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7 Attorneys for Interested Parties  
GLOBAL GENERATION GROUP, LLC  
8 and BENCHMARK CAPITAL, LLC

9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12  
13 SECURITIES AND EXCHANGE  
14 COMMISSION,

15 Plaintiff,

16 v.

17 JOHN B. BIVONA; SADDLE RIVER  
ADVISERS, LLC; SRA MANAGEMENT  
18 ASSOCIATES, LLC; FRANK GREGORY  
MAZZOLA,

19 Defendants,

20 SRA I LLC; SRA II LC, SRA III LLC;  
21 FELIX INVESTMENTS, LLC;  
MICHELLE J. MAZZOLA; ANNE  
22 BIVONA; CLEAR SAILING GROUP IV  
LLC; CLEAR SAILING GROUP V LLC,

23 Relief Defendants.  
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Case No. 3:16-cv-01386-EMC

**GLOBAL GENERATION GROUP, LLC'S  
RESPONSE TO THE COURT'S JULY 17,  
2018 ORDER (DOCKET NO. 379)**

1 Interested Party Global Generation Group, LLC hereby responds to the Court's  
 2 July 17, 2018 Order (Docket No. 379), more specifically the following questions listed in that  
 3 Order.

4 **1) Whether the Court May Adjust the Priority of a Money Judgment (Or**  
 5 **Portions Thereof Such As Principal Versus Interest) Relative to**  
 6 **Shareholder Claims in a Distribution Plan.**

7 **Global Generation's Summary Response: There is no basis for the**  
 8 **Court to adjust the priority as well-established federal and California**  
 9 **statutes prioritize judgment creditors ahead of investors and the few**  
 10 **cases that provide exceptions to this rule do not apply to this case.**

11 The federal priority system is codified in the Bankruptcy Code. That system is  
 12 described in *Czyzlewski v. Jevic Holding Corp*, 137 S.Ct. 973 (2017) as secured creditors "highest  
 13 on the priority list" followed by "[s]pecial classes of creditors, such as those who hold claims for  
 14 taxes or wages ...." *Id* at 979. Third are general unsecured creditors followed by equity holders  
 15 "at the bottom of the priority list ... [and who] receive nothing until all previously listed creditors  
 16 have been paid in full (citation omitted)." *Id.* *Czyzlewski* addressed the issue of whether a  
 17 bankruptcy court has the power to order or approve a liquidation plan providing for distributions  
 18 that do not follow this system without the affected creditors' consent. The Court responded: "Our  
 19 simple answer to this complicated question is 'no.'" *Id.* These priorities constitute the "basic  
 20 underpinning of business bankruptcy law." *Id.* at 983. The Court disagreed that there was any  
 21 exception to the system and not the "rare case" exception relied upon by lower courts. *Id.* at 986-  
 22 987.

23 California statutes are substantively consistent with this federal priority system.  
 24 For example, the Corporations Code provides there can be no distribution to members (equity  
 25 holders) if that distribution leaves the limited liability corporation unable to pay its debts. Cal.  
 26 Corp. Code §§ 17704.05-17704.6. Further, California prohibits liquidating distributions to equity  
 27 holders until the debts of the limited liability corporation have been paid or adequately provided  
 28 for. Cal. Corp. Code § 17707.2.

An exception has developed in individual cases dealing with the relative priority of  
 trade creditor claims. In *Quilling v. Trade Partners*, 2006 W.L. 3694629 (W.D. Michigan 2006),

1 the Court approved a Receiver's distribution plan which subordinated a law firm's claim for fees  
2 incurred prior to the receivership to claims by investors who were victims of the defendants'  
3 securities fraud. The plan ultimately provided for no distribution to creditors. The law firm's  
4 objection to the plan was rejected. "The reasons for rejecting the objection are equitable and  
5 practical. As an equitable matter in receivership proceedings arising out of a securities fraud, the  
6 class of fraud victims takes priority over the class of general creditors *with respect to the*  
7 *proceeds traceable to the fraud.*" *Id.* (Emphasis added.) A similar result was reached in  
8 *C.F.T.C. v. PrivateFx Global One*, 778 F. Supp. 2d 775 (S.D. Texas 2011). That case involved  
9 the creditor claim of a lender who had extended defendants' fund a line of credit. The Receiver's  
10 plan proposed to distribute only to fund investors. The lender objected, arguing that, like the  
11 investors, it had been defrauded in extending credit to defendants. In affirming the plan, the  
12 Court noted that, even if the lender had been defrauded, "it has not linked these statements to the  
13 fraud at issue here." *Id.* at 786. The Court agreed the lender had a claim but questioned  
14 "whether, based on the record before it, [the lender] is entitled to equal footing with defrauded  
15 investors." *Id.* Unlike the law firm in *Quilling* case and the lender in *C.F.T.C.*, Global  
16 Generation was a direct victim of the fraud of Defendants as a result of which it invested money  
17 that was used to purchase the Palantir shares which are the basis of the value of the receivership  
18 estate. The basis of Global Generation's claim is the fraud which is the basis of this action.  
19 Thus, the reasoning behind the trade creditor exception developed in these two cases is not  
20 present here and is not relevant to Global Generation's claim.

21 A second exception arises from the use of the Bankruptcy Code's equitable  
22 subordination provisions, 11 U.S.C. § 510, in federal receivership cases. By its terms, that statute  
23 provides for subordination of a claim arising from transactions in "a security of a debtor." In  
24 *SEC. v. Wealth Management*, 628 F.3d 323 (7th Cir. 2010), two investors with shares in  
25 defendants' fund had partially redeemed their shares in that fund prior to the receivership. The  
26 investors filed a creditor claim in the receivership for the shares which had not been redeemed.  
27 The Receiver proposed a plan which treated "all investors equally as equity holders, regardless of  
28 whether an investor had submitted a request to redeem his or her interest." *Id.* at 329. The Court

1 affirmed the Receiver’s plan and, in doing so, stated that the district court has “the authority to  
2 subordinate claims of certain investors to ensure equal treatment. The Bankruptcy Code codifies  
3 the doctrine of equitable subordination and grants bankruptcy courts the power to subordinate  
4 certain claims; this includes treating shareholders who redeemed their shares as equity holders  
5 rather than unsecured creditors.” *Id.* at 333.

6 Global Generation submits this exception does not apply here as the relevant  
7 Bankruptcy Code provisions, 11 U.S.C. sections 510(b) and (c), limit the subordination of claims  
8 to those “arising from rescission of a purchase or sale of a security of the debtor or of an affiliate  
9 of the debtor, for damages arising from the purchase or sale of such a security...” 11 U.S.C. §  
10 510(b) (Emphasis added). *In re American Wagering, Inc.*, 493 F.3d 1067, 1072 (9th Cir. 2007)  
11 sets forth the two main reasons for subordination under this statute “(1) dissimilar risk and return  
12 expectations of creditors and shareholders and (2) the reliance of creditors on the equity cushion  
13 provided by shareholder investment” and further provided that “a claim should only be  
14 subordinated when it will accomplish” those purposes. *Id.* Global Generation was not an  
15 investor in Defendants’ business. Further, the purposes of subordination is not met here as  
16 Global Generation’s only expectation of risk and reward, its only reliance, was on its investment,  
17 through Defendants, in the securities of companies unrelated to Defendants. Global Generation’s  
18 claim is based on fraud in securities transactions concerning unrelated companies and is not  
19 predicated on any transaction in any security of Defendants. As neither the statute nor the  
20 purposes of the statute is involved in Global Generation’s claim, the concept of equitable  
21 subordination is not applicable.

22 For these reasons, Global Generation submits this Court may not adjust the  
23 priority of a judgment relative to shareholder claims as part of a distribution plan.

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1                   2)     **Whether the Court May Ignore Or Discount Any Portion of a Money**  
2                                   **Judgment to Permit Recovery, e.g., Of Only The Original Out-Of-**  
3                                   **Pocket Loan/Investment (As Under the SEC’s Proposed Plan With**  
4                                   **Respect to Progresso).**

4                                   **Global Generation’s Summary Response: The Court May Not Ignore**  
5                                   **or Discount Any Portion of Global Generation’s Judgment as Part of a**  
6                                   **Distribution Plan.**

6                   Before this receivership action was filed, Global Generation’s judgment was  
7 entered in the United States District Court for the Eastern District of Michigan (“Global  
8 Generation’s Judgment”). (CD 359-1, Ex. C) Article IV, Section 1 of the United States  
9 Constitution requires each state to give full faith and credit to the judicial proceedings of every  
10 other state. This so-called full faith and credit clause does not address how the Court may  
11 proceed with regard to Global Generation’s federal judgment. However, the Supreme Court has  
12 addressed the issue of whether a federal court is bound by an earlier federal court judgment from  
13 another district. In *Baldwin v. Iowa State Traveling Men’s Assn.*, 283 U.S. 522 (1931), a  
14 judgment had been entered in an Iowa federal court. The loser in the Iowa federal court refiled in  
15 a Missouri federal court. The jurisdictional defense asserted in the second case was the same as  
16 that asserted, litigated and lost in the first case. The question was whether the second federal  
17 court could revisit the jurisdiction question between the parties. The Supreme Court noted that the  
18 full faith and credit clause did not apply “since neither of the courts concerned was a state court  
19 ... (citations omitted)” (*id.* at 524) but concluded “[w]hile this Court has never been called upon  
20 to determine the specific question here raised, several federal courts have held the judgment *res*  
21 *judicata* in like circumstances. (Citations omitted.) And we are in accord with this view.” *Id.* at  
22 526. The party contesting jurisdiction was thereby barred from relitigating the issue of  
23 jurisdiction, once decided in the first federal court, in the second one. Commentators and the  
24 Restatement agree with this result. Wright & Miller, Fed. Prac. & Proc. Juris. § 4466 (2d ed.);  
25 Restatement (Second) of Conflicts of Laws § 417 (2d ed.), suggesting that 28 U.S.C. Section  
26 1738 (“State and Territorial statutes and judicial proceedings; full faith and credit”) be extended  
27 to decisions of federal courts.

28                   For these reasons, Global Generation submits that ignoring or discounting Global

1 Generation's Judgment or any part of that judgment is barred by these legal principles and should  
2 not be condoned by the Court as part of a distribution plan.

3 **3) Whether Progresso and Global Generation can be permitted to**  
4 **"choose" between investor or creditor status, or must be treated as**  
5 **creditors based on their judgment.**

6 **Global Generation's Summary Response: Global Generation submits**  
7 **permitting it to choose between creditor and investor status is**  
8 **equitable given its distinct legal position relative to other creditors and**  
9 **the status of the case.**

10 As has been oft-repeated in this case, the Court has the discretion to classify claims  
11 in a way that recognizes the differences between claimants. *SEC v. Enterprise Trust Co.*, 559  
12 F.3d 649, 652 (7th Cir. 2009); *SEC v. Wang*, 944 F.2d 80, 84-85 (2d Cir. 1991). Distribution  
13 plans in the reported cases vary widely. There are cases, such as those discussed *supra*, in which  
14 all investors are treated in the same way. There are other cases in which distribution plans have  
15 been approved which classify and provide for claimants in different ways – even to the extent of  
16 providing for distributions to one group or groups of claimants and none to others. *SEC v.*  
17 *Levine*, 881 F.2d 1165 (2d Cir. 1989); *SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991).

18 Global Generation submits it is in a different legal position than other claimants. It  
19 is not disputed that Global Generation was an investor – it was the first investor – the first to  
20 purchase Palantir shares from Defendants, investing \$2,800,000 for 933,333 shares of Palantir on  
21 December 12, 2011. (CD 197, 5:5-6:2) Like other investors, Global Generation was harmed by  
22 Defendants' fraud. Global Generation did not race any other investor to the courthouse, but  
23 unlike other investors, well before this receivership action was filed, Global Generation spent the  
24 time, money and effort to pursue their legal remedies and obtained judgments in their favor and  
25 against Defendants. Global Generation filed a federal action which became a lengthy arbitration  
26 which became a federal court judgment. (CD 198, 5:17-6:7) Global Generation then pursued  
27 collection efforts against Defendants in Michigan, New York, New Jersey and California. (*Id.*)  
28 Further, Global Generation is blameless in the fraud which is the subject of this action. Global  
Generation did not authorize Defendants to sell, transfer or pledge Global Generation's Palantir  
shares and did not know Defendants had sold, transferred or pledged Global Generation's Palantir

1 shares. Finally, had Defendants' scheme succeeded, none of the gains would have been realized  
2 by Global Generation. These factors are cited in *SEC v. Enterprise Trust Company*, 559 F.3d  
3 649, 652 (7th Cir. 2009) as sufficient reasons to give preference to a specific group of claimants.

4 The Court has made clear that it will not permit Global Generation to proceed with  
5 claims both as a creditor and as an investor (CD 379). However, Global Generation submits its  
6 claim (CD 359-2, Ex. 1) states a viable independent investor claim and a viable independent  
7 creditor claim for it to proceed on either.

8 The SRA Funds Investor Group has argued throughout that the receivership is a  
9 "zero sum game," that any amounts paid or stock given to Global Generation or Progresso will  
10 come from assets that would otherwise go to other investors. But that is true whether Global  
11 Generation and/or Progresso are deemed an investor or a creditor. Here, it is worth noting that  
12 the vast majority of reported cases involve efforts by claimants to affirm their status as creditors  
13 to obtain the priority that status usually confers. While there is cautious optimism, the fact is the  
14 receivership's primary asset, its Palantir holding, has an undetermined value. What will be  
15 realized from those shares and when that amount will be realized is uncertain. If given the  
16 choice, Global Generation will have to choose between the priority afforded a creditor and the  
17 potential upside available to an investor. It is also uncertain whether it will be more advantageous  
18 or less for others concerned should Global Generation choose to be classified as a creditor or  
19 investor.

20 Because of the status of its claim and the uncertain value of Palantir shares, Global  
21 Generation submits it is in a different legal position than other claimants and this Court should  
22 exercise its discretion to permit it to choose whether to be a creditor or an investor.

23  
24 Dated: July 24, 2018

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25  
26 By: /s/ Theodore A. Griffinger, Jr.

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