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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOHN V. BIVONA; SADDLE RIVER ADVISORS, LLC; SRA MANAGEMENT ASSOCIATES, LLC; FRANK GREGORY MAZZOLA,

Defendants, and

SRA I LLC; SRA II LLC; SRA III LLC; FELIX INVESTMENTS, LLC; MICHELE J. MAZZOLA; ANNE BIVONA; CLEAR SAILING GROUP IV LLC; CLEAR SAILING GROUP V LLC,

Relief Defendants.

Case No. 3:16-cv-01386-EMC

(1) INTERESTED PARTY PROGRESSO VENTURES, LLC'S REPLY IN FURTHER SUPPORT RE: CLASSIFICATION OF ITS INVESTOR AND CREDITOR CLAIMS; AND

(2) DECLARATION OF EDUARDO SAVERIN
(filed under separate cover)

Date: July 16, 2018
Time: 1:30 pm
Courtroom: 5
Judge: Edward M. Chen

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Interested party Progresso Ventures, LLC ("Progresso") hereby submits this reply in further support of a determination by this Court that Progresso shall be classified as a creditor up to the amount of its $5,529,364.25 judgment and as an investor to the extent a liquidating event generates an amount that, based on the 719,520 Palantir shares of Palantir Technologies, Inc. owed to Progresso, exceeds the amount distributed to Progresso as a result of its creditor claim.

PRELIMINARY STATEMENT

The SRA Investor Group's response brief is rife with mischaracterization and conjecture, but devoid of legal authority supporting the novel arguments advanced to deny Progresso's investor claim and limit Progresso's creditor claim. With respect to the investor claim, the SRA Investor Group asks this Court to ignore what all parties know to be true: on November 10, 2011, $4.45 million of funds due to Progresso were diverted to receivership entity Clear Sailing Group IV, LLC and were used to purchase Palantir shares a few days later. Thereafter, Progresso received repayments of $2,939,007.50. *See* Declaration of Eduardo Saverin ("Saverin Decl.") at §3. As a result, Progresso still is owed $1,510,992.50 worth of the Palantir investment made with its funds. Full stop. Progresso did not authorize the Palantir investment and has never claimed that it did. But an unauthorized investment is a far cry from a disclaimer of share ownership—both as a factual and a legal matter. It is a fundamental tenet of restitution law that if a wrongdoer profits from misappropriated funds, the aggrieved party is entitled to recover those profits. Indeed, the "elementary rule of restitution is that if you take my money and make money with it, your profit belongs to me." *Nickel v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir. 2002). Courts in this Circuit have repeatedly followed this precept and awarded profits to plaintiffs situated similarly to Progresso. The SRA Investor Group cites no case law to the contrary yet relies on the rejected argument that profits are not recoverable because Progresso did not authorize the investment at issue. This argument is at odds with 9th Circuit precedent espoused in *Nickel* and other cases. The SRA Investor Group's election of remedies and res judicata arguments fare no better, as they are both inapposite given the facts underlying Progresso's claim and the equitable

nature of this proceeding. The SRA Investor Group may not like that Progresso's investor claim reduces its own recovery, but that is not a valid reason for this Court to decline to award Progresso its share of any Palantir profits.

The SRA Investor Group does not have as much to say about Progresso's creditor claim. It concedes Progresso's entitlement to recover as a creditor and does not dispute that Progresso is entitled to the principal component of its judgment in the New York actions. It takes issue, however, with the quantum of attorneys' fees and interest awarded in the New York actions and asks this Court to use its discretion to limit these amounts to a number that the SRA Investor Group deems "reasonable". The argument is misguided. Progresso is a judgment creditor. The court in the New York actions has already determined that Progresso's attorney's fees are reasonable. Likewise, Progresso's bargained-for rate of contractual interest was part of the deal it struck and thus, part of the judgment in the New York actions. The SRA Investor Group does not get to pick and choose which of the receivership's debts and obligations should be deemed payable. Progresso is entitled to recover the same as any other creditor. Finally, the SRA Investor Group's double recovery argument is baseless. As Progresso's opening brief makes clear, it has structured its creditor and investor claims to avoid any possibility of a double-recovery or a windfall.

Progresso is a victim of defendant's Ponzi scheme, like Global Generation, and like the SRA Investor Group. Unlike Global Generation and Progresso, however, the SRA Investor Group appears to believe that its claims should take precedence over those of other claimants. The general tone of the SRA Investor Group's response brief is clear: every dollar paid to claimants such as Progresso or Global Generation is coming out of the SRA Investor Group's pockets. But this argument is based on faulty reasoning as it wholly ignores the very nature of a Ponzi scheme. Claimants here are all victims. The money at issue is not in the SRA Investor Group's "pockets" any more than it is in the "pockets" of Progresso or Global Generation. The victims here are in the same boat and they have all bore the brunt of defendants' wrongful conduct. They should all share in any recovery just the same.

I. Progresso Should Be Treated As A Palantir Investor[1]

The SRA Investor Group devotes nearly a quarter of its opposition brief to a blow-by-blow account of the circumstances that gave rise to the judgments in Progresso's New York actions. Putting aside the inaccuracies in the SRA Investor Group's recitation, such facts are largely irrelevant to Progresso's creditor claim. Indeed, with limited exceptions, the SRA Investor Group does not rely on such details to make its erroneous legal arguments. The facts are useful, however, for exposing the defects in the SRA Investor Group's arguments for rejecting Progresso's *investor* claim. Simply put, despite the SRA Investor Group's self-serving attempt to lump together Progresso's investor claim with those asserted in the New York actions, a review of the relevant facts demonstrates that the claims are entirely distinct.

A. Progresso's Claims In The NY Actions Are Distinct From the Investor Claim It Asserts Here

On or about February 16, 2011, FB Management and Eduardo Saverin entered into a Note Purchase Agreement ("Agreement") in which Mr. Saverin lent FB Management $4,000,000 in exchange for a promissory note ("Note") that entitled Mr. Saverin to principal, interest at a rate of 15% (compounding annually), and, upon the occurrence of a Liquidity Event, a profit participation based on the price at which FB Management sold the membership interests it acquired with Mr. Saverin's money. In March 2011, Mr. Saverin assigned all relevant rights, title and interest in the Note to Progresso.

The Note matured on the earlier of February 16, 2014 or the occurrence of a "Liquidity Event," defined as either (i) the sale by FB Management of its membership interests in Facie Libre or (ii) a distribution to FB Management of cash or stock of Facebook with respect to FB Management's investment in Facie Libre. Upon the occurrence of a Liquidity Event, Progresso was entitled to receive 50% of the net proceeds received by FB Management from that Liquidity Event

[1] As specified in Progresso's opening brief, because Progresso seeks to also be treated as a creditor, to avoid double counting, it only seeks to be treated as an investor to the extent a liquidating event generates an amount that, based on the 719,520 Palantir shares of Palantir Technologies, Inc. owed to Progresso, exceeds the amount distributed to Progresso because of its creditor claim.

in excess of the aggregate outstanding principal amount of the Note, plus all accrued but unpaid interest thereon. Failure to pay the amount owed upon the occurrence of a Liquidity Event constituted a default under the Note. In June of 2011, FB Management defaulted. Messrs. Bivona, Mazzola and others signed personal guarantees on the Note requiring each of them to pay the outstanding amounts in the event of a default. When FB Management did not pay the amount owed under the Note, Progresso turned to the guarantors to pay the amounts due under the guarantees. FB Management paid some, but not all, of the amounts due under the Note and the guarantors also failed to pay the remainder of the amounts owed. These are the relevant facts that prompted Progresso's New York litigation. On March 2, 2015, Progresso initiated a breach of contract action against FB Management for the amount due on the Note. On August 5, 2015, Progresso sued Messrs. Bivona and Mazzola, and others, to enforce their separate personal guarantees. The New York actions pursued discrete claims for breaches of contract, which did not involve Clear Sailing. After expending much time and money litigating, Progresso was successful in obtaining judgment.

The SRA Investor Group points out that Progresso's complaints, summary judgment motions, and corresponding judgments in the New York actions do not mention Palantir shares. Why would they? None of the entities or individuals named in Progresso's suits were holding Palantir stock—Clear Sailing, who was not a party to any of its contracts, holds the shares.

The conduct that underlies Progresso's investor claim in this receivership is distinct and clearly postdates the sequence of events giving rise to Progresso's New York breach of contract actions. That is, months after a Liquidity Event occurred under the Agreement, a default occurred under the Note, and FB Management refused to make good on its contractual obligation (i.e., the events giving rise to Progresso's breach of contract actions in New York), the $4.45 million owed to Progresso was transferred by FB Management to FMOF II, which then diverted the money to Clear Sailing on November 10, 2011. A few days later, Clear Sailing used Progresso's $4.45 million to purchase 3.1 million Palantir shares, which it has held ever since. Although Progresso was

subsequently repaid $2,939,007.50 by a different entity,[2] $1,510,992.50 of Progresso's money invested in Palantir stock remained with Clear Sailing. *See* Saverin Decl. at §3. It was this receipt of Progresso's money by Clear Sailing and reinvestment of its funds in Palantir that establishes Progresso's entitlement to restitution in this receivership. Needless to say, Progresso's investor claim is not predicated on the underlying breach of contract, but rather, the events that followed.

B. Progresso Has Asserted A Valid Investor Claim

The SEC and its CPA Monica Ip have provided an uncontroverted record that $4.45 million of Progresso's funds were diverted to Clear Sailing on November 10, 2011 and were used to purchase Palantir shares. According to the SEC, Progresso's money was used to purchase 3.1 million shares of Palantir stock on November 14 and 15, 2011. (D.E. 197 at 5-6.) Unable to deny the fact of Progresso's investment, the SRA Investor Group appears to argue that Progresso somehow is not entitled to investor treatment because its funds were used in an unauthorized manner. But *so were the SRA Investor Group's* – that's what happens in a Ponzi scheme. That Progresso was defrauded in a somewhat different manner is a distinction without meaning.

Indeed, the SRA Investor Group is unable to cite *any* legal authority to support its argument that because Progresso did not authorize its Palantir investment, it is not entitled to investor treatment.[3] To the contrary, as the Ninth Circuit has recognized, the "elementary rule of restitution is that if you take my money and make money with it, your profit belongs to me." *Nickel*, 290 F.3d at 1138. The facts in *Nickel* are very similar to those underlying Progresso's investor claim. In *Nickel*, the defendant bank overcharged plaintiff trusts by $24 million and profited from using the misappropriated funds. *Id.* Even though the plaintiffs did not authorize the investments or loans that generated the profits, the 9th Circuit held that "[t]he appropriate remedy is to allot to these

[2] The SRA Investor Group incorrectly states that "FB Management claimed that in November 2011, it had entered into an oral understanding with Progresso to invest the $1.5 million in Palantir shares." (SRA Opp. at 2) (emphasis added). As detailed in Progresso's opening papers, all repayments took place subsequent to the unauthorized transfer in November 2011, between February and July 2012.

[3] Progresso has never claimed that it "ever signed an SRA investor subscription agreement or received an SRA investor welcome letter," let alone appeared on any corresponding investor list. (SRA Opp. at 3.) Under the circumstances, the presence of any such documentation would be, at best, surprising.

unwitting and unwilling contributors a proportionate share of the banks' profits during the years of misappropriation." *Id.* at 1139. Further, in reversing the district court's ruling that limited recovery to return of the misappropriated funds with simple interest, the court observed that such relief was insufficient because "it does not give the trusts an amount close to equaling a share in the profits made with their money." *Id.* Like the trusts in *Nickel*, Progresso is entitled to "a share in the profits made with [its] money" regardless of whether it authorized the investment. *See also SEC v. Wencke*, 783 F.2d 829, 833, 838-39 (9th Cir. 1986) (upholding order for disgorgement of profits derived from shares of a company purchased with misappropriated funds); *Aguayo v. U.S. Bank*, 200 F. Supp. 3d 1075, 1077 (S.D. Cal. 2016) (finding that plaintiffs' requested relief for disgorgement of profits "earned on money [defendant] unlawfully took from [plaintiffs]" was restitutionary, and therefore cognizable under California Unfair Competition Law); Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) ("A conscious wrongdoer or a defaulting fiduciary who makes unauthorized investments of the claimant's assets is accountable for profits and liable for losses.").

Grasping at straws, the SRA Investor Group suggests that Progresso has misled the receivership and this Court by not disclosing in its proof of claim that it received almost $3 million in cash in 2012. This is a red herring. Progresso's opening brief makes clear that it was repaid $2,939,007.50 and that, as a result, Progresso is owed $1,510,992.50 worth of the Palantir investment made with its funds, which is 719,520 shares based on a $2.10/share price. As for its proof of claim, Progresso simply inserted $4.45 million for the line item "Net Investment Amount," which Progresso understood to refer to the quantum of funds invested in Palantir shares, *as did a number of other investors*. Indeed, through no fault of their own, other investors completed valid claim forms that "contained the investors' substitution of the gross amount of their investment for the net amount." (D.E. 342 at 2.) Likewise, Progresso did not understand cash "due from the [Palantir] investment" as stated on the claim form to include the payments it received, as the payments were not made by Clear Sailing at all. That said, Progresso has reduced the number of Palantir shares it is owed to account for the payments received. If this was not clear from

Progresso's claim form, Progresso's opening brief leaves no doubt that Progresso is only seeking $1,510,992.50 of the Palantir investment made with its funds. In any event, as the SEC explained, if "the gross amount of the investment matched the Receiver's records, the claim form was provisionally accepted, subject to the Court's eventual determination regarding whether to use gross investment amount and/or net investment amount for the purpose of making an eventual distribution" (*id.*), so the SRA Investor Group's accusations are of no moment.

C. The SRA Investor Group Relies On Legal Doctrines That Do Not Preclude Progresso's Investor Claim

The SRA Investor Group also advances two legal arguments for why this Court "should reject Progresso and Global Generation's investor claims in their entirety." (SRA Opp. at 7.) Not only are these arguments unpersuasive, they also lack any legal support whatsoever.

1. The Election of Remedies Doctrine Does Not Apply to Progresso's Investor Claim

In general, the election of remedies doctrine provides that a plaintiff "may recover only under one theory" when "allowing [the plaintiff] to recover twice would yield an unwarranted windfall recovery." *Isr. Disc. Bank of N.Y. v. First State Depository Co.*, No. 7237-VCP, 2013 WL 2326875, at *22 (Del Ch. May 29, 2013) (internal quotations omitted). Importantly, however, "[t]he doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party." *Id.* Moreover, the "bar of an election does not apply to the assertion of distinct causes of action against different persons arising out of independent transactions with such persons." *Id. See also Am. Gen. Life Ins. Co. v. Fernandez*, No. CV 09-01398, 2012 WL 5267703, at *6 (C.D. Cal. Oct. 24, 2012) ("the election-of-remedies doctrine is designed to prevent double recovery for a single injury, but it does not prevent a party from pursuing multiple claims against multiple parties until full satisfaction is had") (citation omitted); *Penn Anthracite Mining Co. v. Clarkson Sec. Co.*, 205 Minn. 517, 525 (1939) ("Between plaintiff's remedy on the note of the Dock Company and its cause of action in tort against defendant there was no inconsistency. The two were jointly and severally liable for the tort. Plaintiff could pursue one or both. In such a case it is satisfaction, and not judgment, which raises

the bar.").

As courts in the Ninth Circuit have explained, a "traditional election of remedies affirmative defense often arises in contract actions" in that a plaintiff must either elect to sue for rescission or enforce the contract and seek damages. *J&J Sports Prods., Inc. v. Bear*, No. 1:12-cv-01509-AWI-SKO, 2013 WL 708490, at *6 (E.D. Cal. Feb. 26, 2013). *In re Ryan*, for example, properly recognized that the election of remedies doctrine did not apply where a plaintiff had both contract-based claims and tort claims, in that action against the same party. *In re Ryan*, 369 B.R. 536, 545 (N.D. Cal. 2007) ("It is the existence of inconsistent remedies stemming from only one cause of action—one set of operative facts—that justifies the election of remedies doctrine."). Likewise, Progresso's claim against the receivership is based on an entirely separate wrong from its judgments in the New York actions, in which Progresso asserted breach of contract claims against only those parties with which it was in privity of contract. As set forth above, in November 2011, $4.45 million of Progresso's funds due under its note with the entity it sued were diverted to receivership entity Clear Sailing and were used to purchase Palantir shares a few days later. After accounting for repayments, Progresso is owed $1,510,992.50 worth of the Palantir investment made with its funds. Clear Sailing is a separate entity from FB Management. Therefore, the election of remedies doctrine does not apply. *See Blue Sky, LLC v. Jerry's Self Storage, LLC*, 44 N.Y.S.3d 173, 176 (App. Div. 2d Dep't 2016) ("When causes of action exist against several persons, the commencement of an action against one or more individuals does not constitute an election of remedies which bars an action against other potential defendants.").

In any event, as courts in this district have recognized, the election of remedies doctrine "has been repeatedly criticized and seems to be falling into disfavor. It also has been characterized as a harsh, and now largely obsolete rule, the scope of which should not be extended." *In re Ryan*, 369 B.R. at 545 (internal quotations omitted). *See also e.g.*, *GeoData Sys. Mgmt., Inc. v. Am. Pac. Plastic Fabricators, Inc.*, No. EDCV 15-04125VAP, 2016 WL 6562064, at *8 (C.D. Cal. Apr. 21, 2016) (explaining that "[c]ourts and commentators have long recognized the harshness of the election of remedies doctrine and have for some time looked upon it with disfavor" and rejecting

argument that fraud and contract claims should be barred because they are "based on the same nucleus of operative facts"). In short, a doctrine, which has "no application to the pursuit of remedies against parties concurrently liable, short of payment and satisfaction" is simply inapplicable to the facts concerning Progresso's claims. *Siderpali, S.P.A. v. Judal Indus., Inc.*, 833 F. Supp. 1023, 1033 (S.D.N.Y. 1993). Moreover, a doctrine that has been long criticized for its "harshness" has no place in this equitable proceeding.

2. Res Judicata Does Not Apply to Progresso's Investor Claim

It is well-settled that a court may only apply res judicata if that finding is proper "under the law of the State in which the judgment was rendered." *Cloverleaf Realty of N.Y., Inc. v. Town of Wawayanda*, 572 F.3d 93, 95 (2d Cir. 2009); *see also Honey v. Distelrath*, 195 F.3d 531, 533 (9th Cir. 1999) (applying California law to res judicata determination). In New York, to "determine whether claim preclusion applies to preclude later litigation, a court must find that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Modular Devices, Inc. v. Alcatel Alenia Space Espana*, No. 08-CV-1441, 2009 WL 749907, at *2 (E.D.N.Y. Mar. 16, 2009) (internal quotations omitted). The SRA Investor Group cannot meet this standard.

"Generally, Courts apply claim preclusion to bar a plaintiff from seeking to litigate additional claims against the same defendant, when plaintiff should have litigated those claims in a prior action." *Id.* at *4. In *Modular*, res judicata did not apply because "[u]nlike the traditional situations" the subsequent action involved new defendants, and "[p]laintiff was not required to bring its claims against Alcatel and SS/L because they are independent claims. The defendants in each action held separate contracts with Plaintiff, and Mier [the defendant in the first action] held its own incentives." *Id.* Here, it would not be proper (let alone equitable) to depart from a traditional application of res judicata.

Although Progresso's claims in the New York actions were adjudicated on the merits, receivership entity Clear Sailing, which holds the Palantir shares purchased with Progresso's funds,

was not a party to the contracts at issue or to the litigation. To the extent that defendant Mazzola is a principal of Clear Sailing, he was not sued in that capacity and certainly did not purport to represent the interests of Clear Sailing. Indeed, with respect to privity, the SRA Investor Group does not argue that any receivership entity "controlled or substantially participated in the control of the presentation" on behalf of FB Management in the prior action and there is no other reason to suggest that there is "a sufficient alignment of interests to warrant a finding of privity." *Id.* at *5 (internal alterations omitted).

Moreover, even assuming that Progresso's investor claim for Palantir shares can be deemed to arise out of the same transaction as its breach of contract claim against FB Management and the guarantors of the Note (which it does not) as a general matter "[w]hen a litigant files consecutive lawsuits against separate parties for the same injury, the entry of judgment in the prior action does not bar the claims against other potentially liable parties." *Id.* at *4; *see also, e.g.*, *Blue Sky, LLC,* 44 N.Y.S.3d at 176 (res judicata not applicable "for the basic reason that the plaintiff never asserted any claim against this defendant. The fact that the plaintiff sued one tort-feasor does not automatically preclude him from suing another tort-feasor later") (internal quotations omitted); *N. Shore-Long Island Jewish Health System, Inc. v. Aetna US Healthcare, Inc.*, 811 N.Y.S.2d 424, 426 (App. Div. 2d Dep't 2006) ("That [tortious interference and breach of contract claims] are not the same or identical causes of action, but, rather, wholly separate and distinct legal wrongs, giving rise to different causes of action, has long been settled.").

Astor Holdings, Inc. v. Roski, No. 01 Civ. 1905, 2002 WL 72936 (S.D.N.Y. Jan. 17, 2002) is instructive. In *Astor*, defendants claimed, *inter alia*, that a tortious interference claim was barred by res judicata, arguing that plaintiff already had been "compensated for any alleged damages it suffered as a result of Thorpe's breach of contract." *Id.* at *15. The "tortious interference with contract claim, however, [was] a separate tort for which there [was] a separate cause of action brought against different persons than those sued in the bankruptcy court. While a breach of contract claim against Thorpe would be precluded, having already been litigated in the former proceeding, the claim at issue here involves Roski's and BattleBots' involvement in that breach, which has not yet been litigated,

and for which a claim is not extinguished." *Id.* The same is true here. Progresso's claim against the receivership entities as a Palantir investor, which is akin to a tortious interference claim, has not yet been resolved and is separate from the contract-based claims that Progresso has litigated in New York. Tellingly, the SRA Investor Group's opposition is devoid of any citation to the New York action for its erroneous argument that "the same evidence will be presented by Progresso and Global Generation to prove their investor claims that was used to prove their earlier claims." (SRA Opp. at 10.) The reason is simple: there is no identity of claims.

D. In Any Event, These Legal Doctrines Have No Place In This Equitable Proceeding

Res judicata and election of remedies are legal defenses that simply do not bind this Court in this equitable receivership proceeding. Indeed, both doctrines require two distinct *lawsuits*. Importantly, however, "[b]y presenting the claim to the receiver a creditor becomes a quasi-party to the suit. Such a presentation of claims is not equal to an intervention or the bringing of a separate suit." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 725 F.2d 584, 586 (10th Cir. 1984). Thus, both arguments must fail on that basis alone. Moreover, a receivership like this one is equitable in nature with a goal of investor restitution. *See SEC v. Schooler*, No. 3:12-CV-2164-GPC-JMA, 2015 WL 1510855, at *9 (S.D. Cal. Mar. 4, 2015). The SRA Investor Group's arguments run counter to this objective. For this independent reason, the res judicata and election of remedies arguments are unpersuasive.

II. Progresso's Should Be Treated As A Creditor For The Entire Amount Of Its Judgment

The SRA Investor Group concedes that Progresso is a valid judgment creditor and is entitled to recover on some portion of its judgment. (SRA Opp. at 12.) It concedes that Progresso is entitled to claim for its entire unpaid principal amount. (*Id.*) And it concedes that Progresso is entitled to claim for interest and attorneys' fees underlying its judgment, on the condition that such amounts are "reasonable". (SRA Opp. at 11-12.) Thus, the dispute concerning Progresso's creditor claim is significantly narrower in scope than that of Progresso's investor claim. (*Id.*)

The SRA Investor Group's argument that this Court should "limit Progresso's creditor claim to a reasonable amount," however, does not pass muster. (SRA Opp. at 11.) First, the SRA Investor

Group complains about the legal fees incorporated into Progresso's judgment, which are required to be awarded under the terms of the Note, arguing that $1.6 million is "excessive" "for a lightly litigated proceeding." (*Id.*) The SRA Investor Group's claim that the New York actions were "lightly litigated" is simply untrue, and its belief that the legal fees charged were "excessive" is of no moment altogether. The reasonable quantum of Progresso's legal fees *has already been litigated* in a trial-like hearing with witnesses before a Special Referee in New York, who expressly determined that "HSG billed for its professional staff at hourly rates [that are] found to be reasonable for commercial litigators practicing in New York." (Sup. Ct. N.Y. Cnty. No. 650614/2015, Dkt. No. 336 at 7.) Special Referee Helewitz went on to consider the following factors in determining the reasonableness of the fees: "(1) the time and labor required, the difficulty of the questions involved and the skill required to handle the problems presented; (2) the lawyer's experience, ability and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved." (*Id.* at 4.) Upon analyzing these factors and hearing testimony including that "it was a hotly contested case, involving multiple motions," Special Referee Helewitz found the fees charged to be reasonable and awarded them to Progresso. Once awarded, Progresso became a judgment creditor. Like any other creditor, Progresso is entitled to the amount it is owed. The SRA Investor Group may believe that Clear Sailing's rent was too high, that it overpaid for office supplies, or that it could have trimmed its headcount and employed less staff. But the SRA's self-interested views regarding Clear Sailing's (and other receivership entity's) monetary obligations are irrelevant. If Clear Sailing's landlord, office supplier, or employee are owed money, they, like Progresso, are rightful creditors. Nor is it proper for the SRA Investor Group to pick apart the amount of valid debts, especially in the case of Progresso where the debt has been adjudicated to be reasonable.

Likewise, the 15% interest rate reflected in Progresso's judgment is in strict accordance with the terms of the underlying Note, which specifies that contractual interest "shall be compounded annually, computed on the basis of the actual number of days elapsed and a year of 365 days from

the date of the Note until the principal amount and all interest accrued thereon are paid." (Sup. Ct. N.Y. Cnty. No. 650614/2015, Dkt. No. 29 at § 7.) The SRA Investor Group takes no issue with the interest calculation; rather, it suggests that Progresso's judgment somehow would be smaller if it had filed suit earlier.[4] But not only is the 15% contractual interest rate keyed to repayment of Progresso's money—repayment that *still* has not taken place—but, as a technical matter, Progresso also is entitled to post-judgment interest, which accrues at a statutory rate of 9% per annum under New York law. Such additional interest is not even included in the claim.

As structured, allowing both Progresso's investor and creditor claims would not result in a windfall. Progresso is pursuing two separate claims for separate wrongs. To the extent that there is overlap, Progresso has proposed a structure to eliminate any potential double-recovery. Like Global Generation, Progresso is a victim of the defendants' Ponzi scheme and Clear Sailing's actions. And like Global Generation, Progresso's funds were used to purchase the bulk of Palantir shares. Denying Progresso investor treatment, while allowing the later-in-time SRA Investor Group to reap the benefits of Progresso's funds, is not equitable. Likewise, Progresso expended much time and money litigating the New York actions, none of which would have been necessary if Clear Sailing had not taken Progresso's funds. Denying Progresso treatment as a creditor for the amount of its judgment allows Clear Sailing to interfere with Progresso's contracts and convert its funds with impunity. Unlike the SRA Investor Group, Progresso is not trying to preclude other investors from recovering. It is simply seeking to pursue its claims, pro rata, along with other defrauded investors and creditors. Given the equitable and restitutionary nature of this receivership, that is the most proper and fair result.

CONCLUSION

For the reasons stated herein, Progresso seeks a determination that Progresso shall be classified as a creditor up to the amount of its $5,529,364.25 judgment and as an investor to the

[4] Progresso did not sit on its rights, contrary to the SRA Investor Group's suggestion. Rather, for the three-year period that preceded Progresso's suit, it engaged with FB Management, John Bivona, and Frank Mazzola in an effort to resolve the dispute. When those negotiations reached an impasse, it filed suit.

extent a liquidating event generates an amount that, based on the 719,520 shares of Palantir stock owed to Progresso, exceeds the amount distributed to Progresso as a result of its creditor claim.

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