

1 Theodore A. Griffinger, Jr. (SBN 66028)  
Ellen A. Cirangle (SBN 164188)  
2 LUBIN OLSON & NIEWIADOMSKI LLP  
The Transamerica Pyramid  
3 600 Montgomery Street, 14th Floor  
San Francisco, CA 94111  
4 Telephone: (415) 981-0550  
Facsimile: (415) 981-4343  
5 [tgriffinger@lubinolson.com](mailto:tgriffinger@lubinolson.com)  
[ecirangle@lubinolson.com](mailto:ecirangle@lubinolson.com)

6 Attorneys for Interested Parties  
7 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.  
24

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

**OBJECTION OF INTERESTED PARTY  
GLOBAL GENERATION GROUP, LLC  
TO AMENDED PROPOSED JOINT PLAN  
OF DISTRIBUTION**

Date: December 13, 2018  
Time: 1:30 p.m.  
Courtroom: 5, 17<sup>th</sup> Floor  
Judge: Hon. Edward M. Chen

1 Interested Party Global Generation Group, LLC (“Global”) objects to the  
2 Amended Proposed Joint Plan of Distribution filed on November 21, 2018, by Plaintiff Securities  
3 and Exchange Commission (Court Docket No. (“CD”) 420) (“Proposed Plan”) as follows.

4 On July 30, 2018, this Court issued an Order which rejected Global’s request to be  
5 classified as a creditor up to the amount of its judgment and then as an investor to the extent a  
6 Palantir liquidating event generates proceeds that exceed the net of the amount attributable to the  
7 sale of Global’s unredeemed Palantir shares less the amount paid to Global on account of its  
8 judgment. CD 385, 3-6. Subsequently, on October 10, 2018, this Court issued another Order  
9 which rejected Global’s request to be allowed to choose whether to be classified as an investor or  
10 as a creditor, determining “Global must recover as a creditor.” CD 409, 4:20-5:1. In doing so,  
11 the Court retained discretion “to adjust the priority of Global’s claim relative to those other  
12 claimants as appropriate (citations in text omitted here but listed and discussed *infra*.)” *Id.*

13 Global submits that, as a defrauded investor having been denied the right to  
14 participate as an investor in the potential gains of a Palantir liquidating event, Global’s  
15 classification as a creditor ought to include the one benefit a creditor has over an investor –  
16 priority. The Proposed Plan denies Global that benefit. It proposes three distributions: a “First  
17 Distribution,” to those claimants electing to make an “Early Election Claim” (e.g. creditor or  
18 investor claims made for an “early percent distribution of 25-30% of their claim”) (CD 420, 12:9-  
19 12; 17: 20-18:8); a “Second Distribution,” to satisfy accrued administrative expenses and then to  
20 creditors and investors, “on a par or pari passu” and pro rata for, in the case of creditors, “the  
21 principal amount owed” and, in the case of investors, for the principal net amount of their  
22 outstanding investment (CD 420, 18:9-26); and a “Third Distribution,” to satisfy first outstanding  
23 administrative expenses, then to satisfy any “unpaid amounts from the Second Distribution” and  
24 finally, to investors “pro rata based on the amount of securities they purported to have purchased”  
25 less any repayment received in a prior distribution. The Proposed Plan includes nothing concrete  
26 for a judgment creditor on account of attorneys’ fees, interest and costs awarded as part of its  
27 judgment, only that “[t]he Receiver or the SEC staff will also make a recommendations with  
28 respect to payment of some or all of the Subordinated Claims.” CD 420, 19:4-23. A

1 “Subordinated Claim” is defined elsewhere in the Proposed Plan to include “...claims by Global  
2 Generation and Progresso Ventures, that include a portion of the money judgement that is for  
3 interest ...attorney’s fees, and costs....” CD 420, 13:8-14.

4 Global submits the general federal rule is that a creditor claim has priority over an  
5 investor claim and that rule should be applied in this case. The few cases allowing exceptions to  
6 the general rule are legally and factually distinguishable from the present case. No legal or  
7 equitable reason has been offered justifying the application of those cases here. Global requests  
8 the Court order the Proposed Plan be amended to prioritize Global’s creditor claim ahead of  
9 investor claims.

10 On July 24, 2018, Progresso and Global each filed a brief describing the general  
11 rule that creditors take priority over investors as to distributions from the receivership estate. CD  
12 382, 2:4-3:23 and CD 384, 6:4-7:28, respectively. Those briefs will not be repeated here, but to  
13 summarize: “[C]reditors are usually paid ahead of shareholders...whether the proceedings take  
14 the form of bankruptcy, or of receivership.” *CFTC v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401,  
15 407 (7th Cir. 2011) (citation omitted). “The rule that creditors are given absolute priority over  
16 investors or equity holders is well established.” *SEC v. Wealth Mgmt. LLC*, 2009 WL 10699977,  
17 at \*2 (E.D. Wis. Nov. 20, 2009). California law is consistent with federal law. For example, the  
18 California Corporations Code provides there can be no distribution to investors if that distribution  
19 leaves the corporation unable to pay its creditors. Cal. Corp. Code §§ 17704.05-17704.6.  
20 Further, California prohibits any liquidating distribution to investors until the debts of the  
21 business have been paid or provided for. Cal. Corp. Code § 17707.2.

22 In its October 10, 2018 Order, the Court refers to three cases concerning its  
23 discretion to adjust the priority of Global’s claim: *Quilling v. Trade Partners Inc.*, 2007 WL  
24 107669, at \*3 (W.D. Mich. Jan. 9, 2007); *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, at \*4  
25 (M.D. Fla. Aug. 14, 2009); and *In re Indian Motorcycle Litig.*, 307 B.R. 7, 15-16 (D. Mass.  
26 2004). CD 409, 4:20-5:1. Each case of these cases involves the relative priority of a third party,  
27 non-investor claim. Only one of these cases approves a deviation from the general federal rules  
28 of distribution from a receivership estate: *Quilling v. Trade Partners Inc.*, 2007 WL 107669, at \*3

1 (W.D. Mich. Jan. 9, 2007). In that case, a law firm with a creditor claim for attorneys' fees  
2 incurred by the defendant objected to a proposed distribution plan that placed it in a class of  
3 claimants that would "be paid nothing." *Id.* The *Quilling* court approved the proposed plan: "In  
4 receivership proceedings arising out of securities fraud, the class of fraud victims takes priority  
5 over *the class of general creditors* with respect to proceeds traceable to the fraud." (Italics  
6 added.) *Id.*<sup>1</sup> In other words, the *Quilling* court exercised its equitable power to reallocate the  
7 priority of distributions, approving a plan which subordinated a general creditor claim not  
8 traceable to Defendants' fraud. Here, Global is not a general creditor with a claim not related to  
9 Defendants' fraud. To the contrary, Global is a defrauded investor making a claim directly  
10 traceable to Defendants' fraud. CD 385, 2:17-18; CD 198, at 5-6. The exception to creditor  
11 priority carved out by the *Quilling* case is not applicable here.

12           The other two cases referred to in the Court's October 10, 2018 Order, *S.E.C. v.*  
13 *HKW Trading LLC*, 2009 WL 2499146, at \*4 (M.D. Fla. Aug. 14, 2009) and *In re Indian*  
14 *Motorcycle Litig.*, 307 B.R. 7, 15-16 (D. Mass. 2004), also involve questions as to the priority of  
15 a third party claim for attorneys' fees, however, not attorney's fees incurred by a defendant but  
16 attorney's fees awarded a third party's counsel and imposed against the receiver in unsuccessful  
17 litigation. *Id.* In the first case, *S.E.C. v. HKW Trading LLC*, the Court followed the general rule  
18 of creditor priority and denied the receiver's request to subordinate the third-party claim for  
19 attorney's fees to those of the defrauded investors. *Id.* The second case, *In re Indian Motorcycle*  
20 *Litig.*, 307 B.R. 7, 15-16 (D. Mass. 2004), did not involve a question of creditor/investor priority.  
21 Rather, the third-party litigant's attorney argued that his claim for prevailing party attorney's fees  
22 against the receivership estate should have priority over the Receiver's administrative claim for  
23 fees. *Id.* As in *HKW Trading*, *Indian Motorcycle* followed the general rules of priority in  
24 denying the third party's requested subordination and upheld the priority of the receiver's  
25

26 <sup>1</sup> The *Quilling* exception was also applied on similar facts in *CFTC v. PrivateFX Global One*, 778  
27 F.Supp.2d 775, 786 (S.D. Tex. 2011) which also involved a general creditor claim, by Wells  
28 Fargo Bank based on a default in a line of credit between the defendants and bank. The Court  
cited *Quilling* in ruling the Bank's general creditor claim was properly subordinated to  
receivership assets traceable to the defendants' fraud. *Id.*

1 administrative claims over that of the third party. To summarize, *HKW Trading* and *Indian*  
2 *Motorcycle* follow the general rules of priority. Each case denied a request for subordination.  
3 Neither provide legal, factual or policy authority upon which to base subordination of Global's  
4 claim in this action.

5           The three cases discussed above involve priority questions concerning non-  
6 investor claims. Other receivership cases discussed in earlier briefs involve an investor or group  
7 of investors who, sensing there would be insufficient assets in the receivership estate to satisfy  
8 investor claims, attempted to change their status from investor to creditor and thereafter claim the  
9 priority of a creditor's claim. For example, in *SEC v. Amerindo Inv. Advisors Inc.*, 2014 WL  
10 2112032, at \*16 (S.D.N.Y. May 6, 2014), certain investors filed and obtained a state court  
11 judgment *while the underlying federal receivership was pending* and thereby sought "judgment  
12 priority over the claims of any other investor." *Id.* The receiver proposed a plan classifying all  
13 investors together thereby denying the priority sought by the newly-minted creditors. In  
14 approving the proposed plan, the *Amerindo* court determined that these investors' claims were  
15 substantively similar to those of all other investors and declined to give their claims priority. That  
16 court also said its job was to "consider the facts of the case and the underlying merits of the of  
17 victims' claims, not technicalities or legal gamesmanship." *SEC v. Amerindo Inv. Advisors Inc.*,  
18 2014 WL 2112032, at \*16 (S.D.N.Y. May 6, 2014). Another such case is *S.E.C. v. Wealth*  
19 *Management*, 628 F.3d 323 (7th Cir. 2010) in which certain investors "redeemed" their shares  
20 after "things began to unravel" and in the subsequent receivership claimed priority status as  
21 creditors. *Id.* at 328. The Court found that "the claims of redeeming and nonredeeming  
22 shareholders were identical in substance – all were defrauded investors whose claims derived  
23 from equity interests in (defendants)" (*Id.* at 333) and approved a plan in which all shareholders  
24 were to receive similar distributions. *Id.* Global submits *Amerindo* and *Wealth Management* do  
25 not involve the issue of creditor/investor priority posed in this case. Rather, each focuses on  
26 whether a party seeking creditor priority is, in fact, a creditor or an investor. As this Court has  
27 determined that Global is a creditor, these cases have no application here.

28

1           The Proposed Plan ignores the general rule of creditor priority and creates its own  
2 legal standard, the proponents arguing: arguing: “To ensure that all securities fraud victims are  
3 treated equally, receiverships do not give unsecured judgment creditors any priority over  
4 defrauded investors.” CD 381, 2:22-23. Global submits that is not the law – as described above,  
5 the general federal rule is that a creditor claim has priority over an investor claim. No reason has  
6 been offered why the general rule of creditor priority should not be applied in this case except  
7 “[t]o ensure that all securities fraud victims are treated equally.” CD 381, 2:22-23. While a noble  
8 goal, this statement is an insufficient basis to bring this case within any exception to the general  
9 rule.

10           The cases which do carve out an exception to the general rule of creditor priority  
11 are the previously-discussed *Quilling* and *PrivateFX* cases. Those cases approved plans which  
12 provided for the subordination of a general creditor claim to those of defrauded investor as to  
13 distributions of the proceeds of the defendants’ fraud. Global submits the policy behind this  
14 exception is the fundamental purpose of an SEC receivership, which is to “consider how to treat  
15 investors who have bought into (the defendants’ fraudulent scheme).” *CFTC v. PrivateFX Global*  
16 *One*, 778 F.Supp.2d 775, 779 (S.D. Tex. 2011). That policy justifies prioritizing the claims of  
17 investors over those of general creditors as to the proceeds generated by defendants’ fraud. *Id.* at  
18 786; *Quilling v. Trade Partners Inc.*, 2007 WL 107669, at \*3 (W.D. Mich. Jan. 9, 2007). But that  
19 is not the case here. Global is not a general creditor. It has been determined that Global was an  
20 early investor with Defendants. (“In October 2011, Global Generation purchased 933,333 shares  
21 of Palantir through Defendants for a total of \$2.8 million.” CD 385 at 2:17-18). It has been  
22 determined that Global was defrauded by Defendants in making that investment. CD 198 at 5-6.  
23 As such, Global submits the policy behind the *Quilling* and *PrivateFX* exception, of allowing the  
24 subordination of general creditor to investor claims, does not and should not apply to Global’s  
25 claim.

26           The *Amerindo* and *Wealth Management* cases treat the priority of creditor over  
27 investor claims as a given. The issue in these cases is not of priority but whether the claimant is a  
28 creditor or an investor. The *Amerindo* and *Wealth Management* courts set aside legal

1 maneuverings by certain shareholders who had taken steps to change their status as investors to  
2 achieve creditor priority. Global submits the underlying policy of these cases is to ensure that  
3 investors with similar claims receive repayment on an equal basis. *S.E.C. v. Wealth Management*,  
4 628 F.3d 323, 333 (7th Cir. 2010). This Court has already decided that Global does not have a  
5 similar claim to that of other investors, that Global must be classified, not as an investor, but as a  
6 creditor. Global has moved the Court twice unsuccessfully to exercise its equitable power: first,  
7 to allow Global's claim to be partially considered a creditor claim and partially an investor claim  
8 and second, to give Global the choice of being classified as an investor or a creditor. This Court  
9 has declined, twice, to exercise its equitable power to allow Global to share in the potential upside  
10 of a Palantir liquidating event. Global is not to be classified "equally" with all other "securities  
11 fraud victims." Global submits it would be fundamentally inequitable for the Court approve the  
12 Proposed Plan, to thereby exercise its equitable power to deprive Global of the one benefit a  
13 creditor has over an investor – priority.

14 For these reasons, Global requests the Court enter an order that the Proposed  
15 Plan's be amended to prioritize Global's creditor claim ahead of investor claims in any  
16 distribution plan.

17 Dated: December 6, 2018

LUBIN OLSON & NIEWIADOMSKI LLP

18  
19 By: /s/ Theodore A. Griffinger, Jr.

Theodore A. Griffinger, Jr.

Attorneys for Interested Parties

GLOBAL GENERATION GROUP, LLC

and BENCHMARK CAPITAL, LLC