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20 UNITED STATES DISTRICT COURT
21 SOUTHERN DISTRICT OF CALIFORNIA

22 SECURITIES AND EXCHANGE
23 COMMISSION,

24 Plaintiff,

25 v.

26 GINA CHAMPION-CAIN and ANI
27 DEVELOPMENT, LLC,

28 Defendants,

AMERICAN NATIONAL
INVESTMENTS, INC.,

Relief Defendant.

Case No. 3:19-cv-01628-LAB-AHG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER:**

**(1) APPROVING RECEIVER'S
RECOMMENDED TREATMENT OF
CLAIMS (ALLOWED,
DISALLOWED, DISPUTED);**

**(2) APPROVING DISTRIBUTION
METHODOLOGY; AND**

**(3) APPROVING PROPOSED
DISTRIBUTION PLAN**

Date: TBD
Time: TBD
Courtroom: 14A
Judge: Hon. Larry Alan Burns

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1 Krista Freitag (“Receiver”), the Court-appointed permanent receiver for
2 Defendant ANI Development, LLC, Relief Defendant American National
3 Investments, Inc., and their respective subsidiaries and affiliates (“**Receivership**
4 **Entities**”), hereby submits this Memorandum of Points and Authorities in Support
5 of Motion for Order (1) Approving Receiver’s Recommended Treatment of Claims
6 (Allowed, Disallowed, Disputed), (2) Approving Distribution Methodology, and (3)
7 Approving Proposed Distribution Plan (“**Motion**”).

8 I. INTRODUCTION

9 On June 3, 2021 and October 14, 2021, the Receiver filed and the Court
10 approved the Receiver’s Motion for Order (1) Approving Procedures for the
11 Administration of Claims Against the Receivership Estate; (2) Setting Claims Bar
12 Date; and (3) Approving Claims Bar Date Notice and Proof of Claim Forms
13 (respectively, the “**Claims Motion**” and “**Claims Motion Order**”). Dkt. 681, 716.
14 The Receiver and her staff have worked diligently to implement the tasks set forth in
15 the Claims Motion and the Claims Motion Order, and such tasks are now complete.

16 On November 2, 2021, the Receiver sent out the Claims Bar Date Notices,
17 Proof of Claim Forms, and W9 forms to all known Claimants of the receivership
18 estate, setting a December 31, 2021 “**Claims Bar Date**” (the documents were
19 mailed and emailed on or before November 2, 2021, or 60 days prior to the Claims
20 Bar Date). The Receiver then sent notices to Claimants of deficiencies or specific
21 claim disputes (“**Deficiency Notifications**”), as applicable, by March 31, 2022
22 (within 90 days of the Claims Bar Date).

23 The Receiver’s forensic accounting, conducted pursuant to the Court’s orders,
24 preliminarily determined the amount of money-in, money-out (“**MIMO**”) net loss
25 suffered by each investor in the Scheme. The Receiver also analyzed the
26 Receivership Entities’ books and records in order to determine prospective claims
27 by vendors and other third parties (“**Trade Creditors**” or “**Tax Creditors**”, as
28 applicable), who provided goods or services to or incurred tax liabilities associated

1 with the Receivership Entities in the pre-receivership period, but have not received
2 payment for those goods, services or taxes. The Receiver has now completed her
3 analysis of all claims submitted, makes recommendations herein regarding the
4 allowed amount for each claim, and also recommends approval of a plan for
5 distributing receivership estate funds (“**Distribution Plan**”).

6 Pursuant to the proposed Distribution Plan, which is attached as Exhibit A to
7 the Declaration of Krista L. Freitag filed herewith (“**Freitag Decl.**”), holders of
8 Allowed Claims will receive distributions from funds on-hand, based on application
9 of the Rising Tide method of distribution, which is discussed further below.¹ The
10 Distribution Plan further provides for (a) the distribution to Investor Claimants only
11 of approximately \$2 million (“**CTC Settlement Funds**”), which is to be paid to the
12 receivership estate pursuant to the Settlement and Mutual Release Agreement
13 (“**Global Settlement**”) between the Receiver and Chicago Title Company and
14 Chicago Title Insurance Company (together “**CTC**”) – provided the Court approves
15 the Global Settlement – and (b) the distribution to all holders of Allowed Claims of
16 all other funds recovered by the Receiver during the course of the receivership
17 (“**General Receivership Funds**”).

18 By this Motion, the Receiver seeks confirmation of the holders of Allowed
19 Claims, the amount of each Allowed Claim, as well as approval of the Distribution
20 Plan by which the CTC Settlement Funds and General Receivership Funds will be
21 paid. As discussed below, the Receiver also proposes a streamlined process for
22 making interim distributions pursuant to the Distribution Plan.

23 **II. FACTUAL BACKGROUND**

24 On August 28, 2019, the Securities and Exchange Commission filed this
25 action against Defendants Gina Champion-Cain (“**Cain**”) and ANI Development,
26 LLC, and Relief Defendant American National Investments, Inc. Cain later
27

28 ¹ Initial capitalized words that are not specifically defined herein shall have the
meaning or definition set forth in the Distribution Plan.

1 admitted to perpetrating a Ponzi scheme, raising hundreds of millions of dollars
2 from investors for purported short-term, high-interest loans to applicants for liquor
3 licenses (the “**Scheme**”) and pled guilty to criminal charges. The purported loans
4 were a sham and Cain was using monies raised from investors to among other
5 things, support the business operations of her affiliated entities and to make sham
6 interest and principal payments to earlier investors. Freitag Decl. ¶ 2.

7 On September 3, 2019, this Court entered the Order; Granting the Parties’
8 Joint Motion and Stipulated Request by all Parties for Preliminary Injunction Order
9 and Order (1) Freezing Assets; (2) Requiring Accounts; (3) Prohibiting the
10 Destruction of Documents; and (4) Appointing a Permanent Receiver (the
11 “**Appointment Order**”). Dkt. 6. The Appointment Order directed the Receiver to
12 make an accounting, as soon as practicable. Freitag Decl. ¶ 3.

13 Accordingly, the Receiver completed her (a) review and analysis of the bank
14 records, and books and records of the numerous Receivership Entities,
15 (b) evaluation of the Scheme’s sources of funds, and (c) evaluation of the Scheme’s
16 use of funds. The “**Forensic Accounting Report**”, filed on April 30, 2021 (Dkt.
17 No. 659), summarizes the complicated and voluminous transactional history of the
18 Receivership Entities’ bank accounts (as well as certain Chicago Title accounts and
19 certain Kim Peterson-related bank accounts) for the period from May 27, 2011 to
20 September 3, 2019. Freitag Decl. ¶ 4.

21 Considering that the facts underlying the Ponzi scheme are not disputed and
22 indeed have been admitted by Cain in connection with her guilty plea in the related
23 criminal case (*See United States of America v. Gina Champion-Cain*, Case No. 20-
24 cr-02115-LAB-1, Dkt. 5, Plea Agreement July 22, 2020), the focal point of the
25 accounting became the identification of investor-specific data and prospective
26 recoveries for the receivership estate. Freitag Decl. ¶ 5.

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III. IMPLEMENTATION OF THE CLAIMS PROCESS

As noted above, the Court approved the Receiver's Claims Motion on October 14, 2021. The Claims Motion Order directed the Receiver to send Claims Bar Date Notices, Proof of Claim Forms, and W9 forms to Claimants no later than November 29, 2021. In the Proof of Claim Forms sent to all known prospective Investor Claimants, the Receiver embedded a Unique Identifier and a schedule showing the Receiver's MIMO Net Loss calculation, which included transaction level detail, as well as each Investor Claimant's total Money In (all payments into the Scheme from Investor Claimants), total Money Out (both pre and post receivership payments made to Investor Claimants) and Prior Recovery Rate (calculated as Total Money Out divided by Total Money In). Prospective Investor Claimants were also invited to provide additional documentation for review and evaluation in the event they disputed the Receiver's calculation of their MIMO Net Loss. The Receiver included details on third-party settlements (if such payments had already occurred) and explained that any payments made to Investor Claimants from third-parties thereafter would reduce their MIMO Net Loss (and, as discussed below, simultaneously increase their Prior Recovery Rates). Freitag Decl. ¶ 6.

The Forensic Accounting Report reflected that there were approximately 325 unique losing investors, with an aggregate net loss of approximately \$184 million. Having now completed the claims process, the final accounting reflects that 405 unique investors, 308 of whom were losing Investor Claimants,² paid approximately

² There are several reasons why the Forensic Accounting Report and investor-specific numbers presented herein differ. For example, certain investors invested multiple times, through different (but affiliated) entities, through personal accounts, trust accounts and through retirement custodial accounts, or through joint accounts. When the Forensic Accounting Report was filed, it generally reflected each of these as a unique investor; however, as anticipated, during the claims process, many affiliated investments have been combined and netted. Furthermore, there are investors who were deemed net losers in the Forensic Accounting Report, but who are now known to be net winners either due to third-party settlement payment activity or due to the aggregation of affiliated investments (e.g., a losing investor was affiliated with a Net Winner and when aggregated, the net profits exceeded the net losses).

1 \$389 million into the Scheme and received approximately \$226 million from the
 2 Scheme. After adjusting for the “**Net Winners**” - Investor Claimants with Prior
 3 Recovery Rates of more than 100% - the aggregate pre-receivership MIMO Net
 4 Loss is approximately \$183 million. Since the Receiver’s appointment, the
 5 investors have also reportedly received nearly \$164 million from third-party
 6 settlements.³ After deducting the \$128 million of these post-receivership third-party
 7 settlements made against MIMO Net Losses,⁴ the aggregate MIMO Net Loss for the
 8 pre-receivership losing Investor Claimants (total money paid into the Scheme, less
 9 total money received from the Scheme and third parties) is approximately \$55
 10 million.⁵ Freitag Decl. ¶ 7.

11 With respect to Trade Claims and Tax Claims, the Forensic Accounting
 12 Report presented what the Receiver then believed might be approximately
 13 \$1.5 million in non-investor claims for amounts that potentially would be
 14 undisputed and owed to third party creditors. Upon completion of the claims
 15 process, the total non-investor claims filed totaled approximately \$1.8 million, of
 16 which the Receiver is recommending allowance of approximately \$1.05 million and
 17 disallowance of approximately \$750,000. Freitag Decl. ¶ 8.

18
 19
 20

21 ³ The CTC settlement amounts reflected herein represent the total and gross
 22 amounts of the settlements (gross of legal fees) reported to the Receiver. As
 23 further discussed below, the settlement amount, for purposes of a receivership
 24 claim does not get reduced by legal fees paid by investors, if any. This amount
 25 does not include the approximate \$22.3 million that will be paid to the
 26 receivership and distributed to Plaintiff Investors (as defined therein) under the
 27 proposed Global Settlement, if the Court approves same.
 28 ⁴ CTC states that it has paid more than \$164 million in settlements to investors. Of
 this amount, approximately \$36 million went to two investors in excess of their
 MIMO Net Losses, so the amount paid toward MIMO Net Losses is
 approximately \$128 million.
⁵ This amount does not tie to the Receiver’s recommended Allowed Claim
 amounts primarily due to the fact that not all investors with net losses submitted
 claims and a few claims, after aggregation of affiliated investments, became net
 winners and thus the Receiver is not recommending their claims be allowed.

1 **IV. THE RISING TIDE DISTRIBUTION METHOD**

2 Unlike a pro-rata distribution approach in which each claimant receives a set
3 percentage of their net loss, the Rising Tide distribution method brings all claimants
4 up to the same level of recovery,⁶ factoring in both pre-receivership recoveries and
5 post-receivership recoveries. Rising Tide is the most equitable and appropriate
6 distribution method in this case primarily because Prior Recovery Rates vary widely
7 from investor to investor. Prior to the receivership, certain Investor Claimants
8 received payments from the Scheme reflecting a return of more than 100% of their
9 actual payments made to Scheme, while others received no payments from the
10 Scheme at all. Furthermore, the vast majority of third-party settlement payments
11 from CTC have varied from 50% to 75% of MIMO Net Losses, which has
12 perpetuated the disparate recoveries among Investor Claimants. Accordingly, the
13 Receiver determined the Rising Tide distribution method to be the approach best
14 suited for the equitable treatment of all holders of Allowed Claims. Freitag Decl.
15 ¶ 9.

16 The Rising Tide distribution method enables the Receiver to bring all holders
17 of Allowed Claims, to the greatest extent possible, up to an equivalent rate of
18 recovery of their net losses, thereby minimizing instances in which one claimant is
19 proportionally better off or worse off than others. Attached to the Freitag Decl. as
20 Exhibit B is a narrative description of the Rising Tide method, along with an
21 illustrative example. Freitag Decl. ¶ 10.

22 With respect to third-party settlement payments Investor Claimants have
23 received, some Investor Claimants elected to hire counsel and therefore may have
24 paid their counsel a portion of their gross settlement recovery. These attorney fee
25 payments, however, are not factored into the MIMO calculations or Prior Recovery
26

27 _____
28 ⁶ The Receiver cannot eliminate all together instances in which claimants will
have different rates of recovery because some claimants have already recovered
nearly 100%, 100% or more than 100% of their net losses.

1 Rates. Investor Claimants who engaged counsel did so by choice (at their own
 2 expense) and Investor Claimants who did not engage counsel should not have to
 3 subsidize, through the receivership distribution process, the attorney fee payments
 4 those Investor Claimants made. Therefore, using the gross settlement amounts
 5 Investor Claimants received (as opposed to the net amounts after attorney fees) is
 6 more fair and equitable. Freitag Decl. ¶ 11.

7 **V. RESULTS OF THE CLAIMS PROCESS**

8 The vast majority of Investor Claimants (291 investors or just over 94% of the
 9 308 losing investors) accepted the Receiver’s calculations. Six (6) investors
 10 disputed their MIMO Net Loss calculations, seven (7) investors disputed the MIMO
 11 or Rising Tide method or treatment of their investments. Another four (4) investors
 12 either failed to respond (despite repeated contact attempts) or advised the Receiver’s
 13 staff that they did not intend to submit a claim in the receivership. Freitag Decl.
 14 ¶ 12.

15 Attached as Exhibit C to the Freitag Decl. is a table reflecting all
 16 recommended Allowed Claims of Investor Claimants; this table includes 296
 17 Unique Identifiers, and each associated Investor Claimant’s claim details. Freitag
 18 Decl. ¶ 13. The following table summarizes the Investor Claimant claims process
 19 results:

20 Unique Investor Claimant Notices Sent	21 Final Number of Unique Pre-Receivership Losing Investors	22 Unique Investor Claimant (pre-receivership) Net Winners	23 Receiver’s Recommended Number of Investor Claimants with Allowed Claims	24 Receiver’s Recommended Number of Investor Claimants with Disallowed Claims	25 MIMO or Rising Tide Method Disputes	26 MIMO Net Loss Amount Disputes
320	308	97	296	12 ⁷	7	6

27 ⁷ As further discussed below, the Receiver received two additional claims from
 28 aggregators, who are not considered investors but whose clients were investors who are considered Investor Claimants. As such, the Receiver is recommending these two additional claims be disallowed.

1 **A. Disputed Investor Claims Recommended for Allowance at**
2 **Receiver’s MIMO Net Loss Amount**

3 1. Disputes Concerning MIMO Net Loss Calculations

4 Six (6) Investor Claimants disputed the Receiver’s MIMO Net Loss
5 calculation or the applicability of MIMO to their claims, each of which is discussed
6 below. In each case where the Receiver identified a dispute with regard to the
7 amount of a claim, the Receiver requested the Claimant provide additional
8 information or documentation to support their position regarding the claim amount.⁸
9 Attached as Exhibit D to the Freitag Decl. is a table reflecting these as well as the
10 disputes regarding the Receiver’s use of MIMO and/or the Rising Tide method. The
11 Receiver recommends that all of these claims be allowed at the Receiver’s MIMO
12 Net Loss amounts, as reflected on Exhibit D to the Freitag Decl. Freitag Decl. ¶ 14.
13 The following is a description of these disputes:

14 One Investor Claimant [Unique Identifier 443] disputes the Receiver’s
15 calculation, arguing that \$5,000 of a payment he received from the Scheme should
16 not be considered Money Out because he subsequently paid the money to a friend.
17 The alleged \$5,000 payment to a friend (pursuant to their side arrangement),
18 however, does not change the Investor Claimant’s MIMO because the payment does
19 not alter the funds that actually went into the Scheme from him or went out of the
20 Scheme to him. As such, the Receiver recommends this claim be allowed as
21 calculated by the Receiver. Freitag Decl. ¶ 15.

22 One Investor Claimant [Unique Identifier 147] disputes the Receiver’s
23 calculation, arguing she invested more money in the Scheme. This contention,
24 however, is based on investments that were continuously rolled over into new
25

26 _____
27 ⁸ The Receiver and her staff worked diligently with Investor Claimants to address
28 all questions or disputes to the transactional details making up the net loss
calculation; all but these six were resolved/ultimately agreed upon (although
some of these investors ultimately disputed the MIMO or Rising Tide
methodology).

1 promissory notes (and fictitious unpaid interest was added to the principal
2 balances). These “rollovers,” however, do not reflect actual cash transactions, so are
3 not reflected in an investor’s MIMO Net Loss calculation. The Receiver provided
4 this investor with a thorough response and support for her actual cash transactions,
5 to which she did not respond. As such, the Receiver recommends this claim be
6 allowed as calculated by the Receiver. Freitag Decl. ¶ 16.

7 One Investor Claimant [Unique Identifier 198] believes she transferred an
8 additional \$50,000 to the Scheme (\$10,000 and \$40,000) via cashier’s checks.
9 However, she could not provide bank records to support her claim and the books
10 and records supporting the Receiver’s thorough forensic accounting do not reflect
11 any deposits of such amounts at or around the time the investor claims the payments
12 were made. As such, the Receiver recommends this claim be allowed as calculated
13 by the Receiver. Freitag Decl. ¶ 17.

14 One Investor Claimant [Unique Identifier 380] has refused to agree to or sign
15 his claim form until his pending settlement payment from CTC is received.
16 Assuming the payment has been or will be made, the Receiver recommends this
17 claim be allowed as calculated by the Receiver. If for any reason, payment is not
18 made by CTC, the Receiver would adjust this Investor Claimant’s MIMO Net Loss
19 amount. Freitag Decl. ¶ 18.

20 **2Budz Holdings, LLC (“2Budz”)** [Unique Identifier 305]. As discussed in
21 the Settlement Approval Motion (Dkt. 795), 2Budz is one of the seven Non-Joining
22 Plaintiffs that opposes the Bar Order that is a condition of the Global Settlement.
23 With respect to its claim in the receivership, 2Budz disputes that \$750,000 it
24 received from the Scheme should be treated as Money-Out for purposes of the
25 MIMO calculation (2Budz also asserts that \$12,454 it paid to ANI was connected to
26 the \$750,000 transaction and therefore also should not be counted as part of its
27 MIMO calculation). Freitag Decl., Exhibit E. Therefore, 2Budz asserts that its
28 claim should be \$737,546 greater than the Receiver’s calculation. It cannot be

1 disputed, however, that the \$750,000 at issue went directly from the Scheme to
2 2Budz. Instead, 2Budz claims the \$750,000 should not be counted because ANI
3 received an interest in 2Budz in exchange for the payment, and therefore the
4 \$750,000 at issue was unrelated to its claim as an investor in the Scheme.. Freitag
5 Decl. ¶ 19. The facts relating to the relevant transactions show otherwise, however.

6 The relevant transactions show that the \$750,000 in payments that 2Budz
7 received was, in fact, related to investments in the Scheme by 2Budz and its
8 affiliates. 2Budz is owned by Wade Wakefield (through Wakefield Investments,
9 LLC) and Greg Glassberg. Mr. Wakefield also owns Wakefield Capital, LLC. At
10 the time the \$750,000 at issue was paid, 2Budz had invested \$1,500,000 into the
11 Scheme and Wakefield Capital had invested \$3,625,000 into the Scheme.
12 Therefore, it was clear Mr. Wakefield was an investor capable of investing large
13 amounts into the Scheme. Champion-Cain, no doubt wanting to impress
14 Mr. Wakefield and get him to invest more into the Scheme, offered to invest
15 \$750,000 into 2Budz. And it worked – Mr. Wakefield simultaneously offered to
16 invest another \$2,000,000 into the Scheme. In fact, the exchange of funds took
17 place almost concurrently, with Wakefield Investments transferring \$2,000,000 to
18 the Scheme on June 18, 2018, and ANI transferring \$500,000 to 2Budz on June 19,
19 2018 (and ANI later transferring another \$250,000 to 2Budz about six weeks later
20 on August 6, 2018). As a result, there is a direct nexus between the 2Budz and other
21 Wakefield-affiliated investments in the Scheme and the \$750,000 paid to 2Budz,
22 which supports aggregating and netting the transactions for purposes of the 2Budz
23 MIMO claim. Freitag Decl. ¶ 20.

24 Second, including the \$750,000 at issue in the MIMO calculation of 2Budz’s
25 claim has the effect of expeditiously resolving the outstanding issues and avoiding
26 potential litigation between the Receiver and 2Budz relating to the \$750,000. The
27 Receiver would have to pursue recovery of the \$750,000 from 2Budz on fraudulent
28 transfer and other claims for recovery. It would also need to be determined what

1 portion of the funds 2Budz stands to receive from the receivership estate (through
2 the distributions proposed under the Global Settlement, as well as those to be made
3 under the Distribution Plan) would come back to the receivership estate on account
4 of ANI's alleged membership interest in 2Budz.

5 But, by including the \$750,000 in calculating 2Budz's claim, the Court would
6 be essentially effectuating an equitable setoff through the claims and distribution
7 process that avoids the delay and expense of litigation. *Cf. Gordon v. Dadante*,
8 Case No. 1:05-CV-2726, 2010 WL 148131, at *5 n.6 (N.D. Ohio Jan. 11, 2010)
9 (approving receiver's distribution plan that permitted "offsetting of funds against
10 individual investors for equitable reasons," such as where "investor unreasonably
11 caused the Receivership to expend money that would otherwise have been paid to
12 investors"). Indeed, such an equitable setoff is even permissible where the
13 offsetting claim is one for fraudulent transfer. *See Gordon v. Dadante*, Case No.
14 1:05-CV-2726, 2010 WL 4137289, at *2 (N.D. Ohio Oct. 14, 2010) (overruling an
15 investor's objections to receiver's proposed interim distribution where receiver
16 proposed to offset that investor's commissions for soliciting new investors into the
17 Ponzi scheme against the distribution to be made to that investor); *SIPC v. Old
18 Naples Secs., Inc. (In re Old Naples Secs., Inc.)*, 343 B.R. 310, 320 (Bankr. M.D.
19 Fla. 2006) (recognizing that commissions paid to brokers in furtherance of Ponzi
20 scheme were avoidable as fraudulent transfers). Thus, by including the \$750,000
21 that 2Budz received in calculating its allowed claim, the Court would be efficiently
22 addressing an outstanding issue between the Receiver and 2Budz, relieving the
23 parties from having to engage in costly litigation that would likely bring about
24 essentially the same result (i.e., 2Budz's return of \$750,000 through disgorgement,
25 rather than through the reduction of its allowed claim).

26 The inclusion of the \$750,000 paid to as well as the \$12,454 payment from
27 2Budz results in the Receiver's MIMO claim calculation of \$79,204.00, which
28 should be the allowed claim amount for 2Budz. Assuming the Receiver's

1 recommendation regarding the claim is approved, then ANI should not hold any
2 interest in 2Budz and the Receiver will cooperate with 2Budz and take such steps as
3 are necessary to terminate or cancel any such interest.

4 **CalPrivate Bank f/k/a San Diego Private Bank (“CalPrivate”)** [Unique
5 Identifier 63]. CalPrivate does not dispute the Receiver’s calculation of its MIMO
6 Net Loss amount, which is \$9,520,080.13. Instead, CalPrivate asserts that MIMO
7 does not apply to its claim because it has a first priority perfected security interest
8 that gives it the right to recover \$12,475,000, plus interest, charges and attorneys’
9 fees ahead of all other investors. Freitag Decl., Exhibit F. CalPrivate contends that
10 its filing of a UCC financing statement with regard to the personal property of ANI
11 Development, LLC (“**ANI**”) entitles it to a secured interest which attaches to all
12 proceeds recovered by the Receiver. Freitag Decl. ¶ 21.

13 CalPrivate does not have a secured interest as to any proceeds held by the
14 Receiver for several reasons. First, CalPrivate is in the same position as every other
15 victim of the Scheme. The loan agreements attached to CalPrivate’s claim are
16 simply a product of the Scheme and are nothing more than sham transactional
17 documents equivalent to all other investor sham loan agreements.

18 Second, even if the Court were to consider CalPrivate’s loan transaction as
19 anything more than a sham transaction, CalPrivate’s claim to a lien on CTC escrow
20 number DD-00102122 (the “**Escrow**”)⁹ fails because, as CalPrivate has alleged, the
21 Escrow was simply an artificial edifice constructed and maintained by Cain and
22 CTC to facilitate the Scheme. ANI did not own the Escrow, nor did CalPrivate have
23 a security interest in it because, again, it was illusory. Moreover, CalPrivate’s and
24 other investors’ actual money went into CTC’s account at City National Bank (the
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27 ⁹ Different numbers were assigned to the Escrow by CTC at different times, but
28 the number at the time of the Appointment Order was entered was DD-
00102122.

1 “**CNB Account**”).¹⁰ The CNB Account was owned by CTC and contained the
2 commingled funds of many CTC customers. Immediately upon entry of the
3 Appointment Order, the funds in the CNB Account that were raised by Cain and
4 others in furtherance of the Scheme were required to be turned over to the Receiver,
5 not to ANI.

6 Third, CalPrivate’s alleged UCC-1 financing statement does not attach to any
7 of the sale or other proceeds held by the Receiver. The Receiver is not ANI and,
8 even if she were, ANI did not own any of the assets sold by the Receiver.
9 Accordingly, CalPrivate’s claim should be allowed as an unsecured claim for
10 \$9,520,080.13.

11 CalPrivate is Not Entitled to a Priority Claim.

12 CalPrivate and ANI License Fund LLC (the “**License Fund**”) entered into
13 loan agreements whereby the License Fund borrowed the principal amount of
14 \$12,500,000 (the “**Loan**”). License Fund was owned 80% by Kim Petersen and
15 20% by Cain. ANI, Kim Peterson and others guaranteed the Loan. In connection
16 with ANI’s guarantee, Cain executed security agreements which authorized the
17 filing of a UCC-1 financing statement (the “**UCC-1**”) generally granting CalPrivate
18 a security interest in ANI’s personal property. The UCC-1 was limited to ANI’s
19 personal property; it did not include assets of any other entities, nor did it reference
20 the CNB Account, CTC, or any escrow. Freitag Decl. ¶ 22.

21 Like other investors in the Scheme, CalPrivate commenced funding loans to
22 fictitious applicants for liquor licenses via the transfer of funds, which may have
23 gone directly to CTC or indirectly to CTC through License Fund. Like other
24 investors, CalPrivate’s funds ended up being included in CTC’s accounting of the
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¹⁰ For some time during the operation of the Scheme, CTC held funds connected to the Escrow at Union Bank as well. At the time of the Appointment Order, the funds connected to the Escrow were held at City National Bank.

1 Escrow, along with the funds from other investors in the Scheme. Freitag Decl.
2 ¶ 23.

3 CalPrivate’s loan agreements incorporated many of the same terms as those
4 found in loan agreements executed by ANI with other investors. *See* Freitag Decl.
5 *See* Freitag Decl. Exhibit F , Proof of Claim, Attachment 3, Change in Terms
6 Agreement, p.1. Not surprisingly, CalPrivate’s loan agreements provided that their
7 loan proceeds were to be funded pursuant to the fake “Chicago Title Company
8 Escrow Agreement (Holding Funds)” between ANI as Lender and CTC as Escrow
9 Holder, in which escrows, were “opened for the benefit of[Applicant], who is
10 applying for approval of a transfer to Applicant of a license issues by the ...[ABC]”.
11 *See* Freitag Decl. Exhibit F, Proof of Claim, Attachment 3, Change in Terms
12 Agreement, p.1, Exhibit B. Freitag Decl. ¶ 24. Of course, the Escrow and form
13 agreements were simply instruments of the Scheme; theater props developed by
14 Cain to convince people to invest.

15 The Loan History with regard to CalPrivate’s Loan further demonstrates that
16 it was no more a lender than any other Investor Claimant. *See* Freitag Decl.
17 Exhibit G Loan History. As confirmed by the Receiver’s accounting, CalPrivate
18 did not simply lend \$12.475 million to the License Fund pursuant to some
19 established line of credit. Instead, CalPrivate participated in the Scheme by
20 investing \$43.5 million in the Scheme pursuant to funding requests tied to fictitious
21 licenses. Then, just like other Investor Claimants in the Scheme, CalPrivate
22 received loan payments based on fictitious closings of sales of liquor licenses,
23 amounting to over \$34 million. Freitag Decl. ¶ 25. In other words, like other
24 Investor Claimants, CalPrivate may have documents labeled “Promissory Note,”
25 “Guaranty,” and “Change in Terms Agreement”, however, these were simply the
26 tools or props used to convince all investors to participate in the Scheme.
27 CalPrivate believed it was investing in specific fictitious escrow accounts involving
28 specific fictional applicants for liquor licenses - just like every other investor. *See*

1 Freitag Decl. Exhibit G, Loan History. Moreover, from the start, just as other
2 investors did, CalPrivate communicated directly with Cain, who forged emails,
3 documents and signatures of CTC employees, Betty Elixman and Della DuCharme.
4 *Id.*

5 Equity requires that CalPrivate be treated the same as other investors. There
6 is no reason or basis to distinguish between similarly situated investors or to grant
7 one investor priority over others. Rather, in supervising the receivership, the
8 Court’s role is to ensure that estate assets are distributed in a “fair and reasonable”
9 manner. *SEC v. Wealth Management, LLC*, 628 F.3d 323, 332 (7th Cir. 2010); *see*
10 *also SEC v. Byers*, 637 F.Supp.2d 166, 174 (S. Dist. N.Y. 2009). In reviewing the
11 treatment of prospective claims against the receivership estate, the Court’s broad
12 discretion should be used “to classify claims sensibly.” *SEC v. Enter.Trust Co.*, 559
13 F.3d 649, 652 (7th Cir. 2009). “[I]n a receivership proceeding of this nature the
14 court sits in equity, and the allocation of priority lies within [its] sound discretion.”
15 *In re Indian Motorcycle Litigation*, 307 B.R. 7, 16 (D. Mass. 2004).

16 As a general rule, equitable principles favor treating claimants against the
17 receivership estate equally. *Byers*, 637 F. Supp. 2d at 176. This is particularly true
18 where creditors of a receivership occupy similar legal positions. In these instances,
19 “equity would not permit a preference” of certain creditors over others because
20 “equality is equity.” *SEC v. Elliott*, 953 F.2d 1560, 1570 (11th Cir. 1992). Indeed,
21 in cases exhibiting Ponzi-like characteristics, the application of distribution plans
22 treating all creditors equally is particularly appropriate. *See, e.g., SEC v. Byers*, 407
23 F.Appx. 504, 506 (2d Cir. 2010). *See also, e.g., SEC v. Sunwest Management Inc.*,
24 2009 WL3245879, *5,*10 (D.Or. October 2, 2009) (approving claims and
25 distribution plan that did not “discriminate unfairly against any class of Claimants”);
26 *Byers*, 637 F.Supp.2d at 171, 185.

27 This principle of equity among creditors applies most forcefully when such
28 creditors are similarly situated, as is the case here. *See, e.g., In re Dreier LLP*, 2010

1 WL3835179 (S.D.N.Y. September 10, 2010). CalPrivate was victimized by the
2 same perpetrators who defrauded other so-called lenders and investors in a
3 substantially similar manner. CalPrivate’s money ended up being including in the
4 same Escrow accounting (commingled with other funds in the CNB Account),
5 transferred to Cain by CTC, and used by Cain without regard to the Loan or any
6 other agreements with CalPrivate. As such, the Court should hold that CalPrivate is
7 not entitled to priority and should be treated on equal footing with other investors.

8 CalPrivate Does Not Have a Security Interest in Any Receivership Proceeds.

9 Even if the Court determined that CalPrivate’s fraudulent loan documents are
10 enforceable, it is still only entitled to an unsecured claim in the amount of
11 \$9,520,080.13. CalPrivate does not have a perfected security interest in any of the
12 proceeds recovered by the Receiver through her work in this receivership.

13 The Receiver and assets held by the Receiver are distinct from the pre-
14 receivership entities that had rights to or owned assets. While it is true that, by
15 virtue of her appointment, the Receiver succeeded as the legal representative of the
16 Receivership Entities, and stands in their shoes, (*see, e.g., United States v. Plache*,
17 913 F.2d 1375, 1381 (9th Cir. 1990); *FDIC v. O’Melveny & Myers*, 61 F.3d 17, 19
18 (9th Cir. 1995)), until the Receiver’s appointment, the Receivership Entities “were
19 no more [than] . . . evil zombies.” *Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir.
20 1995). “Freed from this spell” by appointment of the Receiver, the Receivership
21 Entities are characteristically distinct from their pre-receivership forms. *Id.*

22 Courts have consistently held that a federal equity receiver acts as an officer
23 of the court who controls the receivership entities’ property under the authority of an
24 equity receivership. *SEC v. American Capital Investments*, 98 F.3d 1133, 1143 (9th
25 Cir. 1996); *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1408 (9th Cir.
26 1992). In *San Vicente*, a limited partner claimed that the receiver could not recover
27 expenses from limited partner assets because the receiver was merely standing in the
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1 shoes of the general partner in receivership, and therefore must adhere to controlling
2 state law. *Id.* at 1408. The district court disagreed, finding that

3 “This analysis fails because Orr was the receiver for San
4 Vicente’s property, not the general partner of San Vicente.
5 This distinction is crucial to our analysis. If Orr were
6 receiver for only APC and its property, section 959(b)
7 might require Orr to assume APC’s exact role and legal
8 relationship in the limited partnership. However, Orr was
9 appointed receiver not only for APC and its property, but
10 for all property controlled by APC (i.e., San Vicente’s
11 property).”

12 Here, as in *San Vicente* and other similar cases, the Receiver holds all
13 proceeds recovered from any source in her capacity as court-appointed equity
14 receiver, and not simply standing in place of Cain, ANI, or any other pre-
15 receivership entity.

16 The proceeds held by the Receiver that are at issue were primarily derived
17 from two sources: the \$11 million turned over to the Receiver at the outset of the
18 receivership by CTC that was held in the CNB Account, and proceeds of sales of
19 real and personal property by the Receiver (the “Sale Proceeds”).

20 CalPrivate Does Not Have a Security Interest in the CNB Account or the
21 Escrow.

22 CalPrivate asserts a security interest in the approximately \$11 million
23 transferred to the Receiver from the CNB Account pursuant to the Court’s orders on
24 September 3, 2019 and November 22, 2019. Dkt. 6, 127. CalPrivate’s sole support
25 are loan documents reflecting the Loan made to the License Fund, which was
26 guaranteed by Cain, ANI, and others, along with a UCC-1 reflecting a security
27 interest in the assets of ANI. CalPrivate has no documents showing a perfected
28 security interest in the CNB Account (and thus the \$11 million therein as of
September 3, 2019). Instead, CalPrivate claims, without support, that its UCC-1
created a security interest in the \$11 million because it came from an ANI account.
The CNB Account in which the \$11 million resided and from which the \$11 million

1 was wired to the Receiver, however, was not ANI’s account (it was CTC’s) and
2 CalPrivate had no security interest in CTC’s assets.

3 The Escrow, however one defines it, was entirely fictional, as were the sub-
4 accounts for the fictional liquor license applicants. CalPrivate has already
5 acknowledged that the so-called Escrow was nothing more than a fiction in
6 furtherance of the Scheme. See Freitag Decl., Exhibit H, CalPrivate First Amended
7 Complaint, p. 29, ¶ 120 (“The Holding Funds Account was not, in fact, an escrow
8 account. . . .”).

9 Moreover, CTC is not a bank, nor a depository institution of any kind. At the
10 Receiver’s appointment, the money at issue here was on deposit in the CNB
11 Account in the name of Chicago Title Company containing the commingled funds
12 from thousands of other escrows CTC was processing at the time. The only means
13 by which a secured creditor can obtain a perfected security interest in a deposit
14 account or the funds contained therein is through possession or a control agreement
15 (“DACA”) under California Commercial Code sections 9312(b)(1) and 9314(b) (“a
16 security interest in deposit accounts is perfected by control under sections
17 7106, 9104, 9105 or 9107 when the party obtains control and remains perfected by
18 control only while the secured party retains control.”). See *Full Throttle Films, Inc.*
19 *v. National Mobile Television, Inc.*, 180 Cal App. 4th 1438, 1442 (2009).

20 CalPrivate did not obtain a DACA from either CTC or City National Bank.
21 As such, CalPrivate did not have a perfected security interest in the CTC bank
22 account which held the \$11 million at the time of the Receiver’s appointment. It is
23 also important to note that the Escrow was at the heart of Cain’s Scheme and as
24 previously mentioned, CalPrivate has already acknowledged that the so-called
25 Escrow was nothing more than a fiction in furtherance of the Scheme.

26 CalPrivate Does Not Have a Security Interest In Any Sale Proceeds.

27 CalPrivate’s claimed security interest in the Sale Proceeds fails because none
28 of the real or personal property sold by the Receiver was owned by ANI. The real

1 and personal property sold by the Receiver was owned by a variety of limited
2 partnerships, LLCs and trusts that held particular assets.¹¹ At the time the Receiver
3 was appointed, ANI did not own any real or personal property (aside from its ability
4 to obtain funds from CTC that were accounted for as part of the Escrow and held in
5 the CNB Account). As such, at no time during the receivership did the Receiver
6 receive proceeds that were even arguably subject to the security interest claimed by
7 CalPrivate in ANI's personal property.

8 CalPrivate was an investor in the Scheme, similarly situated with all other
9 investors. CalPrivate has no legitimate argument to distinguish itself and put itself
10 ahead of other investors, establish a valid lien, or tie its claimed lien to any funds
11 held by the Receiver. Accordingly, the Receiver recommends that CalPrivate have
12 an allowed Investor Claimant MIMO Net Loss claim in the amount of
13 \$9,520,080.13.

14 **B. Disputes Regarding the Use of MIMO or the Rising Tide**
15 **Distribution Method**

16 Seven (7) Investor Claimants [Unique Identifiers 62, 199, 237, 247, 381, 384
17 and 385] have disputed the MIMO method for calculating claims and/or the Rising
18 Tide distribution method.¹² In each case, these Investor Claimants seek exceptions
19 or special treatment based upon the timing of their investments or their reinvestment
20 of payouts (e.g., received payout and then reinvested those dollars), the recovery
21 rate calculation (e.g., pre-receivership payments received from the Scheme should
22 not be included in Prior Recovery Rate, only post-receivership settlement
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24 ¹¹ CalPrivate points to several lien claimants that were paid out of the closing of the
25 sales. These were vendors who provided pre- and post-petition services, were
26 not victims of the Scheme, and/or their liens were also tied to the assets of
27 specific entities that were sold. None of these entities was owned by ANI.

28 ¹² Another approximately 30 Investor Claimants also stated that they were
reserving their rights to claim additional amounts such as interest, lost profits,
etc. These are not counted as disputes, however, because the Claims Motion
Order already established that MIMO will be used to calculate investor claims,
and that claims for interest, penalties, lost profits or other amounts would not be
allowed (at least not at this stage of the claims process).

1 payments), or similar arguments. Freitag Decl. ¶ 26. All of these assertions are
2 contrary to the use of the MIMO and Rising Tide methods. Furthermore, claim
3 calculations should not be adjusted based on Investor Claimants' intent or other
4 subjective factors. One of the primary benefits of the MIMO formula is that it is
5 simple and efficient, and the Court is not required to make time-consuming, fact-
6 specific judgments regarding intent, whether one similarly situated investor is more
7 deserving than another, or other subjective factors relating to transactions that
8 occurred many years ago. Accordingly, the Receiver recommends these Investor
9 Claims be allowed as calculated by the Receiver, according to the approved MIMO
10 formula. As noted above, these disputes are included on Exhibit D to the Freitag
11 Decl.

12 **C. Investor Claims Recommended to be Disallowed**

13 The Receiver recommends that 12 of the 308 possible investor claims be
14 disallowed. Exhibit I to the Freitag Decl. reflects the claims the Receiver is
15 recommending be disallowed. For four (4) of these claims [Unique Identifiers 77,
16 158, 241, and 403], the investor either advised the Receiver they did not intend to
17 file a claim or failed to file a claim despite repeated attempts to contact said
18 investor. Five (5) of these claims [Unique Identifiers 25, 74, 184, 284, and 433]
19 should be disallowed due to fact that the claims process confirmed or third-party
20 settlement payment(s) the Investor Claimants received resulted in a Prior Recovery
21 Rate of 100% or greater. Additionally, three (3) claims [Unique Identifiers 21, 345,
22 and 362] should be disallowed due to aggregation of affiliated investments with the
23 same beneficial owners; in these situations, the aggregate of investments resulted in
24 the net loss being more than offset by the net profit. Because the total recovery in
25 the Scheme is not expected to exceed 100%, the Receiver recommends these claims
26 be disallowed; if the recovery of funds changes such that it will exceed 100%, the
27 Receiver would revisit this matter and seek further relief from the Court. Freitag
28 Decl. ¶ 27.

1 **D. Aggregator/Feeder Fund Claims Should be Disallowed**

2 The Receiver received two claims from Kim Peterson-related aggregator/feeder
3 fund entities – Kim Funding, LLC and ABC Funding Strategies, LLC (“**Peterson**
4 **Funding Entities**”)¹³ – for the combined amount of approximately \$128 million.
5 Freitag Decl. Exhibits J and K. Kim Peterson (“**Peterson**”) and Cain were business
6 partners in the Scheme, and, through the Peterson Funding Entities, Peterson
7 brought into the Scheme in the aggregate approximately \$258 million and received
8 substantial profits in the process. In September 2021, the Receiver filed a Clawback
9 action against Kim Peterson and his related entities, including the Peterson Funding
10 Entities and other entities (“**Peterson Parties**”), seeking to recover approximately
11 \$12.7 million in profits they received in connection with the Scheme. Case No. 21-
12 cv-01620-LAB-AHG. On April 6, 2021, the Court granted the Receiver authority to
13 expand her complaint to include additional claims against the Peterson Parties. On
14 May 18, 2022, the Receiver filed her First Amended Complaint for Fraudulent
15 Transfer, Breach of Fiduciary Duty, Fraud, Aiding and Abetting Breach of Fiduciary
16 Duty, Aiding and Abetting Fraud, and Civil Conspiracy. Freitag Decl. ¶ 28.

17 The Receiver does not believe Kim Peterson or the Peterson Funding Entities
18 have a viable defense to the receivership estate’s Clawback claim, considering that
19 the forensic accounting shows without question that they received \$12.7 million in
20 profits. The Receiver also believes the evidence supporting the receivership estate’s
21 tort claims for additional damages is also very strong. Even if the Peterson Funding
22 Entities were to somehow successfully defend the receivership estate’s claims,
23 considering the large profits they received at the expense of Investor Claimants, it
24 would offend all notions of equity for them to take funds from the receivership
25 estate that would otherwise be distributed to Investor Claimants and other holders of
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27 ¹³ The Receiver has not included these entities as part of the 308 unique losing
28 investors or 405 unique investors because the two entities’ clients were
considered Investor Claimants (some of whom may have been pre-receivership
Net Winners).

1 Allowed Claims. Furthermore, the claims of the underlying Investor Claimants
2 whose investments flowed through the Peterson Funding Entities and who suffered
3 MIMO net losses from the Scheme are recommended herein as Allowed Claims.
4 The claims of the Peterson Funding Entities assert the same losses, and therefore
5 simply duplicate the claims of the underlying Investor Claimants. Accordingly, the
6 Receiver recommends that the claims of the Peterson Funding Entities be
7 disallowed.

8 **E. CTC Claims Should be Disallowed**

9 If the Global Settlement, including the Bar Order, is approved, CTC's claims
10 against the receivership estate will be released, CTC will have the Participation
11 Right provided in the Global Settlement and described in the Settlement Approval
12 Motion (Dkt. 795), and the following discussion will be moot. If the Global
13 Settlement agreement is not approved, however, CTC has requested and been
14 granted relief from the litigation stay to assert crossclaims for indemnity against the
15 receivership estate in the State Court Actions. Dkt. 758.

16 The assets of the receivership estate are subject to this Court's exclusive
17 jurisdiction. All claims to share in distributions of receivership assets must be
18 allowed or disallowed by this Court. Likewise, distributions of receivership estate
19 assets to holders of Allowed Claims can only be made with approval from this
20 Court. Therefore, this Court must decide (a) whether CTC has a valid claim against
21 the receivership estate, (b) if so, what priority the claim will have vis-à-vis other
22 Allowed Claims, and (c) what right, if any, CTC will have to share in distributions
23 from the receivership estate. It would make no sense to have these issues decided in
24 the State Court, which has no jurisdiction over the assets of the receivership estate
25 and has no ability to weigh the numerous claims against the receivership estate to
26 determine which claims should be allowed or entitled to priority.

27 The Receiver hopes the Court will not need to decide this issue because the
28 Global Settlement, including the Bar Order, will be approved. However, if the

1 Global Settlement is not approved, it would be completely inequitable to allow CTC
2 to take funds from the receivership estate that would otherwise be distributed to
3 Investor Claimants and other holders of Allowed Claims. The evidence in support
4 of the fraud, aiding and abetting, breach of fiduciary duty and other claims against
5 CTC is extremely strong, which is why CTC has already reportedly paid nearly
6 \$164 million in settlements to Investor Claimants (and is prepared to pay another
7 \$24 million if the Global Settlement is approved). Even if the Court were to
8 determine that CTC did not act with intent, its actions, at the very least, were grossly
9 negligent and caused tremendous harm to the receivership estate and the Investor
10 Claimants. It is clear the Scheme could not have operated without CTC’s
11 participation – in fact, the reason Investor Claimants felt comfortable investing in
12 the purported loan program was that they believed their investment funds would be
13 safely held by CTC based on the fact that CTC is a very large, well-recognized title
14 and escrow company. Accordingly, the Receiver recommends that, if the Global
15 Settlement is not approved, the claims of CTC against the receivership estate be
16 disallowed.

17 **F. Recommendations Regarding Trade and Tax Claims**

18 Attached as Exhibit L to the Freitag Decl. is a table reflecting all Trade and
19 Tax Creditor Claims submitted, and the Receiver’s recommended treatment thereof.
20 Freitag Decl. ¶ 29. The following table summarizes the Trade Creditor and Tax
21 Creditor claims process results:

Trade Creditor Notices Sent	Trade & Tax Creditor Claims Received	Trade Creditor Claims Recommended as Allowed	Trade Creditor Claims Recommended as Disallowed/Reduced
919 ¹⁴	72	66	17

26 ¹⁴ The Receiver sent claim packets to 919 individual trade creditors which includes
27 417 former employees, of which no claims were expected, and 502 vendors. The
28 Receiver noticed all active employees as of takeover, any employee that received a paycheck during the receivership period and any employee that we identified as

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The following reflects the Receiver’s analysis of the 17 Trade Creditor and Tax Creditor claim amounts¹⁵ she disputes and her analysis with regard to such claims.

- Three (3) Trade Creditor claims being disputed are for fees, expenses or taxes already paid. One was paid through escrow of one of the receivership properties. One reflected a duplicate invoice submitted and the other was for taxes already paid. These Trade Creditors have been notified of the adjustment to their allowed claims. Freitag Decl. ¶ 30.
- Three (3) Trade and Tax Creditor claims being disputed are for interest. The Proof of Claim Form clearly stated an allowed claim shall not include claims for interest, late fees, contract or other damages, legal fees, contingent or unliquidated damages. Freitag Decl. ¶ 31.
- Three (3) Trade Creditor claim amounts are being disputed because the service, fees and/or contract were not authorized by the Receiver. These Trade Creditors have been notified of the adjustment to their allowed claims. Freitag Decl. ¶ 32.
- Three (3) Tax Creditor claims are being disputed. Subsequent to receipt of the claim, one taxing agency has confirmed no amount is owed. Another is for property tax on a property not part of the

having an uncashed paycheck at the time of takeover. The Receiver noticed 502 vendors from 39 entities which included every vendor with a known outstanding balance at takeover and every vendor paid during the receivership period including all known lenders and landlords. The trade creditor claim package was sent via certified mail to all vendors with a known outstanding balance at the time of takeover. All vendors with an outstanding balance at takeover that did not submit a claim were noticed at least one additional time via certified mail (the Receiver also contacted at least 153 vendors via email).¹⁵ The total amount of disallowed and allowed claims do not tie to the total amount of claims submitted because there are 11 claims which have amounts the Receiver is recommending to be allowed and disallowed.

1 receivership at the time the tax was incurred. The Receiver has filed
2 the necessary abatement paperwork to have the tax applied to the correct
3 owner. The third tax claim is for taxes that were previously paid.
4 Freitag Decl. ¶ 33.

5 • A former short-term employee, Phong Luu, submitted a claim in the
6 amount of \$3,410.63 for alleged labor code violations and associated
7 waiting time penalties. Freitag Decl., Exhibit M. Mr. Luu worked at
8 one of the restaurants owned by the Receivership Entities for a very
9 short time – less than two weeks. The Receivership Entities’ books and
10 records show that Mr. Luu was paid all wages owed to him at the time
11 of his termination. Mr. Luu has not presented any documentation in
12 support of his claim that indicates otherwise. Therefore, the Receiver
13 recommends that Mr. Luu’s claim be disallowed. Freitag Decl. ¶ 34.

14 • A former employee, Jennifer Graf, who was terminated after the
15 Receiver’s appointment, submitted a claim for severance pay. Freitag
16 Decl., Exhibit N. All former employees were paid the wages owed to
17 them at the time of their termination, as well as for their accrued and
18 unused PTO. No employees were paid severance. Freitag Decl. ¶ 35.
19 Because severance does not reflect an amount earned in exchange for
20 work, but instead represents a contractual right to a specific sum at
21 termination, severance is the type of consequential damage amount
22 that, like claims for interest due on loans made by Investor Claimants,
23 should be disallowed. Therefore, the Receiver recommends that Ms.
24 Graf’s claim be disallowed.

25 • An aggregator of investor funds, Merit Financial (“**Merit**”), which
26 profited from the Scheme and has a Clawback action pending against it
27 (Case No. 21-cv-01633-LAB-AHG), submitted a claim for alleged
28 unreimbursed expenses, as well as a “contingent” claim for contractual

1 indemnity. Freitag Decl. ¶ 36. Clearly, Merit, as an aggregator that
2 promoted the Scheme to Investor Claimants and profited to the tune of
3 approximately \$1.33 million (and which has repaid none of its profits
4 to date), has no right to be indemnified by the receivership for its
5 Clawback liability or for any other amounts. At most, if Merit could
6 establish a right to recover unreimbursed expenses, such amounts might
7 be applied as an offset to its liability in the Clawback action. The
8 Receiver, therefore, recommends that Merit’s claim (and ability to
9 share in receivership distributions) be disallowed. Attached as
10 Exhibit O to the Freitag Decl. is a copy of Merit’s Proof of Claim
11 Form.

- 12 • A contractor, Iconik Builders, Inc. (“**Iconik**”), submitted a claim for
13 unpaid pre-receivership construction work done at properties owned by
14 the Receivership Entities. Iconik, however, previously released all
15 claims against the Receivership Entities and the receivership estate as
16 part of a Release Agreement that was executed in connection with the
17 Receiver’s sale of real property on which Iconik had a mechanic’s lien.
18 Iconik was paid \$12,500 under the Release Agreement. Therefore,
19 Iconik has released all claims and should not have an Allowed Claim.
20 Attached as Exhibit P and Q to the Freitag Decl. are copies of Iconik’s
21 Proof of Claim Form and Release Agreement. Freitag Decl. ¶ 37.
- 22 • A law firm, Noonan Lance Boyer & Banach, LLP (“**Noonan**”),
23 submitted a claim in the amount of \$37,221.90 for pre-receivership and
24 post-receivership fees and costs. The Receiver accepts that Noonan
25 provided legal services to one of the Receivership Entities (Westlink
26 Development) prior to the receivership and does not dispute the pre-
27 receivership portion of the claim. However, the Receiver did not
28 request that Noonan perform any post-receivership legal work. Instead,

1 the Receiver merely requested that Noonan transition their files for the
2 matter they were handling to counsel in Florida, which counsel handled
3 the case against SunTrust Bank from that point on. Accordingly,
4 Noonan should have an allowed claim for pre-receivership services
5 (\$30,863.40), but should not have a claim for post-receivership work
6 (\$6,358.50). Attached as Exhibit R to the Freitag Decl. is a copy of
7 Noonan’s Proof of Claim Form. Freitag Decl. ¶ 38.

8 For these reasons, the Receiver requests that the Court disallow these 17
9 Trade Creditor and Tax Creditor claims, or portions thereof, as applicable.

10 **G. Proposed Procedure for Future Adjustments to Allowed Claims**

11 The Global Settlement is pending Court approval, and if approved, Allowed
12 Claim amounts for the Investor Claimants affected by the Global Settlement will
13 change. The Receiver is also aware that some Investor Claimants are continuing to
14 pursue potential recoveries from third parties on account of their losses from the
15 Scheme. As provided in the Claims Motion and the Proof of Claim Forms that were
16 sent to Investor Claimants, these recoveries (just like Investor Claimant settlements
17 with CTC) reduce Investor Claimants’ MIMO net losses and increase their Prior
18 Recovery Rates. Investor Claimants are required to disclose recoveries they obtain
19 from third parties on their losses from the Scheme to the Receiver whether they
20 occurred prior to, during, or after the claims process. Moreover, although the
21 Receiver does not presently foresee that any adjustments will need to be made to
22 Allowed Claims for other reasons, it is possible that information may be learned by
23 the Receiver in the future that warrants such adjustments. Freitag Decl. ¶ 39.

24 It would unduly delay distributions from the receivership estate for the
25 Receiver to have to file a noticed motion to adjust Allowed Claims, including
26 Allowed Claim amounts each time an Investor Claimant has a recovery from a third-
27 party or another issue arises warranting an adjustment. Therefore, in these
28 instances, the Receiver proposes to file a “**Notice of Allowed Claim Adjustment**”

1 with the Court, identifying the applicable Investor Claimant(s) by Unique Identifier
2 and stating the applicable adjustment(s) to the Allowed Claim amount(s) and Prior
3 Recovery Rate(s). The notice will also be emailed (or, if the Receiver does not have
4 an email address for the Investor Claimant, mailed) to the applicable Investor
5 Claimant(s). The Investor Claimant(s) must then make any objection to the
6 adjustment known to the Receiver within 15 days and if the objection cannot be
7 resolved during the 15-day period, must file an objection with the Court within 10
8 days of the expiration of the 15-day period. The Court can then determine the
9 appropriate process to resolve the objection. If there is no objection, the proposed
10 adjustment(s) to the applicable Allowed Claim amount(s) and Prior Recovery
11 Rate(s) shall be automatically approved without further order of the Court. Freitag
12 Decl. ¶ 40.

13 **VI. PROPOSED DISTRIBUTION PLAN**

14 As noted above, the proposed Distribution Plan is attached as Exhibit A to the
15 Freitag Decl. The sources of funds to be distributed, net of unpaid approved and
16 anticipated Administrative Expenses, are as follows:

- 17 • The General Receivership Funds are all funds recovered by the
18 Receiver in the course of the receivership with the exception of the
19 CTC Settlement Funds.
- 20 • The CTC Settlement Funds are those to be paid by CTC pursuant to the
21 Global Settlement, less the amounts the Receiver will distribute to
22 specific Plaintiff Investors and the amounts to be paid directly to the
23 four unrepresented investors, as laid out in the Receiver’s pending
24 motion for approval of the Global Settlement. Dkt. 795. After
25 subtracting these amounts, the remaining amount of the CTC settlement
26 payment is \$2,051,421.40. Payment of the CTC Settlement Funds to
27 the receivership estate is conditioned on approval of the Global
28 Settlement and the associated Bar Order.

1 The key provisions of the Distribution Plan include that (a) the General
2 Receivership Funds will be distributed to all holders of Allowed Claims (this
3 calculation will occur first), (b) the CTC Settlement Funds will be distributed
4 exclusively to Investor Claimants with Allowed Claims (this calculation will occur
5 second),¹⁶ and (c) distributions will be made using the Rising Tide Distribution
6 methodology. If the Global Settlement is approved and the Receiver’s
7 recommended treatment of claims presented herein is also approved, the Receiver
8 estimates that holders of Allowed Claims in the aggregate, factoring in post-
9 receivership recoveries from third-parties, will recover at least 90% and likely closer
10 to 95% of their Allowed Claims. Freitag Decl. ¶ 41.

11 At this point, in light of the pending Global Settlement, as well as the
12 unresolved claim disputes discussed herein, it is not feasible for the Receiver to
13 determine or propose that a specific amount of General Receivership Funds be
14 distributed. Therefore, as soon as it is feasible to propose an interim distribution,
15 the Receiver proposes and seeks authority to determine, in her business judgment,
16 the appropriate total amount of distributable receivership funds (along with the
17 corresponding reserve of remaining receivership funds) and file with the Court a
18 **“Notice of Interim Distribution”** which will include a table of the interim
19 distributions to holders of Allowed Claims pursuant to the Distribution Plan. The
20 Notice of Interim Distribution will also be posted on the receivership website,
21 emailed to all those who have subscribed to receive emails from the receivership
22 website, and mailed to Claimants for whom the Receiver does not have an email
23 address. All holders of Allowed Claims will then have 15 days to notify the
24 Receiver’s office (via mail or email) of any objection to the calculation of their
25 interim distribution payment. If an objection is received and the Receiver is unable
26

27 ¹⁶ If approved, the CTC Settlement Funds will be calculated and distributed when
28 the final amount of available General Receivership Funds can be determined. In
other words, CTC Settlement Funds will be distributed only in the Final
Distribution.

1 to resolve the objection within the 15-day period, the objecting party will then have
2 10 days to file a formal objection with the Court and the Court can determine the
3 appropriate process for resolving the objection, in which case the Receiver will
4 proceed with making interim distribution payments to all other holders of Allowed
5 Claims and hold in reserve the distribution payment to the objecting Claimant until
6 such time as the objection is resolved. Freitag Decl. ¶ 42.

7 This proposed notice process should streamline the process of making an
8 interim distribution. Once the Court has ruled on this Motion, including disputed
9 claims, the process for updating Allowed Claim amounts, and the Distribution Plan,
10 distribution calculations pursuant to the Court’s order and the terms of the
11 Distribution Plan should not be controversial.

12 **VII. ARGUMENT**

13 **A. This Court Has Broad Discretion In the Administration Of Claims**
14 **Against Receivership Estates.**

15 “The power of a district court to impose a receivership or grant other forms of
16 ancillary relief does not in the first instance depend on a statutory grant of power
17 from the securities laws. Rather, the authority derives from the inherent power of a
18 court of equity to fashion effective relief.” *SEC v. Wencke*, 622 F.2d 1363, 1369
19 (9th Cir. 1980). The “primary purpose of equity receiverships is to promote orderly
20 and efficient administration of the estate by the district court for the benefit of
21 creditors.” *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
22 of a receiver is authorized by the broad equitable powers of the court, any
23 distribution of assets must also be done equitably and fairly. *See SEC v. Elliott*,
24 953 F.2d 1560, 1569 (11th Cir. 1992).

25 District courts have the broad power of a court of equity to determine the
26 appropriate action in the administration and supervision of an equity receivership.
27 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth
28 Circuit explained:

1 A district court’s power to supervise an equity
2 receivership and to determine the appropriate action to be
3 taken in the administration of the receivership is extremely
4 broad. The district court has broad powers and wide
5 discretion to determine the appropriate relief in an equity
6 receivership. The basis for this broad deference to the
7 district court’s supervisory role in equity receiverships
8 arises out of the fact that most receiverships involve
9 multiple parties and complex transactions. A district
10 court’s decision concerning the supervision of an equitable
11 receivership is reviewed for abuse of discretion.

12 *Id.* (citations omitted); *see also CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115
13 (9th Cir. 1999) (“This court affords ‘broad deference’ to the court’s supervisory
14 role, and ‘we generally uphold reasonable procedures instituted by the district court
15 that serve th[e] purpose’ of orderly and efficient administration of the receivership
16 for the benefit of creditors.”).

17 **B. The Court Has The Authority And Should Approve The Receiver’s**
18 **Proposed Allowed Amount Of Claims.**

19 District courts overseeing receiverships have the general power to employ
20 summary procedures in allowing, disallowing, and subordinating the claims of
21 creditors. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984);
22 *Hardy*, 803 F.2d at 1040 (summary proceeding to approve categorization scheme for
23 investors’ claims was reasonable; fair notice and a reasonable opportunity to
24 respond was given); *Elliot*, 953 F.2d at 1571 (summary claim determinations upheld
25 where claimants cannot demonstrate their rights would have been better protected
26 by an extended proceeding). As part of its oversight, the District Court may “make
27 rules which are practicable as well as equitable.” *Hardy*, 803 F.2d at 1039, (quoting
28 *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1368 (9th Cir. 1978)).

Here, all claims of Investor Claimants were calculated using the simple
MIMO formula that limits claims to each investor’s net loss from the Scheme. The
MIMO formula has been endorsed by the Ninth Circuit and other courts in fraud
cases where, like here, the assets of the estate are insufficient to satisfy all claims in
full. *See Capital Consultants*, 397 F.3d at 738 (describing a net claim calculation as

1 “an administratively workable and equitable method of allocating the limited assets
2 of the receivership”); *Topworth*, 205 F.3d at 1116; *In re Tedlock Cattle*
3 *Company Inc.*, 552 F.2d 1351, 1354 (9th Cir. 1977); *In re Taubman*, 160 B.R. 964,
4 980-82 (Bankr. S.D. Ohio 1993).

5 As to Tax Claimants and Trade Creditor Claimants, the Receiver proposed in
6 the Claims Motion that all claims for accrued or unpaid interest, late fees, attorney
7 fees, consequential damages or lost profits arising from non-payment, and punitive
8 or tort damages be disallowed. This proposal was approved in the Claims Motion
9 Order. This treatment places Investor Claimants and non-investors on similar
10 footing, limiting all claims to losses of principal (or out-of-pocket losses) as
11 opposed to consequential damages.

12 Notwithstanding the Claims Motion Order, certain Trade Claimants have
13 submitted claims which are inconsistent with the approved claims treatment or are
14 otherwise unsupported. As in a bankruptcy case, it should be a claimant’s burden to
15 establish a valid claim against the receivership estate. *See Lundell v. Anchor Constr.*
16 *Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000); *Revere Copper &*
17 *Brass, Inc. v. Adriance Machine Works, Inc.*, 76 F.2d 876, 878 (2d Cir. 1935)
18 (claimants failed to sustain burden of proving claims against receivership). Here,
19 Investor Claimants, Trade and Tax Claimants who are now net winners, who
20 previously waived a right to a claim (e.g., Iconik), who performed unauthorized
21 services (e.g., Noonan), or who failed to respond, provide sufficient support and
22 whose claims could not be otherwise validated via company records should be
23 disallowed in whole or in part, per the Receiver’s recommendations on Exhibits I
24 and L.

25 **C. The Receiver’s Recommendations Regarding Disputed Claims**
26 **Should be Approved.**

27 The applicable law and analysis supporting the Receiver’s objections to
28 specific claims is laid out above. As noted above, in the context of receiverships, in

1 which conserving receivership resources is critically important, it is appropriate for
2 the Court to determine the allowed amount of claims, and relative priority of claims,
3 via summary proceedings. *Arizona Fuels*, 739 F.2d at 458. Claimants who wish to
4 file oppositions and present their arguments should be afforded the opportunity to do
5 so, consistent with due process. The Court should then make determinations as to
6 Allowed Claims such that the receivership can progress and an interim distribution
7 of receivership funds can be made in the near term.

8 **D. The Application Of Rising Tide To Anticipated Distributions Is**
9 **Appropriate Here.**

10 The Receiver believes the Rising Tide Distribution methodology, which
11 levels the playing field and takes into account the disparate amounts already
12 recovered by investors, is the most equitable distribution method in this case. This
13 method has been endorsed by courts as a fair and equitable method of distributing
14 receivership assets in fraud cases, especially where it results in only a small
15 percentage of investors not sharing in the distribution. *See SEC v. Huber*, 702 F.3d
16 903 (7th Cir. 2012); *United States v. Cabe*, 311 F. Supp. 2d 501, 509 (D.S.C. 2003);
17 *CFTC v. Wilson*, 2013 WL 3776902, *7 (S.D. Cal. July 17, 2013).

18 In *Huber*, the Seventh Circuit Court of Appeals compared the rising tide
19 method to the net loss method and found that rising tide “appears to be the method
20 most commonly used (and judicially approved) for apportioning receivership
21 assets.” *Huber*, 702 F.3d at 906; *see also Wilson*, 2013 WL 3776902, at 7 (“the
22 Court concludes the Rising Tide Method is the most equitable remedy available”).
23 The Seventh Circuit went on to say:

24 The more investors in a Ponzi scheme there are who
25 would receive nothing under rising tide and might
26 therefore have difficulty paying their future expenses, the
27 more likely the net loss method is to maximize the overall
28 utility of the investors. But only 18 percent of the
investors in Huber’s scheme receive nothing under rising
tide, and so in this case that method is an acceptable
alternative to net loss.

1 *Huber*, 702 F.3d at 907.

2 Here, the amounts, on a percentage of funds invested basis, that Investor
3 Claimants received back vary widely. In order to ensure that Investor Claimants are
4 treated as equally as possible, Investor Claimants must all be brought to an equitable
5 recovery rate “base line” before additional distributions, over and above that “base
6 line” can be made. The only means of accomplishing this is to apply the Rising
7 Tide methodology to the Receiver’s contemplated distributions on allowed investor
8 claims. Moreover, very few investors – only those who have already recovered at
9 least 90% (and likely closer to at least 95%) of their net losses – are not expected to
10 share in any distributions from the receivership estate.

11 The other distribution method sometimes used in federal equity receiverships
12 – the pro-rata distribution method – does not take into account the fact that some
13 investors received little or no recovery from the Scheme (i.e. pre-receivership),
14 whereas other investors had already recovered well over 90% of their net losses
15 from the Scheme prior to the receivership. With the exception of the CTC
16 settlements with Ovation and Banc of California, who recovered more than 100% of
17 their net losses and therefore no longer have claims in the receivership, all investor
18 settlements with CTC were determined by a percentage of net losses, meaning the
19 disparate pre-receivership recoveries among investors were simply perpetuated (i.e.
20 those with little to no pre-receivership recovery received the same or similar
21 percentage of their net loss from CTC as others with relatively high pre-receivership
22 recoveries). Accordingly, the Rising Tide method is the most fair and equitable
23 distribution method in this case.

24 **VIII. CONCLUSION**

25 For the foregoing reasons, the Receiver respectfully requests that this Court
26 enter an order:

- 27 1. Granting the Motion in its entirety;
- 28 2. Allowing claims as set forth on Exhibits “C and L” to the Freitag Decl.;

1 3. Disallowing claims as set forth on Exhibits “I and L” to the Freitag
2 Decl.;

3 4. Approving the Distribution Plan attached as Exhibit “A” to the Freitag
4 Decl.

5 5. Authorizing the Receiver to a file a “Notice of Allowed Claim
6 Adjustment” and approving the procedures laid out in Section V(G) above regarding
7 making future adjustments to Allowed Claims (including amounts) and Prior
8 Recovery Rates.

9 6. Authorizing the Receiver to determine, in her business judgment, the
10 appropriate total amount of distributable receivership funds (along with the
11 corresponding reserve of remaining receivership funds) and file a “Notice of Interim
12 Distribution” and approving the procedures laid out in Section VI above regarding
13 making interim distributions to holders of Allowed Claims.

14 Dated: May 31, 2022

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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By: /s/ Edward G. Fates

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Attorneys for Receiver
KRISTA L. FREITAG

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