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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. MATTHEW WADE BEASLEY, *et al.*, Defendants, THE JUDD IRREVOCABLE TRUST, *et al.*, Relief Defendants.	Case No. 2:22-cv-00612-CDS-EJY Judge Hon. Cristina D. Silva **OPPOSITION OF RECEIVER, GEOFF WINKLER, TO MOTION TO INTERVENE** [Declaration of Geoff Winkler submitted concurrently herewith]

TO ALL INTERESTED PARTIES AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE that Geoff Winkler (the "Receiver"), the Court-appointed receiver in the above-referenced action for certain entity defendants and over the personal property assets of

certain individual defendants and relief defendants (collectively, the "Receivership Defendants"), hereby opposes the Motion to Intervene (the "Motion") of Kristie Young and Omid Shahabe (collectively, the "Movants"), for the following reasons:

I. INTRODUCTION.

The Motion is predicated upon a series of mischaracterizations of law and fact and, if granted, would undermine the very purpose of the receivership and lead to its death by a thousand cuts, as other parties who invested funds with the Receivership Defendants would rush to the Court's door, under the guise of "protecting their own interest." In point of fact, this Court has already made a determination of how best to protect the interests of investors and other creditors of the Receivership Defendants: it has appointed the Receiver and charged him with, among other things, marshaling assets for the benefit of investors and creditors – something the Movants concede he has already commenced doing, very successfully. The law strongly supports the Court's decision, and a receivership is unequivocally the best method for protecting the interests of stakeholders in the present matter.

Moreover, and despite the Movants' claim to the contrary, the bulk of the case law on the issue – including case law requiring the written permission of the Securities and Exchange Commission (the "Commission") to intervene in an enforcement action – militates against intervention. This is not surprising, particularly in the context of a multi-hundred million dollar enforcement action with over two dozen defendants, requiring a detailed forensic accounting and efforts to recover dozens – if not hundreds – of assets purchased with tainted funds. Permitting the Movants to intervene would unnecessarily and unproductively add more chefs to an already bustling kitchen with no concomitant benefit to any interested party, and potentially undermine the very recovery efforts the Receiver has already so successfully commenced. The Movants attempt to distract from this basic truth by suggesting, falsely, that: (a) the Receiver works for the Commission, not the Court, and therefore owes no duty to investors; and (2) the Commission, not the Receiver, will be tasked with returning recovered funds, and cannot be trusted to do so in a manner equitable to investors. Nothing could be further from the truth: the Receiver is an agent of this Court, not the

Commission, and it is he – not the Commission – who has been tasked by this Court with marshaling assets for the benefit of investors and creditors, in anticipation of eventual distribution to claimants.

The Movants' suggestion the Receiver's asset recovery efforts will be undermined by his purported inability to overcome the *in pari delicto* doctrine or similar equitable arguments is likewise erroneous, and entirely at odds with the applicable law. Longstanding precent makes clear that the *in pari delicto* defense cannot be applied to a receiver seeking to recover the proceeds of an allegedly fraudulent scheme, even while he "steps into the shoes" of the alleged wrongdoer. The Receiver is confident that the *in pari delicto* doctrine should not present a significant obstacle to his recovery efforts, and urges the Court to ignore the Movants' baseless claims to the contrary.

The Motion is predicated upon multiple instances of misunderstanding or mischaracterization of the law and the facts, with apparent disregarding for the value presented by the receivership, and with the apparent intent of undermining the receivership in favor of a class action intended to supplant the receivership, in effect if not in name. Such an action would impair the rights of investors and creditors, increase the costs to all stake holders, and wreak havoc with this Court's administration of the receivership estate and its calendar.

Indeed, it is critical to consider that the wave of additional investor actions that could result from granting the Motion would subject investors to attorneys' fees and costs needlessly, in pursuit of recoveries that the Receiver is already pursuing on behalf of all investors. In other words, even if the law supported the Motion (and it does not), the Motion begs the question: Why pay innumerable sets of attorneys (or putative class counsel) to pursue damages which the Receiver is already charged with recovering, particularly when his efforts to date have been so successful?

For these reasons, and as addressed in greater detail below, the Receiver respectfully requests that the Court deny the Motion, bar the Movants from intervening in the above-entitled action, and make clear that it will not countenance a renewed rush to the courthouse that – however well-intentioned – will do nothing but overcomplicate an already complicated matter and interfere with the Receiver's highly successful efforts.

II. RELEVANT FACTUAL BACKGROUND.

The above-entitled action was commenced by the Commission on April 12, 2022. (See ECF No. 1.) In its Complaint, the Commission alleged causes of action arising from an alleged investment scheme, whereby hundreds of millions of dollars in investments were successfully solicited based on claims that funds invested would be backed by settlements to be paid out in litigation across the country. (Id.) As alleged by the Commission, those settlements did not exist, and funds raised from newer investors were used to pay existing obligations to older investors, in a manner consistent with a Ponzi investment scheme. (Id.) In addition, the Commission has alleged that investor funds were diverted by certain defendants to purchase luxury homes, a private aircraft, and multiple luxury automobiles, among other things. (Id.)

On motion by the Commission, this Court appointed the Receiver on June 3, 2022. (See ECF No. 88.) Pursuant to its Order Appointing Receiver (the "Appointment Order"), this Court vested the Receiver with exclusive authority and control over the corporate Receivership Defendants, and over the assets of the individual Receivership Defendants. (Id.) The scope of the Receiver's authority was subsequently extended to apply to additional defendants and assets via the Court's July 29, 2022 Order Amending Receivership Order. (ECF No. 207.) By way of its Appointment Order, the Court charged the Receiver with, among other things, marshaling the assets of the receivership estate, including specifically via the prosecution of litigation to recover estate assets. As of the date of the Receiver's August 2, 2022 First Quarterly Report and Petition for Instructions (ECF No. 223), the Receiver had already recovered millions of dollars' worth of personal and real property for the benefit of the receivership estate, and sought and secured Court approval of his proposed procedures for selling these assets out of receivership. Id.; see also ECF Nos. 137, 146, 172, 224; see also concurrently filed Declaration of Geoff Winkler ("Winkler Decl.") ¶ 2. Since then, the Receiver has recovered additional assets. He presently estimates that he has marshaled assets worth approximately $55 million, including a private aircraft for which he has recently accepted a purchase offer with a net value to the receivership estate of over $5 million. (Winkler Decl. ¶ 3.) In other words, since his appointment, the Receiver has been tremendously

successful at identifying and recovering assets for the benefit of the receivership estate and its creditors, including investors.

III. ARGUMENT.

A. The Movants Are Not Entitled To Intervene As Matter Of Right.

Notwithstanding the Movants' assertion to the contrary, while not barred entirely, intervention in an enforcement action brought by the Commission is not permissible absent written agreement for the Commission. See, e.g., 15 U.S.C. § 78u(g) ("no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission"); SEC v. Egan, 821 F. Supp. 1274, 1275-76 (N.D. Ill. 1993) (denying petition to intervene where the "SEC has expressly refused to consent to the proposed third-party compliant on the ground that it 'would complicate the issues, delay th[e] … action and significantly interfere with the Commission's … responsibilities'"); SEC v. Homa, 2000 WL 1468726, *2 (N.D. Ill. Sept. 29, 2000) (finding the bar to intervention to be "plain and unambiguous" and citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 N. 17 (1979) in which the Supreme Court acknowledged that consolidation of a private action with one brought by the Commission is prohibited by statute); SEC v. Qualified Pensions, 1998 WL 29496, *3 (D.D.C. Jan. 16, 1998) (applying similar standard and further finding that proposed intervenors had failed to make a showing of a right to intervene).

The Motion is conspicuously devoid of any detail regarding the Movants' efforts to meet and confer with Commission regarding their intervention request in the pre-filing period, or of the Commission's position on the propriety of such a request. The Receiver understands that the Commission affirmatively rejected the Movants' intervention request, and that the Motion was filed in the face of that rejection, suggesting that, like the Receiver, the Commission found intervention in this instance to be unwarranted. Notable, too, the Movants never once contacted the Receiver to advise of their intent to seek intervention, or provide any rationale therefore. (Winkler Decl. ¶ 4.) The Movants have failed to secure Commission consent to their intervention, and have ignored the Receiver entirely. He respectfully submits their Motion should be denied.

The Movants have also entirely failed to demonstrate a basis for intervention as a matter of right. The Ninth Circuit has generally outlined 4 requirements for intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). A proposed intervenor must: (1) timely file an application; (2) possess a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) be inadequately represented by the parties to the action. California ex rel. Lockyear v. U.S., 450 F.3d 436, 441 (9th Cir. 2006) (citing Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993)). Failure to satisfy any one of the requirements is fatal to a motion to intervene. Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009).

The fact that an interested party might ***prefer*** to intervene, and insert itself into a receiver's administration of an estate does not give rise to a ***right*** to intervene. See, e.g., SEC v. Am. Pension Servs., Inc., 2015 WL 136322, *2 (D. Utah Jan. 20, 2015) (finding a movant's interests were not impaired or impeded solely because he disagreed with the receiver's administration plans and was, as here, "similarly situated" to other creditors); SEC v. Nadal, 2009 U.S. Dist. LEXIS 94302, *4-5 (M.D. Fl. Sept. 24, 2009). As the Am. Pension Servs. court noted, investors are not entitled to the "absolute satisfaction" the Movants appear to be requesting here, and their dissatisfaction with the existence of a receivership does not give right to a right to intervene. Am. Pension Servs., Inc., 2015 WL 136322at *4.

Indeed, the Movants here have entirely failed to demonstrate that their interests are not appropriately represented by participants in the underlying action. More specifically, the Movants have not met their burden under Ninth Circuit precedent regarding the adequacy of representation, which requires a proposed intervenor to address: (1) whether the interest of a party is such that it will undoubtedly make the intervenors arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceedings that the other parties would neglect. See People of California v. Tahoe Regulatory Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986). "The most important factor in determining the adequacy of representation is how the interests compare with the interests of

existing parties." Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003). As noted by one court, "the adequacy of interest requirement is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy". Pub. Serv. Co. of New Hampshire v. Douglas Patch, 136 F.3d 197, 206 (1st Cir. 1998) (citing Moosehead Sanitary Dist. v. SG Philips Corp., 610 F.2d 49, 54 (1st Cir. 1979)); see also SEC v. TLC Invs. & Trade Co., 147 F.Supp.2d 1031, 1041-42 (C.D. Cal. 2011).

Critically, where "one of the duties of the existing parties is to represent the interest of the intervenor, intervention will not be allowed unless a compelling showing of inadequate representation is made." In re Christina Thompson, 965 F.2d 1136, 1143 (1st Cir. 1992). As here, mere conclusory speculation by intervenors is insufficient and "the putative intervenor must exert concrete facts which demonstrate that (1) the existing representation of the putative intervenors interest is inhibited by the personal interest of the existing representative, (2) the existing representative and opposing party are engaged in collusive activities, or (3) the existing representative has failed or refused to fulfill the fiduciary duty to protect the interests asserted by the putative intervenor." Id.

The Movants' attempt to suggest that they are differently situated from other investors, or that their funds are held in a specific "trust" distinct from the receivership is belied by the allegations and exhibit they rely upon to justify their requested intervention. The Movants argue that they are parties to "personal injury settlement contracts" in connection with which their investments "are held in [t]rust" and – therefore – that their funds are distinct from other funds over which the Receiver exerts authority and control; yet they also concede the these contracts were "fraudulent offerings" because the contracts pursuant to which they invested "were fictitious." (See Motion at 2:4-20; 6:19-21.) Worse, the Movants do not even append their own investment contracts as evidence in support of their claims; they append merely a "sample" contract which they claim is emblematic of the language in their investment agreements, which they simultaneously concede were "fictitious" purchase agreements. (See Motion at 4:14 and Ex. A(1).) The Movants cannot have it both ways: Either they are parties to unique contracts giving rise to a unique right to intervene, or they are victims of the fraudulent scheme alleged by the Commission, in which case

they appear to be ***identically*** situated to other allegedly defrauded investors, and are seeking to intervene in this action for the improper purpose of attempting to enforce what they themselves concede are fraudulent contracts.[1]

It does not matter which option the Movants choose. Their interests are, unequivocally, adequately represented. The Receiver's duty to maximize the value of the receivership estate for the benefit of the investors and creditors overlaps with the Movants' interest in recouping their investment. To that end, as reflected in the Receiver's interim report, motions regarding asset sales procedures, and recent report and recommendation regarding liquidation of estate assets, the Receiver has already begun highly successful efforts to marshal and sell assets for the benefit of the receivership estate, including its investors, as the Movants themselves concede. (See, e.g., Motion at 6:1-7.) Again, "absolute satisfaction" is not the standard for adequate representation of an interest. Am. Pension Servs., Inc., 2015 WL 136322at *4.

Here, as in the TLC case, the Movants' assertion of inadequate representation is premised merely on the claim that the Receiver is not pursuing their individual interest and preferred strategy. However, there is no dispute that the Receiver, the Court and the Movants share the same ultimate goal: To recover assets and maximize their value for all creditors. Am. Pension Servs., Inc., 2015 WL 136322 at *4. As such, the Movants' argument regarding their purportedly unique situation and allegedly inadequate representation is nothing more than the "paper tiger" recognized by the Pub. Serv. Co. court. Setting aside the dramatic nature of the Movants' accusations – e.g., that the Receiver is the "SEC's receiver"; that an undisclosed, potential distribution approach allegedly discussed at a meeting for which the Movants were not present was "divisive"; that the SEC, not the Receiver, will be marshaling assets and making distributions in this case – the issues raised in the

[1] This internal contradiction alone is sufficient basis to deny the Motion. By the Motion, the Movants seek the ability to prosecute their own recovery claims, derived from investment contracts which they themselves concede are fraudulent. As reflected in the exhibits to the Motion, the investment contracts in issue are governed by Nevada law. In Nevada, the remedy for damages suffered as a result of a fraudulent contract is recission, not specific performance. Fraud in the inducement renders a contract voidable, not enforceable as against the alleged fraudster. See, e.g., Bishop v. Stewart, 13 Nev. 25, 42 (1878); The Friendly Irishman, Inc. v. Ronnow, 74 Nev. 316, 319 (1958) (rejecting argument that performance was appropriate remedy for fraudulent contract).

Movants have already been contemplated by this Court in evaluating the propriety of the Receiver's appointment. The Movants have not provided the Court with any basis to deviate from its current approach to administering this case.

For the foregoing reasons, the Receiver respectfully submits that the Movants have not satisfied the standard for intervention as of right, and that, accordingly, their Motion should be denied.

B. The Equities Militate Strongly Against Permissive Intervention.

Fed. R. Civ. P. 24 (b)(1)(B) states that the Court may permit intervention by someone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24 (b)(1)(B). Permissive intervention is discretionary. Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977). In determining whether to exercise its discretion, a court may consider, among other things, whether the proposed intervenor's interests are adequately represented by other parties, whether intervention will prolong or unduly delay litigation, and whether intervenor will significantly contribute to full development of the underlying factual issues. Id. A party seeking permissive intervention has the burden of establishing the basis for intervening. Citizens For Balanced Use v. Montana Wilderness Assoc., 647 F.3d 893, 897 (9th Cir. 2011). The Receiver respectfully submits that Movants have not demonstrated that permissive intervention is necessary here and, indeed, the equities strongly militate ***against*** permitting them to intervene.

Specifically, Movants make clear in their Motion that it is their intent to initiate their own claims, exclusively in order to recover the full amount of their investments. (See Motion at 10:16-19; and Sections 1(a) and (b).) The Movants' interests therefore do not directly align with those of the receivership estate or other investors: The Movants' motive for intervening is to maximize ***their own*** recovery, not to maximize returns to all parties.

Unlike the Receiver, the Movants have no duty to maximize recoveries for the benefit of all creditors. As such, and notwithstanding the Movants' protestations to the contrary, there is no reason to assume *ex ante* that their intervention would advance the goals of either the Commission or the receivership. Indeed, the law supports continuing to permit the Receiver to administer the receivership estate without interference from the Movants. See, e.g., SEC v. Universal Fin., 760

F.2d 1034, 1038-39 (9th Cir. 1985). Because "the interests of the Receiver are very broad and include not only the protection of the receivership *res*, but also the protection of investors and judicial economy[,]" the interests of the Receiver in administering the entities and assets under his control, particularly early in the case, should "weigh more heavily than the merits of the [creditor's] claim." Id. at 1039; see also SEC v. Wencke, 622 F.2d 1363, 1373-74 (9th Cir. 1980). The Receiver therefore respectfully submits that the equities militate against permitting intervention, and on that basis request that the Motion be denied.

C. The *In Pari Delicto* Doctrine Is Largely Irrelevant Here.

In their Motion, the Movants assert that the *in pari delicto* doctrine – in which defenses available against an agent's predecessor are available against the agent – stands "poised to thwart [the Receiver's recovery] claims." (See Motion at 16:8-10.) This is not so. Neither is the Movants' contention that the Receiver lacks standing to prosecute claims for recovery because of the application of the doctrine.

As a preliminary matter, the Movants' reliance on FDIC v. O'Melveny & Myers, 61 F.3d 17 (9th Cir. 1995), for the proposition that the question of whether the doctrine is applicable to a receiver is "not so cut and dry" as might otherwise be believed is woefully misplaced. Indeed, in O'Melveny, the Ninth Circuit affirmatively found that a receiver was ***not barred*** from suing the defendant by equitable defenses which the defendant could otherwise have asserted against the entity under the receiver's control. Id. at 19. In reaching this conclusion, the Ninth Circuit underscored the fundamental premise that, while a receiver does step into the shoes of the entity under his control, a "receiver, like a bankruptcy trustee and unlike a normal successor in interest, ***does not voluntarily*** step into the shoes of the [entity]; ***it is thrust into those shoes***." Id. (emphasis added). In other words, given the very purpose of a receivership, equitable principles alone are sufficient to bar the application of the *in pari delicto* doctrine to a receiver.

Many Circuit and District Courts around the country have agreed with the Ninth Circuit. See, e.g., Jones v. Wells Fargo Bank, 2012 U.S. App. LEXIS 390, *26-27 (5th Cir. Jan. 9, 2012) ("Although a receiver generally 'has no greater powers than the corporation had as of the date of the receivership,' it is well established that 'when the receiver acts to protect innocent creditors … he

can maintain and defend actions … even though the corporation would not be permitted to do so."); Mosier v. Stonefield Josephson, Inc., 2011 U.S. Dist. LEXIS 124058, *18 (C.D. Cal. Oct. 25, 2011) (allowing a defendant "to invoke the defense of in pari delicto would frustrate the Court's plan by 'diminishing the asset pool held,' thereby hurting innocent third-party creditors"); Goldberg v. Chong, 2007 U.S. Dist. LEXIS 49980, *29 (S.D. Fla. July 11, 2007) ("The Court fails to see how the purposes of the principle of *in pari delicto* would be served by preventing recovery on account of [the principal's] wrongdoing"). As such, the Movants are mistaken in their suggestion that the *in pari delicto* doctrine stands poised to undermine the Receiver's efforts.

The Movants are also mistaken when they argue that because, "like a bankruptcy trustee, a federal receiver stands in the place of the entities for which he is appointed", the Receiver will lack standing to prosecute claims to recover receivership assets. (Motion at 16:11-13.) To the contrary, as made clear by the Movants' own cited authority, entities under the authority of a receiver may be analogized to "evil zombies" freed from the malignant control of their pre-receivership principal and, accordingly, "entitled to the return of … moneys – not for the benefit of [the entities' principal] but of innocent investors – that [the principal] had made the corporations divert to unauthorized purposes." Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995). Once those entities are "controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors … we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated … " Id. at 755. Indeed, in Scholes, the Seventh Circuit affirmatively ***rejected*** the notion that the receiver lacked standing to prosecute his claims, holding that, at a minimum, the fraudulent transfers in issue "removed assets from the [receivership] corporations … and by doing so injured the corporations." Id. at 754. In other words, and assuming, *arguendo*, that the Movants' characterization of Scholes is accurate (and it is not), Scholes actually ***confirms*** the Receiver's ability to prosecute claims here. The Movants also fail to alert the Court to the fact that the Ninth Circuit has expressly adopted the Scholes analysis. See, e.g., Donell v. Kowell, 533 F.3d 762, 777 (9th Cir. 2008) (finding that a receiver may bring actions "to redress injuries" suffered by the entities in receivership as a consequences of their management's pre-

receivership misconduct, specifically in the context of a receiver's effort to disgorge funds from an investor in possession of profits derived from a Ponzi investment scheme).

Put simply, the Movants' *in pari delicto* analysis is profoundly flawed, and their efforts to suggest to the Court that the Receiver will be unable to prosecute asset recovery efforts successfully because of the doctrine finds no meaningful support in the law, particularly in the Ninth Circuit. Accordingly, the Receiver respectfully request that the Court ignore these misplaced suggestions, and deny the Motion.

D. None Of The Arguments Presented In Section 2(B)(2) Of The Motions Has Merit.

In addition to the specific arguments presented above, the Receiver also believes it is critical to highlight that the arguments presented in Section 2(B)(2) of the Motion reflect a profound misunderstanding of the receivership process, as well as a misunderstanding the of law. While addressing every baseless accusation or meritless aside presented in the Motion is unnecessary, the Receiver considers it appropriate to address the following:

1. There is no "resulting trust" in favor of the Movants.

In large part, the Movants' Motion is predicated upon the fiction that, either because their investment agreement promised that they investment would be held in trust, and attach to a (nonexistent) settlement, or because of equitable considerations, the funds they invested with the Receivership Defendants are held in a "resulting trust" for their exclusive benefit. This is not so. As a preliminary matter, and as already addressed above, the Movants acknowledge that the investment agreements in issue "were fictitious." As such, the language used to induce the Movants' investment is irrelevant here. More critically, many of the Commission's pleadings filed in the initial stages of this action document how investors' money was transferred out through the Receivership Defendants' initial intake accounts, to other accounts, and ultimately used to purchase assets ranging from multi-million dollar homes, to a private aircraft, to luxury automobiles and cryptocurrency. (See, e.g., ECF Nos. 2, 21, 23, 24, 67, 87.)

In other words, whatever representations may have been made to the Movants regarding the nature and security of their investment, the reality is that their funds were commingled with funds

contributed by other investors, and diverted for purposes entirely unrelated to the initially stated investment goals. It is for this very reason that receivers are not obligated to "trace" funds in Ponzi disgorgement cases. See, e.g., United States v. 13328 & 13324 State Highway 75 N., 89 F.3d 551, 553 (9th Cir. 1996) (holding that requiring tracing would "frustrate equity"); SEC v. Elliott, 953 F.2d 1560, 1569 (11th Cir. 1992) (rejecting tracing as inequitable); FTC v. Bronson Partners, LLC, 654 F.3d 359, 374 (2d Cir. 2011); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000). The Movants' request to intervene is antithetical to the principles underlying these decisions, and would be tantamount to a decision that the Movants are ***uniquely entitled*** to a finding, however inconsistent with the apparent facts, that ***their*** investment was distinctive or exceptional, remains segregated, and should be set apart to be pursued by them alone. None of the applicable authority supports such a funding and the Motion should be denied.

2. Neither the Receiver nor the Commission is "Usurping" the Movants' Prospective Recovery.

In support of their contention that the appointment of the Receiver reflects an effort by the Commission to "usurp their recovery[,]" the Movants cite to a handful of bankruptcy decisions finding that bankruptcy trustees hold no rights in assets that are not part of a bankruptcy estate, presumably in the hopes that the Court will believe that this uncontroversial statement means that the Receiver has no authority over the funds they invested with the Receivership Entities. This is not so. First, this put the cart before the horse, and assumed that the Movants have established the existence of a unique "trust" containing their unique investment (or associated rights by assignment), when they have done no such thing.

Second, the one decision the Movants ***do*** cite that involves receivers – far from holding that receivers hold no rights in property deemed by a court to be property of a receivership estate – actually confirms that it is they, not the Receiver or the Commission, whose stated interest is problematic. See, e.g., In re Technical Land, Inc., 172 B.R. 429, 430 (Bankr. D.C. 1994) ("[T]he primary issue is purely one of law: is a marshal's sale of property in the custody of a receiver, conducted without leave of the receivership court, effective to convey title to property? I conclude it is not."). Accordingly, the Movants' claim that permitting them to intervene and sue actually

"***furthers***" (italics original) the Receiver's and the Commission's goals is beyond suspect. This Court should not take the bait: The Movants are requesting that commingled funds subject to the exclusive jurisdiction of this Court and under the exclusive authority should be carved out from the receivership estate so that they may benefit unilaterally, potentially to the detriment of the other investors and creditors' the Receiver's efforts are intended to benefit.

3. The Receivership is not "At Odds" with the Interests of Investors in Recovering Their Investments.

The Movants further claim that, because "the Commission has never been required to distribute all disgorged funds to … defrauded investors[,]" their interests have somehow been undermined by the existence of the receivership. This assertion is predicated upon a fundamental misunderstanding of the receivership. While it is true that, in certain cases, the Commission pursues the recovery of damages (including via disgorgement from defendants) on its own, that is not the procedure that the Commission (or the Court) have elected here. While the Receiver is confident that the Commission will prosecute its claims to the best of its ability, his efforts to recover funds for the benefit of the receivership estate and its creditors (including investors) are entirely independent of any damages recovered by the Commission. The Receiver, not the Commission, has already recovered tens of millions of dollars' worth of assets pursuant to the authority conferred by the Appointment Order. To disrupt such highly successful efforts at this time, simply on the basis of the Movants' claims regarding the alleged inefficiency of distributions undertaken by other parties (not the receiver) in the past, in other cases, is entirely unnecessary and would do nothing but, again, confer an inequitable and unilateral benefit upon the Movants.

4. The Movants' Contention that any Eventual Distribution Process will not be "Fair and Equitable" is Entirely Baseless, and Premature.

Finally, the Movants' contention that any distribution process undertaken by the Receiver in this matter will be inequitable is entirely baseless, as no claims or distribution process has been proposed yet by the Receiver, let alone approved by the Court. The suggestion that case law enabling courts to principles of equity in tailoring distribution plans will necessarily result in "unfair" outcomes is likewise misplaced. Indeed, as with their claims regarding a "resulting trust",

the Movants' challenge to an as-yet undeveloped, un-proposed, and unapproved distribution plan is based upon a premature concern they may recover less than their aggregate investment with the Receivership Defendants, an outcome they preemptively deem to be "unfair" regardless of the facts. Notably, once the Receiver has developed a claims and distribution process, he will publicly petition this Court for approval, meaning the Court (not the Receiver) alone will be empowered to determine the propriety of the proposal after receiving full briefing from the Receiver and any interested parties. Accordingly, the Movants' premature accusations regarding the alleged unfairness of a presently non-existent process is no basis for granting a motion to intervene. The Motion should be denied.

E. If Granted, The Relief Requested In The Motion Will Undermine The Very Purpose Of The Receivership.

The purpose of a receivership in the context of a securities enforcement action is to achieve the most equitable outcome possible for all stakeholders. Because "the interests of the Receiver are very broad and include not only the protection of the receivership res, but also the protection of investors and judicial economy[,]" the interests of a receiver in administering the entities and assets under his control should "weigh more heavily" than the merits of the Movants' claims. SEC v. Universal Fin., 760 F.2d 1034, 1039 (9th Cir. 1985) (citations omitted) (among other things, affirming denial of investor motion for relief from stay); see also SEC v. Wencke, 622 F.2d 1363, 1373-74 (9th Cir. 1980) (same).

The purpose of the receivership cannot be reconciled with the relief requested in the Motion. If accepted by the Court, the arguments presented by the Movants will (1) unilaterally privilege the Movants' reimbursement claims above those of all others; while (2) simultaneously encourage copycat motions to intervene by any other investors who believe that they are more likely to recover their investments by going it alone. In other words, there is a very real risk attendant to granting the Motion, as such a decision could open the floodgates to a raft of additional investor/intervenor motions and set off a new "race to the courthouse" with each aggrieved investor (or other creditor) pursuing efforts to recover at the potential expense of all others. Worse, and contrary to their representations in the prefatory sections of their Motion, ***this appears to be among the Movants'***

affirmative goals: As reflected in footnote 13 to the Motion, and without any sense of irony regarding their earlier complaints regarding the alleged usurpation of claims, the Movants note that, "[b]ased on their experience with class litigation, Intervenors' counsel may recommend amending the [proposed] Complaint [in intervention] … in order to add class allegations … since no personal notice to class members is required an no opt-out right is provided."

Setting aside the question of whether the Movants are appropriate class representatives, or can satisfy the requirements for the establish of a class, the Movants have not even yet established standing to petition for intervention[2] – given their failure to secure the Commission's consent, let alone to use their claims as a lever to throw open the receivership estate to a costly litigation free-for-all administered by agents that do not directly answer to this Court, have not committed to controlling fees and expenses the way the Receiver and his professionals have done, and whose objectives may wreak havoc with the principles of judicial economy. In this sense, the Motion is a Trojan horse submitted with the apparent, deliberate intent of undermining the receivership, and it should be denied.

IV. CONCLUSION.

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Movants' Motion.

Dated: September 12, 2022

SEMENZA KIRCHER RICKARD

/s/ Jarrod L. Rickard

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[2] If the Movants' lack standing to file their Motion, the *pro hac vice* applications that accompanied the motion may be procedurally improper.

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CERTIFICATE OF SERVICE

I am employed by the law firm of Semenza Kircher Rickard. in Clark County. I am over the age of 18 and not a party to this action. The business address is 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145.

On the 12th day of September, 2022, I served the document(s), described as:

OPPOSITION OF RECEIVER, GEOFF WINKLER, TO MOTION TO INTERVENE

☒ by serving the ☐ original ☒ a true copy of the above and foregoing via:

☒ a. **CM/ECF System** to the following registered e-mail addresses:

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☐ b. **BY U.S. MAIL.** I deposited such envelope in the mail at Las Vegas, Nevada. The envelope(s) were mailed with postage thereon fully prepaid. I am readily familiar with Semenza Kircher Rickard's practice of collection and processing correspondence for mailing. Under that practice, documents are deposited with the U.S. Postal Service on the same day which is stated in the proof of service, with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.

☐ c. **BY PERSONAL SERVICE.**

☐ d. **BY DIRECT EMAIL.**

☐ e. **BY FACSIMILE TRANSMISSION.**

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

/s/ Olivia A. Kelly
An Employee of Semenza Kircher Rickard