No. 23-55252

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM H. PETERSON, individually, as Trustee of the Peterson Family Trust dated April 14, 1992, and as Trustee of the Peterson Family Trust dated September 29, 1983; KIM FUNDING, LLC; ABC FUNDING STRATEGIES, LLC,

Plaintiff-Appellants,

v.

KRISTA FREITAG, Receiver for ANI Development, LLC, AMERICAN NATIONAL INVESTMENTS, INC., and their subsidiaries and affiliates; UNITED STATES SECURITIES AND EXCHANGE COMMISSION; CHICAGO TITLE COMPANY, CHICAGO TITLE INSURANCE COMPANY, NOSSAMAN LLP, and MARCO COSTALES,

Defendant-Appellees.

On Appeal from the United States District Court
for the Southern District of California
Hon. Larry A. Burns, No. 19-cv-1628

APPELLANTS' MOTION FOR A STAY OF THE DISTRIBUTION ORDER PENDING APPEAL

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
RELIEF NEEDED BY APRIL 24, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s) 23-55252
Case Name U.S. Sec. and Exch. Comm'n et al v. Chicago Title Co. et al

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

> Appellants seek an immediate stay effective April 24, 2023, when the District Court's temporary stay of the February 4, 2023 Distribution Order underlying this appeal expires, and, after appropriate briefing, a stay of the Distribution Order pending this appeal.
>
> The District Court is overseeing a federal securities receivership which was commenced after the collapse of a Ponzi scheme that defrauded appellants and other victims of hundreds of millions of dollars. This appeal involves an order denying them a right to participate in distributions from the receivership estate. It is related to another appeal, No. 22-56206, which is from a separate order by the District Court that, among other things, enjoins appellants' state court claims against two aiders and abettors of the Ponzi scheme, defendants and appellees Chicago Title Company and Chicago Title Insurance Company.

Relief is needed no later than *(date)*: April 24, 2023

The following will happen if relief is not granted within the requested time:

> Absent a stay from this Court by April 24, 2023, the Receiver will move forward with her plans to distribute $21 million of the receivership's assets to approved claimants in short order, which will render equitably moot the present appeal from the Distribution Order denying appellants' claims and cause them irreparable harm.

Appellants could not have filed this motion earlier because:

The transcript from the hearing where the district court denied Appellants' request for a stay was supposed to be available today, but is now not available until Wednesday, April 19 or Thursday, April 20, 2023. The hearing transcript is required for Appellants to comply with Rule 8(2)(A)(ii), which requires a party seeking a stay from the circuit court to "state any reasons given by the district court for its action [denying a request for a stay]."

I requested this relief in the district court or other lower court: [X] Yes [ ] No

If not, why not:

The District Court denied appellants' request for a stay pending appeal but granted a temporary 14-day stay until April 24, 2023 to allow appellants to request a stay from this Court.

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: [X] Yes [ ] No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: April 17, 2023

By *(method)*: Email

Position of other parties: Unknown

Name and best contact information for each counsel/party notified: Ted Fates, tfates@allenmatkins.com, counsel for the Receiver

I declare under penalty of perjury that the foregoing is true.

Signature */s/ Seanna R. Brown* **Date** April 17, 2023

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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MOTION FOR STAY

I. INTRODUCTION

Under Federal Rule of Appellate Procedure 8 and Circuit Rule 27-3, appellants Kim Peterson ("Peterson"), Kim Funding, LLC, and ABC Funding Strategies, LLC (collectively "appellants") move for an emergency stay of the February 24, 2023 Distribution Order underlying this appeal.

Appellants are victims of a massive Ponzi scheme orchestrated by an individual named Gina Champion-Cain with the assistance of defendants-appellees Chicago Title Company and Chicago Title Insurance Company (collectively "Chicago Title"). To redress the theft of their funds from these responsible parties, appellants brought suit in California state court against Chicago Title and, like numerous other claimants, filed claims in the underlying federal securities receivership over Cain's entity. However, following a settlement between the Receiver and Chicago Title, the District Court first approved a bar order precluding appellants' state court claims against Chicago Title (the "Bar Order") and then upheld the Receiver's denial of their claims in the receivership and the distribution of receivership funds to the remaining claimants (the "Distribution Order"). The Bar Order is the subject of a related appeal in this Court (No. 22-56206) while the Distribution Order underlies the present appeal.

At the hearing on appellants' stay motion, the District Court erroneously denied appellants a stay of the Distribution Order pending appeal but granted a temporary stay that expires April 24, 2023. Contrary to the District Court's finding, appellants established that, absent a stay, they will be irreparably harmed by the planned, imminent distribution of $21 million in receivership funds, rendering equitably moot this appeal and the serious due process and other legal questions it raises. Moreover, the Receiver will not be unduly prejudiced by a stay that will merely maintain the status quo pending this appeal (and the related Bar Order appeal). Further, both the purpose of the Securities and Exchange Act underlying this receivership and the broader public interest favor the requested stay to protect the ability of investors like appellants to seek redress through the courts.

Accordingly, appellants respectfully request that this Court (1) grant an immediate stay of the Distribution Order no later than April 24, 2023, when the temporary stay expires, and (2) after appropriate briefing, grant appellants a stay pending this appeal to protect their right to meaningful appellate relief.

II. FACTUAL BACKGROUND

A. Unaware that the Investment Was a Ponzi Scheme, Peterson Invested with Champion-Cain and ANI Development in 2012

Peterson is a successful real estate developer from San Diego who was first approached in 2012 about a business opportunity by Gina Champion-Cain, a

prominent San Diego businesswoman. (*See* Dkt. 796-5, ¶16.)[1] Cain's plan was to provide financing to liquor license applicants and hold the loaned money in escrow accounts with Chicago Title while their applications were under review. (Dkt. 926 at 2.) Upon approval of their liquor licenses, the applicants were supposed to wire the originally loaned funds plus a lending fee into escrow, allowing the loaned funds to be returned to the lenders and the escrows to be closed. (796-5, ¶16.)

After experiencing initial success investing his personal funds, Peterson created two entities, appellants Kim Funding, LLC ("Kim Funding") and ABC Funding Strategies, LLC ("ABC Funding"), that entered into funding agreements with Cain's company, ANI Development, LLC ("ANI"). (Decl. of Seanna Brown *et al*. ("Brown Decl."), Ex. 3, at *6.) Peterson then solicited various high net worth individuals and financial institutions to loan money to Kim Funding for the investment. (*Ibid*.) Kim Funding entered loan agreements for approximately $120 million to secure money to loan to liquor license applicants. (*See* Dkt. 807-13.) Consistent with his belief that the investment was legitimate, the loans to Kim Funding were often personally guaranteed by Peterson. (Brown Decl., Ex. 3, at *6.) Peterson's other entity, ABC Funding Strategies, was a private placement vehicle through which forty individuals he solicited invested more than $10 million

[1] Unless otherwise noted, references to docket entries are from the district court action titled *SEC v. Cain*, S.D. Cal. No. 19-CV-1628-LAB-AHG.

to loan to liquor license applicants. (*Ibid.*; *see also* Dkt. 807-14.) This arrangement was not a traditional investor relationship in that Peterson believed that Kim Funding and ABC Funding's money that was placed in Cain's liquor license lending program was safely escrowed at Chicago Title and could not be withdrawn for any purpose other than the program itself. (Dkt. 831.1, ¶10.)

B. The Fraud Was Revealed, Including to Peterson, Years Later

Years later, an SEC investigation revealed that the lending program was a massive Ponzi scheme devised by Cain and her entity, ANI, and aided by Chicago Title employees. (Brown Decl., Ex. 1 at 2–3.) The investment opportunities were entirely fictitious, and no loans were ever made to liquor license applicants. (*Ibid.*)

Cain and ANI did maintain an escrow account at Chicago Title, but it was an instrumentality of the fraud. (Dkt. 796-9, ¶¶13, 29.) Chicago Title knew Cain lied to investors about the safety and control of their money but profited by collecting fees each time ANI deposited or withdrew money from the ANI escrow account. (*Id.*, ¶¶28, 29, 40.) At least four Chicago Title employees knowingly participated in the fraud. (*Id.*, ¶¶7, 39.) They accepted tens of thousands of dollars in cash bribes, gifts, and perks from Cain (*id.*, ¶¶81–82); signed at least 30 fraudulent form escrow agreements (*id.* ¶50); lied to auditors (*id.*, ¶¶57, 60); and ignored Cain's use of fake Chicago Title email addresses to impersonate Chicago Title employees (*id.*, ¶44). In short, Chicago Title was instrumental to the success and longevity of the $390

million fraud. (*See id.*, ¶36 ["Chicago Title's participation legitimized the Loan Program in the eyes of the investors. Cain's fraudulent scheme would not have succeeded without Chicago Title's name and active involvement."].)

After the SEC brought an action against Cain and ANI for securities law violations in 2019 (Dkt. 1), the District Court appointed Krista Freitag (the "Receiver") as the permanent receiver to ANI and related entities (the "Receivership Entities") (Dkt. 6.) Cain pled guilty, admitting that she ran a massive Ponzi scheme and naming Chicago Title and its escrow officers as "co-conspirators" in the fraud. (Dkt. 796-9, ¶ 32; Dkt. 795-7.) Cain is now serving a 15-year sentence (ECF No. 42 in *USA v. Champion-Cain*, S.D. Cal. No. 20-cr-2115-LAB); her CFO is now serving a four-year prison sentence (ECF No. 36 in *United States v. Torres*, No. 20-cr-2114-LAB-1 (S.D. Cal. Mar. 24, 2021); and two Chicago Title employees have asserted their Fifth Amendment rights against self-incrimination during testimony. (Dkt. 921 at 3.) Notably, Peterson denies any knowledge of or wrongdoing related to the Ponzi scheme, and Cain has testified that Peterson was not privy to the fraud. (Brown Decl., Ex. 3 at *6.)

C. Peterson Filed Proof of Claims to Recoup Monies Owed to Lenders, But the Receiver Sued Him and His Entities

In December 2021, Kim Funding and ABC Funding filed proof of claims for $128 million with the Receiver for the outstanding amounts owed under their

funding agreements with ANI—monies that Kim Funding borrowed and owes to its lenders as Peterson largely personally guaranteed them. (Dkts. 807-13, 807-14.)

In 2021, the Receiver sued Peterson and his entities for the return of the $12 million ANI paid to Peterson's entities under the funding agreements between them before the fraud came to light. (*See Freitag v. Peterson et al.*, S.D. Cal. No. 21-cv-1620-LAB-AGH, ECF No 1.) In 2022, the Receiver amended her complaint to add common law causes of action. (*See id.,* ECF No. 36.) As noted, however, consistent with Cain's testimony, Peterson continues to deny any knowledge of or wrongdoing related to Cain's Ponzi scheme. (Brown Decl., Ex. 3 at *6.)

D. The District Court Issued the Distribution Order and Bar Order, Approving Denial of Appellants's Claims and Enjoining Their Claims Against Chicago Title

In May 2022, the Receiver sought approval of her distribution motion with recommended treatment of claims, distribution methodology, and distribution plan, included recommended denial of Kim Funding and ABC Funding's claims. (Dkt. 807; Dkt. 807-1 at 25–26.) Around the same time, the Receiver also moved for approval of a Settlement Agreement and Bar Order with Chicago Title. (Dkt. 795.)

Under the Settlement Agreement, Chicago Title would pay the Receiver approximately $24 million, nearly $22 million of which would go to losing

investors.[2] (Dkt. 795-1 at 6.) In exchange, Chicago Title would get global peace in the form of a bar order enjoining all claims against it related to the Ponzi scheme, including claims by appellants in state court. (Dkt. 795-4, ¶7.b.) Chicago Title was also given a claim in the Receivership, which was cross-referenced in the Receiver's distribution motion. (*Id.*, ¶4; see also Dkt. 807-1 at 26.)

Appellants, among others, filed objections to the Receiver's distribution motion and bar order motion (*see* Dkts. 831, 832), and the District Court initially ordered oral argument on both (Dkt. 789). During the hearing, however, after hearing arguments on the bar order motion as planned, the District Court concluded the proceedings without hearing the distribution motion, acknowledging that the latter "wasn't argued or touched on very much here" and directing counsel to "put it in [a] brief to me then." (*See* Brown Decl., Ex. 4 at 93:3–17.) Appellants obtained a new October 11, 2022 hearing date on the distribution motion after contacting the District Court Chambers, and moved for oral argument. (*See* Dkt. 886 at 1.) The District Court denied oral argument, stating that it was "neither necessary nor required to satisfy due process," and instead, granted appellants leave to file a supplemental brief "to raise any new arguments relating to the

[2] The remaining $2 million reimburses the Receivership Estate for fraudulent escrow fees paid by the Receivership Entities to Chicago Title and the Receiver for fees incurred to pursue claims against Chicago Title. (Dkt. 795-2, Ex. A, ¶1, g–h.)

distribution plan." (Dkt. 914, 2–3.) Appellants then filed their supplemental brief, to which the Receiver responded. (Dkts. 921, 922.)

On November 22, 2023, the District Court issued its order overruling appellants' objections and approving the Receiver's motion for a settlement agreement and bar order (the "Bar Order"). (Brown Decl., Exs. 1, 2.) Three months later, on February 24, 2023, the District Court approved the Receiver's distribution motion (the "Distribution Order"). (Brown Decl., Ex. 3 at *1.)

E. Appellants Filed this and a Related Appeal and Unsuccessfully Sought to Stay of the Distribution Order in the District Court

Appellants had no choice but to timely appeal the Bar Order and the Distribution Order separately based on the dates of their respective issuance. Accordingly, appellants first timely appealed the Bar Order, in which their Opening Brief is due July 12, 2023 (the "Bar Order Appeal"). (No. 22-56206, ECF Nos. 1, 26.) There was no need to seek a stay of the Bar Order or in the related Bar Order Appeal because appellants' state court claims against Chicago Title can be revived should this Court reverse the Bar Order. However, after appellants filed the underlying appeal from the Distribution Order, in which their Opening Brief is due June 23, 2023 (ECF No. 1), they diligently moved the District Court to stay the Receiver's ability to distribute funds pending this appeal (Dkt. 973). After briefing and a short hearing, the transcript from which is not yet available, the District Court denied the stay pending appeal, but permitted a 14-day temporary stay until

April 24, 2023 to allow appellants to seek relief from this Court. (Dkt. 987; *see* Brown Decl., ¶2.d–e.)

Meanwhile, on April 11, 2023 the Receiver filed a notice of distribution, advising all parties of her intention to distribute $21 million, over half the Receivership's cash on hand, to approved claimants. (Dkt. 988.) Absent relief from this Court, the Receiver will begin distributing receivership funds in short order, causing appellants irreparable harm and rendering this appeal equitably moot.

III. LEGAL STANDARD

Interlocutory and final judgments in an equity receivership are not automatically stayed. *See* Fed. R. Civ. P. 62(c). However, courts have inherent authority and discretion to issue a stay "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *accord Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). This Court also retains express authority to issue stay where the district court fails to provide the requested relief while an appeal is pending. *See* Fed. R. App. P. 8.

The Supreme Court has articulated four factors for district and appellate courts to consider before granting a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). The first two factors are "the most critical," *id.* at 434, but under a flexible, "sliding scale" approach, a strong showing of irreparable harm requires a lesser showing of likelihood of success on the merits, and vice versa, *see Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020). For the reasons discussed, appellants satisfy all four factors here.

IV. ARGUMENT

A. Contrary to the District Court's Unexplained Finding, Appellants Establish that They Will Suffer Imminent, Irreparable Harm Absent a Stay of the Distribution Order

Appellants face two forms of irreparable harm unless this Court grants a stay: first, the *de facto* deprivation of their fundamental right to appeal; and second, monetary losses owed them by an insolvent Receivership.

As noted, absent a stay, the Receiver plans to start distributing the bulk of the receivership funds shortly, which will render the present appeal from the Distribution Order equitably moot. *See Castaic Partners II, LLC v. DACA-Castaic, LLC (In re Castaic Partners II, LLC)*, 823 F.3d 966, 968 (9th Cir. 2016) ("Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to 'unscramble the eggs.'"); *SEC v. Cap. Consultants*, 397 F.3d 733, 746 (9th Cir. 2005) (recognizing the concept of equitable mootness in receiverships). As numerous courts have

recognized, the loss of appellate review because of mootness constitute irreparable harm. *See, e.g., United States v. Real Prop. and Improvements Located at 2366 San Pablo Ave.*, No. 13-cv-02027, 2015 WL 525711, at *3 (N.D. Cal. Feb. 6, 2015) ("the risk of mootness by itself is sufficient to show irreparable harm"); *Ctr. for Int'l Envtl. Law v. Office of the United States Trade Representative*, 240 F.Supp.2d 21, 22–23 (D.D.C. 2003) (finding mootness, a "*de facto* deprivation of the basic right to appeal," constitutes irreparable harm); *In re Family Showtime Theatres, Inc.*, 67 B.R. 542, 551–52 (Bankr. E.D.N.Y 1986) ("unless a stay is granted, Family Showtime will be denied its right of appeal, an integral part of due process"); *accord In re Hologenix, LLC*, No. 20-cv-10109-FMO, 2020 U.S. Dist. LEXIS 250555, at *4–6 (C.D. Cal. Dec. 21, 2020).

Appellants can also show irreparable harm because the Receivership is insolvent and owes them money. However, once the Receiver distributes the receivership funds, "recalculat[ing] every [claimant's] net loss would be a highly complex undertaking" and too "difficult to unwind." *Cap Consultants*, 397 F.3d at 745–46. Thus, even if this Court later reverses the Distribution Order, there will be no way for appellants to be compensated by the Receiver on their claims, and this inability to be compensated after a successful appeal is also recognized as constituting irreparable harm. *See Sea Carriers Corp. v. Empire Programs, Inc.*, No. 04 Civ 7395, 2006 WL 3354139, at *4 (S.D.N.Y. Nov. 20, 2006) (finding

irreparable harm where "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied"). Notably, this is an exception to the general rule that mere payment of money is not usually considered irreparable harm "because money can usually be recovered from the person to whom it is paid." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010). Rather, if, as here, "expenditures cannot be recouped, the resulting loss may be irreparable." *Ibid.*; *see also Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015).

This is why courts sensibly conclude that monetary loss constitutes irreparable harm where the obligations are owed by an insolvent. *See*, *e.g.*, *Hilao v. Est. of Ferdinand Marcos (In re Est. of Ferdinand Marcos, Hum. Rts. Litig.)*, 25 F.3d 1467, 1480 (9th Cir. 1994); *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 250 (2d Cir. 1999) ("[C]ourts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents."). Whereas a Ponzi scheme is by definition insolvent and the Receivership estate is all but insolvent, it will be completely so after it distributes the limited funds it has or expects to receive via the settlment with Chicago Title. *See Janvey v. Democratic Senatorial Campaign Comm.*, 712 F.3d 185, 196 (5th Cir. 2013) ("a Ponzi scheme is, as a matter of law, insolvent from its inception").

Thus, appellants do establish the threshold issue for stay of the Distribution Order, that is, irreparable harm, under the applicable standard. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (recognizing that threshold issue in granting stay is showing of irreparable harm); *Leiva-Perez v. Holder*, 640 F.3d 962, 9668 (9th Cir. 2011) (noting that movant satisfies its burden by showing that irreparable injury is "likely" or "more probable" than not absent a stay); *accord Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

B. Appellants Also Establish a Substantial Likelihood that They Will Prevail on the Merits of their Appeal, Which Raises Due Process and Other Serious Legal Questions

Given their strong showing of irreparable harm, appellants need only make a "threshold showing" on the remaining *Nken* factors, including their likelihood of success on the merits. *Leiva-Perez*, 640 F.3d at 966. Thus, they "need not demonstrate that it is more likely than not that they will win on the merits" or that success is "probable," but only that they have a "fair prospect" of success, "a substantial case on the merits," or that "serious legal questions are raised." *Id.* at 966–67; *accord Al Otro Lado*, 952 F.3d at 1007. As discussed, appellants do so.

1. Appellants Were Net Losers and the Court Acting in Equity Cannot Disregard Their Legal Obligations to Investors

In weighing the equities of the distribution motion, the District Court acknowledged that appellants executed loan agreements with lenders to invest in ANI; that many these loans were personally guaranteed by Peterson; and that,

despite the fallout of the fraud, Peterson remains personally liable to these lenders for millions of dollars. (Brown Decl., Ex. 3 at *6–7.) Nevertheless, under the guise of equity, the District Court disregarded Peterson's obligations under the loan agreements; ignored the Receivership's obligations to Kim Funding and ABC Funding Strategies under the funding agreements; declared appellants net winners; and denied their claims. As discussed, this is contrary to the law and inequitable.

"[C]ourts sitting in equity are not allowed to disregard the law in its entirety." *SEC v. Mgmt. Sols., Inc.*, No. 2:11-CV-01165-BSJ, 2013 WL 594738, at *3 (D. Utah Feb. 15, 2013); *Manufacturers' Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935) ("legal rights are as safe in chancery as they are in a court of law."). As a result, while courts overseeing receiverships possess broad equitable powers, they are "powerless" to grant equitable relief "if the one from whom it must come would be deprived of a legal right." *Id.* But here, the District Court overextended its equitable powers by disregarding the loans between appellants and their lenders and the legal obligations and remedies flowing from them, all contrary to law: "It is well-settled that a court of equity, in the absence of fraud, accidence, or mistake, cannot change the terms of a contract." *Manufacturers' Fin. Co.*, 294 U.S. at 449.

The money loaned to appellants and placed with the Receivership Entities per funding agreements with ANI is money belonging to Kim Funding and ABC Funding, not their lenders. *See In re Smith*, 966 F.2d 1527, 1533 (7th Cir. 1992)

(holding that borrowed money is the borrower's own money); *United States v. Yates*, 16 F.4th 256, 273 (9th Cir. 2021) (noting that once loan is issued to borrower, it is the borrower's to use as they wish). When ANI collapsed, the Receivership Entities owed appellants over $128 million, which sums appellants, including Peterson as personal guarantor, remain liable to pay their lenders. This means that, notwithstanding the $12 million the Receiver alleges was transferred to appellants by ANI, appellants remain net losers because their obligations relating to the scheme far outweigh any received sums.

The case closest to the facts here arose in the liquidation of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), involving the question whether to allow the claims of either the feeder fund vehicle that invested with Madoff Securities or the claims of the feeder funds' underlying investors. *In re Bernard L. Madoff Investment Securities LLC*, 708 F.3d 422 (2d Cir. 2013). The Second Circuit held that the claims of the indirect claimants (feeder fund investors) could not be elevated over those who held direct claims against the estate (feeder funds). *See id*. at 427 (indirect investors in feeder fund related to Ponzi scheme could not pursue independent claims with trustee because they had no direct financial relationship with debtor). Here, however, in denying appellants' claims while approving those of claimants, including those who loaned funds to Kim Funding and invested in ABC Funding, the Receiver improperly substituted and

elevated these lenders' and investors' indirect claims over and above appellants' direct claims against the Receivership estate, all contrary to settled law.

2. The District Court Improperly Classified Appellants as "Insiders," a Serious Error Raised on Appeal

The District Court's approval of the Receiver's recommendation to deny appellants' claims was grounded in the notion that, as "insiders," their claims could be denied. (Brown Decl., Ex. 3 at *6.) But Peterson and his entities are not "insiders"; rather, even Cain testified that Peterson was not aware of the Ponzi scheme, consistent with which Peterson was never charged or subpoenaed to testify before a grand jury; has never asserted his rights under the Fifth Amendment despite being deposed three times relating to this fraud; and has participated in voluntary interviews with the SEC and the DOJ. (Dkt. 921 at 1.)

Moreover, the cases on which the District Court relied are distinguishable as none involved denying claims by claimants whose liabilities survived the scheme, because, as here, they borrowed millions of dollars, personally guaranteed most of those loans, and remained liable for those sums despite themselves being defrauded. For example, in most cases cited by the District Court, courts approved the denial of claims for commissions by those were involved in developing and marketing the fraud. *See e.g., SEC v. Byers*, 637 F.Supp.2d 166, 184 (S.D.N.Y. 2009); *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657 (6th Cir. 2001); *SEC v. Pension Fund of Am. L.C.*, 377 Fed. App'x 957, 963 (6th Cir. 2001).

However, appellants' claims here are not for commissions related to the fraud, but for the principal sums they borrowed to place with ANI in Cain's liquor license lending program while they were unaware of the fraud.

In the remaining cases, courts approved the denial of claims by those implicated in the fraud. *E.g., Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) (approving denial of claims by indicted party); *SEC v. Merrill Scott & Assocs., Ltd.*, No. 2:02 CV 39, 2006 WL 3813320 (D. Utah Dec. 26, 2006) (denying the claims of a party involved with debtor in creating shell entities and shielding assets from creditors). However, unlike the claimants in *Byers*, Peterson was not even subpoenaed to testify, let alone charged, and has never asserted his rights against self-incrimination. Moreover, though it is unclear whether the claims in *Merrill Scott & Associates* were for commissions or not, the denial followed extensive hearings on the issue of the claimant's culpability, including live testimony from the claimant and the admission of documentary evidence. *Id.* at *7–11. But nothing close to that happened in the underlying matter to allow the District Court to conclusorily deem Peterson or appellants alleged "insiders"; in fact, as further discussed, appellants did not even get a chance to argue the distribution motion in the District Court in violation of their fundamental due process rights.

3. The Denial of Due Process to Appellants Related to the Distribution Order Raises Serious Merits Issues on Appeal

As discussed, despite their requests for a hearing, the District Court never allowed appellants an opportunity to be heard on issues raised in the Receiver's distribution motion before issuing the Distribution Order. This alone establishes a substantial likelihood of success on the merits because denial or limitation of oral argument in other receiverships has been deemed a denial of due process. For example, rejecting the Receiver's argument that more due process was impractical, the Eleventh Circuit has previously found that claimants were denied due process where the district court "limited the scope of the objections and the issues at oral argument to the form of the proposed distribution plan" and declined to address the claimants' arguments about their receipt of alleged fictitious profits. *SEC v. Torchia*, 922 F.3d 1307, 1319 (11th Cir. 2019) ("Due process required the district court to provide the [claimants] a meaningful opportunity to object to the receiver's determinations and calculations, present evidence and argue their claims and defenses, and challenge the substance of the receiver's proposed distribution plan."); *SEC v. Elliott*, 953 F.2d 1560, 1568 (11th Cir. 1992) (finding claimant's due process rights were violated where claimant was only permitted to file written objections to her claims determination and was denied a hearing on the matter).

Here too, the District Court deprived appellants adequate due process when it denied them an opportunity for oral argument despite their requests, even though

it went on to deem them "insiders," and despite the fact that the Distribution Order guides all future Receivership distributions. Under such circumstances, due process warranted a meaningful opportunity for oral argument. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting that due process "is not a technical conception with a fixed content" but must be flexibly employed to meet the demands of a particular situation); *see also Torchia*, 922 F.3d at 1319 ("the need for expediency and a district court's authority to utilize summary proceedings in receivership do not outweigh an investor's right to due process.").

C. The Requested Stay Will Not Harm the Receiver or Other Parties to the Litigation Other Than Slightly Delay Distribution and Will Maintain the Status Quo Pending This Court's Review

Issuance of the stay here also satisfies the third *Nken* factor because the stay does not substantially injure other parties to the litigation, but rather, maintains the status quo pending appeal. The District Court found that other investors would be harmed by delays in the Receiver's distributions to them, but such delays are far outweighed by the irreparable harm faced by appellants should the lack of a stay allow the Receiver to foreclose their right to appeal and bar their ability to recover their losses even if the Distribution Order is reversed. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (granting stay where appellants would otherwise get no appellate review); *In re Hologenix, LLC*, 2020 U.S. Dist. LEXIS 250555, at *6 ("While a stay pending appeal may cause foreseeable delay. . . of

plan disbursements, the failure to issue a stay in this instance may lead to [plaintiff's] forfeiture of its right to appeal the Confirmation Order. Thus, the balance of equities favors [plaintiff].”). Especially because most claimants have already received some distributions through settlements with Chicago Title, any inconvenience or prejudice to them from delayed distributions is not grounds to deny appellants a stay. *Nostas Assocs. v. Costich (In re Klein Sleep Products, Inc.)*, No. 93 Civ 7599, 1994 WL 652459, at *2 (S.D.N.Y. Nov. 18, 1994).

D. The Securities and Exchange Act and the Broader Public Interest Also Favor Issuance of the Requested Stay Pending Appeal

Appellants also satisfy the last *Nken* factor because a stay furthers the goals of the Securities and Exchange Act, under which the receivership was commenced, to protect them as investors, while also serving the broader public interest in ensuring their right to meaningful appellate review. *Krull v. SEC*, 248 F.3d 907, 915 (9th Cir. 2001) (recognizing that a key purpose of the Securities and Exchange Act is “to protect the public interest by insuring the stability of the markets and integrity of representation by its participants.”); *In re Hologenix, LLC*, 2020 U.S. Dist. LEXIS 250555, at *6 (noting public's strong interest in ensuring a party's right to seek redress through the courts); *Cal. Chamber of Com. v. Council for Educ. and Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (“It is always in the public interest to prevent the violation of a party's constitutional rights.”).

V. CONCLUSION

Absent a stay, appellants will not be able to vindicate the theft of their money by Cain, ANI, and Chicago Title. Rather, while these responsible entities escape liability, appellants will be left to pay substantial alleged liabilities to the Receiver and their secured creditors. Under the circumstances, the most prudent, fair, and equitable course of action also supported by law is for this Court to grant an immediate stay no later than April 24, 2023, when the temporary stay expires, and, after appropriate briefing, grant a stay through the pendency of this appeal.

Dated: April 17, 2023

Respectfully submitted,

NIDDRIE ADDAMS FULLER SINGH LLP
By: */s/ Rupa G. Singh*

BAKER & HOSTETLER LLP
By: */s/ Seanna R. Brown*

GRANT & KESSLER, APC
By: /s/ Miles D. Grant

TENCER SHERMAN LLP
By: /s/ Philip C. Tencer

Attorneys for Plaintiff-Appellants

DECLARATION OF SEANNA R. BROWN IN SUPPORT OF MOTION

Under 28 U.S.C. §1746, I, Seanna R. Brown, declare as follows:

1. I am an attorney in good standing licensed to practice in New York, am admitted to this Court, and am the lead counsel for Appellants Kim H. Peterson, Kim Funding, LLC and ABC Funding Strategies, LLC (Appellants) in this appeal. I submit this declaration in support of Appellants' Motion for A Stay of Distribution Pending Appeal. I would testify to the facts set forth in this declaration, if necessary.

2. Appellants are filing this emergency motion pursuant to Circuit Rule 27-3. This declaration contains the information requested in Ninth Circuit Form 16. In compliance with Circuit Rule 27-3, I certify the following:

a. Relief Requested: Appellants are appealing two orders from the District Court, which is overseeing a federal securities receivership. The receivership follows the collapse of a Ponzi scheme that defrauded victims, including Appellants, of hundreds of millions of dollars. Appellants appeal an order denying them a right to participate in the receivership distributions ("Distribution Order"). Appellants sought a stay from the district court preventing the Receiver from distributing $21 million of receivership funds while this appeal is pending, but their request was denied. Instead, the District Court

granted a temporary stay, until April 24, 2023, for Appellants to request a stay from this Court.

Appellants now respectfully request that this Court (1) grant an immediate stay of the Distribution Order no later than April 24, 2023, when the temporary stay expires, and (2) after appropriate briefing, grant a stay pending this appeal to protect their right to meaningful appellate review.

b. Date of Relief Requested: April 24, 2023.

c. Consequences if Relief is Not Granted: Absent a stay from this Court by April 24, 2023, the Receiver will move forward with her plans to distribute $21 million of receivership assets in short order and Appellants' appeal of their denial of claims will become equitably moot, causing them irreparable harm.

d. Action in District Court: Appellants sought a stay pending appeal in the District Court, which was denied for reasons stated on the record at the hearing on the stay motion. The district court did, however, grant Appellants a 14-day temporary stay to allow them to seek a stay from this Court.

e. Timeliness: Appellants' motion for a stay is due today under Circuit Rule 27-2. Appellants were waiting for receipt of the hearing

transcript to file this motion to comply with Rule 8(2)(A)(ii) of the Federal Rules of Appellate Procedure, which requires a party seeking a stay from the circuit court to "state any reasons given by the district court for its action [denying a request for a stay]." Appellants' counsel, Philip Tencer, contacted the Court Reporting Services last week and was informed the transcript would be ready today, April 17. When he contacted the Court Reporting Services today, he was told the transcript will not be available for several more days because of a backlog.

f. Notice to Ninth Circuit: Appellants sent an email to Ninth Circuit staff on April 17, 2023 regarding notice of this motion.

g. Notice to Counsel: Appellants sent emails on April 17, 2023 notifying counsel of the filing of this motion. The names and contact information of the notified counsel are as follows:

Name/Contact Information	Position on Motion
Ted Fates, tfates@allenmatkins.com	Unknown

3. Attached as **Exhibit 1** is a true and correct copy of the district court's Order Overruling Objections to the Global Settlement and Bar Order in favor of

Chicago Title, *SEC v. Cain*, No. 19-cv-1628-LAB-AHG (S.D. Cal. Nov. 22, 2022), ECF No. 926.

4. Attached as **Exhibit 2** is a true and correct copy of the district court's Order Approving Global Settlement and Entering Chicago Title Bar Order, *SEC v. Cain*, No. 19-cv-1628-LAB-AHG (S.D. Cal. Nov. 22, 2022), ECF No. 927.

5. Attached as **Exhibit 3** is a true and correct copy of the district court's Distribution Order, *SEC v. Champion-Cain*, No. 19-cv-1628-LAB-AHG, 2023 WL 2215955 (S.D. Cal. Feb. 24, 2023).

6. Attached as **Exhibit 4** is a true and correct copy of the hearing transcript from the district court's hearing held on August 31, 2022, *SEC v. Cain*, 19-cv-1628-LAB-AGH (S.D. Cal. Aug. 31, 2022), ECF No. 884.

I declare under penalty of perjury that the foregoing is true and correct. Executed April 17, 2023 in New York, New York.

s/ Seanna R. Brown
Seanna R. Brown

Exhibit 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

GINA CHAMPION-CAIN and ANI DEVELOPMENT, LLC,

Defendants, and

AMERICAN NATIONAL INVESTMENTS, INC.,

Relief Defendants.

Case No.: 19-cv-1628-LAB-AHG

ORDER:

1) OVERRULING OBJECTIONS TO GLOBAL SETTLEMENT AND BAR ORDERS [Dkt. 824, 832, 835, 839, 841, 842, 843, 851-1]; and

2) GRANTING REQUESTS FOR JUDICIAL NOTICE [Dkt. 795-5, 902-4];

3) DENYING MOTION FOR RELIEF FROM STAY AS MOOT [Dkt. 849];

4) GRANTING LEAVE TO FILE OPPOSITION [Dkt 823]; and

5) GRANTING LEAVE TO APPEAR TELEPHONICALLY [Dkt. 873]

Krista Freitag (the "Receiver"), the Court-appointed permanent receiver for Defendant ANI Development, LLC, Relief Defendant American National Investments, Inc., and their subsidiaries and affiliates (the "Receivership Entities"), moved for an order approving the settlement agreement (the "Global Settlement") between Chicago Title Company and Chicago Title Insurance Company (collectively, "Chicago Title") and the Receivership Entities. (Dkt. 795). The Receiver also requests the entry of two bar orders: the first in favor of Chicago Title (the "Chicago Title Bar Order") and the second in favor of Nossaman LLP and Marco Costales (collectively, "Nossaman" and the "Nossaman Bar Order"). Chicago Title and Nossaman filed joinders in support of the Global Settlement and bar orders, (Dkt. 796, 799), which were opposed by numerous non-parties. (Dkt. 824, 832, 835, 839, 841, 842, 843, 851-1).

Following proper notice and a hearing on these matters, and having considered the filings and heard the arguments of counsel, the Court **OVERRULES** the objections. By separate Orders, the Court **GRANTS** the motion, **APPROVES** the Global Settlement, and **ENTERS** the Chicago Title Bar Order and Nossaman Bar Order.

I. BACKGROUND

A. SEC Action and Settlement Negotiations

In August 2019, the U.S. Securities and Exchange Commission ("SEC") initiated this enforcement action against Gina Champion-Cain, ANI Development, LLC, and American National Investments, Inc., alleging that Champion-Cain defrauded investors through a fraudulent, multi-level investment scheme she operated through the defendant entities. (*See generally* Dkt. 1, Compl.). Champion-Cain claimed investors could earn large returns quickly by investing in short-term, high-interest loans to parties applying for California liquor licenses. Participating investors were directed to deposit funds in specified escrow accounts allegedly controlled by Chicago Title. These investment opportunities

were fictitious, and no loans were made to liquor license applicants. In the parallel criminal case, Champion-Cain entered into a plea agreement in which she admitted the liquor license loan investment opportunities she offered to investors were part of a fraudulent Ponzi scheme. (*See* Dkt. 795-7).[1] Following the SEC's motion, the Court appointed the Receiver to manage the Receivership Entities, accounting for their assets and distributing funds received through illegal conduct back to investors. (Dkt. 6).

After the Receiver's appointment, many defrauded investors brought state law claims against Chicago Title for its alleged role as escrow agent in the scheme. In January 2022, with the Court's permission, (Dkt. 737), the Receiver brought claims against Chicago Title in state court. Chicago Title has received leave of Court to bring crossclaims against the Receiver, (Dkt. 758), though it hasn't done so yet. Chicago Title has since reached settlements with more than 300 investors with net losses in the scheme, returning more than $163 million to investors. (Dkt. 795-1 at 8–9; Dkt. 796 at 6).

The proposed Global Settlement and bar orders emerged from extensive negotiations between the Receiver, Chicago Title, and the ten investors with suits still pending against Chicago Title (the "Plaintiff Investors"). Although Court-ordered mediation sessions with the Honorable Steven R. Denton didn't initially lead to a global resolution, (Dkt. 795-1 at 12; Dkt. 796 at 7), the Global

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[1] The Court **GRANTS** the Receiver's request for judicial notice of the plea agreement signed by Gina Champion-Cain in *United States v. Champion-Cain*, No. 20-cr-2115-LAB-1 (S.D. Cal. July 22, 2020), ECF No. 5. (Dkt. 795-5). Courts may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Proper subjects for judicial notice include "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (internal citation and quotation marks omitted).

Settlement was ultimately reached following additional negotiations between the Receiver and Chicago Title, (Dkt. 795-1 at 12–13; Dkt. 796 at 8). The investors yet to settle with Chicago Title—including the Plaintiff Investors and four investors without suits pending against Chicago Title—were given the opportunity to join the Global Settlement: seven joined (the "joining investors") and seven didn't (the "non-joining investors"). (Dkt. 795-1 at 13).

In addition to the suits involving Chicago Title, there is also a state court action pending against Nossaman brought by Ovation Management. Ovation reached a $47 million dollar settlement with Chicago Title and seeks additional recovery from Nossaman for alleged misrepresentations about the Ponzi scheme's legitimacy. (Dkt. 833 at 9–14, 21).

B. The Global Settlement

The Global Settlement, a copy of which is attached as Exhibit A to the Receiver's declaration in support of the motion to approve the Global Settlement, (Dkt. 795-4), will provide global resolution to all claims arising from Chicago Title's alleged relationship with Champion-Cain and the Receivership Entities. Under its terms, Chicago Title will pay $24,359,133.64 (the "Settlement Payment"). Chicago Title will pay the joining investors directly and transfer the remainder of the Settlement Payment to the Receiver for distribution to the non-joining investors once the Court approves the proposed distribution plan. (Dkt. 795-4 ¶ 4; *see also* Dkt. 807, Proposed Distribution Plan). The Plaintiff Investors will receive **100%** of their money-in, money-out ("MIMO") net loses, while the remaining investors will receive 70% of their MIMO net losses.[2] To secure 100% of the payments for the Plaintiff Investors, Chicago Title received a limited right to share in future distributions of the Receivership Estate in place of the Plaintiff Investors.

[2] MIMO net loss figures for each investor are based on the Receiver's forensic accounting investigation and MIMO calculations. (*See* Dkt. 795-1 at 10–12).

(Dkt. 795-4 ¶ 4; *see also* Dkt. 795-1 at 14; Dkt. 860 at 6). In the event a non-joining investor appeals, the Global Settlement details the treatment for that investor's portion of the Settlement Payment. (Dkt. 795-4 ¶ 15). If the Global Settlement is approved, the Receiver expects an eventual recovery between 90% and 95% of aggregate investor MIMO net losses. (Dkt. 795-1 at 5). This is a remarkably favorable recovery for investors in this Court's experience.

In exchange for the Settlement Payment, the Receivership Estate and Chicago Title mutually release all pending or potential claims against one another. (*Id.* ¶ 5). The Global Settlement is conditioned on the Court entering the Chicago Title Bar Order, permanently enjoining all claims against Chicago Title arising from the investment scheme. (*Id.* ¶ 7.b).

In addition to the terms between the Receiver and Chicago Title, the Global Settlement also requires the Receiver to support the entry of the Nossaman Bar Order in the event of a settlement between Chicago Title and Nossaman. (Dkt. 795-4 ¶ 10; Dkt. 795-1 at 28). The anticipated settlement was reached between Chicago Title, Nossaman, and the Receiver (the "Nossaman Settlement"), a copy of which is attached as Exhibit 12 to Chicago Title's joinder in support of the Receiver's motion. (Dkt. 796-14). The Receiver's motion requests that the Court enter the Nossaman Bar Order, which would bar all pending or future claims against Nossaman related to the Ponzi scheme.[3]

C. Notice and Hearing

The Receiver has moved for approval of the Global Settlements, (Dkt. 795), and proposed a notice plan, (Dkt. 798). The Court approved the form and manner

[3] Nossaman filed a motion for relief from the stay of litigation against the Receivership Entities. (Dkt. 849). As the motion noted, because the Court will enter the Nossaman Bar Order, there is no need to grant the requested relief. Accordingly, the motion for relief from the stay is **DENIED AS MOOT**.

of notice and set a ninety-day briefing and hearing schedule.[4] (Dkt. 812). The Receiver posted the motion and supporting documents on the longstanding receivership website and emailed a summary of the same materials and a hyperlink to the website to all known investor and creditor email addresses. (Dkt. 815). The Court permitted those opposing the Global Settlement—the non-joining investors, Kim Peterson, and entities associated with Peterson (collectively, the "Objectors")—to file briefs opposing the global settlement and bar orders, (Dkt. 812)[5]; allowed interest investors to attend the hearing both in person and telephonically, (Dkt. 874); permitted extensive oral argument on the Global Settlement and proposed bar orders, (Dkt. 884); and ordered supplemental briefing on issues unresolved after the hearing, (Dkt. 877, 885).

II. LEGAL STANDARD

The "primary purpose of [federal] equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). Federal courts have broad "power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership." *SEC v. Cap. Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (internal citations and

[4] The SEC filed a motion to appear telephonically at the August 31, 2022 hearing on the Receiver's motion, and did so with leave of Court. (Dkt. 874). The Court therefore **GRANTS** the SEC's motion to appear telephonically. (Dkt. 873).

[5] 2Budz Holding, LLC, Wakefield Capital, LLC, and Wakefield Investments, LLC (collectively, the "Wakefield Parties") filed an *ex parte* motion for leave file oppositions and joinders to oppositions to the Receiver's motions for (1) approval of the Global Settlement and (2) approval of the proposed distribution plan on July 25, 2022. (Dkt. 823). In its June 8, 2022 Order, the Court permitted non-parties to file oppositions to either or both motions by July 25, 2022. (Dkt. 812). The Wakefield Parties subsequently filed oppositions to both motions, (Dkt. 840, 842), and a joinder to other oppositions, (Dkt. 843), which the Court took into consideration in reaching its decision. The Wakefield Parties' *ex parte* motion is therefore **GRANTED**. (Dkt. 823).

quotation marks omitted). This "authority derives from the inherent power of a court of equity to fashion effective relief," *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980), and includes the power to compromise claims by approving settlements, *see SEC v. Stanford Int'l Bank, Ltd. (Stanford)*, 927 F.3d 830, 840 (5th Cir. 2019), and to enjoin all claims against a party, *see Wencke*, 622 F.2d at 1369.

Receivership courts may "exercise [their] discretion to approve settlements of disputed claims to receivership assets, provided that the settlements are 'fair and equitable and in the best interests of the estate.'" *Stanford*, 927 F.3d at 840 (quoting *Ritchie Cap. Mgmt., L.L.C. v. Kelley*, 785 F.3d 273, 278 (8th Cir. 2015)). To determine whether a compromise is "fair and equitable," courts evaluate the probability of success in litigation; any difficulties that may be encountered in collection; the complexity of the litigation and the expense, inconvenience, and delay necessarily attending; and the interest of the receivership entities' creditors and their reasonable views. *See In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988) (discussing factors for evaluating settlements in bankruptcy context); *see also SEC v. Cap. Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005) (finding bankruptcy law "analogous" to and, therefore, persuasive in the administration of receivership estates).

When approving receivership settlements, courts may bar claims against third parties. *See, e.g.*, *SEC v. Aequitas Mgmt.*, LLC, 2020 WL 7318305, at *1 (D. Or. Nov. 10, 2020) ("Where creditors of a receivership estate may have claims against third parties, . . . numerous district courts in receivership actions have barred certain further claims against those [third parties] in conjunction with authorizing settlements of certain other claims against the [third parties]."), *report and recommendation adopted*, 2020 WL 7318129, at *1 (D. Or. Dec. 11, 2020). The Court may enter bar orders to protect the receivership's settlements with third parties when those settlements are conditioned on the entry of a bar order

protecting the third parties. *See Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 902 (5th Cir. 2019); *id.* at 899–900 (finding the authority to enter bar orders extends to barring claims against alleged third-party tortfeasors); *see also SEC v. DeYoung*, 850 F.3d 1172, 1183 n.5 (10th Cir. 2017) (collecting cases where district courts entered bar orders in favor of third parties to secure settlements). This authority is an exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *See Zacarias*, 945 F.3d at 902–03.

The Court can bar investor claims against a third party that are "derivative of and dependent on the receiver's claims and compete with the receiver for [available] dollars." *Zacarias*, 945 F.3d at 900. Such claims are derivative of and dependent on the receiver's claims when the receiver "seeks recovery for injury to the [receivership] entities in the form of the entities' additional liability to investors due to [third party] conduct." *Rotstain v. Mendez*, 986 F.3d 931, 941 (5th Cir. 2021). If investors seek recovery for the same injury as the receiver, the investors' claims depend on the same loss: "[i]f the [receivership] entities had suffered no injury, the investors would have no claims." *Id.*

Before issuing a bar order affecting the rights of non-parties, the Court should "afford[] [objectors] all the process due: notice and opportunity to be heard on the proposed settlement and bar orders." *Zacarias*, 945 F.3d at 903. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

III. DISCUSSION

The Objectors oppose the Global Settlement, Chicago Title Bar Order, and Nossman Bar Order, advancing numerous arguments for why the Court can't or shouldn't approve the Global Settlement or enter the bar orders. For the following

reasons, the Court **OVERRULES** those objections.

A. The Court Can Bar the Objectors' Claims Against Chicago Title and Nossaman

The Objectors advance several arguments concerning the Court's lack of authority to enter the bar orders. For the following reasons, the Court disagrees and overrules those objections.

1. The Objectors' Claims are Derivative Of and Dependent On the Receiver's Claims

The Objectors argue their claims can't be barred because they are sufficiently independent of the Receiver's claims. The Court can bar the Objectors' claims against Chicago Title and Nossaman if the claims are "derivative of and dependent on the [R]eceiver's claims and compete with the [R]eceiver for the dollars" available. *Zacarias*, 945 F.3d at 900. Here, the Court finds the Objectors' claims are derivative of and dependent on the Receiver's claims because the Receiver "seeks recovery for injury to the [Receivership Entities] in the form of the [E]ntities' additional liability to investors due to [Chicago Title and Nossaman's] conduct." *Rotstain*, 986 F.3d at 941. The Objectors' claims depend on the same loss as the Receiver's claims: "[i]f the [Receivership Entities] had suffered no injury, the [Objectors] would have no claims." *Id.*; *see also DeYoung*, 850 F.3d at 1176 (finding the district court could bar investor claims that were "substantially identical" to the receiver's because "[t]he claims [were] all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors").

Several Objectors argue their claims are independent of the Receiver's because they advance claims based on distinct legal theories. However, these "distinct claims" all seek recovery for injuries suffered as a direct result of the Ponzi scheme and, therefore, remain "derivative of and dependent on the [R]eceiver's claims." *Zacarias*, 945 F.3d at 900. Attempts to distinguish a claim based on a

different theory of liability in pursuit of additional recovery is "word play" and don't impart independence on the Objectors' claims. *Id.*

The Court finds the Objectors' claims against Chicago Title and Nossaman are derivative of and dependent on the Receiver's claims.

2. The Bar Orders Protect the Receivership *Res*

The Objectors argue the proposed bar orders aren't necessary to protect the Receivership *res*. But the Receiver points out the bar orders protect the *res* by eliminating the threat of equitable indemnity claims against the Receivership, securing the Global Settlement and Nossaman Settlement, and, through the Settlement Payment, reducing or eliminating investor claims to Receivership assets. The Court agrees with the Receiver.

The Objectors have pending state law claims against Chicago Title and Nossaman in California state superior court. If the Objectors succeed in these state court actions, Chicago Title and Nossaman could, and likely would, bring equitable indemnity claims against the Receivership. Even if the Objectors' claims fail, this Court has already granted Chicago Title permission to bring equitable indemnity claims against the Receivership for prior settlements, (Dkt. 758), and, if the Global Settlement is rejected, Chicago Title has made clear it will bring these Court-approved claims, (Dkt. 796 at 16). Regardless of the outcomes in these potential equitable indemnity actions, the Receivership *res* will be diminished by the costs associated with continuing litigation.

At the August 31, 2022 hearing on the Global Settlement, the Objectors argued that California state law bars Chicago Title and Nossaman from bringing equitable indemnity claims against the Receivership. Specifically, they argued that California law prohibits either alleged or actual intentional tortfeasors from bringing equitable indemnity claims against another intentional tortfeasor. On September 1, 2022, the Court ordered supplemental briefing to address this state law question. (Dkt. 877, 885). After careful review of the briefing and relevant state

law, the Court finds that California law permits Chicago Title and Nossaman—as alleged intentional tortfeasors—to bring equitable indemnity claims against the Receivership. *See Leko v. Cornerstone Building Inspection Serv.*, 86 Cal. App. 4th 1109, 1120 (2001) (allowing alleged intentional tortfeasors to bring equitable indemnity claims against another tortfeasor); Min. Order, *Kim Funding LLC v. Chicago Title Co.*, No. 37-2019-00066633-CU-FR-CTL (Cal. Super. Ct. Apr. 1, 2022) (holding Chicago Title may, as an alleged intentional tortfeasor, bring equitable indemnity claims against concurrent tortfeasors);[6] *Baird v. Jones*, 21 Cal. App. 4th 684, 693 (1993) (holding that an intentional tortfeasor may obtain equitable indemnity from another intentional tortfeasor).

The proposed bar orders are also necessary to secure the Receivership's settlements with Chicago Title and Nossaman. Federal receivership courts may enter bar orders to protect the receivership's settlements with third parties when those settlements are conditioned on the entry of a bar order protecting the third parties. *See Zacarias*, 945 F.3d at 902. Here, the proposed bar orders are necessary conditions for two settlements to which the Receiver is a party: the Global Settlement, (s*ee* Dkt. 795-4), and the Nossaman Settlement, (*see* Dkt. 796-14).

Finally, the proposed Chicago Title Bar Order is a necessary precondition for the transfer of the Settlement Payment, which will itself protect the *res* by reducing or eliminating claims to Receivership assets. The Settlement Payment will be distributed to the remaining investors in two ways. For the joining investors, Chicago Title Company will pay the designated amount directly to each investor.

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[6] The Court **GRANTS** Chicago Title's request for judicial notice of (1) the April 1, 2022 minute order in the state court action *Kim Funding LLC v. Chicago Title Co.*, No. 37-2019-00066633-CU-FR-CTL, and (2) the transcript of this Court's August 31, 2022 hearing, (Dkt. 902-4). State court proceedings are a proper subject for judicial notice "if those proceedings have a direct relation to matters at issue." *Bias*, 508 F.3d at 1225.

For the non-joining investors, Chicago Title Company will transfer the remaining balance of the Settlement Payment to the Receiver, who will distribute the amount designated for each non-joining investor at the conclusion of any such investor's appeal (or back to Chicago Title Company if an appeal is successful). Regardless of how an investor receives their settlement payment, each payment will reduce or eliminate that investor's claim to the Receivership's assets, thus protecting the *res* by preserving the remaining balance for future distribution. (*See* Dkt. 860 at 14).

For the forgoing reasons, the Court finds the proposed bar orders protect the Receivership *res*.

3. The Anti-Injunction Act Doesn't Prohibit the Bar Orders

The Objectors argue that the proposed bar orders violate the Anti-Injunction Act ("AIA") by staying state court proceedings. 28 U.S.C. § 2283. The AIA prohibits federal courts from staying state court proceedings unless certain exceptions apply. *Id.* As relevant here, a federal court may stay state court proceedings "where necessary in aid of its jurisdiction." *Id.* In the receivership context, federal courts exercise jurisdiction over the receivership estate and there is "'a threat to the court's jurisdiction' where 'a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction.'" *Zacarias*, 945 F.3d at 902–03 (quoting *Texas v. United States*, 837 F.2d 184, 186 n.4 (5th Cir. 1988)).

Here, the Objectors seek to continue to litigate against Chicago Title and Nossaman in state court. If the Objectors prevail in their actions, Chicago Title or Nossaman could bring equitable indemnity claims against the Receivership, which would incur additional legal expenses and could result in a money judgment against the Receivership. Additionally, the Global Settlement is contingent on the Court entering the Chicago Title Bar Order. Without the bar order, the Receivership Estate will not receive the $24.3 million payment from Chicago Title.

The Court finds the proposed bar orders are necessary to aid its jurisdiction over the Receivership Estate. *See* 28 U.S.C. § 2283.

4. Bankruptcy Rules Against Nonconsensual Releases Don't Prohibit the Bar Orders

The Objectors argue that the Court should follow bankruptcy court rules precluding nonconsensual third-party releases. But this isn't a bankruptcy proceeding, and this Court isn't bound by the strictures of bankruptcy law. *See SEC v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, at *8 (D. Or. Oct. 2, 2009) ("Federal equity receivership courts are not required to exercise bankruptcy powers [] nor to strictly apply bankruptcy law."). While bankruptcy courts are barred by statute from issuing nonconsensual releases in certain situations, there is no such barrier to entering the proposed bar orders here. *Compare In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995) (holding the Bankruptcy Code bars bankruptcy courts from releasing third parties from liability), *with SEC v. Kaleta*, 2012 WL 401069, at *8 (S.D. Tex. Feb. 7, 2012) (issuing a bar order when "the undersigned is an Article III judge who is not impaired by Article I bankruptcy judges' lack of plenary authority"). Just the opposite is true: the Court has broad "power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership," *Cap. Consultants*, 397 F.3d at 738, including the power to bar third party claims, *see Wencke*, 622 F.2d at 1369. Accordingly, the Court finds bankruptcy rules don't prohibit the proposed bar orders.

5. Objectors Were Provided Due Process

The Court may bar the Objectors' claims only if the Objectors received "all the process due: notice and opportunity to be heard on the proposed settlement and bar orders." *Zacarias*, 945 F.3d at 903; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (holding due process consists of adequate notice and an opportunity to be heard). Notice must be "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

Here, the Court ordered the Receiver to file a notice plan "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the [motions] and afford them an opportunity to present their objections." (Dkt. 789 at 3 (quoting *Mullane*, 339 U.S. at 314) (alternation in original)). The Court approved the proposed notice plan, (Dkt. 812), and the Receiver posted the motion and supporting documents on the longstanding receivership website and emailed a summary of the same materials and a hyperlink to the website to all known investor and creditor email addresses, (Dkt. 815). The Court permitted the Objectors to file briefs opposing the Global Settlement and bar orders; set a hearing date more than ninety days after the motion was filed, (Dkt. 812); allowed interested investors to attend the hearing both in person and telephonically, (Dkt. 874); permitted extensive oral argument at the hearing, (Dkt. 884); and, after the hearing, ordered supplemental briefing on unresolved issues, (Dkt. 877, 885). The Court finds the Objectors were provided notice and an opportunity to be heard sufficient to satisfy the requirements of due process.

B. The Global Settlement is Fair, Reasonable, and in the Best Interests of the Receivership

1. The Global Settlement is Fair with Respect to the Receivership as a Whole

The Objectors argue that the Court should reject the Global Settlement because it's unfair to them individually. When supervising a receivership, a court may approve "settlements [that] are 'fair and equitable and in the best interests of the estate.'" *Stanford*, 927 F.3d at 840 (quoting *Ritchie Cap. Mgmt., L.L.C.*, 785

F.3d at 278). Courts determine whether a compromise is "fair and equitable" by evaluating the probability of success in litigation; any difficulties that may be encountered in collection; the complexity of the litigation and the expense, inconvenience, and delay necessarily attending; and the interest of the receivership entities' creditors and their reasonable views. *See In re Woodson*, 839 F.2d at 620.

If the Global Settlement is approved, non-joining investors will receive 100% of their MIMO net losses, joining investors will receive 70% of their MIMO net losses, and the Receivership will receive $2.1 million for distribution to other investors with MIMO net losses. (Dkt. 795-1 at 18–19). The proposed bar orders will eliminate equitable indemnity claims against the Receivership. The Receiver estimates the Global Settlement will "pave the way" for an aggregate investor recovery between 90% and 95%. (Dkt. 795-1 at 5).

If, however, the Global Settlement is not approved, Chicago Title won't make any settlement payments and state court litigation will continue, which will necessarily delay distributions from the Receivership Estate. The Receivership would remain liable to the Plaintiff Investors and expend additional resources defending against equitable indemnity claims. The outcome and duration of this complex litigation is uncertain and would delay and reduce future distributions.

After considering the facts uncovered in her investigation, the risk of continued litigation, and the potential recovery, the Receiver determined that the Global Settlement was favorable and in the best interests of the Estate and investors as a whole. (Dkt. 795-1 at 29). The Court agrees and finds the Global Settlement to be fair, equitable, and in the best interest of the Receivership Estate.

Objectors also argue that the Global Settlement is unfair because of Chicago Title's limited right to share in future distributions (the "participation right") and the protective bar order. The participation right secured settlement payments covering 100% of the non-joining investors' MIMO net losses, (Dkt. 795-1 at 14;

Dkt. 860 at 6), and the Chicago Title Bar Order is a prerequisite to the Global Settlement, (Dkt. 796 at 9 ("An essential component of the Global Settlement is its Bar Order, without which Chicago Title would not have agreed to its terms.")). In the Receiver's business judgment, both concessions were necessary to secure favorable settlement terms. *See Aequitas Mgmt., LLC*, 2020 WL 7318305 at *1 (accepting the "Receiver's business judgment" as to the fairness of settlement compromises). The Court finds the participation right and Chicago Bar order fair, equitable, and in the best interests of the Receivership Estate.

2. The Negotiations Leading to the Global Settlement were Procedurally Fair

Finally, the Objectors argue the negotiations leading to the Global Settlement were procedurally unfair. The Global Settlement was reached after (1) extensive factual investigation by both the Receiver and Chicago Title and (2) vigorous, good faith, arm's-length, mediated negotiations between the Receiver, Chicago Title, and the Plaintiff Investors. The facts of the fraudulent scheme at the heart of this case have been thoroughly investigated. The Receiver conducted a thorough, years-long investigation of the Ponzi scheme and the Receivership Entities. (Dkt. 860 at 8). Chicago Title conducted extensive discovery in state court, the fruits of which were available to the Receiver during the negotiations with Chicago Title. (*Id.*). In January 2022, the Receiver, Chicago Title, and the Plaintiff Investors attempted to reach a global resolution in Court-ordered mediation sessions with the Honorable Steven R. Denton. (Dkt. 795-1 at 12; Dkt. 796 at 7). Post-mediation negotiations between the Receiver and Chicago Title resulted in the proposed Global Settlement, which the remaining investors were given the opportunity to join. (Dkt. 795-1 at 12–13; Dkt. 796 at 8). When the non-joining investors rejected the Global Settlement, the Receiver determined that moving forward with the Global Settlement was in the best interest of the Receivership and investors as a whole. (Dkt. 860 at 9).

The Court finds that the negotiations leading to the Global Settlement were conducted in good faith, at arm's-length, by competent counsel, and were procedurally fair.

IV. CONCLUSION

The Court **OVERRULES** the objections and, by separate Orders, **GRANTS** the motion, **APPROVES** the Global Settlement, and **ENTERS** the Chicago Title Bar Order and Nossaman Bar Order.

IT IS SO ORDERED.

Dated: November 23, 2022

Hon. Larry Alan Burns
United States District Judge

Exhibit 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

AMERICAN NATIONAL INVESTMENTS, INC.,

Defendants.

AMERICAN NATIONAL INVESTMENTS, INC.,

Relief Defendants.

Case No.: 19-cv-1628-LAB-AHG

ORDER:

1) APPROVING GLOBAL SETTLEMENT [Dkt. 795, 796], and

2) ENTERING CHICAGO TITLE BAR ORDER

The Court-appointed Receiver, Krista L. Freitag (the "Receiver"), and non-parties Chicago Title Company ("CTC") and Chicago Title Insurance Company ("CTIC" and, together with CTC, "Chicago Title"), have jointly moved ("Motion") the Court to approve the Settlement Agreement and Mutual Release ("Global Settlement"), a copy of which is attached as Exhibit A to the Receiver's declaration in support of the motion, (Dkt. 795-4), and enter a bar order in favor of Chicago Title (the "Chicago Title Bar Order"). Following notice and a hearing, and having considered the filings and heard the arguments of counsel, the Court

GRANTS the Motion.

Accordingly, it is **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Motion is **GRANTED**, and the Global Settlement is **APPROVED**.

2. The Global Settlement was entered into amongst the following:

   a. CTC and CTIC, inclusive of each's past, present and/or future parents, including but not limited to Fidelity National Financial, Inc., subsidiaries, affiliates, officers, directors, agents, employees, including but not limited to Adelle (Della) DuCharme, Betty Elixman, Thomas Schwiebert, and their heirs, executors, representatives, and/or trusts, if any, predecessors, successors, assigns, sureties, insurers, excess insurers, reinsurers, and any and all of their respective shareholders, owners, and/or partners, limited or general (collectively, the "Chicago Title Parties"); and

   b. The Receiver for ANI Development, LLC, American National Investments, Inc., and their subsidiaries and affiliates, (the "Receivership Entities" or "ANI").

3. In August 2019, the Securities and Exchange Commission initiated this action against Gina Champion-Cain and the Receivership Entities, styled as *SEC v. Gina Champion-Cain, et al.*, Case No. 19-cv-1628-LAB-AHG, in connection with a fraudulent liquor license loan program (the "Program").

4. There is other currently pending litigation in the California Superior Court for San Diego County relating to the Program and styled as *Ovation Finance Holdings 2 LLC, Ovation Fund Management II, LLC, and Banc of California, N.A. v. Chicago Title Insurance Company, et al.*, Case No. 37-2020-00034947-CU-FR-CTL (the "Ovation/BoC Action"); *Banc of California, N.A. v. Laurie Peterson, et al.*, Case No. 37-2019-00060809 (the "BoC Action"); *CalPrivate Bank v. Chicago Title Company, et al.*, Case No. 37-2020-00039790-CU-FR-CTL ("CalPrivate Action I");

CalPrivate Bank v. Kim H. Peterson, Trustee of the Peterson Family Trust dated April 14, 1992, Case No. 37-2019-00058664-CU-BC-CTL ("CalPrivate Action II"); *Kim Funding, LLC, et al. v. Chicago Title Company, et al.*, Case No. 37-2019-00066633-CU-FR-CTL (the "Kim Funding Action"); *Krista Freitag, Court-appointed permanent receiver for ANI Development, LLC, American National Investments, Inc., and their subsidiaries and affiliates v. Chicago Title Company, et al.*, Case No. 37-2022-00000818-CU-FR-CTL (the "Receiver/CTC Action"); *Susan Heller Fenley Separate Property Trust, DTD 03/04/2010, et al. v. Chicago Title Company, et al.*, Case No. 37-2020-00022394 (the "Heller-Fenley Action"); and *Wakefield Capital LLC, Wakefield Investments, LLC, 2Budz Holdings, LLC, Doug and Kristine Heidrich, and Jeff and Heidi Orr v. Chicago Title Company, et al.*, Case No. 37-2020-00012568-CU-FR-CTL (the "Wakefield Action" and, together with the Ovation/BoC Action, the BoC Action, CalPrivate Action I, CalPrivate Action II, the Kim Funding Action, the Receiver/CTC Action, and the Heller-Fenley Action, the "State Court Actions").

5. The Receiver has calculated the net money-in, net money-out ("MIMO") for all investors in the Program and has determined ANI's alleged MIMO net loss liability with respect to the following individuals and entities: the Shelley Lynn Tarditi Trust (the "Tarditi Claimant"); the Payson R. Stevens & Kamaljit Kaur Kapur Trust Dated March 28, 2014; Payson R. Stevens; and Kamalji K. Kapur (the "Stevens/Kapur Claimants"); the Susan Heller Fenley Property Trust, DTD 03/04/2010 and the Susan Heller Fenley Inherited ROTH IRA (the "Heller-Fenley Claimants"); Wakefield Capital LLC; Wakefield Investments, LLC; 2Budz Holding LLC; Doug Heidrich; Kristine Heidrich; Living at the Next Level, LLC; Heidi Orr; and Jeffrey Orr (the "Wakefield-Related Claimants"); CalPrivate Bank (f/k/a San Diego Private Bank) and inclusive of C3 Bank (f/k/a First National Bank of Southern California) (the "CalPrivate Claimant" and, together with the Tarditi Claimant, the Stevens/Kapur Claimants, the Heller-Fenley Claimants, the

Wakefield-Related Claimants, the "Plaintiff Claimants"); the Babette Newman Trust, Anthony D. Radojevich, Eugene Shapiro, and Robert McArdle (collectively the "Non-Plaintiff Claimants" and, together with the Plaintiff Claimants, the "Claimants").

6. The Receiver has brought suit against Kim H. Peterson, Kim Funding, LLC, the Peterson Family Trust dated 4/14/1992; the Peterson Family Trust dated 9/29/1983; ABC Funding Strategies, LLC, ABC Funding Strategies Management, LLC, ANI License Fund, LLC, Kim Media, LLC, Kim Management, Inc., Kim Aviation, LLC, Aero Drive, LLC, Aero Drive Three, LLC, Baltimore Drive, LLC, George Palmer Corporation, and Kim Funding LLC Defined Benefit Pension in this Court in the currently pending matter styled as *Krista Freitag, Court-appointed permanent receiver for ANI Development, LLC, American National Investments, Inc., and their subsidiaries and affiliates v. Kim H. Peterson, et al.*, Case No. 21-cv-1620-LAB-AHG (the "Receiver/Peterson Action").

7. CTC and CTIC have also brought crossclaims for equitable indemnity in the State Court Actions against Kim H. Peterson, Joseph Cohen, Kim Funding, LLC, ANI License Fund, LLC, ABC Funding Strategies, LLC, and ABC Funding Strategies Funding Management, LLC, as applicable (the "Peterson Crossclaims" and, together with the Receiver/Peterson Action, the "Peterson Actions").

8. The notice of the Motion provided by the Receiver was reasonably calculated, under all the circumstances, to apprise interested parties of the relief sought in the Motion and afforded them an opportunity to present their objections and a reasonable time to make their appearance.

9. The Global Settlement is the product of good faith, arm's-length, mediated negotiations involving experienced and competent counsel, is a reasonable and fair compromise of the Receivership Estate's claims against the Chicago Title Parties, and is in the best interests of the Receivership Estate, taking into account the interests of all investors and creditors.

10. The litigation against the Chicago Title Parties involves considerable uncertainty, risk, delay and litigation costs, and would likely require a lengthy time to complete, including through all trials and appeals.

11. The Chicago Title Bar Order is an essential condition of the Global Settlement and, due to the fact that the Plaintiff Claimants' claims against the Chicago Title Parties substantially overlap with the Receivership Estate's claims against the Chicago Title Parties, continued litigation in the State Court Actions may otherwise threaten the Estate's assets due to Chicago Title's indemnity claims, and continued litigation in the State Court Actions may unduly delay distribution of the Estate's assets, it is necessary to protect Receivership Estate assets.

12. The Plaintiff Claimants who have opposed the Motion and objected to the Chicago Title Bar Order will receive 100% of their MIMO net losses through the Receivership as part of the Global Settlement.

13. The Court hereby permanently bars and enjoins all persons and entities whatsoever, including but not limited to the Claimants; Susan Heller Fenley; Shelley Lynn Tarditi; ROJ, LLC; John Milito; Wade Wakefield; Stacy Wakefield; Greg Glassberg; Joseph J. Cohen; ABC Funding Strategies, LLC; ABC Funding Strategies Management, LLC; Laurie Peterson; Kim H. Peterson; Kim Funding, LLC; the Peterson Family Trust dated 4/14/1992; the Peterson Family Trust dated 9/29/1983; Kim Media, LLC; Kim Management, Inc.; Kim Aviation, LLC; Aero Drive, LLC; Aero Drive Three, LLC; Baltimore Drive, LLC; George Palmer Corporation; Kim Funding LLC Defined Benefit Pension Plan; ANI License Fund, LLC; Gina Champion-Cain; Nossaman LLP; Marco Costales; the Receiver and the Receivership Entities; any and all persons or entities who have been, are, or will be subject to any fraudulent transfer claim brought by the Receiver; any and all persons or entities who previously received a settlement payment from CTC; and any and all persons or entities who have submitted investor claim forms

with the Receiver, or anyone else whomsoever that has a claim arising from the Program, from commencing, instituting, prosecuting, maintaining, or continuing, directly or indirectly, any lawsuit, action, cause of action, claim, crossclaim, third-party claim, demand, controversy, claim over, appeal (except for an appeal from this Court as it pertains to its approval of the Global Settlement) or other action, of whatsoever nature at common law, statutory, legal, or equitable, or otherwise, including but not limited to any claim seeking damages, indemnity, contribution, or otherwise, in any forum against the Chicago Title Parties related to or arising from, directly or indirectly any damages, injuries, or losses allegedly sustained by, or related directly or indirectly, to the subject matter of *SEC v. Champion-Cain*, the Receiver/CTC Action, the Receiver/Peterson Action, and/or the State Court Actions.

IT IS SO ORDERED.

Dated: November 23, 2022

Hon. Larry Alan Burns
United States District Judge

Exhibit 3

2023 WL 2215955
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
Gina CHAMPION-CAIN and ANI Development, LLC, Defendants,
and
American National Investments, Inc., Relief Defendant.

Case No.: 19-cv-1628-LAB-AHG
|
Signed February 24, 2023

Attorneys and Law Firms

Gary Y. Leung, Jr., Kathryn Colleen Wanner, Stuart Alexander Johnson, United States Securities and Exchange Commission, Los Angeles, CA, for Plaintiff.

Gina Champion-Cain, San Diego, CA, Pro Se.

ORDER:

1) APPROVING RECEIVER'S RECOMMENDED TREATMENT OF CLAIMS (ALLOWED, DISALLOWED, DISPUTED), [Dkt. 807-12, 807-15, 853-3];

2) APPROVING DISTRIBUTION METHODOLOGY, [Dkt. 807];

3) APPROVING PROPOSED DISTRIBUTION PLAN, [Dkt. 807]; and

4) GRANTING LEAVE TO FILE EXCESS PAGES, [Dkt. 806]

Larry Alan Burns, United States District Judge

***1** Krista Freitag (the "Receiver"), the Court-appointed permanent receiver for Defendant ANI Development, LLC, Relief Defendant American National Investments, Inc., and their subsidiaries and affiliates (the "Receivership Entities"), moved for an order approving the Receiver's (1) recommended treatment of claims (allowed, disallowed, disputed), (2) distribution methodology, and (3) proposed distribution plan (the "Distribution Motion"). (Dkt. 807). The Receiver's motion was opposed by numerous interested non-parties. (Dkt. 827, 831, 837, 838, 840, 921).

Following proper notice and a hearing on the motion, and having considered the filings, arguments of counsel, and relevant law, the Court **OVERRULES** the objections; **GRANTS** the Distribution Motion; and **APPROVES** the Receiver's recommended treatment of claims, distribution methodology, and distribution plan.

I. BACKGROUND

A. SEC Action and Claims Process

In August 2019, the U.S. Securities and Exchange Commission ("SEC") initiated this enforcement action against Gina Champion-Cain, ANI Development, LLC, and American National Investments, Inc., alleging that Champion-Cain defrauded investors through a fraudulent, multi-level investment scheme she operated through the defendant entities. (*See generally* Dkt. 1, Compl.). The Court appointed the Receiver to manage the Receivership Entities, accounting for their assets and distributing funds received through illegal conduct back to investors. (Dkt. 6).

To determine the Receivership Estate's liability, the Receiver conducted a forensic accounting and, with the Court's approval, (Dkt. 716), calculated (1) net loss amounts for each investor with the money-in, money-out ("MIMO") method and (2) each investor's prior recovery rate. (Dkt. 807-1 at 8). MIMO net losses were found by taking the total amount an investor paid into the scheme (money-in) and subtracting the total amount the investor received back in payments (money-out). (*Id.*). The net loss amounts were then reduced by the amount each investor received from settlements with third parties. (*Id.*). The calculations didn't consider additional amounts claimed by investors such as interest, lost profits, or attorneys' fees. (Dkt. 681-1 at 15). Following the Receiver's motion, (Dkt. 681), the Court approved procedures for the administration of investor claims against the Receivership Estate; set the claims bar date; and approved claims bar date notices, proof of claim forms, and W9 forms. (Dkt.

716). The Receiver sent claims bar date notices, proof of claim forms, and W9 forms to all known investors. (Dkt. 807-1 at 8). Each proof of claim form contained the recipient's individualized MIMO net loss calculation with transaction level detail. (*Id.*). Potential investor-claimants were permitted to challenge the Receiver's calculations by providing additional documentation. (*Id.*) After reviewing all claimant submissions, the Receiver sent additional materials to those claimants with deficiencies or specific claim disputes. (*Id.* at 5). The Receiver also reviewed claims from the Receivership Entities' trade and tax creditors. (Dkt. 807 at 27–31).

***2** In addition to administering the claims process, the Court authorized the Receiver to pursue and, when possible, settle clawback claims against non-parties that profited from the fraudulent scheme. (Dkt. 493, 551). The Court recently approved the $24 million settlement agreement the Receiver reached with Chicago Title Company and Chicago Title Insurance Company (collectively, "Chicago Title"). (Dkt. 927). That settlement agreement will pay investors that joined the settlement 70% of their MIMO net losses, while those that didn't join will receive 100% of their MIMO net losses. (Dkt. 795-1 at 18–19). The Receiver estimates the Chicago Title settlement will "pave the way" for an aggregate investor recovery between 90% and 95%. (*Id.* at 5).

B. Recommendation for the Treatment of Claims, Proposed Distribution Methodology, and Proposed Distribution Plan

At the conclusion of the claims review process, the Receiver filed the Distribution Motion, asking the Court to approve the recommended treatment of claims, proposed distribution methodology, and proposed distribution plan.[1] (Dkt. 807). The Distribution Motion details the Receiver's forensic accounting and review of disputed claims and recommends which claims should be allowed and disallowed. The Receiver also recommends the claim amount for each allowed claim based on her MIMO net loss calculations. The proposed allowed claims and their amounts, as revised, are attached as Exhibit A to the Receiver's supplemental declaration in support of the motion (the "Receiver's Supplemental Declaration"). (Dkt. 853-3). The proposed disallowed claims are attached as Exhibit I to the Receiver's declaration in support of the motion (the "Receiver's Declaration"). (Dkt. 807-12). The proposed treatment of claims by trade and tax creditors is attached as Exhibit L to the Receiver's Declaration. (Dkt. 807-15). To expedite distributions, the Receiver proposes procedures for making future adjustments to approved claims (including amounts) and requests the authority to file a "Notice of Allowed Claim Adjustment" as necessary. (Dkt. 807-1 at 31–32).

In addition to recommending treatment for each claim, the Receiver also proposes a distribution plan and distribution methodology. (*Id.* at 10–11, 31–34). To determine distribution amounts for each claimant, the Receiver recommends using the Rising Tide distribution methodology. (*Id.* at 10–11). The Rising Tide method seeks to bring all claimants to an equivalent rate of recovery by considering pre- and post-receivership recoveries. (*Id.*) A detailed description of the mechanics of the Rising Tide distribution methodology is attached as Exhibit B to the Receiver's Declaration. (Dkt. 807-5). The proposed distribution plan is attached as Exhibit A to the Receiver's Declaration. (Dkt. 807-4). The Receiver also proposes procedures for making interim distributions to holders of allowed claims and requests the authority to determine, in her business judgment, the appropriate total amount of distributable Receivership funds and file a "Notice of Interim Distribution." (Dkt. 807-1 at 32–34).

The Receiver filed the Distribution Motion on May 31, 2022, (Dkt. 807), and the Court set a set a ninety-day briefing and hearing schedule, (Dkt. 812). The Court permitted interested non-parties opposing the Distribution Motion ("Objectors") to file opposition briefs, (*id.*); allowed interested claimants and Objectors to attend the hearing both in person and telephonically, (Dkt. 874); heard oral argument on the Distribution Motion, (*see, e.g.*, Dkt. 884 at 6:22–9:21, 32:19–36:1, 48:14–49:25); and permitted supplemental briefing after the hearing, (Dkt. 914, 921, 922).

II. LEGAL STANDARD

***3** The "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). "[A] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *Id.* at 1037; *see also* *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978) ("[I]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."). This "authority derives from the inherent power of a court

of equity to fashion effective relief," *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980), and includes the ability to distribute receivership assets, *see, e.g.*, *SEC v. Elliott*, 953 F.2d 1560, 1569 (11th Cir. 1992). Any distribution should be done fairly and equitably. *Id.*

When administering the distribution of receivership assets, federal district courts may "make rules which are practicable as well as equitable," including approving the use of summary procedures. *Hardy*, 803 F.2d at 1038, 1040; *see also Elliott*, 953 F.2d at 1566 (citing *Wencke*, 783 F.2d at 837; *United States v. Ariz. Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984)) ("A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets."). Specifically, "[r]eceivership courts have the general power to use summary procedure in allowing, disallowing, and subordinating the claims of creditors." *Ariz. Fuels*, 739 F.2d at 458; *see also Wencke*, 783 F.2d at 836–38 (approving summary proceedings to adjudicate claims on receivership assets); *SEC v. Universal Fin.*, 760 F.2d 1034, 1037 (9th Cir. 1985) (same). Generally, it is the claimant's burden to establish a valid claim against the receivership estate. *Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) (describing the general rule that, in the bankruptcy context, creditors must establish a valid claim against the debtor); *see also SEC v. Cap. Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005) (finding bankruptcy law "analogous" to and, therefore, persuasive in the administration of receivership estates).

The Court considers the Distribution Motion under traditional principles of equity. First among these is the principle that "equity demands equal treatment of victims in a factually similar case." *Cap. Consultants*, 397 F.3d at 738–39; *see also SEC v. Enter. Tr. Co.*, No. 08 C 1260, 2008 WL 4534154, at *3 (N.D. Ill. Oct. 7, 2008) ("There are no hard rules governing a district court's decisions in matters like these. The standard is whether a distribution is equitable and fair in the eyes of a reasonable judge.").

III. DISCUSSION

Objectors oppose the proposed treatment of their claims and the proposed distribution plan. For the following reasons, the Court **OVERRULES** their objections.

A. Claims Treatment

Objectors oppose the Receiver's proposed treatment of claims, including the Receiver's use of the MIMO method to calculate net losses and the exclusion of consequential losses. The Court received individualized oppositions from: 2Budz Holding, LLC, Wakefield Capital, LLC, and Wakefield Investments, LLC (collectively, the "Wakefield Investors"), (Dkt. 840); and Peterson Funding, LLC and ABC Funding, LLC (collectively, the "Peterson Entities"), (Dkt. 831).[2] The Wakefield Investors and the Peterson Entities object to the Receiver's treatment of their individual claims. For the following reasons, the Court agrees with the Receiver's proposed claims treatment and **OVERRULES** the objections. The Court **APPROVES** the proposed allowed claim amounts set forth in Exhibit A to the Receiver's Supplemental Declaration, (Dkt. 853-3), and Exhibit L to the Receiver's Declaration, (Dkt. 807-15). The Court **DISALLOWS** the claims set forth in Exhibits I and L to the Receiver's Declaration. (Dkt. 807-12, 807-15). Additionally, the Court **APPROVES** the proposed procedures for making adjustments to allowed claims (including amounts) and prior recovery rates and **AUTHORIZES** the Receiver to a file a "Notice of Allowed Claim Adjustment." (Dkt. 807-1 at 31–32).

1. Money-in, Money-out Net Loss Calculation Method

***4** The Receiver used the money-in, money-out ("MIMO") method to calculate net losses for each investor. Several investors object to the use of MIMO and the exclusion of interest and attorneys' fees from the net loss calculations. (*See, e.g.*, Dkt. 828 at 3, Dkt. 840 at 7–9). The Wakefield Investors also object to MIMO because it excludes the value of their claims against Chicago Title. (Dkt. 840 at 8). The MIMO method of calculating net losses has been endorsed by numerous courts as an "administratively workable and equitable method of allocating the limited assets of the receivership." *Cap. Consultants*, 397 F.3d at 737–38; *see also CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1116 (9th Cir. 1999) (approving a net loss calculation method equivalent to MIMO); *In re Tedlock Cattle Co.*, 552 F.2d 1351, 1352 (9th Cir. 1977) (same); *SEC v. Total Wealth Mgmt., Inc.*, No. 15-cv-226-BAS-RNB, 2018 WL 4353151, at *2 (S.D. Cal. Sept. 11, 2018) ("[T]he MIMO method thus appears to be a reasonable and practical method to ascertain the size of allowable claims against distributable

assets."). MIMO remains an equitable method when the amount of allowed claims is reduced by the amount received from third-party settlements. *See Cap. Consultants*, 397 F.3d at 738–39 (describing MIMO calculations which allowed partial reduction in claims for claimants receiving third-party recoveries as "administratively workable and equitable"). A receivership court may delay recovery on claims for interest and attorneys' fees by excluding these claims from net loss calculations. *See SEC v. Francisco*, No. 8:16-cv-2257-CJC-DFM, slip op. at 6–17 (C.D. Cal. May 13, 2019), ECF No. 340 (approving receiver's proposal to allow investor claims based on MIMO calculations and disallow non-investor claims for interest, consequential damages, and attorneys' fees).

This Court previously approved the Receiver's proposal to use the MIMO method to calculate net losses and to exclude additional amounts claimed as consequential damages—including interest, lost profits, or attorneys' fees—until such time the Receivership pays all MIMO net losses in full. (Dkt. 716). Based on that approval, the Receiver calculated net loss amounts and prior recovery rates for each investor without considering amounts claimed as interest, lost profits, or attorneys' fees. (Dkt. 807-1 at 8, Dkt. 681-1 at 15). Rejecting these MIMO calculations would require the Receiver to recalculate net losses for all investors, further delay distributions, and reduce already limited Receivership resources. The Court has considered the arguments opposing the use of the MIMO method and supporting the inclusion of consequential damages and finds them unpersuasive. The Court finds the MIMO method to be an "administratively workable and equitable" means of "allocating the limited assets of the [R]eceivership." *Cap. Consultants*, 397 F.3d at 738. The objections to the MIMO method are **OVERRULED**.

2. The Wakefield Investors

The Wakefield Investors object to the Receiver's proposal to treat ANI Development, LLC's ("ANI") purchase of a $750,000 membership interest in 2Budz Holding, LLC ("2Budz") as money-out in 2Budz's net loss calculation. (Dkt. 840 at 9–13). The Wakefield Investors argue that ANI's purchase was unrelated to 2Budz's investment in the liquor license loan program and, therefore, shouldn't be considered a distribution from the fraudulent scheme. (*Id.* at 10). Additionally, they argue the Receiver's proposed treatment of 2Budz's claim should be rejected because it doesn't provide for an appropriate means to liquidate the 2Budz membership interest held by ANI. (*Id.* at 12). In response, the Receiver argues ANI's purchase the membership interest was made to induce the Wakefield Investors to make additional investments in the fraudulent scheme. (Dkt. 853 at 19–20). The Receiver contends the history of transfers between ANI and the Wakefield Investors indicates a "direct nexus" between the fraudulent investment scheme and ANI's transfer of $750,000 to 2Budz, and that this nexus supports treating the $750,000 transfer as money-out in 2Budz's MIMO net loss calculation. (*Id.* at 20, Dkt. 807-1 at 12). The Receiver also argues that including the $750,000 at issue in the MIMO calculation preserves Receivership assets by avoiding the additional cost of litigating the fraudulent transfer claim the Receiver has brought against 2Budz. (Dkt. 807-1 at 14–15); *see also* Compl., *Freitag v. 2Budz Holding, LLC*, No. 3:22-cv-885-LAB-AHG (S.D. Cal. June 17, 2022), ECF No. 1. The Receiver maintains that, with the cooperation of 2Budz, she will take whatever steps are necessary to terminate or cancel the membership interest. (Dkt. 807-1 at 16).

***5** The Wakefield Entities are three separate but related entities: Wakefield Capital, LLC and Wakefield Investments, LLC—both owned by the Wakefield family, (Dkt. 840 at 2)—and 2Budz, LLC—owned by Wade Wakefield (through Wakefield Investments) and Greg Glassberg, (Dkt. 807-1 at 14). The relevant transactions between these entities and ANI are as follows:

- On May 12, 2017, 2Budz invested $1.5 million in the fraudulent scheme and transferred its investment to Chicago Title, (Dkt. 840 at 2);
- On February 7, 2018, Wakefield Capital invested $3.625 million in the fraudulent scheme and transferred its investment to Chicago Title, (*id.*);
- On June 18, 2018, Wakefield Investments invested $2 million in the fraudulent scheme and transferred its investment to Chicago Title, (*id.*);
- On June 19, 2018, and August 6, 2018, ANI transferred $500,000 and $250,000, respectively, to 2Budz for a membership interest, (*id.* at 6).

It is undisputed that Champion-Cain was operating a fraudulent Ponzi scheme in which she would use money from new investors to pay back early investors.[3] ANI's initial $500,000 transfer came one day after Wakefield Investments made a $2 million dollar investment in the scheme. (Dkt. 807-2 ¶ 20). And all the funds ANI transferred to 2Budz

came from an account containing commingled investor funds derived from the fraudulent scheme. (Dkt. 853-1 ¶ 7). Against this backdrop, the Court find that ANI's transfer of $750,000 to 2Budz was part of the larger fraudulent scheme and may appropriately be treated as money-out in 2Budz's net loss calculation. *See* *Lincoln Thrift Ass'n*, 577 F.2d at 606 ("[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.").

This conclusion isn't disturbed by the Wakefield Investors' claim that the transfer is unrelated to the fraudulent scheme simply because ANI received a membership interest in 2Budz. 2Budz received funds derived from the fraudulent scheme in an apparent attempt to induce additional investment in the scheme. (*See* Dkt. 807-2 ¶ 20). The Receiver has treated other funds distributed from the scheme as money-out in the recipient's net loss calculation. The most equitable approach here is to treat the $750,000 transferred to 2Budz as a distribution from the fraudulent scheme and, therefore, as money-out in 2Budz's net loss calculation. *See* *Cap. Consultants*, 397 F.3d at 738–39 ("[E]quity demands equal treatment of victims in a factually similar case.").

Even if the transfer of $750,000 was unrelated to the fraudulent scheme, the funds can still permissibly be included in 2Budz's MIMO calculation because such inclusion will expedite the resolution of the issue, avoiding additional litigation and preserving Receivership assets. *See* *Ariz. Fuels*, 739 F.2d at 460. If the $750,000 isn't included in the MIMO calculation, the Receiver will continue to pursue recovery from 2Budz through the pending action for fraudulent transfer. *See* Compl., *Freitag v. 2Budz Holding, LLC*, No. 3:22-cv-885-LAB-AHG. By including the $750,000 in the calculation of 2Budz's claim, the Court is essentially permitting an equitable setoff via the claims and distribution process by reducing the value of 2Budz's claim against the Receivership. A court may permissibly approve such an equitable setoff during the distribution process as a means of offsetting a fraudulent transfer claim. *See, e.g.*, *Gordan v. Dadante (Gordan I)*, No. 1:05-cv-2726, 2010 WL 148131, at *5 n.6 (N.D. Ohio Jan. 11, 2010) (approving proposed distribution plan and empowering the receiver to offset "funds against individual investors for equitable reasons"); *Gordan v. Dadante (Gordan II)*, No. 1:05-cv-2726, 2010 WL 4137289, at *2 (N.D. Ohio Oct. 14, 2010) (overruling objections to proposed interim distribution when the receiver proposed offsetting commissions an investor received for recruiting additional investors into a scheme against the distributions to be made to the investor); *SIPC v. Old Naples Secs., Inc. (In re Old Naples Secs., Inc.)*, 343 B.R. 310, 320 (Bankr. M.D. Fla. 2006) (holding commissions and returns on investments paid in furtherance of a Ponzi scheme were avoidable as fraudulent transfers).

***6** The Court finds the Receiver's proposed treatment of 2Budz's claim fair and equitable. The Wakefield Investors' objection is **OVERRULED**.

3. The Peterson Entities

The Receiver recommends disallowing the Peterson Entities' claims and instead allowing claims from investors whose investments in the scheme were coordinated by the Peterson Entities (the "Peterson Investors"). The Peterson Entities object to the Receiver's recommendation, arguing the proposal to deny their claims is "unfair and unreasonable." (Dkt. 831 at 5).

i. Claims from Insiders can be Disallowed

The Receiver argues the Peterson Entities' claims should be disallowed because Kim Peterson—who controlled the Peterson Entities—and his associated entities were insiders to Champion-Cain's fraudulent scheme. (Dkt. 853 at 25, Dkt. 922 at 2–4). In response, the Peterson Entities argue it is inappropriate to exclude them on the basis of Peterson's alleged wrongdoing. (Dkt. 921 at 1–3). Receivership courts may approve distribution plans that exclude those who participate in the fraudulent scheme as insiders, marketers, or recruiters. *See, e.g.*, *SEC v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) (approving distribution plan that excluded "those involved in the fraudulent scheme" and describing the plan as "eminently reasonable and [ ] supported by caselaw"); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 660–61, 667 (6th Cir. 2001) (upholding distribution plan that reduced the recovery for any investor who received a commission for referring additional investors); *SEC v. Pension Fund of Am. L.C.*, 377 Fed. App'x 957, 963 (6th Cir. 2001) (upholding distribution plan that excluded a sales agent who received commissions for recruiting investors when the agent had no knowledge the pension fund was a fraudulent investment scheme). A claimant can be excluded from receivership distributions as an "insider" when they are involved with a scheme at a "more intimate level" than the

typical investor, even when the insider had no knowledge the scheme was fraudulent. *SEC v. Merrill Scott & Assocs., Ltd.*, No. 2:02 CV 39, 2006 WL 3813320, at *11 (D. Utah Dec. 26, 2006) (approving distribution plan that excluded an investor who claimed to have no knowledge of the fraudulent nature of the investment scheme because he was an "insider" who was involved in the operation of the scheme and allowed his name to be used to recruit additional investors).

The Peterson Entities had extensive business relationships with Champion-Cain and the Receivership Entities. The Peterson Entities were explicitly created to raise capital for investment in the liquor license lending scheme. (Dkt. 831 at 2–3). "Kim Funding raised capital by borrowing funds ... under loan agreements that were often personally guaranteed by Mr. Peterson" and ABC Funding "raised capital from investors through a private placement memorandum." (*Id.* at 3). Both Peterson Entities entered funding agreements with ANI, which paid in proportion to the investments brought into the scheme. (Dkt. 807-13 at 371–84, Dkt. 807-14 at 972–82). Additionally, Kim Funding was a 1% equity holder and 50% voting member of ANI. (Dkt. 922-4) Peterson also had a personal friendship with Champion-Cain. (Dkt. 922-3). Champion-Cain testified that Peterson wasn't aware of the fraud, and Peterson has neither been found liable for his role in the scheme nor been charged with any wrongdoing. (Dkt. 921 at 2). Notwithstanding Peterson's ignorance of the fraud, the business relationships, recruitment efforts, compensation structure, and personal relationship all indicate that the Peterson Entities were involved in the scheme at a "more intimate level" than the typical investor. *Merrill Scott & Assocs.*, 2006 WL 3813320, at *11. The Court finds that the Peterson Entities were insiders in the fraudulent scheme at issue here.

ii. The Peterson Investors' Claims can be Allowed

***7** The Receiver recommends allowing the Peterson Investors' claims. (Dkt. 807-1 at 25–26). The Peterson Entities object, arguing the Peterson Investors have only indirect claims against the Receivership while the Peterson Entities hold direct claims. (Dkt. 831 at 8). In support, the Peterson Entities cite *Kruse v. Securities Investor Protection Corp. (In re Bernard L. Madoff Investment Securities LLC)*, 708 F.3d 422 (2d Cir. 2013). The Receiver contends *Kruse* has no application here. (Dkt. 853 at 26).

In *Kruse*, the court held investors in "feeder funds" that then invested in the Ponzi scheme at issue weren't "customers" under the Securities Investor Protection Act ("SIPA"). 708 F.3d at 426–27. *Kruse* doesn't control the outcome here. First, the court in *Kruse* was interpreting and applying SIPA, which applies only to registered broker-dealers. ANI isn't a broker-dealer, so *Kruse's* interpretation of SIPA isn't relevant. Second, the reasoning in *Kruse* supports allowing claims from the Peterson Investors. The *Kruse* court considered it particularly important that the feeder fund investors had no direct relationship with the Ponzi scheme, lacked control over the feeder funds' investments, and weren't identified in the Ponzi scheme's books or records. *Id.* By contrast, many of the Peterson Investors communicated directly with Chicago Title, Champion-Cain, and other ANI employees. (Dkt. 853 at 27). Many transferred their funds directly to Chicago Title and retained control of when to invest and withdraw their funds, and some even selected which fictitious liquor license loans to fund. (*Id.* at 27–28). Additionally, the escrow ledgers maintained by Chicago Title list the names of the Peterson Investors who directly transferred funds to Chicago Title. (*Id.* at 27). Based on these considerations, the Court finds *Kruse* unpersuasive.

The Peterson Entities also argue that denying their claims while permitting claims from the Peterson Investors is improper because it ignores existing contractual relationships and would require distributions to investors who are "strangers to the estate." (Dkt. 831 at 7–8, Dkt. 921 at 5–6). They contend that the Peterson Investors' only relationship to the scheme was with the Peterson Entities, not with ANI. The Receiver responds by arguing that the Peterson Investors did, in fact, have substantial connections to ANI. (Dkt. 922 at 4). The Court finds this objection unpersuasive. First, most of the funds solicited by Peterson were transferred directly to Chicago Title without moving through the Peterson Entities. (*See* Dkt. 922-1 ¶ 4). Second, many Peterson Investors had escrow agreements with *ANI and Chicago Title.* (*See, e.g.*, Dkt. 922-5). Pursuant to these agreements—which were, like all agreements in the scheme, fraudulent—the Peterson Investors transferred their funds to Chicago Title and believed they maintained ownership and control over the funds. (Dkt. 922 at 4). The Peterson Entities never gained control over or access to the funds. (*Id.*). The Court finds that the relationship between the Peterson Investors, ANI, and Chicago Title is such that the Peterson Investors—not the Peterson Entities—are the proper claimants.

iii. The Peterson Entities Were Net Winners

Finally, the Peterson Entities argue that they are net losers in the fraudulent scheme under the MIMO method and it would be inequitable to exclude them from Receivership distributions. (Dkt. 921 at 5–6). As the Receiver points out, to reach this conclusion, the Peterson Entities must include the money invested and lost by the Peterson Investors in their net loss calculation. (Dkt. 922 at 5–6). Excluding the Peterson Investors' losses, the Peterson Entities received more than $12 million in net profits from the scheme. (Dkt. 853 at 25). The Peterson Entities also point out that Kim Peterson personally guaranteed many of the loan agreements with the Peterson Investors and that he remains exposed to personal liability in state actions brought by these investors. (Dkt. 831 at 6). The Peterson Entities contend that equity requires they receive distributions from the Receivership instead of the Peterson Investors. The Court rejects this argument. "[E]quity demands equal treatment of [similarly situated] victims." *Cap. Consultants*, 397 F.3d at 738–39. The Peterson Investors are similar situated to investors that were exclusively in contact with ANI and Chicago Title when investing. The Peterson Entities, by contrast, were insiders that helped to bring approximately $258 million of investments into the scheme. (Dkt. 807-1 at 25). Notwithstanding Peterson's personal exposure in other suits, it would be inequitable for entities controlled by such an insider to receive distributions instead of the investors he recruited. *See Merrill Scott & Assocs.*, 2006 WL 3813320, at *11.

* * *

***8** The Court finds the Receiver's proposed treatment of the Peterson Entities' claims fair and equitable. The Peterson Entities objection is **OVERRULED**.

B. Distribution Plan

The Receiver proposes a detailed distribution plan which calls for making distributions in accordance with the Rising Tide distribution method. (Dkt. 807-1 at 10–11, 31–34). The Wakefield Investors object to the use of the Rising Tide method.[4] (Dkt. 840 at 14–15). They also object to the distribution plan on due process and "suitability" grounds. (*Id.*). For the following reasons, the Court agrees with the Receiver's proposals regarding the distribution method and distribution plan and **OVERRULES** the objections. The Court **APPROVES** the proposed distribution plan set forth in Exhibit A to the Receiver's Declaration. (Dkt. 807-4). Additionally, the Court **APPROVES** the proposed procedures for making interim distributions to holders of allowed claims and **AUTHORIZES** the Receiver to determine, in her business judgment, the appropriate total amount of distributable Receivership funds (along with the corresponding reserve of remaining Receivership funds) and to file a "Notice of Interim Distribution." (Dkt. 807-1 at 32–34).

1. Rising Tide Distribution Methodology

The Receiver proposes using the Rising Tide distribution methodology to calculate distribution amounts for each claimant. (Dkt. 807-1 at 10–11). In highly simplified terms, the Rising Tide method aims to achieve equivalent recovery rates for all claimants by considering each claimant's pre- and post-receivership recovery to determine prior recovery rates. (Dkt. 807-5 ¶¶ 1–2). Distributions are then made to claimants with the lowest rates of recovery first. (*Id.* ¶¶ 3–9). As a result, the Rising Tide method slowly brings all claimants to an equivalent rate of recovery. A more detailed description of the mechanics of the Rising Tide method is attached as Exhibit B to the Receiver's Declaration. (*Id.*); *see also* *SEC v. Huber*, 702 F.3d 903, 904–06 (7th Cir. 2012) (describing the mechanics of the Rising Tide method and comparing it to the net loss method). The Wakefield Investors object to the Rising Tide method and assert pro rata distributions would be more appropriate. (Dkt. 840 at 15). They make no argument why pro rata distributions would be more fair or equitable to the claimants as a whole. (*Id.*).

***9** The Rising Tide method is widely endorsed as the most commonly used and equitable method for distributing receivership assets in fraud cases. *See, e.g.*, *Huber*, 702 F.3d at 906 ("Rising tide appears to be the method most commonly used (and judicially approved) for apportioning receivership assets."); *id.* (collecting cases approving the Rising Tide method); *CFTC v. Wilson*, No. 11-cv-1651-GPC-BLM, 2013 WL 3776902, at *7 (S.D. Cal. July 17, 2013) (concluding that "the Rising Tide Method is the most equitable remedy available"). The Rising Tide method is especially equitable when there are widely varying rates of recovery and factual circumstances distinguishing each claimant. *See Wilson*, 2013 WL 3776902, at *7.

The Court has considered the arguments against the Rising Tide distribution method and finds them unavailing. The Court finds that the Rising Tide method is the most equitable approach for distributing the Receivership's assets. The objection to the Rising Tide method is **OVERRULED**.

2. Due Process

The Wakefield Investors contend that the proposed distribution plan strips them of their due process rights.[5] (Dkt. 840 at 14). District Courts supervising receiverships may "use summary procedure in allowing, disallowing, and subordinating the claims of creditors." *Ariz. Fuels*, 739 F.2d at 458; *see also* *Wencke*, 783 F.2d at 836–38 (approving summary proceedings to adjudicate claims on receivership assets); *Universal Fin.*, 760 F.2d at 1037 (same). When ruling on the fairness of a proposed plan to distribute receivership assets, a district court must provide claimants with due process. *See* *SEC v. Am. Cap. Inv., Inc.*, 98 F.3d 1133, 1146–47 (9th Cir. 1996), *overruled on other grounds by* *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 94 (1998); *Wencke*, 783 F.2d at 836–38. Due process consists of adequate notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Wakefield Investors and other Objectors received notice of the Distribution Motion more than 90 days before the August 31, 2022 hearing, (*see* Dkt. 807-22); had almost 60 days to file briefs opposing the Motion, (*see* Dkt. 812); and were given a full and fair opportunity to present their objections during lengthy oral argument at the hearing, (*see* Dkt. 878, 884). The Court finds these procedures more than satisfy the requirements of due process. The Wakefield Investors' due process objection is **OVERRULED**.

3. Suitability

The Wakefield Investors also raise three additional objections, arguing the distribution plan is "unsuitable." (Dkt. 840 at 14). They argue that the plan: (1) "has too few specifics to be approved at this point" because it "is too open-ended with no deadlines [or] no dollar figures, not even aspirational ones"; (2) "fails to account for reserves or plan, or a deadline in the future, as to when all the pending litigation will be resolved"; and (3) "goes too hard for the" settlement agreement reached with Chicago Title. (*Id.* at 14–15). These objections lack merit. First, the distribution plan provides a clear structure for how distribution amounts will be calculated, (*see* Dkt. 807-1 at 10–11, Dkt. 807-5), and establishes clear procedures for making interim distributions, (*see* Dkt. 807-1 at 32–34). Second, the Court has already charged the Receiver to use her business judgment to manage ongoing litigation to maximize the net recovery for the Receivership Estate. (*See* Dkt. 493-1 at 11, Dkt. 551). Third, the Court has already approved the settlement with Chicago Title, rendering the final objection moot. (*See* Dkt. 926, 927).

***10** The Wakefield Investors' objections to the suitability of the distribution plan are **OVERRULED**.

IV. CONCLUSION

The Court **OVERRULES** the objections and **ORDERS** as follows:

1. The Distribution Motion is **GRANTED**, (Dkt. 807);

2. The proposed allowed claim amounts set forth in Exhibit A to the Receiver's Supplemental Declaration, (Dkt. 853-3), and Exhibit L to the Receiver's Declaration, (Dkt. 807-15), are **APPROVED**;

3. The claims set forth in Exhibits I and L to the Receiver's Declaration are **DISALLOWED**, (Dkt. 807-12, 807-15);

4. The proposed procedures for making future adjustments to allowed claims (including amounts) and prior recovery rates are **APPROVED**, and the Receiver is **AUTHORIZED** to a file a "Notice of Allowed Claim Adjustment," (Dkt. 807-1 at 31–32);

5. The distribution plan, attached as Exhibit A to the Receiver's Declaration, is **APPROVED**, (Dkt. 807-4); and

6. The proposed procedures for making interim distributions to holders of allowed claims are **APPROVED** and the Receiver is **AUTHORIZED** to determine, in her business judgment, the appropriate total amount of distributable Receivership funds (along with the corresponding reserve of remaining Receivership funds) and file a "Notice of Interim Distribution," (Dkt. 807-1 at 32–34).

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 2215955

Footnotes

1 The Receiver filed an *ex parte* motion for leave to file a memorandum in support of the Distribution Motion in excess of the twenty-five-page limit imposed by Civil Local Rule 7.1(h). (Dkt. 806). The Receiver concurrently filed the Distribution Motion and overlength supporting memorandum, (Dkt. 807-1), which the Court took into consideration in reaching its decision. Good cause appearing, the Receiver's *ex parte* motion is **GRANTED**. (Dkt. 806).

2 The Court received an opposition and joinders to oppositions objecting to the use of the MIMO method and exclusion of interest and attorneys' fees from Objectors Susan Heller Fenley Separate Property Trust, Susan Heller Fenley Inherited Roth IRA, Shelley Lynn Tarditi Trust, Payson R. Stevens, Kamaljit K. Kapur, and the Payson R. Stevens & Kamaljit Kaur Kapur Trust. (Dkt. 828, 830, 836). The Court also received a joinder from Objector ROJ, LLC. (Dkt. 838). The Court considered these filings in reaching its decision, but, because they raise objections applicable to all Objectors, they aren't discussed individually.

The Court also received an opposition from Objector Chicago Title objecting to the Receiver's proposed treatment of their claims. (Dkt. 827). However, the Court approved the settlement agreement between Chicago Title and the Receiver, and Chicago Title no longer opposes the Distribution Motion. (*Id.* at 1).

3 The Court takes judicial notice of the plea agreement signed by Gina Champion-Cain in *United States v. Champion-Cain*, No. 3:20-cr-2115-LAB-1 (S.D. Cal. July 22, 2020), ECF No. 5. Courts may "judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Proper subjects for judicial notice include "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (internal citation and quotation marks omitted).

4 The Court also received an opposition from Objector CalPrivate Bank ("CalPrivate") objecting to the proposed distribution plan. (Dkt. 837). CalPrivate and the Receiver have since reached a settlement agreement. (Dkt. 956). Pursuant to the terms of the agreement, CalPrivate has agreed to withdraw its objection and assign its claims against Kim Peterson and the Peterson Entities to the Receiver. (*Id.* at 2–3). The settlement is contingent on the Court both approving the settlement and authorizing the Receiver to pursue the assigned claims. (*Id.* at 3). The Court has set a briefing schedule and hearing date for the joint motion (Dkt. 957), but now conditionally approves the settlement and authorizes the Receiver to pursue the assigned claims. Therefore, CalPrivate's objection is **OVERRULED AS MOOT WITHOUT PREJUDICE**. If the joint motion is ultimately denied, CalPrivate will be permitted to renew its objection.

5 In a Court-ordered supplemental brief, the Peterson Entities argue the Court denied them due process by not holding additional argument on the Distribution Motion. (Dkt. 921). As the Court noted in its October 4, 2022 Order denying the Peterson Entities' motion requesting additional oral argument, "it is well settled that oral argument is not necessary to satisfy due process." (Dkt. 914 (quoting *Toquero v. INS*, 956 F.2d 193, 196

n.4 (9th Cir. 1992))). For the reasons discussed in its October 4 Order, the Court finds the Peterson Entities' have been provided with all the process they are due. (*Id.*).

End of Document

Exhibit 4

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. GINA CHAMPION-CAIN, Defendant.	No. 19-CV-1628-LAB August 31, 2022 11:33 a.m. San Diego, California

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE LARRY A. BURNS
UNITED STATES DISTRICT JUDGE

Court Reporter: Melinda S. Setterman, RPR, CRR
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Reported by Stenotype, Transcribed by Computer

SAN DIEGO, CALIFORNIA, AUGUST 31, 2022, 11:33 A.M.

* * * *

THE CLERK: Number 9 on the calendar, 19-CV-1628, Securities Exchange Commission vs Champion-Cain, et al.

11:33 Your Honor, counsel has checked in, and I've asked them to come to the lectern when they speak to address the Court.

THE COURT: Okay. If I can have appearances of counsel then, please.

11:33 MR. FATES: Good morning, Your Honor. Ted Fates, Allen Matkins, on behalf of Krista Freitag, the Receiver, and Ms. Freitag is here in the courtroom as well.

THE COURT: All right. Good morning.

MR. STRAUSS: Good morning, Your Honor.

11:34 THE COURT: Mr. Strauss.

MR. STRAUSS: Steven Strauss and Megan Donohue for Chicago Title, on the same side of the table as Mr. Fates.

MR. YODER: Good morning, Your Honor. Michael Yoder for plaintiff, CalPrivate, and I am joined by John Stephens and

11:34 Evan Jones.

THE COURT: Okay. Mr. Yoder, good morning.

MR. POTT: Good morning, Your Honor. Earll Pott appearing on behalf of the joining parties Nossaman, Marco Costales.

11:34 THE COURT: Good morning.

MR. MURPHY: Good morning, Your Honor. Paul Murphy and Dan Csillag for Murphy Rosen. We're here on the behalf of the objector, Ovation Fund Management II, LLC.

THE COURT: All right. Good morning.

11:35 MR. ARMSTRONG: Good morning, Your Honor. James Armstrong for the objecting parties and plaintiffs in the state court action, 2Budz Holding LLC; Wakefield Capital LLC; and Wakefield Investments LLC.

THE COURT: Good morning.

11:35 MS. BROWN: Good morning, Your Honor. Seanna Brown of Baker Hostetler. I am at the very tail end of the throat thing. It is not COVID. I took a million tests. I apologize.

I am also joined by Philip Tencer of Tencer Sherman and Miles Grant of Grant and Kessler. We represent Kim 11:35 Peterson, ABC Funding, and Kim Funding. Thank you.

THE COURT: Okay. That is it for the in-person. How about those that are appearing by video conference.

MS. WANNER: Good morning, Your Honor. Kathryn Wanner on behalf of the United States Securities and Exchange 11:36 Commission.

THE COURT: All right.

MS. ROSING: Good morning, Your Honor. This is Heather Rosing of Klinedintz PC, here with my law partner, Earll Plott, on behalf of Nossaman and Marcos Costales. And 11:36 thank you for letting me appear from Germany, and I appreciate

it.

THE COURT: What time is it there?

MS. ROSING: It is 8:30 pm, Your Honor.

THE COURT: Okay. Is that it, Tish, as far as those that have checked in by zoom or telephonically?

11:36

THE CLERK: Yes, Your Honor.

THE COURT: This matter is on for the Court to consider approval of the post-settlement between Chicago Title and the Receiver. I've received huge number of documents, all of which as can you tell from my annotations that I've read carefully gone over. I understand the arguments being made jointly by the Receiver and by Chicago Title.

11:36

I also understand the arguments that have been made, some very similar, some different, by the objectors in this case. I think what the total of seven -- seven objectors, Mr. Fates?

11:37

MR. FATES: Yes, that is correct.

THE COURT: Yeah. So I have read those thoroughly. As you can tell I have annotated them. All that to say, I am willing to hear from you if you have matters additional to what you put in your papers. We did have one reply that was filed and rejected because leave of the Court was not sought, so that has not been considered. It didn't come to me. I rejected it. I think it was -- was it Nossaman?

11:37

MR. FATES: Nossaman parties.

THE COURT: Yeah. Leave of the Court is required to file, you know, a reply. It was a 25-page reply, and it prompted request for a sur-reply, and I said I think I have it based on the original moving papers, so I have not looked at that. It was -- it was rejected, but that is -- that is where we are.

11:37

I think I have a pretty good understanding of this, of what the case law is, but I am happy to hear from -- let me begin with the objectors, any of the objectors that have anything to add to their written submissions.

11:38

MR. YODER: Yes, Your Honor, with the Court's permission.

THE COURT: Yes, Mr. Yoder.

MR. YODER: Your Honor, I appreciate the opportunity to address the Court and also appreciate Your Honor has received a lot of material, and I know you've gone through it carefully, but in looking at the reply papers for the Receiver and Chicago Title. They rely very, very heavily on the *Zacarias* case, which Your Honor noted in some of your prior orders in this case as well in trying to address whether the state court cases should be stayed. And as Your Honor knows, they were not. They were allowed to proceed.

11:38

11:38

And I think a comparison of *Zacarias*, the facts of *Zacarias* with the facts of this case show not only that the Receiver doesn't have standing, and it wouldn't be appropriate

11:39

to issue a Bar Order here, but more importantly that it wouldn't be fair or equitable looking at the whole, not just looking at my client, but looking at the entire situation that we have before the Court as I stand here.

11:39 THE COURT: You have to remind me, in *Zacarias* I thought that the Court did ultimately issue one of the requested Bar Orders rejected the other because the other clearly was not related to the grasp or the Receiver's interest it had to do with employment matters that occurred after the

11:39 fact. Wasn't that the case in *Zacarias*?

MR. YODER: That was a related case, the *Stanford* case that is referred to as --

THE COURT: Okay. All right.

MR. YODER: -- where there were also officers and

11:39 directors that were suing for insurance coverage for claims against them, and there were also investor claims.

But in *Zacarias* itself, the Court did approve a settlement and did issue a Bar Order. But as I say, Your Honor, the facts there are very different from the facts here,

11:40 and there are five key points, if I can make them quickly.

THE COURT: Of course.

MR. YODER: First of all, in *Zacarias* all of the creditors, the victims were unsecured, and as Your Honor is aware in this case, CalPrivate has assert add lien on at a

11:40 minimum the 11.3 million that the Receiver obtained from

Chicago Title.

THE COURT: The basis of that arises out of what, the original agreement with ANI though, I mean, the contract arrangement with ANI?

11:40 MR. YODER: The business loan agreement --

THE COURT: Right.

MR. YODER: -- which included a security agreement.

THE COURT: Permeated with fraud, though, right?

MR. YODER: The Receiver nor Chicago Title have not

11:40 cited one case that valid agreements disappear because they may have been somehow connected with a Ponzi scheme.

THE COURT: Isn't that begging the question, you are saying valid agreements, and the whole thing was predicated on a fails representations, and I mean that no question that Cal

11:41 Pacific got sucked in with the promise of protected funds under escrow, but you are asking me to credit part of that and consider Cal Pacific --

MR. YODER: CalPrivate.

THE COURT: -- CalPrivate a secured creditor.

11:41 MR. YODER: Your Honor, there also were secured creditors that had interest in real estate. That was also in connection with this Ponzi scheme, and the Receiver has honored those liens. What the Receiver has argued here, number one, this was all part of a Ponzi scheme, but the agreement, the

11:41 loan agreement and the security interest were valid.

They don't disappear because the other side is engaged in some other fraud. It is still gives the party to that contract rights under that agreement.

THE COURT: Is your position that that is binding on me or that should be persuasive because of the way it is handled in other contexts?

MR. YODER: I think it should be binding, Your Honor. I don't think the Receiver has cited any law that this Court can ignore a valid security lien. In fact, their case, the *Byers* case, *SEC vs Byers*, the Court recognized and honored security interest.

THE COURT: I understand I have discretion to do that, but we're in equity here, right? And the overriding concern I have is for the whole.

MR. YODER: Right.

THE COURT: Not any particular private individual, not any particular person that might be affected by this but the whole and to give respectful consideration, and I have, and I am willing to, to CalPrivate and the others, but I don't know that strictly speaking, I know I am bound by UCC principles or secured creditor principles. It is persuasive to me. I don't ignore that.

MR. YODER: Right.

THE COURT: But it is sort of tied in with the original agreement which you acknowledge the whole thing was,

you know, was fraudulent, right?

MR. YODER: The scheme was fraudulent for sure, Your Honor, but money was advanced under the loan agreement. It was advanced based upon a security interest with the UCC1 that was filed. Under state law that lien is valid. The arguments the Receiver makes otherwise don't hold water, and so therefore, it would be a takings, to take that away even though it is in an equitable receivership.

And I would note that the Receiver cites no authority for the proposition that the Court can disregard valid state liens even though this is a receivership proceeding which we acknowledge, and we acknowledge that the Court has discretion, but that, Your Honor, we think would be a taking.

In any event, I also would say relevant to Your Honor's point, they are completely disregarding the claim, and not only that, Your Honor, they are proposing in the settlement -- and this is a death trap. It is sort of like heads, they win; tails, we lose -- that if Your Honor approves this agreement and we appeal and we're successful, we have forfeited win, lose, or draw any right to this security interest, to this claim.

That our only right at that point would be to continue to pursue Chicago Title, and we have no claim against the receivership estate even if we prevail on appeal. So this settlement is completely disregarding our claim which is secure

and giving us no value for that whatsoever, which we would argue Your Honor, the Court doesn't have discretion to approve but certainly shouldn't in the interest of fairness and equity.

Number two, what I would say is in *Zacarias* there was
11:44 an unchallenged finding by the district court that the claims were derivative. And in *Zacarias* you had directors and officers looting the company, and there were derivative claims against those directors and officers. And as Your Honor well knows a derivative claim, the plaintiff is standing in the
11:45 shoes of some other party, corporate setting shareholders bringing suit for the corporation that has been damaged where the board doesn't pursue the claims.

The claims here for CalPrivate are not derivative, and the Receiver has recognized that with this Court time and time
11:45 again by representing to this Court that CalPrivate and the other investor lender claims are unique and they are not duplicative and they are not derivative. CalPrivate's claims don't flow from ANI. They flow from direct duties that Chicago Title owed to my client CalPrivate to imply contracts that we
11:45 allege, to statements that were made, and to aiding and abetting particular actions that they took that violated duties to us.

THE COURT: How -- on the last point, how is that not derivative? I mean, the aiding and abetting is that they aided
11:46 and abetted ANI and Champion-Cain, right?

MR. YODER: Yes, sir.

THE COURT: There is evidence of four employees or former employees of Chicago Title were complicit in this and received payments to keep --

11:46 MR. YODER: Probably three.

THE COURT: Three, okay.

But I don't understand on the third point how that wouldn't be derivative aiding and abetting claim. It sounds like it arises out of the main fraud.

11:46 MR. YODER: Arises out of is not the same as derivative. Again, Your Honor, derivative means -- when you look at Blacks Law Dictionary it comes from another source. So in a derivative claim, the harm is to the entity, and you have representative, whether they are beneficiaries, shareholders

11:46 suing on behalf of the entity as opposed to the entity suing directly.

THE COURT: Seems like you've narrowed the definition that both *Zacarias* and *Stanford* have used though for the relatedness of the claims. I think one of the cases used some

11:47 language about, you know, regardless of fanciful titles that we give it, it is all the same. Elder abuse was alleged, and it is because some of the investors happened to be elderly, and however you characterize this, it comes from the same nucleus of facts.

11:47 MR. YODER: And Your Honor, I agree that there is

loose language in *Zacarias* that talks about some of these other conductivities that they mention in the course of their opinion, but what I would point out is that the finding of the district court was unchallenged. The finding was that it was derivative, so it really wasn't up to the Fifth Circuit to challenge that finding in their discussions, so, one, it really was dicta.

11:47

But beyond that it really changes the meaning of derivative, Your Honor, which I think has a well-established meaning in the law, and it makes sense because if we're not seeking the same damages, right, there is no reason why the investor claims shouldn't go forward.

11:47

And indeed, that is what the Receiver represented to Your Honor when Chicago Title was asking Your Honor to stay those state court proceedings, and the Receiver made quite clear that the state court plaintiff's claims are unique and they are not duplicative. They were not flowing through claims of ANI or the Receiver.

11:48

So, third point I would make Your Honor deals with the *res*. And in *Zacarias*, the Court found that the claims of the state court plaintiffs did threaten the *res* of the receivership estate, but there were reasons why because, number one, the Court found that the claims were derivative.

11:48

But more importantly, the Court found that there were finite resources available and that every penny that went to an

investor was going to reduce the money that would go to the Receiver. I make two points on that, Your Honor. Number one, the 9.5 million that is supposed to come to my client, that is never going to the Receiver, right?

11:49 If we agree to this settlement, it comes to us. If we don't, Receiver doesn't get to keep it. It goes back to Chicago Title, and if we're successful on appeal if this were approved, Chicago Title keeps it, and the Receiver gets nothing from it.

11:49 Our claim doesn't threaten the *res* of the Receiver. Of the 24 million that is part of this settlement from Chicago Title as Your Honor knows, 22 million is allocated to objectors, investors that are saying we don't think it is a fair settlement. It is not going to payoff directly other

11:49 creditors.

THE COURT: Are you saying that you are entitled to no portion of that if the settlement is approved? Because I think your opponents have taken a different view that you are going to get a portion of that.

11:50 MR. YODER: If we agree, but if we appeal --

THE COURT: Or if the Court approves the settlement, right?

MR. YODER: We still have the right to appeal, Your Honor.

11:50 THE COURT: Right. I understand.

MR. YODER: If we appeal -- this is the death trap, Your Honor. If we appeal -- if Your Honor approves this, go hypothetically here, and we appeal and we win. If we lose, we're stuck with it, right. If we win, then we get to go back and continue to prosecute our claims against Chicago Title. The 9.5 million goes to Chicago Title, and as I said, we have no right at all even if we win our appeal against the receivership estate, it is gone.

11:50

THE COURT: Like one of the poison pills in a will. You challenge the will, you get nothing.

11:50

MR. YODER: I've never seen -- you are right. Maybe in the will contested, it is something like that. It is exactly the same effect. It is like heads, they win; tails, I lose. It cannot possibly be that we can be stripped of our appeal rights even if we win.

11:51

The other point I would make is Chicago Title is a solvent defendant. They have already paid out $163 million. Now, you would say that is nice of them to do to get this thing resolved, give them credit. Well, there is a reason that they paid out $163 million. It is because they are a third party tortfeasor who we believe the evidence shows was an active coconspirator with a known Ponzi scheme fraudster.

11:51

And they are solvent. They have plenty of money, so it is not a finite pool here as it was in *Zacarias* where the Court was very concerned that if we allow these claims to go

11:51

forward, every penny that goes to the investors is a penny less for the Receiver. The Court was very concerned about that. Not our situation.

THE COURT: I've been concerned about that from the very beginning, as I think everybody knows that I was concerned from the beginning that the cost of the action here would reduce the recovery, any recovery that would be made, and I've taken steps to make sure that I police that very carefully, and I have to say that the Receiver has taken all of that very seriously.

And the recovery here is quite remarkable, I think, don't you, as receiverships go? I've handled a number of them, and the Receiver estimates now between somewhere between 90 and 95 percent on the dollar going back to defrauded investors, money in-money out basis.

MR. YODER: Well, two points, one is money in money out, which is not the measure of damages, true damages.

THE COURT: I understand that there are additional claims that flow from interest and attorney's fees and the like.

But I am talking about typical receivership, people get pennies on the dollar, if they get that, and most the recovery is eaten up by the cost of the Receiver litigating -- litigating to even get that amount back. This is remarkable in my experience. I am not expert on receiverships. I've handle

a number of them. I have not had one that came in with the amount of recovery that is anticipated here, never.

And I think it is a testament to the Receiver kind of heeding what I said from the beginning, which is that I didn't want a lot of ancillary litigation eating up whatever recovery was available for those that were victimized.

MR. YODER: And to be clear, we're not criticizing what has been done in the course of the receivership. Our criticism relates to this particular settlement with Chicago Title which we don't think is fair and equitable.

Let me conclude with two points. They go right to the heart of what Your Honor was just raising. There is a reason that the Receiver hasn't incurred more fees and costs. There is a reason why Chicago Title has paid out this amount of money. It is because plaintiffs like my clients actively prosecuted the claims in state court against Chicago Title with the Receiver's blessing.

The Receiver represented to this Court that it wasn't going to interfere with those state court claims. The Receiver advised the plaintiffs that we are aren't going to come in and try to take these over. The Receiver encouraged them -- we actually were cooperating with the Receiver in connection with the claims against Chicago Title.

Some of the plaintiffs -- some of the victims chose not to prosecute cases against Chicago Title. They chose that

they would rather take their 50 to 75 percent knowing they would get no more from Chicago Title but knowing they didn't have to invest anything in going after them, and they knew they might not get any more money from the receivership estate. They made that conscious decision. Fine. Might have been a good decision for them given their personal circumstances.

There is other victims that decided no, Chicago Title shouldn't get off for that, we're going to go after them, and no question that Ovation and Banc of Cal took the lead initially, but as my declaration pointed out, we were involved every step of the way.

My client has spent over two and a half million dollars, and the reason that we're here and Chicago Title is willing to do this is not the Receiver was going after them. It was because my client and others were, so when you look at the big picture --

THE COURT: I think that is a good point, and that came across in the papers too, but here's the other side of it, the other side of it is that if I disallow this settlement, then the Receiver anticipates that they are going to be on the line for indemnity claims by Chicago Title which is going to perpetuate the litigation, and it is going to drive down the recovery.

And that affects the whole. Going back to first principles, I am to look primarily at the whole, give

respectful consideration to those that object, but -- Tish, did we lose the folks that were on video? They just dropped on line. Hold on one second.

(Zoom connection temporarily dropped.)

12:02 (Off-the-record discussion.)

THE COURT: I see Ms. Rosing. Can you hear me now, Ms. Rosing?

MS. ROSING: Yes, Your Honor. Thank you.

THE COURT: Sorry. We had a glitch. As soon as we were aware of it, we stopped talking, at least about the issues before the Court, and waited for you to come back on.

So, Tish, everybody that was appearing by zoom or telephonically is on?

THE CLERK: Yes.

12:02 THE COURT: Go ahead.

MR. YODER: Let me conclude by addressing the point Your Honor raised before the disruption. It is not simply doing something for the good of the whole. It has to be fair and equitable for the whole. And, in essence, what is

12:02 happening here is that what is being proposed as part of this settlement is to take the value of CalPrivate and other objecting plaintiff's claims that they believe they have and they are willing to go to court to prove it, and they are stripping that away, and they are then using the money they

12:03 saved by not having to defend against Chicago Title to pay

these other victims who chose to take the money they took from Chicago Title without making the investment and knowing they might not get another penny from the receivership estate.

And I would submit, Your Honor, that is not fair or equitable at all. And I would also suggest that at the end of the day the real ultimate affect of approving this settlement is to let the Chicago Title off the hook from having to defend against these claims in state court by threatening if Your Honor doesn't do, this they are going to sue the Receiver, force the Receiver to spend money indemnifying it for these claims.

One, I am not sure an active tortfeasor is entitled to indemnity, but beyond that they ought not get away with that bullying. That is exactly what is happening here. They are not putting money to go to these people. Most of the money going to the objectors who are saying it is not a fair deal.

And I would submit it is not just what is good for the whole, it is what is fair and equitable. And I would submit, Your Honor, what they are proposing here isn't, and the Receiver should be sent back to the drawing board.

Thank you very much. I appreciate it.

THE COURT: Thank you very much, Mr. Yoder.

MR. GRANT: Good afternoon, Your Honor. Miles Grant for Kim Peterson, ABC Funding, Kim Funding.

Your Honor, I intentionally jumped up quickly because

I want to follow a lot of what Mr. Yoder said. First of all, this is a unique situation. There is not a single case that any of us have found, not *Zacarias*, not any similar case, that every granted a Bar Order to an entity that had essentially unlimited funds.

12:05

And every case, when you read what the cases are saying is there is limited funds and they have to protect the rest, and if you only got $10 million from a debtor and that debtor gives some of the money to the objectors, it kicks away from the estate.

12:05

If the Court doesn't mind, I just want to read two specifics quotes from *Zacarias*. This is on page 894: Exercising their jurisdiction under securities law, federal district courts can utilize a receivership where a troubled entity bedeviled by their violation will be unable to satisfy all of it's liabilities to similarly-situated investors its securities.

12:05

And then on page 883: By entering the Bar Orders, the district court recognized the reality that given the finite resources at issue in this litigation, the investors may not be able to recover.

12:06

We do not have that situation here. Chicago Title is the largest title insurance company in the world. It is a multibillion dollar company. Your Honor, it reserves $1.5 billion a year for losses. To date it has paid 163

12:06

million. That is ten percent of its loss reserve. It is proposing to pay another 24.3 million. That is one and a half percent of its loss reserve.

And just so it is clear, almost all the money that Chicago Title has paid to date has been settlement of the state court litigation, which the Receiver allowed to go on. It wasn't because of the Receiver's direct efforts, and that is in no way to criticize the Receiver, but the Receiver has intentionally not spent a lot of money in litigation because the Receiver has chosen to allow other people to do it.

If Chicago -- I want to make one point before I get to what I really want to tell Your Honor. It seems to me that the Receiver is saying we got to do this settlement because Chicago Title is going to sue us for indemnity. It can't. California Code of Civil Procedure Section 875, there shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person. That is contribution.

California Supreme Court case, *BB minor vs County of Los Angeles*, let me get the cite, 10 Cal5th 1, decided in 2020. The California Supreme Court said while a tortfeasor's liability can be reduced if there are other tortfeasors not when it is an intentional tort. They are liable for the full amount.

There is no case -- there is no California law that allows Chicago Title to get indemnity from the estate. That

ends the Receiver's concern about Chicago Title is going to sue us.

So now let's talk about fairness, because Mr. Yoder mentioned that, and that is really the heart of this. I am only going to talk about my client. Now, admittedly the Court has to make a decision for what is best for all of the creditors. My client signed personal guarantees of $100 million. Every person he signed a guarantee from may get back 100 percent of their money in-money out loss.

12:08 There is still $50 million owed in interest and legal fees. Fifty. If this Court grants the Bar Order, my client is personally on the hook for $50 million with no recourse because the only recourse would be Chicago Title. My client is bankrupt, so you weigh the equity.

12:09 Chicago Title, a giant company, whose offering to pay another $24 million, but you don't given the Bar Order, so what. You put my client in bankruptcy. The Receiver already got my -- has my client's financial statement. They know my client can't come close to satisfying $50 million of debt.

12:09 On top of that, Your Honor, before the stay we were three months away from going to trial against Chicago Title. We filed this lawsuit. I don't know if it was 2019 or 2020. My client has spent $4 million in legal fees. Months away my client expects to get a multi-hundred million dollar judgment against Chicago Title with punitive damages.

If this Court denies the Bar Order and allows all of the objectors to proceed against Chicago Title and everybody wins and Chicago Title loses, Chicago Title might have judgments against them for 3- or $400 million. And guess what, they can afford every penny of it. Is it a lot of money? Sure.

Is it going to affect what the Receiver recovers? Absolutely not. The Receiver is going to get the same amount of money. The Receiver can proceed against Chicago Title or not. Why does it matter? The Receiver could sit on the sidelines, like she's been for the most of the case, dismiss the case against Chicago Title, not get the rest of the $24.3 million settlement, distribute the money she now has to everybody, and let the objectors pursue their case.

The Receiver doesn't get hurt. No one gets hurt. The only person who gets hurt is Chicago Title. There is no benefit to the other creditors by entering into this settlement. It is not going to give them any more money. Based on the distribution of how this money is going, almost all of it is going to the objectors. The other creditors aren't getting more money. And if they were getting more money, we're talking about pennies on the dollar.

So when you balance the equity, when you look at all these factors, it just screams. I mean, in this particular case, Chicago Title is not an innocent third party that, oops,

we made a little mistake, we have liability. This Ponzi scheme could not have existed without Chicago Title.

From day one Chicago Title allowed this Ponzi scheme to start, exist, and prosper for seven years. Every time anyone was suspicious, they spoke to Della or Betty, the escrow officers at Chicago Title, and those two women repeated over and over again, no problem, we have the money, they are escrowed.

Chicago Title, the largest title insurance company in the world, you are a potential investor, Your Honor, you are speaking to an escrow officer and you are being told there is 50 million in escrow, $100 million in escrow, why should you be concerned? Why should you be further suspicious?

Chicago Title made this happen, and the Chicago Title has the ability to pay everybody. But we're going to let them off for $24 million?

Your Honor, I don't want to get into settlement. I know it is not appropriate, but you are here trying to do equity, and this Court knows because this Court has talked to Judge Goddard extensively, I am sure, about the numerous settlement negotiations that have been going on by all the parties.

This Court knows that for a few more dollars there would be a global settlement and there would be nobody objecting, so you balance the equities. Do you make Chicago

Title pay a little bit more to get the global settlement they want, or do you bankrupt Kim Peterson and you not allow all the other objectors to get the money they are owed?

THE COURT: Anything else, Mr. Grant?

12:13 MR. GRANT: No, Your Honor.

THE COURT: Thank you.

MR. MURPHY: Good afternoon, Your Honor. Thank you for the opportunity. Paul Murphy on behalf of Ovation.

I am here, Your Honor, because I want to amplify some 12:13 of the things that Mr. Yoder said, but in the context of the uniqueness elevation, we're in a different position than every other party in the case. We're here focusing on one simple aspect of the proposed settlements. That is the Nossaman Bar Order.

12:13 And I start with the proposition we put in our papers. He who seeks equity must do equity. And if you just look at how Nossaman has acted both in the underlying claims and even in this Court, they are not entitled to equity under the circumstances. And I don't want to belabor what we put in the 12:14 complaint, but the complaint at paragraphs 22 to 62 lays out not based on information and belief, not based on what we think happened, what we know happened in their own words, in their own documents, in their own sworn testimony, what they did.

And let me just give you one example. They downplay 12:14 completely in their joinder what they did to Ovation, but let

me just give you one example, and it is the first example. In July of 2017 Nossaman's attorney, Mr. Costales, tells us as part of our due diligence, this is our gatekeeper focus, should we invest? He says -- and we have the words because they are memorialized -- he says I don't see how you can lose your principal in this.

12:15

And we're being told at the same time that this has been being fully vetted by him in emails that are copied to him, and at deposition says, never occurred to me to correct those. And why that is particularly pernicious in July of 2017? Because two months earlier, two months, he does the only due diligence he ever did. What does he do? His client Mr. Peterson sends him a list of 23 escrows with licenses and, look at these, these look weird to me.

12:15

12:15

What does he do? He investigates, and of those 23 escrows, 14 are not supportable under the program. His conclusion, his own conclusion based on his review of the ABC website, the licenses were either cancelled, revoked, nonexistent. That is more than 50 percent.

12:15

Two months later as part of our due diligence he says, this is fine. Imagine what would have happened if he said, well, I never vetted the program, and I did look at 23 of the licenses and 14 are not supported and are bizarre, some of them don't even exist.

12:16

That is what happens in due diligence when you rely on

the authenticity and accuracy of people who are presented to you as knowledgeable of the program, and we're entitled to rely on that. That is the first time. That is nowhere, nowhere in Nossaman's papers. They don't even identify that subject. And
12:16 they, of course, know it happened. It is in their own documents. It is in their own testimony.

If you walk through 2018, they do identify 2018 they say, well, there is a memo, not reasonable to rely on it. The memo's second question is there any risk in this program?
12:16 Functional answer, no. How can that not be a material thing? Mr. Costales specifically said, Ovation, you can rely on this, and you can take it to your banks to borrow money to rely on. That is what he told us specifically, and it --

THE COURT: How were these claims not derivative of
12:17 the claims that have been brought by the Receiver though? Seems to me, and you characterize it as well, it is negligence, it is malpractice on the lawyer's part, but it all arises out of the same misrepresentations, right, misrepresentations that this is going into escrow; no one can touch it; your funds are
12:17 protected; you have a lawyer that looks at it.

You are not suggesting that he was complicit in this. You are just suggesting that he didn't perform up to par in either investigating or giving the right advice, but it seems to me all of that flows from the initial fraud.

12:17 MR. GRANT: Well, at some level everything, no matter

how high you go up, will flow from the fraud. If there is no program, there is no investment violation. The question is -- remember, we're talking about the Ovation entity that is the manager. These funds are not funds that we ever invested. This is damages independent of our entire program, redemptions -- $280 million of redemption.

So it -- it depends upon the definition of how far up the food chain you want to go. I can't tell you there is no relation. Of course there is a relation. That is why I am standing here. I don't think it is the relation that matters under the law.

And going back what is it that they did 2019, again, there is an SEC investigation. Mr. Costales is aware of it. He is aware of the fact of what they are focusing on, these licenses, and he tells us it is all fine. And they fault us, by the way, for relying on their own statements, which is the Animal House defense, right? It is the old gig where the pledge let's the active use his car, his brother's car and they destroy it. I think he says, you destroyed my brother's car, in a colorful language I can't totally say here, he said, you messed up, you trusted us. That is their defense in this case.

That is the equities that we're talking about on this narrow portion on this Bar Order that relates to Nossaman. That in the context that they didn't tell the Receiver that we existed -- that they had an existing tolling agreement with us

that they tried to settle the case. They didn't even tell you, Your Honor. That is the equities. And they come here and say, Your Honor, do equity, but they have to have done equity.

And let's talk a little bit about when you have two and a half million dollars of attorney's fees. Ovation has 12 and a half million dollars of attorneys fees. That was the payoff. Receiver says, Ovation, Banc of California, took the lead role for all plaintiffs in the state court actions, including preparing what became the model complaint for the plaintiffs, propounding numerous discovery requests, and taking numerous depositions of CTC witnesses.

Every investor in this case was on our back and everybody else who invested money. 12 and a half million dollars in our circumstance. That is a huge amount of money. When we say, okay, Nossaman, now is the time, they say, oh, sorry, we have a Bar Order. We want to get out of jail free card. That is what they are asking for, Your Honor.

They have never demonstrated an ounce, an ounce, of equity in this case. He who seeks equity must do it. They haven't done it. We urge you to deny that Bar Order.

THE COURT: Thank you.

MR. ARMSTRONG: James Armstrong for the Wakefield parties, and good afternoon, Your Honor, because it is indeed now afternoon.

THE COURT: Good afternoon, again, Mr. Armstrong.

MR. ARMSTRONG: I want to first, if I can, maybe address some of the concerns you've identified that specifically relate to my clients, and that I just want to share a few things that do make my clients stand apart. I do think the plaintiffs in the state court action from day one have done a good job of trying to be efficient and work together and dovetail as much of what they allege and what they've sought as far as relief together and has done that.

But there are some differences, and I think given your line of inquiry today, I think a couple of those points really might make a difference for you, and I think they are touched on, but I do need to expound upon them.

I am going to clarify one, perhaps, factual misunderstanding, and I know the Court is very pleased with the anticipated payout to aggrieved victims. I do want to be clear that one of my clients, 2Budz Holding, LLC will go home with two percent of the funds it sent directly to Chicago Title.

There is a reason for that, and you'll hear about that more a little bit later, but two percent. So I want to be clear, and I hope you're as disappointed with the two percent figure as you are potentially pleased with 90 percent or more.

Two, you mentioned that you encouraged the Receiver to avoid a lot of ancillary litigation. There are currently, not counting the June 17, 2022, filing against my client, ten active ancillary proceedings filed by the Receiver. The most

oldest -- I guess the oldest of those is ten months old. We're not done. They are not done. They are not started. Some of them had their 26F meetings, many haven't.

THE COURT: Clawback actions?

12:23 MR. ARMSTRONG: Yeah. And I understand that they think this is a magic wave your wand, but they are there, and they have been incurring fees and expenses with those all along.

I do want to speak very briefly, too, to your concern 12:23 about if you don't approve this, then the Receiver has suggested they are suffering indemnity claims, and prior counsel correctly referenced Section 875 which says, no, that is not possible. I can't recall, so cut me off if he did, but the case I relied upon for that is *Martinez vs de los Rios*. It 12:23 is a 1960 case, California Court of Appeals. It is 187 Cal App2nd 28, and the relevant language is going to be at pages 33 and 34.

And to summarize, the Court explains that that provision of the code that allows contribution exists for the 12:24 benefit of negligent tortfeasors not intentional wrongdoers.

And I think I'll leave that point there because I want to make sure that I let you know at the end I am going to address your concern that you think not just my client's claims but everybody who is on the plaintiff's side claims are all 12:24 derivative, but I am going to ask you to let me get that at the

end, if I can.

I think when Your Honor is looking at the proposal, I think you ought to be troubled. I think you ought to be skeptical. I think you ought to wonder why it is coming when it is coming two-plus years into very ripe, very active litigation, why Chicago Title after that same time period is suddenly motivated to do more, offer more, and cut a deal, and I don't think that there is a satisfactory answer to that.

I think the idea is because the litigation is ripening, that it is getting worse, not better for Chicago Title, and they would do anything and everything they could possibly do to avoid the same result when they tried the similar issue about a dozen years ago.

That is what is here. There is nothing wrong. It is capitalism. It is dollars and cents, but as I promised you, you should be concerned. One reason that you should be concerned in particular does have to relate to a unique circumstance involving 2Budz.

One thing they want to do which drives my client's claim down to two percent recovery is they want you to determine that when ANI purchased a membership interest in 2Budz Holding, LLC that those funds should be offset against the 2Budz claim, and in doing so they cited a trio of cases to you from Ohio and the Middle District of Florida bankruptcy court.

You read my brief, so you know that is zero authority for Your Honor to do anything as far as an offset, and they've completely abandoned those line of cases and that line of reasoning. It is gone.

12:26 I think that should be concerning to you. You should be concerned why they would have based in its $750,000 decision, which is 92 percent of the 2Budz claim, on authority that apparently just wasn't even good authority to begin with. That should be concerning.

12:27 I will tell you it is concerning for 2Budz because that is -- we're not big company, right, we're not banks, but it is -- it is a massive amount of money for us. We wouldn't be here, and I wouldn't be getting paid to be here if it weren't a big issue.

12:27 So my concern is not only is the law is not good on that offset. I understand you want to accomplish and you are obligated I think to accomplish what is best for everyone, but I don't want to be that proverbial baby. This is a big issue for my people. This is a really, really large sum.

12:27 And equally problematic without the basis of law to support the imposition of an unjust offset is the facts aren't even there. We provided Your Honor, you've read it. It is docket 840-1 at paragraph 18 to 19, in which the manager of 2Budz explains, we hear your theory, you think this was a quid

12:28 pro quo, and ANI wanted somehow more money, we'll get to that

in a minute, by the way, and therefore, sure, we'll do that if you do this, more money in if you buy a piece of us.

The manager Mr. Wakefield testified that was not a consideration at any time. And remember at the date that the money that ANI sent to purchase a membership interest in 2Budz, the other Wakefield entities were already pregnant with $5.125 million that that -- this $750,000, it is a big number, but in relation to the water already under the bridge, this was not a motivating factor.

And, Your Honor, the testimony is uncontradicted. It is uncontroverted. It was not challenged. It was not objected to. And the Receiver did not provide Your Honor despite two-plus years any documents from ANI, any emails, any notes, any statements from a Ms. Champion-Cain, any statements from anybody at any of the receivership entities that this membership interest was some quid pro quo and some circle of cash.

They had the opportunity. I am going to ask you to be concerned on a -- for us a big number, $750,000, why they want you to wipe 92 percent of at least my client's claim -- I think that goes into the whole picture -- why that is justified when there is no law and no facts.

I think it also encourages Your Honor to look at everybody else. If they didn't do the math on the $750,000 claim, if they didn't do the research to give you a comfortable

feeling to making a ruling, and if they didn't provide the facts to support the outcome they desire and they had to file on June 17th after the claims -- what I call the claims handling motions are filed, what they literally say in their papers is just sort of belt and suspenders in case it blows up, we'll come after you, that should be concerning, and you should apply the same level of scrutiny to the other issues raised by the other plaintiffs.

12:30 THE COURT: What was the percentage of the 750 that was strictly speaking invested?

MR. ARMSTRONG: So I am going to back into that if I may, Your Honor.

THE COURT: Okay.

MR. ARMSTRONG: So, one, you have anticipated my next 12:30 question. We see ourselves different than investors. A total of 1.5 million came in from 2Budz. That is the entity we're talking about. That money came in May 12th, 2017.

There were a number of payments. They want to take those away from us. We're not fighting over that. The net 12:31 claim is $815,000 and change. The 750 they want to wipe out is against the 816. Is that your question?

THE COURT: Yes.

MR. ARMSTRONG: That is in our papers. We walk you through that. So that is how we get to the 92 percent. I 12:31 think it might be 91.9, but if I may, like the gas station, I

like to round up on that one.

Now, here's -- here are my final thoughts, Your Honor, my folks, my three -- and I say "folks" because these are people behind these numbers, again not big companies. We didn't give any money to Kim Peterson or any Peterson entity. We didn't send any money to ANI or any ANI entity. We didn't send money to Gina. We're not a lender. We don't think we're a lender.

12:31

One reason I think you saw in the brief a lot of beating up on CalPrivate and what the Receiver in Chicago Title didn't like about their arguments was you are a lender and you have this, and you touched on that. I understand that.

12:32

The reason you don't have similar statements cited is because every time Chicago Title took a deposition of one of my client's representatives, they said this wasn't a loan. We thought we were parking money. We thought we were helping someone who didn't have liquidity that we're blessed to have, and sure, we get paid along the way.

12:32

They have all testified under oath they thought they were parking the money at the escrow company, similar when they bought homes -- their homes and it would just be there, and sure they get a little vig, right? That is capitalism.

12:32

But that is why when we filed our first complaint on behalf of each one of these three entities 2Budz, Wakefield Capital, Wakefield Investments, we didn't mention ANI. We

12:33

didn't mention Champion-Cain. They didn't like that, meaning Chicago Title. They were up in arms before Judge Medel on that.

I don't need to sue them, Judge. That is not my case. My case are direct claims against ANI. And I am not going to walk through all of them, I assure you, but here's some important claims why I don't need them, why we're not impacting the *res*, right, and why they are not derivative. And now I am keeping my promise. I am coming back to you and told you I would talk about this and I am about to.

We were the only plaintiff to make an implied contract claim, and we're survived for demurs than I care to remember on that. What do I need for that? I did something for you, you did something for me. It is not the haircut we got in first year of contracts but much, much bigger records. I have no reference to ANI on that. Judge.

They owe an independent obligation. They paid, meaning Chicago Title, paid themselves for the luxury of having my client's money sit with them where we thought it was safe. I don't need somebody for that. I don't need ANI.

Breach of fiduciary duty. We have convinced a state court judge, more than one at this point, that we're allowed to go forward under breach of fiduciary claim. Directly against -- we said when someone -- when folks who are just people, give money to a big, massive organization that maybe

some juror out there, maybe some bunch of them once they've been impaneled could reach the conclusion, you know, you owe these people something, you took it on, right, you assumed a duty, and we survived on that, and we get to go to a jury on
12:34 that, and we would like to, but I don't need ANI for that.

I am not saying ANI did anything wrong. I am saying I gave the money to you and you messed up because you took a lot of responsibility because this is what you do for a living.

I am not as excited about negligence, but it is there,
12:35 right? They did something bad. They had a duty, and they breached it. I don't need ANI for that, Judge. I don't have to derive my claims from what the Receiver's claims may be.

When the comes to money had and received in conversion, I am getting a little more excited, right? I gave
12:35 you money. The judges are being consistent across the street. Those are good claims. The reason I am a little more excited, conversions and intentional tort, as Your Honor knows that gets me squarely in 875.

I have the ability to get in front of a jury, tell
12:35 them our simple story. We gave money to a big, bad company, and we never saw it again, help us out here, do the right thing, protect us. And I don't have to mention ANI. I don't have to talk about them.

And, Your Honor, that means they don't -- the risk of
12:36 -- of I may -- the risk of indemnity claims goes away. If I

win on conversion, they are done. 875 kicks in. They are an intentional wrongdoer. What was your question, Your Honor?

THE COURT: That is it. You are relying on the same provisions as the others are, that there is no indemnity claim that is valid under 875. That is the two cases cited.

MR. ARMSTRONG: Correct, that is correct.

So really that is it. We're a little different, right? I don't think so different that we don't still have a community of interest, not so different that I don't think that the other parties should receive similar scrutiny. And you ought to ask yourself if you would what other concerns that you have when you go through that.

I am never going to tell a district court judge, probably any judge, they can't do, of course, what they think is right, but I am going to ask you, Your Honor, with that incredible power you have whether you should do it. Does it get people like me, my clients who put their retirement, wisely or not. We can talk about if they look bad, if they are too greedy, doesn't matter to me. They did it.

But whether, you know, those folks who gave the money directly to Chicago Title with no intervening person like Mr. Peterson or a banker, none of those things, we gave the money right away. We've been consistent. Whether you should do that or whether we should maybe encourage some confidence in this incredible legal system we have and allow them to have

their day.

And we would ask you to give them their the day, Your Honor. We would ask you to reject the settlement. We would ask you -- it doesn't mean they can't come back with prejudice. Let them do their homework and come back. I don't want to be back here again, but I understand that. I think it goes away. We would ask you to make it go away. We definitely ask that, definitely want it, at least as to 2Budz. We need the offset out of here.

12:37 They told me this is all the due process I get. You've been incredibly kind and patient with your time and listening and how attentive you are, but I think if we're going to apply the standard, that 750 goes away, I don't know the answer what that does to the rest of the settlement or how they are treating the rest of the claims, but I don't think that it bodes well.

THE COURT: Thank you, Mr. Armstrong.

MR. ARMSTRONG: Thank you, Judge.

THE COURT: Anyone else on behalf of the objectors?

12:38 Mr. Fates, you could start with --

MR. FATES: Yes.

THE COURT: -- the driving engine on this I think from Receiver's point of view is that you want to end the litigation. You don't want to see further expenditures going toward defending an indemnity action. All of the objectors

have said what are they worrying about? There is the civil code section that is right on point that forecloses this, and there is case authority from both the California Supreme Court and Intermediate Appellate Court in California that forecloses this as well. I am told that the authority goes all the way back to the early '60s.

Can you speak to that why you fear you wouldn't succeed on summary judgment or some other form of motion to say we're out of here, we're out of here?

MR. FATES: You know, oral argument 101 is you always want to address the Court's question directly, but in this instance I may not be the best person to do that because this is an indemnity claim being asserted against the receivership estate.

THE COURT: Right.

MR. FATES: I am not here and probably wouldn't be smart for me to be here to tell that is a good claim, you know.

THE COURT: But isn't that -- I mean, from your point of view, that is one of the great incentives that the Court should rely on is that it will end the litigation, it will preserve the rest for the defrauded investors or at least a big portion of it, bring some finality to this, but if that can happen with law and motion, why would you be worried about it?

It doesn't seem like it is a huge additional expenditure at this point and maybe one that ought to be

litigated if the objectors are correct.

MR. FATES: I think there are a lot of material and economic benefits of this deal, certainly that there is an indemnity claim that this Court has granted Chicago Title relief from the litigation stay to assert in state court that has to be factored in to the calculus of this settlement --

THE COURT: Right.

MR. FATES: -- and what is in the best interest of the whole here.

12:40 THE COURT: But -- I understand what I've done. I withheld the authority of Chicago Title for awhile, but now I am being told the claim is not worth very much, Judge, let us get it in front of state court judge, and they'll foreclose it and not allow this indemnity claim to be made by a joint tortfeasor exacted intentionally. That is what I am being told.

MR. FATES: And, again, it puts us in a bit of an awkward position to argue to you that it is a good indemnity claim. We've disputed that indemnity claim. If you recall, we're opposed the position to have them allowed to be assert an indemnity claim, and we're opposed their claim in the receivership that relates to that indemnity claim, so it would be contradictory --

THE COURT: But the right place to decide it is in state court, right?

MR. FATES: I think the right place to decide it is this Court. I think only this Court can decide that there is a valid indemnity claim that would allow Chicago Title to share in distributions of the *res* of the estate that is before this Court.

12:41

So although they have been granted permission to assert that claim in state court with Judge Medel, I think ultimately what priority that claim has, what validity that claim has, and what distributions get made on account of that claim would have to come back to this Court.

12:41

So I don't think that Judge Medel can decide what relative priority or treatment claims in the receivership are going to receive. That is exclusively in this Court's jurisdiction.

THE COURT: Clarify something for me. He's just allowed the claim to go forward, or has there been law and motion where he's ruled on it and said that the receivership might owe indemnity to Chicago Title? Has he ruled on that?

12:42

MR. FATES: No. There has been no ruling on that. In fact, the claim is yet to be asserted because this settlement intervened, and the Receiver's case against Chicago Title has been stayed temporarily.

12:42

THE COURT: Mr. Strauss.

MR. STRAUSS: Your Honor, I apologize to Mr. Fates and the Court for standing on that point. I think there's been

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misinformation provided to Your Honor, so I would like to speak it.

THE COURT: On this issue.

MR. STRAUSS: This issue specifically, the contribution and indemnity. Mr. Peterson demurred to the cross-complaint that Chicago Title filed making that express argument that an intentional tortfeasor can't recover in contribution and indemnity. We opposed that demur. We cited the case of *Baird vs Jones*.

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Baird vs Jones stands for the proposition that an intentional tortfeasor can recover against another intentional tortfeasor. Clearly Ms. Cain, who has pled, a convicted felon, is an intentional tortfeasor. Judge Medel denied the demur on that ground among others. He has order that I would be happy to provide to the Court. So I don't think that it has been correctly portrayed to Your Honor. That issue was litigated in the law and motion, and *Baird vs Jones* is clear.

12:43

THE COURT: *Baird* was a California Supreme Court case? I remember it was in the papers. I can't remember. Was it Intermediate Appellate Court or the California Supreme Court?

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MR. STRAUSS: *Baird vs Jones* is an appellate court, but it cites to *American Motorcycle*, which is the California Supreme Court case --

THE COURT: Okay.

MR. STRAUSS: -- where the comparative fault

12:43

principles were established.

THE COURT: You say the issue really turns on whether we are dealing with two intentional tortfeasors, and one, you believe under California law, can recover, can seek indemnity from another intentional tortfeasor.

MR. STRAUSS: Absolutely. And, Your Honor, that of course, assumes a big step that Chicago Title would ever be found to be an intentional tortfeasor which I'll speak to when I get my turn.

THE COURT: Okay.

MR. FATES: Well, what I would like to do is to address some of the other comments that were made here. We're been here an hour, and I'll try to focus my comments on things that are particularly inaccurate that were stated, but if the Court has concerns you would like me to address. Of course, I would be happy to do that as well. I want to be sensitive of the Court's time today and the fact that we have a criminal restitution hearing coming up after this as well.

So one of the things Mr. Yoder focused on was the *Zacarias* case and the definition of what is a derivative claim. This is a key point, and I think you correctly observed that he was trying to narrow the definition of what is a derivative claim substantially. Blacks Law Dictionary does not guide what is a derivative claim here. The Fifth Circuit in *Zacarias* and the facts in *Zacarias* are remarkably similar to the facts here.

But the Fifth Circuit in *Zacarias* specifically talked about what is a derivative claim, and it went back to what losses are being asserted, what are the facts and circumstances that give rise to these claims, and do they overlap or match with claims that the Receiver is asserting in the Receiver's action.

12:45

And that is exactly what we have here, because the same losses that these objecting investors have asserted in their claims against ANI, against the receivership estate, those are the losses, the very same losses that the Receiver must recover from Chicago Title through her action. So we're talking about the same losses.

12:46

Now, they have tried to say, well, the Receiver is changing her story because before she said this was all different and now she is saying it is the same. That is not at all what happened. The distinction we drew for Your Honor in prior motions to -- for authority to bring our case against Chicago Title was that the theories of recovery, the claims were distinct, right, whether you could assert a breach of fiduciary duty claim, whether you could reach a breach of contract claim, the theories that the Receiver would base her claims on in state court, those were distinct.

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12:46

But the losses, we've always acknowledged that those losses substantially overlap with the losses that the investors are asserting in Chicago Title, so that is what brings this

12:46

case squarely within the *Zacarias* decision where the Fifth Circuit looked at this and said these have to be derivative claims and the Receiver has to have the ability to settle these claims with a Bar Order.

12:47 Otherwise, essentially third parties have no incentive to settle with a Receiver in these circumstances, right. The Receiver would never be able to settle the claims. Litigation could go on for years, and essentially the entire distribution process -- the receivership distribution process that we're on 12:47 the brink of being able to engage in and get money back to these victims, that would be held up for years because these same objecting investors have claims in that process, right.

So if there is no settlement and the litigation goes on for years, it is not just that the other investors, you 12:47 know, get affected by this. We don't even know what their claims are going to be in the receivership because they have ongoing litigation against a third party that affects their claims and that affects the distribution to everyone.

Mr. Grant tried to say that this settlement could 12:48 simply be rejected and it would have no adverse affect on the receivership estate. That is completely wrong because the money that comes to the receivership through the settlement and all of it comes to the receivership first, then a portion of it gets distributed to the objecting investors. It doesn't go 12:48 straight to the investors as Mr. Yoder tried to say. It comes

to the Receiver first, and the Receiver gets to eliminate their claims against the receivership through the distribution to them.

But the larger point is that if you don't have this $24.3 million settlement, then the Receiver is not able to eliminate through the 100 percent -- 100 percent MIMO distribution to those objecting investors, we can't eliminate those claims. That directly affects what everybody else gets.

12:48

You only get to a 90 percent to 95 percent distribution because you have a settlement that eliminates their claims through the 100 percent MIMO net loss distribution to them, and then everybody else with the remaining funds comes up to 90 to 95 percent.

12:49

THE COURT: You've taken issue with CalPrivate's claim that 9.5 million is totally outside the purview of the Receiver. Can you explain that? You say it is not. It is part of, you know, what belongs to the *res* --

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MR. FATES: Yes.

THE COURT: -- and should be distributed equitably among all, not separate.

12:49

MR. FATES: Well --

THE COURT: It is not separate and apart. That is your position, right?

MR. FATES: If what you mean is the security interest that they've asserted, we don't believe that they have a valid

12:49

security interest. As you pointed out, their security instruments are all predicated on fraud. Gina Champion-Cain pulled them in just the way she pulled everybody else in, signed a bunch of fraudulent documents this was a UCC that they
12:50 believed was a valid UCC. We don't believe that that is valid.

And as a second point on the security interest, even if CalPrivate Bank had a security interest, it couldn't attach to any money, right, because all of the money was -- that they are trying to attach their lien to was held at Chicago Title.
12:50 It wasn't being held by ANI, right, and that is an important point under the UCC. A UCC security interest only attaches to the assets of the debtor that are in the debtor's possession.

This was money held at Chicago Title in a bank account at City National Bank. There is no way that they get -- even
12:51 if they had the securities, there is no way that they get that to attach to $11.3 million being held at Chicago Title.

So they don't have a security interest. They don't have priority over any other investor. Their claim for MIMO net loss is 9.5 million. That is an unsecured investor claim
12:51 that should be treated the same as all the others.

Now, under the settlement agreement, they get 100 percent of that, of that MIMO net loss. 9.5 comes to the receivership, and the Receiver is then able to eliminate that claim through the distribution to CalPrivate Bank, just the
12:51 same it works with the other objecting investors.

I do want to address also this point about the poison pill. The objection to how it works if CalPrivate or one of the other plaintiffs with were to appeal this Court's order, let's say, again hypothetically, the Court approves this settlement, they appeal that order, okay.

When that happens, what the settlement agreement provides for is that the money that comes to the receivership and then would be distributed to them gets held by the Receiver in reserve, right, because there is a pending appeal. We don't know how that appeal comes out. We hold that money in reserve.

If they are unsuccessful in that appeal, i.e., the Bar Order is withheld and they are enjoined from continuing to pursue claims against Chicago Title, they get the 9.5. It gets distributed to them. If they are successful in the appeal and, therefore, they have the right to then continue their case against Chicago Title, then that is their remedy, right.

They have turned down a settlement that gets them 100 percent of their MIMO net loss, and they have appealed an order that approved that settlement. For them to then say, well, not only do we get to pursue our case against Chicago Title, we get to reject your settlement and hold up the entire distribution process. That is not right, and so --

THE COURT: If they are successful on appeal, Mr. Fates, what happens to the 9.5 million? Does it go back to Chicago Title?

MR. FATES: It does because Chicago Title is faced with defending that claim again, so that makes perfect sense.

THE COURT: Right, right.

MR. FATES: So another one of the points, and this was raised by Mr. Grant in connection with the Kim Peterson aspect of the objections here is that his client will be faced with $50 million of liability and will be bankrupt and all of this.

The Receiver has a clawback case against Mr. Peterson. That case has actually been expanded to assert additional claims. There has been extensive discussions, settlement discusses through Judge Goddard on this, and I am sure you are familiar with this, but --

THE COURT: Actually, I am not. I am not supposed to be.

MR. FATES: I am happy to share it with you. We have been through --

THE COURT: I don't know that you should. I am making dispositive rulings here, and it is supposed to be completely independent of whatever was said during, you know, confidential settlement negotiations.

So everyone is clear, she has not shared with me at all the substance of those negotiations or numbers or anything like that. I am not supposed to know so it doesn't affect any decision that I make on any dispositive motions.

MR. FATES: Understood. And to be clear, I am not

going to share substance. I will just relay that there have been settlement negotiations.

THE COURT: I am aware of ongoing settlement discussions, both private and mediation. I know Judge Goddard has convened the parties a number of times and directed things. I just don't know the substance of the discussions.

MR. FATES: No, and I understand. And the point really there is that there is a path that has been presented in which Mr. Peterson can settle the case, the clawback case. There would be a Bar Order in his favor similar to the Bar Order presented here, and that that would be a complete and final resolution of the litigation against him.

THE COURT: All right. I have to deal with what is in front of me though, right?

MR. FATES: True, true. But for him to come here and say this is unfair, Your Honor, because I am facing all this liability, that is disingenuous.

I also would like to address the 2Budz issue, the $750,000. So what Mr. Armstrong said up here is that his client will get a two percent recovery on their claim. I have to take issue with that because what he is not acknowledging is that his client did receive $750,000 from ANI.

That is the whole point here is that his client got that money, right, and so he is sort of ignoring that that transaction actually took place and his client received those

funds, and those funds were commingled investor funds from the Ponzi scheme, okay, so he is acting as though they didn't get the money, they are getting a two percent distribution on their -- that is not true, of course.

12:56 THE COURT: Clarify this for me, because I thought Mr. Armstrong said, look, we acknowledge we got some back, that is not at issue here, but here's what we didn't get back and here's what we get two percent recovery on. I thought that was the 750. I thought they got 800,000, some amount like that back, and they are not making a claim on that.

MR. FATES: So I'll try to clarify. For -- their MIMO net loss, money in-money out net loss --

THE COURT: Right.

MR. FATES: -- in our view is $79,000, and that takes into account the fact that they received $750,000. You know, that is at issue here.

THE COURT: Yeah.

MR. FATES: Their view is that the claim is $816,000 because they ignore the fact that they received $750,000. They treat that as though it did not happen or something else.

THE COURT: And there is no clawback action with respect to that amount?

MR. FATES: There is a clawback action with respect to the $750,000 because Mr. Armstrong's clients refused to sign a tolling agreement. We didn't want the fraudulent transfer

claim to evaporate, and so we had to file it, but this is the appropriate forum in the receivership case to determine whether they have a claim and what the amount of that claim is.

Now, if the Court decides against us on the claim, yes, we'll pursue the fraudulent transfer action. In our view that is needless litigation because the Court has an opportunity and certainly has the discretion in equity to offset these amounts.

They clearly changed hands. They don't deny that they got the money, okay. They are just trying to say, well, it was something else. Let's not look at that money that we got. Let's treat it as something else and, let's say we have an $816,000 claim instead of a $750,000 claim.

Under the settlement, proposed settlement, they get 100 percent of the $79,000 claim which factoring in the $750,000 that they received gets them to 100 percent as with the other objecting investors. That is how we get there with the math.

And the Court absolutely has discretion to equitably set off these two interchanging, interconnected -- we've been through this in the papers. We don't need a declaration from Gina Champion-Cain to establish that this is clearly related.

I mean, the whole point -- a Ponzi scheme doesn't operate unless you continue to draw in new money, right, so obviously Gina Champion-Cain had to do that to keep this whole

scheme going, so the $2 million was one of many instances in which she, you know, conned somebody to bring more money in.

And in this instance the con was: I'll put $750,000 into your investment fund and you'll put $2 million of new money back into the Ponzi scheme, and on the net I get 100 -- a million two five, right; that is great; I got new money that I can do what I want with or pay people off or run my restaurants or whatever she was doing with that it. That is the con here.

It is not something separate from the Ponzi scheme. It is part of the Ponzi scheme. That is why on an equitable basis, the Court certainly has the discretion to offset these, and it would make no sense to do anything else.

So those are the comments I have. I am happy to address any questions that the Court may have.

THE COURT: Look, I am not afraid to make a decision, and I am not hesitant to make a decision here, but there is one other thing I want to ask you about, without getting into any discussions, again, about settlement, but Mr. Grant in his remarks alluded that there had been discussions to try to get rid of the objectors, that in his judgment, you know, there wasn't a lot separating the parties on that.

Do you agree with that assessment? Again, not getting into the substance, it was this idea that maybe if we gave it the old college try again we might get rid of the objectors or we might reach something or both sides compromise, might be

aided by the questions that I asked today that gives a basis for consideration I think to everyone. But what is your view on that?

MR. FATES: Very hard for me to say. I don't get the sense that, you know, a small amount of additional money is going to eliminate all of the objections.

(Cellphone disruption.)

THE COURT: I like your choice of music, Mr. Armstrong.

MR. ARMSTRONG: It is not mine. It is my child's. I took my child's phone before school, Your Honor.

THE COURT: Kind of cool.

MR. ARMSTRONG: Give me a second to turn it off.

THE COURT: Did you -- was the Receiver a participant in those discussions?

MR. FATES: We've been a participant in two formal mediations with Judge Dembin.

THE COURT: Involving Peterson, Chicago Title?

MR. FATES: Involving Mr. Peterson, Chicago Title, the objecting investors.

THE COURT: Okay. But you don't have a sense on that whether -- you know, I don't want to forestall this. Like I said, I am not afraid to make a decision in this case, but on the other hand sometimes it is helpful to, I think, see what -- make an assessment of the tea leaves, and if you are that

close.

Mr. Grant.

MR. GRANT: Your Honor, I apologize. Is it okay if I speak from here?

01:02 THE COURT: Sure, sure. Speak into the mic if you would.

MR. GRANT: I just want to respond.

THE COURT: Speak into the mic.

MR. GRANT: Your Honor, we sent a letter to Judge

01:02 Goddard, it was a settlement letter, laying out exactly how this case could settle with all the objectors on board, so --

THE COURT: I got the impression that you thought it was reasonable and close, though, that was something that wasn't just way out there, didn't deal with the amounts at

01:02 issue now.

MR. GRANT: You know, reasonable and close depends upon who you talk to, but we're not talking about in relation to what Chicago Title has already paid. We're not talking about much more extra money. We are really not.

01:03 THE COURT: All right. Maybe that is not a fair question to put to you, but --

MR. FATES: It is very difficult to predict what would happen if this settlement is not approved where do we go from here.

01:03 THE COURT: Okay. Mr. Fates, thank you. I appreciate

your comments.

MR. FATES: Thank you.

THE COURT: Mr. Strauss.

MR. STRAUSS: Thank you, Your Honor. I thought by -- Steve Strauss for Chicago Title.

I thought that by the way that you scheduled this that it was going to be very constrained, but now that there's been more than an hour of argument from the objectors and Receiver I would appreciate the Court's indulgence to give more fulsome remarks that I intended.

THE COURT: Sure, of course.

MR. STRAUSS: Let me take your last question, Your Honor, first. This is the end of the road. Without getting into settlement communications, what we have received is not small amounts, and, Your Honor, that was the reason that Chicago Title went to 100 percent which, as you noted, is remarkable, and that is the reason that the Receiver agreed and supported it to get this settled, but that is the end of the road.

If this settlement is approved which it should be, that is $187 million paid by Chicago Title, Your Honor, so I don't think that it is appropriate to try and kick the can on this. We listened to a year and a half ago when you said make hay. We made hay. We had a lot of settlement discussions, a lot of mediations. We've been with Judge Dembin, through Judge

Goddard, and it is ready for you to make a decision, Your Honor.

And let me go back then to the decision that we're asking you to make -- that the Receiver is asking you to make and that Chicago Title is joining in. Really you have two key questions. Some of this is summary, but it is going to set up a few of the arguments we're going to go through, so I apologize if it is repetitive.

But your first question is whether this global settlement is fair, equitable, and in the best interest of the receivership. That is your first question. And Mr. Fates has addressed it. And you noted the authority in the beginning from *Zacarias* that the test is it has to be for the benefit of all of the parties concerned.

That is important when you step back after the sound and fury that we heard, because 98 percent of the investors in this scheme support this settlement. This represents two percent of the investors, which is pretty remarkable. You don't get 100 percent of anything.

And you asked about the settlement. We kept the settlement open after the agreement was reached, and about half of the potential objectors took it, so these are the remaining holdouts, this group of seven. That is it, Your Honor, and that is out of about 330 investors. Every single one has recovered.

They all recovered -- the majority recovered 70 percent. This group wouldn't take that. We said to them that, take the 70 percent, because you are going to recover more in the receivership. Mr. Fates said that to them because he had 28 million in the bank, and he is going to get 24 million in the settlement.

THE COURT: Is that how we get up to the estimate of up to 90, 95 percent combination of Chicago Title --

MR. STRAUSS: Yes.

01:06 THE COURT: -- with the Receiver?

MR. STRAUSS: Yes.

THE COURT: Does that include anticipated clawbacks or not?

MR. STRAUSS: Without the clawbacks. It could go over 01:06 100 percent. We're up to 99 percent without that.

And so what we said to get it done, which was a big move was, okay, Chicago Title will pay the difference between 70 and 100 and have a limited participation right, and that was the breakthrough that Mr. Fates and Ms. Freitag needed to 01:06 support the settlement to ensure that this group got 100 percent of their net loss.

You know, Your Honor, by comparison you might find it interesting because we quoted a lot from the *Stanford* fraud, the *Zacarias* case, that case lasted over a decade and they 01:07 recovered less than ten percent, and the Court issued a Bar

Order and found the settlement was fair.

You know what the authority was that *Zacarias* cited to do that? *Wencke*, Ninth Circuit. They said that we're a court of equity. We have plenary powers. We have the authority to do this, again, citing to *Wencke*, which says the same thing. So these arguments that there is no authority is just wrong.

01:07

And there is no case, Your Honor, that maps on these facts like *Zacarias*, very similar kind of fraud. What *Stanford* did, he issued these CDs, and then he had two insurance brokers. He got insurance, and the insurance brokers wrote letters, and they purported to the investors that that insured the deposits, which wasn't true.

01:07

And when this thing tumbled, the insurance brokers got sued. They made all the same arguments that are being made here. And the Court found, of course, those were derivative independent claims because they are part of the fraud.

01:07

The test on derivative and defendant is straightforward -- derivative and dependent, excuse me, is straight forward. As Mr. Fates said, it doesn't arise from the Ponzi scheme. All the claims against the brokers arrived -- arose from the Ponzi scheme.

01:08

And the same arguments were made that they enabled it. They gave it some legitimacy, some indicia, because of letters they wrote about the insurance, which is the argument being made against Chicago Title, that somehow it gave legitimacy to

01:08

the scheme that it was holding the money.

So *Zacarias* maps factually exactly. Its authority starts with the Ninth Circuit. It has been talked about in the *DeYoung* in the Tenth Circuit. And all of these cases have found that courts of equity have the ability to do this, and of course, no one is going to pay this kind of money to settle this claim without the borrower.

The borrower is absolutely essential. It is the bones of this settlement. It is well trod and tested. It is well supported. You are familiar with *Zacarias*. You cited it in three previous orders.

Let me now go a little bit more specifically to the objectors' claims. As Mr. Fates told you, the Receiver is seeking to recover from Chicago Title for the liability that ANI incurred to investors because the scheme. And as you said in one of your orders, the Receiver and objector seek damages that overlap.

And then you go to *Zacarias*, and there is a quote that is right on and directly responsive to what Mr. Yoder said to you. This is from *Zacarias* at page 900: The Receiver is suing to recover for the additional liability *Stanford* occurred to the investors allegedly by virtue of the broker's participation in the scheme. In other words, plaintiff objector suits are derivative of and dependent on the Receiver's claims. Conjunctive. Derivative and dependent on the Receiver's

claims. Same here.

The objectors' insistence, and I think you noted this from *Zacarias*, that they plead different theories, they seek additional damages. That is nothing but wordplay, and again, 01:10 *Zacarias* speaks to that, page 900: Plaintiff objectors attempt to distinguish themselves with different theories of liability for the Ponzi scheme. This is wordplay. The objectors were injured by the Ponzi scheme.

And then *DeYoung*, 10th Circuit, the claims are all 01:10 from the same loss, from the same entities, relating to the same conduct and arising out of the same transactions and occurrences by the same actors, like here, Your Honor.

So you have well-established authority to bar claims that are based on the alleged conduct in furtherance of the 01:10 Ponzi scheme, and *Zacarias* said a Bar Order is not only essential, it is typical because no one is going to pay that kind of money without the Bar Order.

And as *Zacarias* says again: Incentives to settle or reduce likely eliminated if each investor retains an option to 01:11 pursue full recovery in individual satellite litigation. Such resolution is no resolution. And that is exactly what these objectors are asking you for here.

And clearly, Your Honor, the objectors threaten the rest if their claims proceed because, first, the receivership 01:11 estate will lose the $24 million payment that goes directly to

the Receiver. Again, Mr. Yoder was mistaken. The money goes to the Receiver. It does not go directly to any objector here.

And as *Zacarias* said: The district court exercises jurisdiction over the receivership estate. The particular part 01:11 of that *res* at issue here was 132 million is a receivable owed to the receivership conditioned on the Bar Order. Exactly what you are being asked to do here. Again, it maps precisely, Your Honor.

Also, if the state court actions were to go forward, 01:12 Your Honor, then the objectors are going to compete with the Receiver to cover the same overlapping damages, and the receivership will be extended and it will be expensive. It has already been expensive as you've seen.

And last --

01:12 THE COURT: On that point, several of the objectors. BY have raised the Anti-Injunction Act, which I understand has exceptions. You and the Receiver have relied on one of the exception which is this does affect the *res*, and this ties into the point that you are making about derivative dependent 01:12 claims.

MR. STRAUSS: Yes. Directly from the statute where is says necessary in aid of jurisdiction. You have *in rem* jurisdiction over the *res*, and this is necessary for your jurisdiction to give this Bar Order in order to protect and 01:12 preserve the *res* to protect the whole.

THE COURT: Your position is the Anti-Injunction Act poses no barrier to the settlement that is being proposed?

MR. STRAUSS: No, it doesn't apply. It was addressed in *Zacarias* and I think in *DeYoung* but certainly from other authorities that we cited to you. They said the Anti-Injunction Act does not prevent you from approving this settlement.

01:13

And as to the indemnity liability -- I think I spoke to that first -- but Chicago Title, Your Honor, does have a very serious and significant indemnity claim against the Receiver, and that claim, you know -- so that is important consideration to the Receiver getting a release from that claim.

01:13

And just so the Court knows, you know, the spoonful of sugar that Chicago Title is in the Bar Order, but the medicine is the additional money they pay giving up claims against the Receiver and giving up claims against Mr. Peterson, and those are very real claims too. And as I cited to you from *Baird* and *American Motorcycle*, this issue about Chicago Title not being able to pursue recovery is just wrong. An intentional tortfeasor can be recovered even if it is by another intentional tortfeasor, but of course, we could take issue with that.

01:14

THE COURT: Would you elaborate a little bit on one of the last statements you made. It is confusing to me because I

01:14

read Mr. Peterson's pleadings, and he -- he is made out to be victim, and I read pleadings from the Receiver -- not so much Receiver, Chicago Title say, wait a minute, he is not a victim, he was involved -- the implication was somehow he knew or should have known about this.

01:14

What evidence do you have that would allow to you bring claims against Mr. Peterson?

MR. STRAUSS: We have a plethora of evidence, Your Honor. Let me address Mr. Peterson because I think his claim that it is unfair rings particularly hollow.

01:14

Mr. Peterson is the only winner in the Ponzi scheme. He got $12.7 million out of it, while his partner -- remember, Ms. Cain was his partner, she is in prison -- and Chicago Title is settling his debts. We've already settled about 110 million of them. So we take some umbrage that Mr. Grant, who is recent to the case, his remarks because Mr. Peterson is one of the main beneficiaries of this, and the other debts get settled.

01:15

And going to Mr. Peterson's facts --

THE COURT: One other, and again this is clarification, my understanding was Mr. Peterson had a partner in this?

01:15

MR. STRAUSS: He had a partner in one of his entities, and that partner has not objected. He took the settlement.

THE COURT: Okay. Go ahead.

MR. STRAUSS: Yes, and so let's be frank about

01:15

Mr. Peterson, so he perpetrated the fraudulent scheme that is at the heart of the case, alongside with Gina Cain. She was the small-time crook until Mr. Peterson came along. He was the one that escalated it and sought out the institutions, starting with Tory Pines, with CalPrivate, with the hedge funds, so he is the one who escalated it and benefitted the most.

01:15

He knowingly lured dozens of investors and more into the Ponzi scheme and acted as the exclusive promoter over it for over five years. He was Ms. Cain's exclusive promotor. He earned 80 percent of the fees that came in to her 20 percent. As I said, he is the only winner. For him to come in with temerity and say what he said is -- I'll leave it at that.

01:16

You should also know as to his claim now that he is penniless, it seems self-inflicted. Mr. Peterson was obviously a wealthy man. I am not privy to his financials. But I do know that at the start of this case, you may know, he was thrown into bankruptcy and it was dismissed. So I think there should be skepticism or doubt about his resources.

01:16

And as Mr. Fate said, if he pays back his ill-gotten gains, he'll get a Bar Order too. He'll be done. So there shouldn't be any sympathy for Mr. Peterson, Your Honor.

01:16

As I said, the settlements paid to date have already reduced his liability by over $110 million, and part of the consideration here is that Chicago Title is willing to release very significant cross-claims against Mr. Peterson as a

01:17

condition of the Bar Order.

I could say a lot more about Mr. Peterson and his participation in the scheme if you like. I can give you one example, the fake escrow officer Wendy Reynolds that you may have heard and read about, she was fictitious. Turns out she signed hundreds of escrow agreements.

01:17

And by the way, when Mr. Yoder refers to the agreement, that is a forged agreement, the very agreement that says your money will be held at Chicago Title is a forged agreement, but anyway, it was signed by Wendy Reynolds. Torrey Pines Bank discovered that. It was back in 2017. You think how much of this fraud could be have been prevented. They said no deal, Mr. Peterson, we are not lending you money because Wendy Reynolds is a fictitious person, and you haven't explained that.

01:17

01:18

Mr. Peterson not only knew that, he crowed about it. He towed it in a box with hundreds of agreements signed by Wendy Reynolds to the bank that had been signed, and even after they told him that she was fictitious and he asked Gina who gave him some nonsense explanations, he made no due diligence. He didn't call the bank. He continued to raise $100 million more. That is just one example, Your Honor.

01:18

Let me address CalPrivate briefly. So as you know, CalPrivate is a bank, and they claim the largest MIMO net loss of the objectors at 9.5 million, and there is good reason to

01:18

doubt that they would recover any of that. I won't speak again to the security interest claim because it was handled by Mr. Fates.

I would note for you that it is irrelevant to your
01:19 determination of settlement because they are making that claim in the receivership, and they'll have an opportunity to make that claim even if you grant this, but I think Mr. Fates explained why it is not meritless because, and I didn't have any assets, it was all fraud.

01:19 In addition, CalPrivate as a bank, they'll be judged by what a bank does, a bank entrusted with protecting depositors' funds, what they should have done before invested those monies in a Ponzi scheme. That comes from the *OCM Principle Opportunity's* case and the reasonableness on the
01:19 reliance of what they heard.

Your Honor, 15 banks at least were approached by Mr. Peterson to invest in this scheme. Only two did, one of them CalPrivate, and the reason is because it was pretty obvious and easy to discover that the program violated the
01:19 California liquor law, that most the licenses being transferred had been cancelled or withdrawn.

Counsel for Ovation spoke about that. That was discoverable by everybody. You go on the website. You enter in the license number. It shows cancelled or revoked. So
01:20 there were tons of red flags and warnings to all these

investors. They didn't do their due diligence.

And, of course, the escrow agreements that they were relying on were forged, and they never called Chicago Title about the agreement. There were very simple steps that these
01:20 investors could have taken, particularly a bank. That is why 13 banks turned it down because they did discover that this thing didn't add up.

One phone call by CalPrivate to Chicago Title asking about Wendy Reynolds because they have an agreement signed by
01:20 Wendy Reynolds, one call would have exposed it. They didn't make that call. Even when they did notice flaws in the documents provided by Peterson because there were tons of red flags there, they didn't do anything to investigate that.

Instead, this may not have been clear in the papers,
01:21 they funneled money to the scheme for years. Over $35 million for years this bank funneled into this scheme. Shame on this bank for investing in this Ponzi scheme. And then coming into court and saying getting all my money back isn't enough, I want damages too and trying to hold up a settlement for the other
01:21 people who lost money.

Let me address Mr. Wakefield, excuse me, Mr. Armstrong. So there were different investment vehicles in the scheme. Mr. Peterson's was the most sophisticated. Mr. Armstrong's client, we call them the Wakefield investors,
01:21 they invested directly with Ms. Cain, and they invested through

promissory notes that they negotiated with her, and they didn't have one contact with Chicago Title.

So this whole argument about, you know, how his people relied on that, not true, not one contact with Chicago Title. You know what Mr. Wakefield said when he was deposed about the promissory note, he said he didn't remember reading it, and then he said, quote, I don't care what the note said. So that is the degree that due diligence that Wakefield said.

And now they don't even want to recognize the clawback of 750,000 that got the Ponzi scheme to invest in cannabis business, 2Budz. Mr. Wakefield, excuse me, the Wakefield parties suffered a net loss of $5.7 million under the MIMO analysis.

That is what they will receive if you approve the settlement. That is 100 percent of their net loss. I have no idea where Mr. Armstrong's number comes from. They'll get 100 percent of $5.7 million if this settlement is approved.

Now, Mr. Armstrong says he wants pain and suffering, but, of course, a business entity doesn't get pain and suffering. He wants $50 million, 10 times his loss. You know, Your Honor, that seems to be the same kind of avarice that got Mr. Wakefield in his this problem in the first place.

But Mr. Wakefield, excuse me, the Wakefield parties will recover 100 percent of what they invested, and they certainly don't deserve to be prioritized or to threaten the

settlement for other investors.

Ovation, let me speak briefly to that. So the Nossaman Bar Order is a condition to the Nossaman settlement to which the Receiver is a party. So the Receiver gets a release from Nossaman. It is part of the three-way agreement between the Receiver, Chicago Title, and Nossaman.

And that is an important release, because as Your Honor knows on your docket, is a motion by Nossaman to get relief to sue the Receiver. So that goes away if the settlement is approved, so they clearly signalled that intent.

And let's make no mistake that Ovation's claims are derivative for the same reasons as the other objectors' claims. They are based on an alleged injury from the Ponzi scheme. Again, that is back to *Zacarias* at 900.

It is worth noting, Your Honor, that Ovation Management, this party, they already settled their state court claims. They got $28 million, 80 percent of their claim. Your Honor, this is just a money grab. They didn't file this suit against Nossaman until after the settlement was announced and we filed the papers.

It is just a last ditch attempt to get money by a Texas hedge fund that, again, had no business investing in a Ponzi scheme. And, Your Honor, the Nossaman Bar Order protects the rest because without it the receivership status is threatened with that indemnity liability.

Finally, Your Honor, 100 percent recovery is more than fair and equitable for the investors, and I'll close with this: It is a better recovery than -- it is unprecedented as I think you noted or remarked in the prior restitution hearing and if
01:25 you look at the cases and your experience doing these, and yet really, at bottom, what the objectors claim about is they won't get more.

They won't be satisfied unless they profit from the Ponzi scheme that they recklessly invested in. They want a
01:25 shot to go to trial to hit the jackpot, all to detriment to the 300 investors waiting in line to receive the distribution, and that is not how the law works.

Indeed, the law doesn't give Wakefield $50 million as they claim they should get or measured on that basis. As we
01:25 already said, the measurement is based on the benefit to the whole, and there is some very good authority that we provided you there because Mr. Armstrong's speculation that he would get more and Mr. Yoder's speculation that CalPrivate will get more is not the test of fairness or for you to consider.

01:26 Officers for Justice says, this is a quote at page, 625: The proposed settlement is not to be judged against the hypothetical or speculative measure of what might have been achieved. And what the Court is supposed to do, *Skyline Ridge* the Courts need only canvas the issues, not conduct a mini
01:26 trial on the merits of each disputed legal question.

So, Your Honor, suffice it to say, there is numerous hotly disputed issues in this case, and that is not the test for you to determine if it is a fair and equitable settlement, and at 100 percent, it seems like a light lift, Your Honor.

01:26 As *Zacarias* said, again: Plaintiff objectors argue that if a far greater recovery was possible, that the settlement was premature, and that investors could have recovered 100 percent of their investment, this is at best speculative.

01:27 And I would like to finish with just a couple words from the mouth of the perpetrator herself, Ms. Cain, to show you how hotly disputed, and this came from her deposition, and just two quotes. Question from Ms. Cain from Chicago Title in your conversations and communications with Della Dusharm (phonetic) and Joanne Reynolds, and others at Chicago Title:

You attempted to give the impression at all times that you were running a legitimate business; correct?

Answer: Correct.

Question: And you never told anyone at Chicago Title

01:27 that the liquor license lending business was a fraud; correct?

Answer: Correct.

Your Honor, we respectfully request -- it is almost three years to the day, Labor Day. We made hay. I think we have he done all that the Court has asked. We have worked hard

01:27 to settle this and to get these investors their money back.

Now is the time for you to approve the settlement, Your Honor.

THE COURT: All right. Thank you, Mr. Strauss.

Anything from those that are appearing by phone or on the zoom?

01:28 MR. POTT: Your Honor, if I may, on behalf of Nossaman. I do have brief remarks, if the Court will permit.

THE COURT: Well, okay, if they are brief. I mean, I gave everyone of the objectors an opportunity to speak. I don't want to get into a back and forth, but, yes, I'll hear 01:28 from you.

MR. POTT: The reason I waited, Your Honor, because I am not an objector. So if I may, Earll Pott, appearing on behalf of Nossaman LLC and LLP and Marco Costales.

We obviously joined in the request for approval of the 01:28 settlement and the Bar Orders. I am not going to revisit the arguments that I think have been ably made by Chicago Title and the Receiver with respect to this Court's authority to approve of all of those.

I really just wanted to get up so that I could address 01:28 some of the remarks that Mr. Murphy made on behalf of Ovation. The Court has stricken our reply, and so I come before the Court somewhat chastened and would start with an apology for apparently not having filed the reply or request for leave of time.

01:29 THE COURT: You are not chastened, and it happens and

routinely, if there hasn't been a request for leave to file a rely then it gets stricken. It is wasn't treated differently than it would than any other case where a reply is filed in ordinary course without leave. Go ahead.

01:29 MR. POTT: I appreciate that, and I will be diligent in referring to matters that were not introduced in the reply. However, one thing that I can't accept and that I would like to discuss with the Court is this suggestion that Nossaman and Nossaman's attorneys, in fact, are not entitled to equity in 01:29 this matter.

We filed, as I said, a joinder. It was a six-page joinder. Everything in that joinder that we presented to the Court was true. There had been at that time no claims of any kind that had been filed against us. Now, we're held to task 01:30 because we didn't mention a tolling agreement. The tolling agreement which now you have before you. It is part of Exhibit A in Ovation's filings actually has a provision that says: This agreement is not and shall not be deemed to constitute evidence of an admission of liability with respect to any 01:30 rights, claim, causes of action, or defenses of any of the parties hereto with respect to the litigation. This agreement may not be used or relied upon for any purpose other than enforcement of its terms. The parties agree that this agreement shall not be offered or received into evidence in any 01:30 litigation except as necessary to enforce the terms of this

agreement.

So we're being held at fault for not introducing to this Court a tolling agreement which by its very terms would not permit that introduction, so, no, we didn't address the
01:31 tolling agreement, and nor did we address some of the specific allegations that Mr. Murphy referenced in their complaint. Why? Because, as Mr. Strauss just referred to, they didn't even file their complaint until after we filed the joinder.

So, no, we didn't anticipate the various arguments
01:31 they would make about Nossaman and Nossaman's alleged negligence with respect to communications with Ovation. We filed a very generic, six-page joinder that described in general what Nossaman's role was. So I reject categorically the suggestion that -- certainly that Nossaman's lawyers are
01:31 not entitled to equity.

And now if I could just take a few minutes to discuss Nossaman itself, and again, everything that I am going to discuss with the Court here is either in their complaint or in some other filing that was presented by somebody else, not in
01:32 our reply.

Your Honor, the Nossaman was engaged for a very limited purpose. You can see that limited purpose in this memorandum, right, that is an exhibit to Ovation's limited objection, right. The only reason Nossaman was engaged to
01:32 communicate with investors was to explain ABC procedures and to

give assurances to investors that ABC regulatory action would not threaten the investment, would not threaten the investment.

That is the risk that Nossaman was speaking about in the memo, and you don't have to take my word for it. If you actually read the memo itself it says that. It says: We believe that any risks associated with these activities are exclusively borne by Chicago Title and/or the sister escrow companies, not by any of the funding sources such as the platform. By signing the form, ABC226, an ABC form, and filing it with ABC, these escrow companies essentially have certified to the ABC that all funds are in place so that the ABC may determine whether or not to authorize a transfer of liquor license to the applicant.

And then more directly in the conclusion to the memo, Nossaman writes: In sum, we have not been able to develop a theory, lender liability or otherwise, where the ABC or another governmental authority could attempt to take action against the platform or any other legitimate funding source for these activities.

At no time did Mr. Costales or Nossaman, the firm, ever attempt to vouch for the integrity of the investment scheme, to sit -- to vouch safe that it is a secure investment and not subject to fraud. That was never the intention. It is not what is disclosed in the memorandum.

And so it is -- it is incredible, frankly, that now as

Mr. Murphy tells you, now that they've got their rich settlement agreement with Chicago Title and they've had to spend 12 and a half million dollars of attorney's fees, now it is time for Nossaman to pay up.

01:34 Based on the limited discussions and communications that Nossaman had, it is just not equitable. The Court needs to be concerned about equity here, equity to the whole, and indeed, equity to Ovation. As I mentioned, Your Honor, Ovation has already settled for tens of millions of dollars, a 01:34 $47 million settlement that they elected to apportion the way they wanted to.

In other words, two entities sued Ovation Fund Management II and Ovation Finance II, two entities sued and they settled, and then Ovation decided how they were going to 01:35 split that all up, so they made the decision to settle for the amount that they did. It is an extraordinary successful settlement, as the Court and others have commented, and they have collected, so they have collected a ton of money.

Now they want to come after Nossaman which had an 01:35 extremely limited role in this entire scheme and which like everybody else was fooled with regard to the Ponzi scheme that was being perpetrated on everyone, and now they want to come back to Nossaman to say that Nossaman didn't do enough due diligence.

01:35 I would submit to Your Honor, who didn't do enough due

diligence here was Ovation, the hedge fund was in fact engaged in safeguard their client's money and invest it properly. This is not an Animal House defense. This is about a sophisticated investor, not a retiree who is just putting away their
01:36 retirement dollars, but a sophisticated investor as you can see through -- if you read the complaint that they've attached, they are perfectly capable of conducting their own due diligence, but they didn't get around to it for another year or so after they invested.

01:36 So Nevertheless, they want to avoid all responsibility that they should be bearing for the losses that they suffered -- losses that they suffered, not actual investment dollars, but losses that they suffered because customers' rightly came to fear that Ovation wasn't doing proper due
01:36 diligence and didn't know how to invest their money. They want to put all that responsibility on Nossaman.

That, Your Honor, is not something this Court needs to be concerned about when the Court is doing the balancing that it must do to determine whether or not this is equitable. This
01:37 is an equitable resolution of hundreds of investor claims. It puts an end to a litigation that we were only misfortunate enough to be dragged into at the last minute.

But if the Court doesn't act, then, of course, the litigation goes on. We have indemnity actions that we believe
01:37 are righteous with regard to ANI and the receivership *res*,

which by the way, are not impaired in any way by intentional tort conduct because at worst Nossaman is alleged to have negligently or recklessly perhaps failed to notice red flags.

So we have good claims. We prefer not to make them. We much prefer to settle this case with a reasonable payment that I think is not only within the Court's authority to approve but also fair and just for all the parties. Thank you.

THE COURT: Thank you.

MR. YODER: Your Honor, I know you have heard enough argument. May I make two quick points of clarification of facts that I think were --

THE COURT: Two and only two.

MR. YODER: I promise, Your Honor.

THE COURT: This is Mr. Yoder.

MR. YODER: Michael Yoder for objector CalPrivate.

Number one, as to the 9.5 million, the way settlement works is under section one, the 24 million gets paid by Chicago Title to the Receiver. That is correct. But the Receiver doesn't get to use that 9.5. If CalPrivate were to accept the settlement, it would get paid to CalPrivate. If it doesn't, then under section 2 and section 15, the Receiver holds it, doesn't get to use it for other investors, other victims.

It doesn't become part of the *res* at all. It is separate, and it is held. And ultimately if CalPrivate succeeds on appeal, it goes -- if we have to appeal, it goes

back to Chicago Title. It doesn't get distributed to anybody else.

And the notion that that is for the benefit of these other creditors is just a misstatement. So that is number one. The settlement agreement is quite, quite clear on that. It is not part of the *res* that is going to go to other creditors.

THE COURT: In the absence of the bar, though, Mr. Yoder, they don't pay the full 24 million that they've allotted, so it does affect the other investors.

MR. YODER: Only because of these threats by Chicago Title that they are going to make these indemnity claims and make everything expensive.

My point on that is simply these investors took the money, they took the discounted amount knowing that that was it from Chicago Title and knowing that there might not be any more money at all while the objectors invested time and money in going after Chicago Title.

The second point is this, Mr. Strauss made the statement that the escrow agreement that we claim security interest in was forged, not true. The individual separate escrow agreements are different than the escrow holding account between Chicago Title and ANI. When the Receiver sought to compel Chicago Title to turn the 11.3 million, it was based upon the escrow holding agreement. That was not forged. No one has argued it is not valid. That is what we have our

security interest in.

THE COURT: What about the point that Mr. Strauss made that the *Baird* case allows him on behalf of Chicago Title to come after the Receiver for indemnity because we're not dealing with an innocent party or a negligent party. We're dealing with two intentional tortfeasors here and that exempts it from the Civil Code provision and the case law that has been cited by the objectors. What about that?

01:40 MR. YODER: There are variety of claims against Chicago Title including contractual claims for which there would be no right of indemnity, Your Honor.

THE COURT: But now we're back to the issue of what claims arise from the fraud itself.

01:41 MR. YODER: I think my point is this, Your Honor, so first of all, we have a valid security interest, and contrary to what Mr. Strauss said, we don't have an opportunity to make our claim. It is being --

THE COURT: I am not bound by UCC principles, right. We already established that.

01:41 MR. YODER: No, I know. Under the *Byer* case then that has to be respected, even in an equitable receivership.

THE COURT: Right, and I will. I understand the importance of secured transaction, secured creditor.

MR. YODER: I wanted to make sure our security

01:41 interest was in the escrow holding account and under Commercial

Code 93(15)(c). Proceeds of that are just as subject to the lien as the account itself, not seeking security interest in the forged agreements at all.

In the indemnity agreement, I guess I would end, Your Honor, with this: Mr. Strauss can get up and say there is issues with my client's claims. Sure. He is going to have a defense. He is a good lawyer. But at the end of the day, we believe quite to the contrary. We think the evidence shows they knew exactly what was going on, they took bribes, and they continued to take my client's money.

01:41

01:42

I would submit, Your Honor, it really shouldn't be for you to decide the merits at the end of the day. I am not sure it is a fair thing to put you into, right?

THE COURT: No, I agree.

MR. YODER: And the same thing with the indemnity issues, and I would say who is most deserving to be allowed to continue to have their day in court? I would say it is the objectors who pursued the claims, spent the money, with the Receiver's encouragement and they shouldn't be cut off at the knees now.

01:42

01:42

THE COURT: Thank you, Mr. Yoder.

MR. ARMSTRONG: Your Honor, may I answer your *Baird* question?

THE COURT: Yes.

MR. ARMSTRONG: James Armstrong.

01:42

Your Honor, it is a terrible case -- I hope you read it -- it is a terrible case for Chicago Title. Why? Please read the dissent, pages 693, 696, says all the things people on this side the bar said today.

01:43 And if you read the front part of it, that majority decision, Chicago Title should be worried about an indemnity claim from the Receiver. Why? Because that was a homeowner who didn't sign his wife's name to a purchase agreement.

The fiduciary, the person with more power and

01:43 knowledge, who told him not to sign it and forged some documents, Chicago Title, the Court said, you know, in those very narrow circumstances we're not going to let that homeowner lose the ability who was informed and have a person with superior knowledge about how real estate transactions work get

01:43 off scot-free.

Chicago Title is the real estate broker in the *Baird* case who has that superior knowledge. And no matter how bad ANI and that bunch is, they should be looking to Chicago Title the other way around because they had the duty that went back

01:43 to ANI and all those silly escrow agreements.

So it is a terrible case for them. It is also not controlling given that slew of authority, and the only California district court who considered it said it didn't apply.

01:44 MR. GRANT: Your Honor, I hate to do this because I

know you are really getting over, but if the Court is going to make a decision based on a belief one way or the other on the right of indemnity, I think it should be further briefed because there is too much information and too much conflicting things talked about by counsel because I strongly believe that Chicago Title doesn't have a right of indemnity or contribution.

Miles Grant, I'm sorry, for Kim Peterson.

MR. STRAUSS: Steve Strauss for Chicago Title.

What I would suggest -- you have had plenty of reading -- again, this issue was briefed argued and decided by Judge Medel. I would request permission to just send your department the order.

THE COURT: Thank you. Thank you, all.

I appreciate the presentations. I appreciate the briefing on the case. Typically federal courts don't give tentative decisions. I know state courts do and then wait for further briefing or wait to evaluate the arguments.

I am inclined in this case to give a tentative, and I'll take Mr. Grant's suggestion and follow-up with any further briefing on the question of the right of Chicago Title to seek indemnification because, as I have indicated in my previous comments, it is an important factor to me in this case.

Let me go back to the first principles here. Somebody mentioned we're three years into this, coming up on three

years. From the very inception my interest was in trying to avoid what typically happens in receivership cases, and that has occurred to this point, and I congratulate the Receiver on that.

01:45 Typically in receivership cases, the investigations, the legal fees, all of that eats up the rest, and the investors are left with nothing. This is a remarkable case. Let me say it again. This is a remarkable case in my experience and I think probably in the experience of counsel that the Receiver

01:46 has been able to achieve at this point the result that has not been contested.

Somewhere between 90 and 95 percent on the dollar being recovered for the investors. I get it, there were expenses involved on the part of the objectors and others to

01:46 get to that point, and those aren't accounted for. We're talking about money in money out principle.

But in terms of investors themselves, recovery of this magnitude is remarkable, remarkable fete, and I congratulate the Receiver for that.

01:46 I am concerned here that perpetuating the litigation at this point will not serve a good purpose, will not serve the interest of the whole, and I -- without disparaging at all the claims made by the objectors and their zealousness in wanting to pursue claims against Chicago Title have those in mind, not

01:47 trying to undercut those at all.

But, look, this is stark. We have a group of investors numbering in the hundreds. We have two percent, two percent who object to this, 98 percent who agree with it.

And as I mentioned ironically, Mr. Grant, at least in
01:47 Peterson's case, his partial investor on some of the amount that is being claimed and objected to by Mr. Peterson is not being objected by in the co-investor in the case, which is another indication, I think, that most of the people who objected -- who invested in this thing have no problem with the
01:47 fairness of this and the reasonableness of this.

I understand that I can't put an end to the litigation because as Mr. Yoder points out there is a right to appeal that will hold things up a period of time, probably hold up the payment. Although I am not sure of that.

01:48 Is that the way it works, or is the payment made irrespective of whether the objector appeals? Would it be just that portion, Mr. Fates, the 9.5, or whatever the amount in controversy for the objectors is will be held from distribution?

01:48 MR. FATES: That's correct. Ted Fates for the Receiver. The entire payment $24.3 million will be made to the receivership estate. The appeals will affect the distribution of that money only.

It will be held in reserve, but it will be --

01:48 THE COURT: Okay. All right. Only as to those who

are objecting and only in the amount that is otherwise earmarked for them?

MR. FATES: That's correct. So if, for example, CalPrivate Bank were to appeal and the others were not, that $9.5 million would be held in reserve.

THE COURT: All right. So, look, I think there is an interest in -- certainly on the part of the majority -- the vast majority of investors here to have a resolution of this matter, and that will bring that about, with the exception of some minor nine or ten clawback claims. As far as the investors are concerned, that is just more money in their pockets if the clawbacks come about.

I have looked at this under the standards articulated in both *Stanford* and *Zacarias*. I looked at it in terms of Ninth Circuit case law. The Court's tentative is that I am going to approve the settlement including the Bar Orders -- and the ancillary Bar Order in the Nossaman matter.

I will take one last hard look at this based on the briefing on the issue of indemnity. As I said that has factored into my thinking to a great extent. If there's not really a valid indemnity then, you know, I understand that that has been put up as a reason why the litigation would go on and on when otherwise if the objectors are right, that could be settled fairly quickly and expeditiously.

But I am told by Mr. Strauss that a judge has already

looked at that and said no, no, it is not a bar to them raising these claims, and who knows how long that litigation will continue if allowed to go forward at this point. And all it will do is I think interrupt the settlement and the resolution in this matter.

01:50

It has been three years. No one can, I think, criticize the Court for being hasty in this matter, and the truth of the matter is I withheld the ability of Chicago Title to assert any claims for the longest period of time while we allowed the settlement efforts to go forward, and they were largely successful, and I congratulate to the parties on that to settle the great majority of the claims that were here and return money to the investors to end this litigation.

01:50

I find in this case that all the objectors have been fully heard. There was notice in advance. Due process has been complied with. Everyone knew what the terms of the settlement were, had an opportunity to object specifically to it. We had this niggling issue having to do with the Civil Code provision 875. I am going to go back and look at the *Martinez* case. I am going to go back and look at the minor vs County of LA case and certainly consider the advocacy of the parties on that remaining issue, so this is tentative.

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Typically when a Court makes an oral determination, the oral finding of the Court binds the Court over any written finding that the Court later makes to the contrary. I intend

01:51

for that to be different here. The written judgment that I enter, the written order that I enter in this case will be the Court's final resolution of that.

And to the extent it conflicts at all with things that I said in my tentative, my intention is the written document which will more fully explain and speak to all of the issues that have been raised by the parties will be the controlling determination by the Court.

But tentatively at this point and, you know, subject to an expedited briefing on this last remaining issue -- and that is the only issue I want to hear from. Everything else is fully briefed. I am fully conversant with what the arguments are, including the Anti-Injunction issue and the others that have been raised in the course of oral argument and the Court's questioning today.

I don't need any more. I don't want any more briefing on that, just on this issue of whether they have a right to seek indemnification in this case. I'll consider that, and then in short order you'll get a written decision from me finalizing it.

Again, to reiterate, my tentative is I am inclined to grant the request to make a finding of good faith as to this settlement. I am inclined to issue the requested Bar Orders both in this case and in the ancillary Nossaman litigation which is part of the settlement of that splinter case.

So, again, I appreciate your time. I appreciate the advocacy here. Thank you for indulging us, and I guess I just need a set a briefing schedule then. I don't want to do it in the usual way with back and forth. I am going to set a date.

01:53 How long do you think that you'll need to brief that issue and get me a brief on it, simultaneous briefs on that issue?

MR. STRAUSS: A week.

MR. GRANT: With Labor Day coming up, Your Honor, I

01:53 was just going to say two weeks.

THE COURT: Okay. Two weeks is fine. So today is the 31st --

MR. STRAUSS: The only concern, Your Honor, as the time goes on unless -- there is still activity on the state

01:53 side, so we would like to get the order in presumably --

THE COURT: Well, I assume you can go to Judge Medel or -- is there another state judge involved too?

MR. STRAUSS: No just Judge Medel.

THE COURT: My law school classmate, go and say Judge

01:54 Burns needs two weeks to review things and he has a decision forthcoming, and he's already given a tentative on this, and I assume that will buy you some time on that.

So I'll give you through the -- let's see -- the papers to be filed not later than the 14th of September. That

01:54 is a Wednesday. And then an order one way or the other will

follow in due course.

Thank you all. We're in recess.

MR. YODER: Your Honor, just to be clear, we didn't specifically get a ruling on the claims motion and the distribution plan. Will that be part of the Courts --

01:54

THE COURT: It will, yes. It will, I have in mind that some of the parties some of the parties have objected to the fairness -- the fairness of the claim, not raising the legal issues and whether it is unfair to prohibit the parties from going forward.

01:55

But, yes, I have all that in mind. It wasn't argued or touched on very much here. But I have all that in mind. It will be the part of the final order that I issue.

MS. BROWN: Your Honor, I do want to be heard on the claims motion for Mr. Peterson.

01:55

THE COURT: Put it in your brief to me then. Put it in your brief to me. We're going to take -- I am going to give my court reporter and myself ten minutes, and we'll pick up for the restitution matter. I need you to stick around, Mr. Fates.

MR. FATES: Yes. Will do, Your Honor.

01:55

(Proceedings concluded at 1:55 p.m.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: September 1, 2022, at San Diego, California.

/s/ Melinda S. Setterman

Melinda S. Setterman,
Registered Professional Reporter
Certified Realtime Reporter

CERTIFICATE OF WORD COUNT

Under Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rule 27-1(d), counsel for Appellants certify that this motion does not exceed 5,200 words or 20 pages, excluding certification forms, tables, signature blocks and other non-substantive matters that may be excluded under the rules.

Dated: April 17, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 225 Broadway, 21st Floor, San Diego, California 92130. I certify that, on April 17, 2023, I electronically filed the foregoing APPELLANTS' MOTION FOR STAY OF THE DISTRIBUTION ORDER PENDING APPPEAL and DECLARATION OF SEANNA R. BROWN IN SUPPORT OF THE MOTION (including attached Exhibits) with the Ninth Circuit Clerk of the Court by using the appellate CM/ECF system.

I certify that all participants in the case are registered appellate CM/ECF users and that service will be accomplished by the appellate CM/ECF system on appellees' counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that that this declaration was executed on April 17, 2023 at San Diego, California.

s/ Rupa G. Singh
Rupa G. Singh