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,

Defendants-Appellees.

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

RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR A STAY OF THE DISTRIBUTION ORDER PENDING APPEAL

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TABLE OF CONTENTS

Page

I. INTRODUCTION ... 1

II. DISCUSSION ... 5

A. Legal Standard ... 5

B. The Peterson Parties Have Not Made Any Showing They Are Likely to Succeed on the Merits ... 6

C. The Peterson Parties Cannot Show Irreparable Harm ... 14

D. The Investors and Creditors With Allowed Claims Should Not Have to Wait Another Two Years To Receive Distributions ... 16

E. The Public Interest in Providing A Prompt Recovery to Victims of Securities Fraud Weighs Strongly Against a Stay ... 17

F. If the Court Grants a Stay, the Peterson Parties Should Be Required to Post a Bond ... 18

III. CONCLUSION ... 19

TABLE OF AUTHORITIES

Page(s)

Cases

Al Otro v. Wolf,
952 F.3d 999 (9th Cir. 2020) 5, 6

Al-Adahi v. Obama,
672 F. Supp. 2d 81 (D.D.C. 2009)...6

Clinton v. Jones,
520 U.S. 681 (1997)..5

FTC v. Kutzner,
2017 WL 11632849, (C.D. Cal. December 18, 2017)..................................17

FTC v. World Wide Factors, Ltd.,
882 F.2d 344 (9th Cir. 1989) 17

Hilton v. Braunskill,
481 U.S. 770 (1987)..5

In re Genetically Modified Rice Litigation,
2012 WL 6577269 (E.D. Mo. December 17, 2012)......................................18

In re Tribune Co.,
477 B.R. 465 (Bankr. D. Del. 2012)..18

Landis v. N. Am. Co.,
299 U.S. 248 (1936)..5

Leiva-Perez v. Holder,
640 F.3d 962 (9th Cir. 2011) 5, 14

Missouri v. Biden,
2022 WL 18142520 (W.D. La. 2022) 6

Nken v. Holder,
556 U.S. 418 (2009)..5, 6, 17

Page(s)

Salix v. U.S. Forest Serv.,
995 F. Supp. 2d 1148 (D. Mont. 2014) 6

SEC v. Aequitas Mgm't,
2017 WL 7789717, (D. Or December 11, 2017)..5

SEC v. Byers,
637 F. Supp. 2d 166 (S.D.N.Y. 2009) 9

SEC v. Merrill Scott & Assocs., Ltd.,
2006 WL 3813320, (D. Utah Dec. 26, 2006) 9

SEC v. Pension Fund of Am. L.C.,
377 F. App'x 957 (11th Cir. 2010)..9

SEC v. Torchia,
922 F.3d 1307 (11th Cir. 2019) 13

SEC v. Wencke,
783 F.2d 829 (9th Cir. 1986) 13

Toquero v. INS,
956 F.2d 193 (9th Cir. 1992) 13

Virginian Ry. Co. v. US, 272 U.S. 658, 672 (1926)..5

Receiver Krista Freitag hereby opposes the Emergency Motion to Stay Distribution of the Receivership Funds Pending Appeal ("Motion") brought by Kim H. Peterson ("Peterson"), Kim Funding, LLC, and ABC Funding Strategies, LLC (collectively, "Peterson Parties").

I. INTRODUCTION

This appeal arises from a massive Ponzi scheme (the largest in San Diego's history) perpetrated by Gina Champion-Cain ("Cain"), through ANI Development, LLC ("ANI"), and with assistance from others. Cain generally told investors that they would make short-term, high-interest loans to applicants for California liquor licenses and that the funds loaned would be held by Chicago Title Company ("CTC") in escrows (as required by California law) until the Alcoholic Beverage Control ("ABC") approved the transfer of the liquor license. In reality, the whole program was a lie – there were no applicants for liquor licenses, no loans made to them, no interest paid by them, and no liquor license escrows (only "holding funds" escrows at CTC that Cain had total control over).

On August 28, 2019, the SEC filed this action against Cain, ANI, and relief defendant American National Investments, Inc. On September 3, 2019, the District Court issued a Preliminary Injunction Order and appointed the Receiver. Cain was later charged criminally, plead guilty, and is now serving a 15-year sentence.

The Peterson Parties raised more than $250 million for the Ponzi scheme (more than half of the total funds raised) and received more than $12 million in net profits for doing so. Although Peterson does not dispute having received over $12 million in profits, his fundraising entities asserted claims in the receivership

for what he claims is the outstanding principal amounts purportedly loaned by investors they recruited and who they now claim to owe.

The Receiver and her team performed an investigation and forensic accounting, as required by the District Court's orders. Based on that work, the Receiver concluded the Peterson Parties were insiders to the Ponzi scheme, served as its primary fundraising arm, and received more than $12 million in profits.[1] The investors whose funds were actually lost, therefore, were deemed the proper claimants. Accordingly, the Receiver recommended the investors' claims be allowed and the Peterson Parties' duplicative claims be disallowed. On February 24, 2023, the District Court approved the Receiver's recommendations, finding that the Peterson Parties were insiders who received substantial profits, and therefore the investors were the proper claimants for the amounts lost, calculated on a money in-money out ("MIMO") basis ("Claims and Distribution Order"). The Receiver is now prepared to make a $21 million interim distribution to allowed claimants.

The Peterson Parties appealed the Claims and Distribution Order and sought a stay of distributions from the receivership. The District Court held a hearing on April 10, 2023, at which time it denied their motion, but granted a temporary 14-day stay for them to seek relief from this Court.

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[1] The Receiver sued the Peterson Parties in a related case in the District Court to recover the more than $12 million in profits as fraudulent transfers, as well as for additional claims. USDC, S.D. Cal. Case No. 21-cv-01620-LAB-AHG.

This Court should likewise reject the Peterson Parties' attempt to further benefit themselves to the detriment of defrauded investors through a stay of distributions. All four factors courts consider in determining whether to issue a stay weigh strongly against granting the Motion. The Peterson Parties cannot seriously dispute they are insiders of the Ponzi scheme. The evidence showing them to be insiders is overwhelming. Nor can the Peterson Parties seriously contend the District Court abused its discretion in overseeing this complex receivership by denying their claims. Therefore, they have made *no* showing of likelihood of success in this appeal, let alone the required *strong* showing.

Instead, the Peterson Parties rely almost entirely on claiming irreparable harm, but they fail there as well. The sole basis of their purported claims is that they owe "approximately $128 million" to the investors. But most investors, those with MIMO net losses and to whom they purport to owe money have allowed claims in the receivership, so the distributions the District Court has authorized the Receiver to make will reduce the amounts the Peterson Parties owe those investors dollar-for-dollar. Accordingly, the Peterson Parties actually benefit from distributions from the receivership – they are definitely not harmed by them. Furthermore, the Peterson Parties' purported claims totaling $128 million are grossly overstated for several reasons: (1) the case law supports and District Court approved MIMO as the appropriate formula for calculating investor claims,[2] (2) in

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[2] The Peterson Parties' claims are based on principal balances invested at the time of the receivership, which is contrary to the approved formula for investor claims. The Peterson Parties have made no effort to state a claim reflecting

certain CTC settlements made directly with investors, investors assigned their claims against the Peterson Parties to CTC and CTC subsequently released those claims, thus completely eliminating any potential liability the Peterson Parties had to those investors (meaning the MIMO net losses of those investors must be subtracted from the Peterson Parties' claims), and (3) as the Receiver has recently reported, the remaining investor MIMO net loss claims total just under $44 million, and assuming the District Court approves a pending settlement between the Receiver and investor CalPrivate Bank, and the $21 million pending interim distribution is made, the remaining investor MIMO net loss claims would total ***under $16 million***, only a small portion of which are claims held by recruited investors to whom the Peterson Parties would potentially be liable.

The other two factors courts consider also weigh strongly against a stay. The other parties interested in this proceeding (*i.e.* the investors who actually have MIMO net losses and creditors with allowed claims) have been waiting more than three years to obtain a recovery and should not have to wait another two years while the Peterson Parties pursue a meritless appeal. Moreover, the public interest in enforcing the securities laws and providing a prompt recovery for defrauded investors also weighs against a lengthy delay in distributions. For all these reasons, the Motion should be denied.

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their recruited investors' current MIMO net losses (i.e. all money an investor put into the Ponzi scheme, less all money received by an investor on account of its investment in the Ponzi scheme).

II. DISCUSSION

A. Legal Standard

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (*quoting Virginian Ry. Co. v. US,* 272 U.S. 658 (1926)). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Id*. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34; *see also, e.g., Clinton v. Jones*, 520 U.S. 681, 708 (1997); *SEC v. Aequitas Mgm't*, 2017 WL 7789717, at *4 (D. Or December 11, 2017) ("Stay pending review is extraordinary relief for which the moving party bears a heavy burden"). Courts consider four factors: "(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*, 556 U.S. at 434. The first two factors are the most critical. *Id.*

With respect to the first factor, "in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). With respect to the second factor, "[s]imply showing some possibility of irreparable injury" is insufficient. *Al Otro v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020) (quoting *Nken*, 556 U.S. at 434). Instead, an applicant must show that a stay is necessary to avoid likely irreparable injury while the appeal is pending. *Id.*

"The third and fourth factors require the Court to evaluate whether the issuance of the stay will substantially injure the other parties interested in this proceeding and to evaluate where the public interest lies." *Missouri v. Biden*, 2022 WL 18142520 (W.D. La. 2022). "The public's interest in the 'integrity' of judicial proceedings includes the public interest in the finality of judgments. That is why stays are generally regarded as 'an intrusion into the ordinary processes of administration of judicial review.'" *Salix v. U.S. Forest Serv.*, 995 F. Supp. 2d 1148, 1155 (D. Mont. 2014) (*quoting Nken*, 556 U.S. at 427).

B. <u>The Peterson Parties Have Not Made Any Showing They Are Likely to Succeed on the Merits</u>

"An applicant for a stay pending appeal must make 'a strong showing that he is likely to succeed on the merits." *Al Otro v.* Wolf, 952 F.3d 999, 1010 (9th Cir. 2020) (*quoting Nken*, 556 U.S. at 434). An applicant may satisfy this factor by "raising in its appeal questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 83 (D.D.C. 2009). The Peterson Parties cannot meet this standard.

In their Motion, the Peterson Parties present an alternate reality in which Peterson was an innocent, outside investor who unwittingly raised money from other investors for the Ponzi scheme and, through no fault of his own, has been left in the unfortunate position of owing money to those investors. The Peterson Parties not only grossly overstate their asserted claims, they intentionally leave out facts showing their complicity in the fraud, including but not limited to:

- Peterson was a close friend of Cain and admitted that after they became friends in 2012, their friendship "grew and grew and grew";
- Peterson was told that most of the liquor licenses Cain claimed were being transferred (with financing from the ANI loan program) were not actually valid licenses, and had previously been terminated, revoked or suspended;
- Peterson failed to perform any real due diligence regarding the ANI loan program, instead relying on Cain's word;
- Peterson told investors the ABC had blessed the ANI loan program, when in fact it had not;
- Peterson told investors he had spoken to the purported referral source for the liquor license applicants when in fact he had not;
- Peterson, in coordination with Cain, actively worked to explain away or conceal serious concerns about the ANI loan program raised by existing and prospective investors, including by excluding them from the program, threatening them, and attempting to intimidate them; and
- The Peterson Parties, after being issued a subpoena by the SEC, continued to raise millions of dollars from investors without disclosing the SEC subpoena to them.

All of the above has been established through documents and testimony in the state court actions and the Receiver's action against the Peterson Parties. Although the Peterson Parties have not been charged criminally in connection with

the Ponzi scheme, they have been sued for fraud, aiding and abetting fraud, and similar claims by many of the defrauded investors and the Receiver.

As noted above, the Peterson Parties cannot seriously argue they were not insiders who were involved in the Ponzi scheme at a much more intimate level than the investors. Indeed, the evidence establishing the Peterson Parties' status as insiders is overwhelming. For example, (a) Peterson and Cain became business partners in the scheme, with Peterson taking a 1% equity interest and 50% voting interest in ANI, the defendant entity through which Cain ran the Ponzi scheme, (b) Peterson and Cain entered into funding agreements, pursuant to which Peterson's entities would receive 80% of the fictitious profits from fictitious liquor license loans and Cain/ANI would receive the other 20%, (c) working with Cain, Peterson recruited numerous investors to the scheme, raising more than $250 million for the Ponzi scheme (more than half of the approximately $390 million total raised from investors), and (d) Peterson and his entities received more than $12 million in net profits from the Ponzi scheme.

District Courts supervising complex receiverships arising from Ponzi schemes and other financial frauds have broad powers and wide discretion in the administration of the receivership. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Court explained:

> 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. The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. The basis for this broad deference to the district court's supervisory role in equity

> receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions. A district court's decision concerning the supervision of an equitable receivership is reviewed for abuse of discretion.

Id. (citations omitted).

Denying claims of Ponzi scheme insiders, who recruited investors, raised huge sums of money, received substantial profits and whose claims duplicate the claims of the actual defrauded investors, is supported by ample case law and is certainly within the District Court's broad discretion in this equity receivership. *See SEC v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009); *SEC v. Merrill Scott & Assocs., Ltd.*, No. 2:02 CV 39, 2006 WL 3813320, at *12 (D. Utah Dec. 26, 2006); *SEC v. Pension Fund of Am. L.C.*, 377 F. App'x 957, 963 (11th Cir. 2010).

The Peterson Parties cite *Kruse v. Sec. Inv'r Prot. Corp. (In re Bernard L. Madoff Inv. Sec. LLC)*, 708 F.3d 422 (2d Cir. 2013) for the proposition that a feeder fund that raised money from underlying investors and made investments in a fraudulent scheme holds the claim, not the underlying investors who invested in the feeder fund. The *Kruse* case has no application here.

First and foremost, *Kruse* dealt with an outside investment fund that had no connection to the Ponzi scheme operators. Here, as discussed above, the Peterson Parties were Cain's business partners and consummate Ponzi scheme insiders. Second, the court in *Kruse* determined whether an investor who invested through a feeder fund was a "customer" of the failed broker-dealer (Bernard L. Madoff Investment Securities LLC) under the Securities Investor Protection Act ("SIPA"). SIPA (which only applies to registered broker-dealers) has no application here

because ANI was not a broker-dealer. Third, the court in *Kruse* noted that the books and records of the company only reflected the name of the feeder fund, not the underlying investors. Here, many of the recruited investors transferred their funds directly to CTC and had escrow agreements directly with ANI and CTC, although those agreements later turned out to be forged. Many of the recruited investors also had direct email communications with Cain and other employees at ANI about their investments. Moreover, the escrow ledgers maintained by CTC reflect funds coming in directly from these investors.

Fourth, unlike the investors in *Kruse*, the investors here did not cede control over their funds to the Peterson Parties. The investors retained control over their funds, including when to invest and when to withdraw funds. Some of the investors even reviewed lists of liquor licenses (which lists turned out to be fictitious) and selected which liquor license loans they would fund. This is because the investors were not investing in the Peterson Parties with the understanding the Peterson Parties would invest in the ANI loan program. Rather, the investors themselves invested directly in the program.

The true nature of the relationships is further demonstrated by how the Peterson Parties were paid, which was not by the investors because they did not provide any services to the investors. Instead, they were paid by Cain through side agreements to split fictitious interest on fictitious loans. Therefore, the Peterson Parties were acting as partner/agent to Cain (to raise money for the scheme), not as outside investment funds. Therefore, the District Court's order denying the Peterson Parties' claims is well-supported by the facts and applicable law.

In addition, even if the Peterson Parties were not insiders, they failed to meet their burden of establishing a valid claim against the receivership estate, having never presented anything close to accurate money in, money out ("MIMO") net loss calculations for their claims.[3] Instead, the Peterson Parties asserted they owed $128 million on loans from investors as of the date the Receiver was appointed. This assertion, however, fails to take into account the nearly $227 million paid to investors prior to the receivership or the more than $175 million that has been paid to investors post-receivership (including to the investors to whom the Peterson Parties owe money) through various settlements with Chicago Title Company ("CTC"). To date, the Peterson Parties have never attempted to present an accurate MIMO calculation of their purported claims.

The reality is that at no point in this case has anyone (besides the Peterson Parties themselves) considered the Peterson Parties to be the proper claimants for the amounts lost by investors the Peterson Parties recruited to the Ponzi scheme. Virtually all of the losing investors have now settled their claims against CTC and received settlement payments from CTC (in some cases, CTC settlement funds went to the receivership and then were distributed to losing investors). The Peterson Parties were not parties to any of these CTC settlements.

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[3] In approving procedures for the administration of claims, and then again in the Claims and Distribution Order, the District Court properly noted that it is the claimant's burden of establishing a valid claim against the receivership estate. Dkt. 681, 716, 958, p. 6.

The District Court correctly held that, based on the facts and circumstances, the actual source of the funds that were lost (*i.e.* the recruited investors) are the proper holders of claims for those losses, rather than insiders/fundraisers who profited from the Ponzi scheme by more than $12 million. In so doing, the District Court clearly acted within its broad discretion in administering a complex receivership. There is no basis for this Court to overturn the District Court's order.

The Peterson Parties' due process argument is equally unavailing. District courts overseeing receiverships have the general power to employ summary procedures in allowing, disallowing, and subordinating the claims of creditors. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984). The Peterson Parties were given 90 days' notice of the August 31, 2022 hearing on the Receiver's motion and about 60 days to fully brief the issues. They filed a lengthy brief on their disputed claims (Dkt. 831), which the District Court noted it had reviewed. Counsel for the Peterson Parties, Miles Grant, presented oral argument on the Chicago Title settlement and bar order. Mr. Grant concluded his comments and said nothing about his co-counsel presenting further argument. Counsel for objecting investors also presented oral argument on the Chicago Title settlement ***and*** the disputed issues in the claims / distribution motion. The District Court heard oral argument for over two hours.

It was not until the District Court had concluded the hearing that co-counsel for the Peterson Parties, Seanna Brown, stood up and announced that she intended to present argument on the claims and distribution issues. With the hearing having been concluded, the District Court allowed Ms. Brown to put the Peterson Parties'

additional arguments relating to the claims and distribution issues in a supplemental brief. The Peterson Parties filed their supplemental brief on October 11, 2022 (Dkt. 921) and the District Court decided that further oral argument was not necessary. Dkt. 914. This was well within the District Court's broad discretion to determine when to hold oral argument. *See Toquero v. INS*, 956 F.2d 193, 196 fn. 4 (9th Cir. 1992) (due process does not require oral argument); *SEC v. Torchia*, 922 F.3d 1307, 1316 (11th Cir. 2019) ("Summary proceedings generally afford due process, and the district court does not abuse its discretion, so long as the investors are permitted 'to present evidence when the facts are in dispute and to make arguments regarding those facts.'").

The Peterson Parties were given ample notice and opportunity to present written briefs, as well as oral argument at the August 31, 2022 hearing. The District Court even afforded the Peterson Parties two opportunities to brief the disputed claims and distribution issues. Finally, the Peterson Parties have failed to explain how their rights would have been better protected by further oral argument. *See SEC v. Wencke*, 783 F.2d 829, 837-38 (9th Cir. 1986) (denying due process challenge, noting that appellants had failed to demonstrate prejudice caused by summary nature of proceedings). Any argument that can be made orally can also be made in writing. Accordingly, the Peterson Parties have no credible claim that they were denied due process.

The main purpose of this receivership is to maximize the value of the Receivership Entities' assets and provide a recovery for defrauded investors that is fair and equitable. It would be wholly inequitable, contrary to the purposes of

equity receivership, and, frankly, absurd to hold that the majority of receivership estate funds are to be paid to an insider/fundraiser/net winner who would then decide what to do with the money. The real reason the Peterson Parties want to hold the claims for the investors' losses is so they can use those losses to offset their own gains and avoid returning any of the more than $12 million in Ponzi profits they received, which would simply compound the harm already done to the investors. Accordingly, the Peterson Parties have failed to make ***any*** showing that they are likely to succeed on the merits of their appeal, let alone a strong showing.

C. The Peterson Parties Cannot Show Irreparable Harm

As a threshold matter, the Peterson Parties must show that irreparable injury is *likely* in the absence of a stay, not merely possible. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). The Peterson Parties cannot make this showing.

The entire basis for the claims asserted by the Peterson Parties, which the Court has denied, is that they owe money to the investors on the loans that investors made to the Peterson Parties in connection with their investments in the Ponzi scheme. Of course, the investors cannot recover the amounts they are owed more than once, so the amounts investors recover from the receivership estate reduce the amounts the Peterson Parties owe those same investors dollar-for-dollar. Therefore, the Peterson Parties actually benefit from, and certainly are not harmed by, distributions to the investors from the receivership estate.

The fact that the Peterson Parties are objecting to and trying to stay distributions that directly reduce their liabilities to the investors shows that their true objective is not to see that the investors to whom they claim to owe money are

paid back. Instead, as discussed above, they intend to use the investors' losses to offset their own net gains and thereby avoid returning the more than $12 million in profits they reaped from the Ponzi scheme, all at the expense of the investors and creditors with allowed claims. Indeed, if the pending $21 million interim distribution the Peterson Parties are seeking to stay is made, the MIMO net loss claims of investors to whom the Peterson Parties are potentially liable will fall below the $12 million profit amount the Peterson Parties received, meaning their offset argument (although completely meritless) would no longer even cover their fraudulent transfer liability to the receivership estate. The Court should reject this transparent attempt to further harm the defrauded investors and deny the Motion.

The Peterson Parties argue that the potential loss of their appeal due to equitable mootness is, by itself, sufficient to warrant a stay. If that were the case, any person (even someone with no connection whatsoever to the Ponzi scheme) could assert a claim in the receivership, appeal the denial of their claim, and obtain a stay of distributions because their claim, despite having no basis, would likewise be mooted by the distribution of receivership funds. That would be an absurd result, which underscores why courts do not look solely at irreparable harm and must consider the other three factors (most importantly, the likelihood of success). Considering that distributions from the receivership benefit the Peterson Parties by reducing the amounts they owe investors, the Peterson Parties cannot show any harm from such distributions, so this factor also weighs against a stay.

D. The Investors and Creditors With Allowed Claims Should Not Have to Wait Another Two Years To Receive Distributions

There are many investors and creditors whose claims have been allowed and who, therefore, have a real financial stake in this receivership. This includes the defrauded investors who suffered losses from the Ponzi scheme and have been waiting years to obtain a recovery, in some cases through significant financial hardship. As noted above, the primary purpose of this receivership is to maximize the value of the Receivership Entities' assets and provide as great a recovery as possible for defrauded investors, so their interests are of paramount importance.

These investors, some of whom are elderly, have a strong interest in receiving distributions from the receivership estate, which the Receiver has been working diligently for the past three and a half years to be able to deliver to them. Absent a stay issued by this Court, the Receiver anticipates being able to make distributions to investors and creditors with allowed claims in the next few weeks.

The investors' opposition to a stay and the harm to them that would result from a stay is reflected in the numerous telephone calls and emails the Receiver and her counsel have received since the Peterson Parties motion seeking a stay in the District Court was filed. Examples of emails received by the Receiver from investors who oppose a stay are attached hereto as Exhibit A. Accordingly, this factor also weighs strongly against a stay.

E. **The Public Interest in Providing A Prompt Recovery to Victims of Securities Fraud Weighs Strongly Against a Stay**

"[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). Here, the public interest in enforcing the securities laws and providing a prompt recovery to fraud victims substantially outweighs the Peterson Parties' interests and militates against a stay.

In *FTC v. Kutzner*, 2017 WL 11632849, at *9 (C.D. Cal. December 18, 2017), the FTC had won summary judgment against Kutzner, who had been implicated in connection with a fraudulent scheme. Kutzner moved for a stay pending his appeal of the Court's order, including a stay of the sale of assets by the receiver in order to provide a recovery for the victims of the scheme. In applying the four-factor *Nken* test, the court found that the public interest favoring recovery by parties injured by Kutzner's scheme militated against a stay.

This massive Ponzi scheme has caused enormous harm to hundreds of victims. Consistent with its mission, the SEC filed this case to stop the fraudulent scheme and requested the appointment of the Receiver to protect and maximize the value of the Receivership Entities' assets such that investors could obtain as great a recovery as possible. The SEC, the Receiver, and the District Court have worked toward that objective, providing due process to the defrauded investors and other third parties along the way. A big step towards the ultimate goal – an interim distribution of receivership funds – is now ready to take place, which will provide relief to many investors, including elderly investors who invested their retirement

savings and have endured financial hardship. The public interest is providing this much needed recovery for investors far outweighs the private interests of the Peterson Parties, who profited from the Ponzi scheme by more than $12 million. Accordingly, this factor weighs strongly against a stay of distributions.

F. If the Court Grants a Stay, the Peterson Parties Should Be Required to Post a Bond

Although there is no basis for a stay and a bond would not alleviate the substantial harm a lengthy stay of distributions would cause to investors and creditors, if the Court is inclined to grant a stay, the Peterson Parties should be required to post a supersedeas bond to address the harm to investors and creditors from the delay in receiving distributions, including the lost interest, opportunity costs, and additional administrative expenses of the receivership.

Courts have imposed supersedeas bonds when appellants seek to stay distributions from a pool of assets, such as from a settlement fund or bankruptcy estate, holding that a distribution order is a money judgment. *In re Genetically Modified Rice Litigation,* 2012 WL 6577269 (E.D. Mo. December 17, 2012). In these instances, courts have considered such factors as the anticipated length of time of the appeal, lost interest, opportunity costs, and anticipated appellate expenses. *Id.*; *In re Tribune Co.*, 477 B.R. 465, 480-82 (Bankr. D. Del. 2012).

Here, the Receiver is preparing to make an interim distribution to the holders of allowed claims in the total amount of $21 million. Based on information provided by the Ninth Circuit, a reasonable estimate of the delay in distributions

that would result from a stay pending appeal is 18 months.[4] The Receiver submits that 10% per year of the $21 million interim distribution is a reasonable sum for the Court to require the Peterson Parties to post to protect investors and creditors with allowed claims from the potential lost interest, opportunity costs, and additional administrative expenses caused by the delay in distributions. Therefore, in the event the Court is inclined to grant a stay of distributions pending their appeal of the Claims and Distribution Order, the Peterson Parties should be required to post a bond of $3.15 million (10% per year for 1.5 years).

III. CONCLUSION

For all the reasons above, the Motion should be denied.

Dated: April 20, 2023

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[4] Briefing in this appeal is due to be completed in August 2023 (assuming the current briefing schedule holds). The Ninth Circuit's website states that oral argument is generally held about four months after briefing is completed and most appeals are decided between three months and a year after oral argument. *See* https://www.ca9.uscourts.gov/general/faq/

CERTIFICATE OF WORD COUNT

Under Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rule 27-1(d), counsel for Defendant and Appellee certify that this Response in Opposition to Appellants' Emergency Motion for a Stay of the Distribution Order Pending Appeal does not exceed 5,200 words or 20 pages, excluding certification forms, tables, signature blocks and other nonsubstantive matters that may be excluded under the rules.

Dated: April 20, 2023

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: *s/Edward G. Fates*
DAVID R. ZARO
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Attorneys for Defendant and Appellee
KRISTA FREITAG, Receiver

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 600 West Broadway, 27th Floor, San Diego, California 92101. I certify that, on April 20, 2023, I electronically filed the foregoing RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR A STAY OF THE DISTRIBUTION ORDER PENDING APPEAL 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 Plaintiff-Appellants' 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 20, 2023 at San Diego, California.

s/Edward G. Fates
EDWARD G. FATES