was frozen by four of the investors prior to the Receiver's appointment. The Receiver believes that it is in the best interests of all of the investors to request that this asset be transferred to the Receiver. As set out below, courts have approved distribution plans which provide for a pro rata distribution of receivership assets. Allowing this asset to remain outside the receivership and subject to orders of other courts would circumvent that process, and could result in dissipation of assets that should be made available to all investors.

The account is subject to an order of the United States District Court for the Northern District of Illinois in Case No. 05 C 00078 dated April 7, 2005, upholding an Attachment Order made by the Circuit Court of Cook County on October 27, 2004. The Attachment Order was upheld following the removal of the case to US District Court.

The effect upon creditors of the Receiver taking possession of the general assets of a corporation is to add to the creditors already existing rights a right to a proportional share of the impounded assets. *3 Clark, Law of Receivers, § 646 (3d ed., 1959)* (hereinafter "Clark"). The method of determining what creditor claims exist and their amount is by the use of a claims procedure. "Since the appointing court, by taking control and possession of the defendant's property, has deprived claimants of their claims against the defendant's property, it must provide a method and procedure to claimants to present and process their claims." *1 Clark at § 125*. The general method to determine existing claims is to require each claimant to assert

1 his claim in the court in which the receiver was appointed. The Illinois claimants
 2 should be required to submit their claims to the Receiver, along with the other
 3 investors. Unless there is a statute providing otherwise, the receivership court, as a
 4 court of equity, has the power to fashion the claims procedure as it feels appropriate
 5 to promote justice. See generally, *Fletcher, Cyclopaedia Corporations, Receivers*,
 6 §§7898, 7901 (*Perm. Ed. 1979*).

7 The “general equity power” of the District Court in issuing orders addressing
 8 the administration of a receivership estate was discussed at length by the Ninth
 9 Circuit in *S.E.C. v. Hardy*, 803 F. 2d 1034 (9th Cir. 1986). Recognizing the limited
 10 body of reported decisions in federal receiverships, the Court nevertheless
 11 articulated two overriding principals gleaned from the case law:

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 13 First, a district court’s power to supervise an equity
 14 receivership and to determine the appropriate action to be
 15 taken in the administration of the receivership is extremely
 16 broad. . . . The basis for broad deference to the district
 17 court’s supervisory role in equity receiverships arises out
 of the fact that most receiverships involve multiple parties
 and complex transactions.

18 . . .
 19 Secondly, we have acknowledged that a primary purpose
 20 of equity receiverships is to promote orderly and efficient
 21 administration of the estate by the district court for the
 22 benefit of creditors. [Citations omitted.] Accordingly, we
 generally uphold reasonable procedures instituted by the
 district court that serve this purpose. [Citations omitted.]
S.E.C. v. Hardy, 803 F. 2d at 1037-1038.

23
 24 See also *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978), (“[T]he
 25 district court has broad powers and wide discretion to determine the appropriate
 26 relief in an equity receivership.”) Receivers are not only at the liberty to request
 27 instructions, as explained in *Northern Finance Corporation v. Byrnes*, 5 F.2d 11, 12
 28 (8th Cir. 1925), citing numerous Supreme Court cases, but they are encouraged to

1 apply at all times to the Court for instructions and advice. Such is their obligation in
2 any doubtful or important matter arising in the course of their duties. The Court has
3 wide discretion in the supervision of a receivership.

4 The Ninth Circuit has supported the use of a Receiver to resolve claims in
5 complex cases and to avoid dissipation of assets.

6
7 The use of such proceedings enables a receiver to
8 consolidate all litigation concerning his receivership in a
9 single district court and before a single district judge, and
10 to avoid formalities that would slow down the resolution
11 of disputes. This promotes judicial efficiency and reduces
12 litigation costs to the receivership. [Citations omitted.] The
13 primary purpose of allowing courts to establish
14 receiverships in securities fraud actions is to prevent
15 further dissipation of assets of the defrauded investors; the
16 use of summary post-judgment proceedings helps to
17 effectuate this.

18 *S.E.C. v. Wencke*, 783 F. 2d 829, 837 n. 9 (9th Cir. 1986), cited with
19 approval in *S.E.C. v. Hardy*, 803 F. 2d 1034.

20 II.

21 A PRO RATA DISTRIBUTION AND ALLOWANCE PROCEDURE IS FAIR 22 AND EQUITABLE

23 The Receiver will propose a pro rata distribution plan, once the investor
24 claims have been presented and evaluated. The Ninth Circuit recently approved a
25 pro rata distribution plan, with offsets, in *Securities and Exchange Commission v.*
26 *Capital Consultants, LLC*, No. 03-35406 (9th Cir. 02/02/2005). The defendant,
27 Capital Consultants, LLC, was an Oregon investment management company that
28 made investments for several hundred individuals, corporations, and employee
benefit plans. The company was placed in receivership after the SEC and the
Department of Labor alleged that the monies were invested in worthless loans and
that the defendants were operating a Ponzi scheme. The investor claims totaled

1 approximately \$480 million and assets available for distribution totaled \$259.5
2 million. The District Court approved the Receiver's plan to deduct the value of real
3 estate previously paid to investors, and to an offset for those investors who received
4 settlements from third parties. The Court held that "equity demands equal treatment
5 of victims". *Id.* The Court noted that in a factually similar case, *United States v.*
6 *Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551
7 (9th Cir. 1996), the district court approved an SEC-administered plan to distribute
8 the fund to the defrauded customers on a pro rata basis, even though one customer
9 claimed that he could trace his funds to a particular purchase of real estate. The
10 Ninth Circuit upheld the district court's decision to deny the claim, and agreed with
11 the district court that **"the equities demand that all [customers] share equally in**
12 **the fund of pooled assets in accordance with the SEC plan."** *Id.* at 553.
13 (emphasis added).

14 As recognized in *SEC v. Forex Asset Management*, 242 F.3d 325 (5th Cir.
15 2001), "a pro rata distribution plan provide[d] the most equitable means of
16 addressing all of the victim's harms" even where the individual investor alleged his
17 funds were deposited into a segregated account. *See, also, United States v. Durham*,
18 86 F.3d 70, 73 (5th Cir. 1996).

19 III.

20 CONCLUSION

21 Based upon the foregoing, Robb Evans, Receiver, respectfully requests an
22 Order of this Court authorizing the Receiver to file a Motion in the Illinois
23 proceedings seeking the transfer of funds subject to the Attachment Order made by
24 the US District Court for the Northern District of Illinois to the Receiver. The
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1 Receiver will hold such funds in trust pending the resolution of this case and the
2 approval by this Court of a claims distribution procedure.

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Dated this 14th day of December, 2005.

Linda Candler

Linda J. Candler
Attorney for Receiver
Robb Evans and
Associates LLC

PROOF OF SERVICE

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: 11450 Sheldon Street, Sun Valley, CA 91352.

On December 14, 2005, I served the foregoing document described as **PETITION FOR INSTRUCTIONS AND REPORT OF ASSETS OF RECEIVERSHIP; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR INSTRUCTIONS AND REPORT OF ASSETS OF RECEIVERSHIP; DECLARATION OF KENTON D. JOHNSON IN SUPPORT OF PETITION FOR INSTRUCTIONS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelope addressed as follows:

Alison Lurton, Esq. Gretchen L. Lowe, Esq. Karen Kenmotsu, Esq. Commodity Futures Trading Commission 1155 21 st Street, NW Washington DC 20581 alurton@cftc.gov	Timothy James Carey, Esq. David William Porteous, Esq. Gardner Carton Douglas 191 W. Wacker Drive, Suite 3700 Chicago, IL 60606 dporteous@gcd.com
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(BY MAIL) I caused such envelope to be deposited in the mail at _____, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at _____, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY EMAIL DELIVERY) I caused said documents to be emailed to the addressee(s) as listed above.

(BY FEDERAL EXPRESS) I caused an envelope to be hand-delivered to a representative of FEDEX at Sun Valley, California; whereupon said envelope is to be delivered by hand to a representative of the addressee on the next business day. I am readily familiar with the firm's practice of collection and processing correspondence for delivery with FEDEX for overnight delivery by next business day.

Executed on December 14, 2005, at Sun Valley, California.

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Linda Candler



Printed Name

Signature