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15 UNITED STATES DISTRICT COURT  
 16 SOUTHERN DISTRICT OF CALIFORNIA

17 SECURITIES AND EXCHANGE  
 18 COMMISSION,

19 Plaintiff,

20 vs.

21 TOTAL WEALTH MANAGEMENT,  
 22 INC.; et al.,

23 Defendants.

Case No. 15-cv-226 BAS (DHB)

NO ORAL ARGUMENT UNLESS  
 REQUESTED BY THE COURT

MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 SECOND INTERIM APPLICATIONS FOR  
 PAYMENT OF FEES AND  
 REIMBURSEMENT OF RECEIVER,  
 THOMAS A. SEAMAN, AND ALLEN  
 MATKINS LECK GAMBLE MALLORY &  
 NATSIS LLP

[Notice of Applications for Payment of Fees  
 and Reimbursement of Expenses; Second  
 Interim Application of Receiver; Second  
 Interim Application of Allen Matkins;  
 Declaration of Thomas A. Seaman; and  
 [Proposed ]Order submitted concurrently  
 herewith]

Date: September 6, 2016  
 Ctrm: 4B  
 Judge: Hon. Cynthia Bashant

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 This Court appointed Kristen A. Janulewicz (the "Original Receiver") as the  
4 permanent receiver for Defendant Total Wealth Management, Inc. ("Total Wealth")  
5 and its subsidiaries and affiliates, including, but not limited to Altus Capital  
6 Management, LLC (collectively, the "Receivership Entities" or "Entities") pursuant  
7 its February 12, 2015 "(1) Preliminary Injunction, Appointment of a Permanent  
8 Receiver, and Related Orders; and (2) Order Vacating Hearing on Preliminary  
9 Injunction" (the "Permanent Appointment Order"). On June 7, 2016, the Court  
10 substituted Thomas A. Seaman (the "Successor Receiver") for the Original Receiver  
11 via an Order Approving Joint Stipulation to Substitute Thomas A. Seaman as  
12 Permanent Receiver.<sup>1</sup> While submitted by the Successor Receiver, the instant  
13 Second Interim Applications for Payment of Fees and Reimbursement of Expenses  
14 (the "Applications") cover services provided by the Original Receiver and her  
15 counsel of record, Allen Matkins Leck Gamble Mallory & Natsis LLP ("Allen  
16 Matkins") for the period from July 1, 2015 through December 31, 2015 (the  
17 "Application Period").

18 The Applications seek interim approval of \$90,695.00 in fees incurred by the  
19 Original Receiver during the Application Period, and authorization for the Successor  
20 Receiver to pay, on an interim basis, 90% of the fees incurred, in the amount of  
21 \$81,625.50. The Applications further seek the approval of Allen Matkins' fees and  
22 expenses in the amount of \$159,492.75 and \$3,892.33, respectively, and  
23 authorization for the Successor Receiver to pay Allen Matkins, on an interim basis,  
24 80% of its fees incurred, in the amount of \$127,594.20 and 100% of its expenses in  
25 the amount of \$3,892.33, from the assets of the Receivership Entities.

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28 <sup>1</sup> As the Court may recall, at all times relevant to the Applications, the Original Receiver was employed by the Thomas Seaman Company, the entity owned and operated by the Successor Receiver.

1 **II. RELEVANT FACTUAL BACKGROUND.**

2 A full recitation of the procedural history of the above-captioned action is  
3 unnecessary for the purposes of the Applications, and is presented completely and in  
4 detail in the Original Receiver's previously submitted Initial Report and  
5 Recommendations and Petition for Instructions (the "Initial Report"), her First  
6 Interim Report and Petition for Further Instructions (the "First Interim Report"), and  
7 her Second Interim Report and Petition for Further Instructions (the "Second Interim  
8 Report") each of which summarize the efforts of the Original Receiver and her  
9 professionals<sup>2</sup> since the commencement of the instant receivership, and through the  
10 end of the Application Period. The facts most relevant to the Applications are as  
11 follows:

12 The above-captioned enforcement action commenced with the Commission's  
13 Complaint (the "SEC Complaint"), submitted on February 3, 2015, against  
14 Defendants Total Wealth and Jacob Keith Cooper (See Docket No. 1.) The  
15 Commission's Complaint alleged that Defendants violated the federal securities  
16 laws, including by allegedly breaching their fiduciary duties to investors, wrongfully  
17 deploying client funds for their own, personal purposes, and committing fraud. The  
18 Court entered the Permanent Appointment Order on February 12, 2015, granting the  
19 Commission's request for the appointment of the Original Receiver, and imposing  
20 certain injunctive relief against the Receivership Entities and anyone acting in  
21 concert with them. (See Docket No. 8.) On May 8, 2015, this Court granted the  
22 Original Receiver's request for an Order in Aid of Receivership, clarifying certain  
23 administrative matters and providing the Original Receiver with certain specific  
24 authority regarding communications with Entity investors and protection of private  
25 information, among other things. (See Docket No. 31.)

26  
27  
28 <sup>2</sup> For the purposes of this Application, the only professionals seeking compensation are  
Allen Matkins.

1           Upon her appointment, the Original Receiver assumed control over the  
 2 Receivership Entities and their estate (the "Estate"), and commenced a detailed  
 3 review of their business and financial activities. To date, this effort has enabled the  
 4 Original Receiver – and now the Successor Receiver – to identify, locate, and  
 5 recover assets of the Receivership Entities ("Receivership Assets"), to understand  
 6 the business and financial activities of the Receivership Entities, and to develop an  
 7 accounting reflecting these activities that the Successor Receiver believes should  
 8 enable him to propose and undertake an appropriate claims and distribution process  
 9 to investors in and creditors of the Receivership Entities, with Court approval, of  
 10 course. (See concurrently filed Declaration of Thomas A. Seaman ["Seaman Decl."]  
 11 ¶ 2.) Indeed, as of the date of the Applications, the Original Receiver and the  
 12 Successor Receiver have recovered \$3,467,008.32 in Receivership Assets, in cash,  
 13 for the benefit of Estate, net of expenditures. (Id. at ¶ 5.)

14           Again, the specific actions taken by the Original Receiver are described in  
 15 detail in her Initial Report, First Interim Report, and Second Interim Report.<sup>3</sup>  
 16 Having diligently carried out their duties in connection with the instant receivership,  
 17 the Successor Receiver (on behalf of the Original Receiver) and Allen Matkins now  
 18 request that the Court authorize the interim payment of their respective fees and  
 19 expenses, for the period from July 1, 2015 through December 15, 2015, from the  
 20 assets of the Estate as addressed here and in the Applications.

### 21 **III. ARGUMENT.**

#### 22 **A. The Applications Are Reasonable And Appropriate And Payment** 23 **Should Be Authorized.**

24           "As a general rule, the expenses and fees of a receivership are a charge upon  
 25 the property administered." Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994).  
 26 These expenses include the fees and expenses of the Original Receiver and her  
 27

28 <sup>3</sup> A Third Interim Report and Petition For Further Instructions will be filed by the  
 Receiver roughly contemporaneously with the Applications.

1 professionals. Decisions regarding the timing and amount of an award of fees and  
2 costs to a receiver and his or her professionals are committed to the sound discretion  
3 of the Court. See SEC v. Elliot, 953 F.2d 1560, 1577 (11th Cir. 1992) (rev'd in part  
4 on other grounds, 998 F.2d 922 (11th Cir. 1993)).

5 1. The Fees and Expenses Requested in the Applications are  
6 Reasonable.

7 In determining the reasonableness of fees and expenses requested in this  
8 context, the Court should consider the time records presented, the quality of the  
9 work performed, the complexity of the problems faced, and the benefit of the  
10 services rendered to the receivership estate. SEC v. Fifth Avenue Coach Lines, Inc.,  
11 364 F.Supp. 1220, 1222 (S.D.N.Y. 1973); see also Southwestern Media, Inc. v. Rau,  
12 708 F.2d 419, 427 (9th Cir. 1983) (superseded on other grounds by statute as stated  
13 in In re Hokulani Square, Inc., 460 B.R. 763, 768 (9th Cir. BAP 2011)).

14 Here, the Applications describe the nature of the services that have been  
15 rendered, and, where appropriate, the identity and billing rate of the individual(s)  
16 performing each task. The Original Receiver and Allen Matkins endeavored to staff  
17 matters as efficiently as possible in light of the level of experience required and the  
18 complexity of the issues presented. Moreover, both the Successor Receiver (on  
19 behalf of the Original Receiver) and Allen Matkins seek payment, on an interim  
20 basis, of only a percentage of the fees and costs incurred, in recognition of the fact  
21 that the work on this matter is ongoing. The Successor Receiver seeks payment of  
22 90% of fees incurred during the Application Period, in the amount of \$81,625.50.  
23 Allen Matkins seeks payment of 80% of its fees incurred during the Application  
24 Period, totaling \$127,594.20, plus 100% of its expenses, totaling \$3,892.33.  
25 Payment of the proposed 10% and 20% holdbacks, respectively, will be sought at  
26 the conclusion of the receivership. In general, the Applications reflect the Original  
27 Receiver's and Allen Matkins' customary billing rates and the rates charged for  
28

1 comparable services in other matters, less any discounts or reductions specifically  
2 identified in the Applications.

3 The Successor Receiver has reviewed the Applications, completed a thorough  
4 review of the work completed by the Original Receiver during the Application  
5 Period, and believes the fee and expense requests to be fair and reasonable, and an  
6 accurate representation of the work performed for the benefit of the Receivership  
7 Entities. (See Seaman Decl. ¶ 6.) The Successor Receiver has likewise determined  
8 that the Estate has actually benefited from the services. (Id.)

9 2. The Fees and Expenses Requested in the Applications have been  
10 Submitted to the Commission, Without Objection.

11 Courts give great weight to the judgment and experience of the Commission  
12 relating to receiver compensation. "[I]t is proper to [keep] in mind that the  
13 [Commission] is about the only wholly disinterested party in [this] proceeding and  
14 that ... its experience has made it thoroughly familiar with the general attitude of the  
15 Courts and the amounts of allowances made in scores of comparable proceedings."  
16 In re Philadelphia & Reading Coal & Iron Co., 61 F.Supp. 120, 124 (D.C. Pa. 1945).  
17 Indeed, the Commission's perspectives are not "mere casual conjectures, but are  
18 recommendations based on closer study than a district judge could ordinarily give to  
19 such matters." Finn v. Childs Co., 181 F.2d 431, 438 (2d Cir. 1950) (internal  
20 quotation marks omitted). In fact, "recommendations as to fees of the  
21 [Commission] may be the only solution to the 'very undesirable subjectivity with  
22 variations according to the particular judge under particular circumstances' which  
23 has made the fixing of fees seem often to be 'upon nothing more than an ipse dixit  
24 basis.'" Id. Thus, the Commission's perspective on the matter should indeed be  
25 given "great weight," as observed by the court in Fifth Avenue Coach Lines, Inc.,  
26 364 F. Supp. at 1222.

27 In order to ensure that the fees and expenses requested in the Applications are  
28 appropriate, the Successor Receiver and Allen Matkins submitted their respective



1 invoices to the Commission for review. The Commission has indicated that it does  
2 not object to the requested fees and costs. The Commission's apparent satisfaction  
3 with the subject invoices therefore merits significant deference. As the Philadelphia  
4 & Reading Coal & Iron Co. court observed, the Commission is "thoroughly familiar  
5 with ... the amounts of allowances made in scores of comparable proceedings." 61  
6 F.Supp. at 124. Indeed, the Commission is likely in the best position to measure the  
7 fees and costs requested here against those incurred in other, similar proceedings,  
8 and cases of similar complexity. The Successor Receiver and Allen Matkins thus  
9 respectfully request that the Court approve all requested fees and expenses reflected  
10 in the Applications.

11 **B. The Successor Receiver Should Be Authorized To Pay Allowed**  
12 **Fees And Expenses From Cash On Hand.**

13 The Successor Receiver presently holds approximately \$3,467,008.32 for the  
14 benefit of the Receivership Entities. (See Seaman Decl. ¶ 5.) In the aggregate, the  
15 Receiver holds funds well in excess of those requested in the Applications, and the  
16 Receiver respectfully requests the Court's permission to pay requested fees and costs  
17 from the cash on hand and available from the accounts of the Receivership Entities.

18 **IV. CONCLUSION.**

19 The Successor Receiver and Allen Matkins therefore respectfully request that  
20 this Court enter an Order:

- 21 1. Approving the Successor Receiver's fees, in the amount of \$90,695.00;
- 22 2. Authorizing and directing the Successor Receiver to pay 90% of  
23 approved fees, or \$81,625.50, from the assets of the Receivership Entities, on an  
24 interim basis;
- 25 3. Approving Allen Matkins' fees, in the amount of \$159,492.75;
- 26 4. Authorizing and directing the Successor Receiver to pay Allen Matkins  
27 80% of approved fees, or \$127,594.20, from the assets of the Receivership Entities,  
28 on an interim basis;

1           5.       Approving Allen Matkins' costs, totaling \$3,892.33, and authorizing  
2 and directing the Successor Receiver to reimburse Allen Matkins for such costs in  
3 full.

4  
5 Dated: August 2, 2016

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

6  
7  
8 By:           /s/          Joshua A. del Castillo          

JOSHUA A. DEL CASTILLO  
Attorneys for Receiver  
THOMAS A. SEAMAN

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**PROOF OF SERVICE**

*Securities and Exchange Commission v. Total Wealth Management, Inc., et al.*  
USDC, Southern District of California – Case No. 15-cv-226 BAS (DHB)

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

A true and correct copy of the foregoing document(s) described below will be served in the manner indicated below:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
SECOND INTERIM APPLICATIONS FOR PAYMENT OF FEES  
AND REIMBURSEMENT OF EXPENSES OF RECEIVER, THOMAS A.  
SEAMAN AND COUNSEL FOR RECEIVER, ALLEN MATKINS LECK  
GAMBLE MALLORY & NATSIS LLP**

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – the above-described document will be served by the Court via NEF. On **August 2, 2016**, I reviewed the CM/ECF Mailing Info For A Case for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

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- **Joshua Andrew del Castillo**  
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2. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):** On August 2, 2016, I served the following person(s) and/or entity(ies) in this case by placing a true and correct copy thereof in a sealed envelope(s) addressed as indicated below. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion for party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 (one) day after date of deposit for mailing in affidavit.

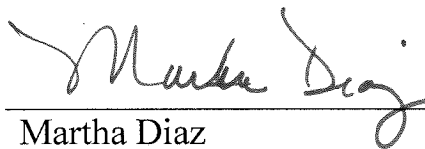
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**Via U.S. First Class Mail**

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 2, 2016 at Los Angeles, California.

  
\_\_\_\_\_  
Martha Diaz