Terence G. Banich (SBN 212173)
terence.banich@katten.com
Allison E. Yager (*pro hac vice*)
allison.yager@katten.com
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe St.
Chicago, IL 60661
Telephone: (312) 902-5200
Facsimile: (312) 902-1061

Attorneys for the Receiver
Michele Vives

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ZACHARY J. HORWITZ and 1inMM CAPITAL, LLC,

Defendants.

Case No. 2:21-cv-02927-CAS(GJSx)

NOTICE OF MOTION AND MOTION OF RECEIVER MICHELE VIVES FOR ORDER APPROVING SETTLEMENT WITH JAMES DAINARD AND RELATED ENTITIES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 13, 2023
Time: 10:00 a.m. PT
Judge: Hon. Christina A. Snyder
Courtroom: 8D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on March 13, 2023, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 8D, located at the United States Courthouse, 350 West First Street, Los Angeles, California 90012, Michele Vives, not individually, but solely as the federal equity receiver (the "Receiver") of defendant of 1inMM Capital, LLC and its subsidiaries, affiliates and over the assets more particularly described in the *Order on Appointment of Permanent Receiver*, dated January 14, 2022 [ECF #70] (the "Receiver Order"), will and hereby does move the Court for entry of an order approving the settlement with James Dainard (the "Motion"). The Motion is based on the Memorandum of Points and Authorities below and is supported by the *Declaration of Michele Vives*, dated February 13, 2023 ("Vives Decl."), copy attached as **Exhibit 1**.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on February 10 and 13, 2023. **No party requests a hearing on the Motion.**

Dated: February 13, 2023

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

By: /s/*Terence G. Banich*
Terence G. Banich

Attorneys for the Receiver
Michele Vives

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

MEMORANDUM OF POINTS AND AUTHORITIES

Factual Background

A. The SEC's enforcement action against Horwitz and 1inMM

On April 5, 2021, the Securities and Exchange Commission ("SEC") commenced the above-captioned action against Zachary J. Horwitz ("Horwitz") and 1inMM Capital, LLC ("1inMM," and together with Horwitz, the "Defendants"), alleging that they committed an offering fraud and Ponzi scheme[1] in violation of the federal securities laws. (*Complaint*, dated April 5, 2021 [ECF #1] ("Compl."), ¶¶ 1, 4.)

Specifically, the SEC alleges that, since at least March 2014 and continuing until at least December 2019, Defendants raised over $690 million from investors by selling promissory notes issued by 1inMM using fabricated agreements and fake emails with prominent third-party companies with whom Defendants had no actual business relationship. (Compl. ¶¶ 4, 19-33.) Defendants represented to potential investors that the purpose of the offering was to finance 1inMM's acquisition and licensing of distribution rights in specific movies to major media companies, such as Netflix and Home Box Office ("HBO"). (*Id.* ¶¶ 5, 34-38.) To induce investors to purchase 1inMM's promissory notes, Horwitz made various false and misleading statements about his experience and the involvement of major media corporations as his "Strategic Partner[s]," and showed potential investors falsified documents and communications to make his statements more believable. (*Id.* ¶¶ 5-6, 39-48.) The reality, however, was that Defendants had no relationship with Netflix or HBO, and

[1] "A Ponzi scheme is a fraudulent arrangement in which an entity makes payments to investors from monies obtained from later investors rather than from any 'profits' of the underlying business venture. The fraud consists of funnelling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment." *In re United Energy Corp.*, 944 F.2d 589, 590 n.1 (9th Cir. 1991) (citing *Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924)).

had never licensed any movie rights to any company. (*Id.* ¶¶ 8, 49.) Horwitz used investor funds to pay purported returns on previous investments, as well as to spend lavishly on his lifestyle. (*Id.* ¶¶ 4, 9-12, 50-61.)

B. The Receiver Order

On December 8, 2021, the SEC filed a motion in this case asking the Court to appoint a receiver over 1inMM and over all assets held by, for the benefit of or under the direct or indirect control of Horwitz (the "Receiver Motion"). [ECF #65] In the Receiver Motion, the SEC argued that appointing an equity receiver was necessary to marshal investor assets that Horwitz misappropriated into a variety of third-party business enterprises or for his own personal benefit. (Receiver Mot. at 1.) The SEC alleged that Defendants raised a staggering $690 million from investors, and subsequently invested about $23 million into startup and film-production companies. (*Id.* at 1, 3-4.) These investments, the SEC asserted, may result in significant monetary returns, so they require the management and supervision of an independent fiduciary in order to maximize recovery to the defrauded investors. (*Id.* at 5-7.)

On January 14, 2022, the Court granted the Receiver Motion and entered the Receiver Order, finding that good cause existed to appoint a permanent receiver over 1inMM as well as assets that are attributable to investor or client funds or that were fraudulently transferred by Defendants, in order to identify and marshal assets to make the defrauded investors as whole as possible. (Receiver Order § I; Vives Decl. ¶ 4.) Ms. Vives is receiver of 1inMM and its subsidiaries and affiliates, as well as over the assets that are attributable to funds derived from investors or clients of Defendants or were fraudulently transferred by Defendants (collectively, the "Estate"). (Receiver Order §§ I-II; Vives Decl. ¶ 4.)

The Receiver Order confers on Ms. Vives "full powers of an equity receiver," and specifically authorizes and directs the Receiver to, among other things: take custody and control over all assets of 1inMM and its subsidiaries and affiliates;

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

conduct an investigation and discovery as may be necessary to locate and account for the assets of or managed by 1inMM and its subsidiaries and affiliates; and investigate and, where appropriate, prosecute claims and causes of action that the Receiver may possess. (Receiver Order § II; Vives Decl. ¶ 5.)

C. The Receiver's investigation of transfers

Pursuant to the authority conferred on her by the Receiver Order, and as the Receiver has discussed in her previous quarterly reports, the Receiver and her staff have devoted a great deal of time and effort to conduct a forensic accounting analysis of the financial transactions involving 1inMM, Horwitz and their respective insiders and affiliates. (Vives Decl. ¶ 6.) This project is critical to determine who may be liable to the Estate for receiving fraudulent transfers, identify previously unknown assets and obtain information about 1inMM's investors. (*Id.*)

The Receiver has determined that 1inMM did not just transfer funds to investors and their feeder funds; 1inMM also transferred very large sums to various persons and entities who do not appear to have been investors in the 1inMM Ponzi scheme. (Vives Decl. ¶ 7.) The Receiver is investigating both types of transfers. (*Id.*) In doing so, the Receiver will be able to identify potential fraudulent transfers to both investors and non-investors alike, thereby increasing the pool of potential recovery to the Estate. (*Id.*) *See, e.g., Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008) ("[c]ourts have routinely applied [the California Uniform Voidable Transactions Act] to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi-scheme investors").

Settlements that the Receiver reaches with such transferees are likely to be very significant Estate assets. (Vives Decl. ¶ 7.) The Receiver and her professional staff have, therefore, devoted considerable time and attention to reviewing and analyzing tens of thousands of banking transactions and other records associated

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

with 1inMM and Horwitz to identify those persons and entities who may have received transfers that are subject to avoidance and recovery. (*Id.* ¶ 8.)

D. Transfers to the Dainard Entities and subsequent investigation

During her forensic accounting investigation, the Receiver discovered that 1inMM and Horwitz had made a significant amount of transfers to James M. Dainard ("Mr. Dainard"), both directly as well as to an entity that Mr. Dainard owns and controls, JMD Investments WA, LLC ("JMD Investments"), and to a large financial institution as custodian of Mr. Dainard's individual retirement account (the "Dainard IRA," and collectively with Mr. Dainard and JMD Investments, the "Dainard Entities"). (Vives Decl. ¶ 9.) Specifically, the Receiver determined that, between December 2015 and June 2018, 1inMM Defendants made multiple transfers in the total aggregate amount of $353,034.17 (the "Transfers") to the Dainard Entities. (*Id.* ¶ 10.) The Receiver's forensic accounting analysis of the Transfers indicated that they constituted Mr. Dainard's profits from investing in the 1inMM Ponzi scheme. (*Id.*)

Beginning on or about July 8, 2022, the Receiver, by her counsel, informally requested that Mr. Dainard produce documents pertaining to the Transfers. (Vives Decl. ¶ 11.) Discussions with Mr. Dainard continued periodically over the next several months, and eventually he retained Magnus R. Andersson of Hanson Baker Ludlow Drumheller P.S. in Bellevue, Washington, as his counsel. (*Id.*) Mr. Dainard produced documents to the Receiver in response to her informal request. (*Id.* ¶ 12.) Through discussions with Messrs. Dainard and Andersson and review of documents Mr. Dainard produced, the Receiver determined that Mr. Dainard was an investor in 1inMM, and that in connection therewith he made several investments in 1inMM beginning in October 2013 and continuing to June 2018. (*Id.* ¶ 13.) On various dates between approximately December 21, 2015 and June 12, 2018, 1inMM made 14 transfers to the Dainard Entities in differing amounts for a grand total of

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

$353,034.17. (*Id.* ¶ 14.) These constitute the Transfers, a detailed list of which is annexed to the Vives Declaration as **Exhibit 1-1**. (*Id.* ¶ 15.)

E. The parties' claims and defenses as to the Transfers

The Receiver asserted that she may avoid and recover all of the Transfers as actual fraudulent transfers pursuant to section 3439.04(a)(1) of the California Uniform Voidable Transactions Act, Cal. Civ. Code § 3439 *et seq.* ("UVTA") (the "Claims"). (Vives Decl. ¶ 16.) This was because, the Receiver contended, 1inMM and Horwitz made the Transfers with the actual intent to hinder, delay, or defraud their creditors, as Horwitz pled guilty and admitted that he used 1inMM to operate a Ponzi scheme, which conclusively establishes the intent element for purposes of an actual fraudulent transfer claim under Cal. Civ. Code § 3439.04(a)(1). (*Id.*) Finally, as there was no serious question that the Dainard Entities were either the first transferees of the Transfers or the persons for whose benefit those transfers were made, the Receiver argued that she could recover all of the Transfers from them under Cal. Civ. Code § 3439.08(b)(1)(A). (*Id.* ¶ 17.)

The parties then engaged in good-faith, arms-length settlement negotiations. (Vives Decl. ¶ 18.) The Dainard Entities asserted various defenses to the Claims. (*Id.* ¶ 19.) Their principal defenses were that the Receiver could not avoid or recover the Transfers because the statute of limitations under UVTA had expired, and that some of the Transfers constituted a return of principal, as opposed to profits, and were therefore not avoidable under UVTA. (*Id.*) The Receiver reviewed the financial records and other documents that the Dainard Entities produced in response to her informal requests to assess whether the Transfers at issue were return of principal or profits. (*Id.* ¶ 20.) This process turned out to be somewhat inconclusive for both sides because, despite diligent efforts, some of the banking and financial records pertinent to the older transfers were no longer available. (*Id.*) The Receiver's counsel also sent

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

Mr. Andersson a detailed analysis of why the Claims are not barred by the statute of limitations. (*Id.*) This point remained contested during the parties' negotiations. (*Id.*)

F. The proposed settlement

On February 1, 2023, the parties entered into that certain *Settlement Agreement and Mutual Release* (the "Settlement Agreement"), a true and correct copy of which is attached as **Exhibit 2**. (Vives Decl. ¶ 21.)

As reflected in the Settlement Agreement, the Dainard Entities agreed to pay $247,000 to the Estate in full settlement of the Claims (the "Settlement Payment"). (Vives Decl. ¶ 22; Sett. Agmt. ¶ 2.) The Settlement Payment is 69.9 percent of the amount in controversy of $353,034.17, and reflects the Receiver's assessment of the relative strength of her Claims weighed against the risk and cost associated with litigating those claims, particularly as to the Dainard Entities' asserted defenses. (Vives Decl. ¶ 23.)

The Receiver, Mr. Dainard and JMD Investments will exchange mutual general releases of any claims arising out of or relating to the Dainard Entities' transactions and dealings with 1inMM and Horwitz, the Transfers and the Claims. (Vives Decl. ¶ 24; Sett. Agmt. ¶¶ 3-5.) Mr. Dainard and JMD Investments will also waive any right to file, and covenant not to file, a claim against the Estate. (Vives Decl. ¶ 25; Sett. Agmt. ¶ 7.) The validity of the Settlement Agreement, and the parties' obligations thereunder, are subject to the condition precedent that the Court enters an order approving its material terms. (Vives Decl. ¶ 26; Sett. Agmt. ¶ 8.)

Legal Standards

District courts have "extremely broad" power and "wide discretion" in overseeing the administration of a receivership. *Sec. & Exch. Comm'n v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986) (internal citations omitted). The Ninth Circuit "affords 'broad deference' to the district court's supervisory role" in receivership cases, and "generally uphold[s] reasonable procedures instituted by the district court that serve th[e] purpose of orderly and efficient administration of the receivership

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

for the benefit of creditors." *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) (quoting *Hardy*, 803 F.3d at 1037-38).

That broad authority to oversee the administration of a receivership extends to approving compromises and settlements. "[N]o federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate." *Gordon v. Dadante*, 336 F. App'x 540, 549 (6th Cir. 2009) (citing *Liberte Cap. Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006)); *see also Sec. & Exch. Comm'n v. Kaleta*, 530 F. App'x 360, 362 (5th Cir. 2013) (affirming order approving receiver's settlement, observing "because this is a case in *equity*, it is neither surprising nor dispositive that there is no case law directly controlling" the district court's order approving the compromise) (original emphasis).

Local Rule 66-8 directs a receiver to "administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy." LR 66-8. District courts sitting in receivership may look to bankruptcy law for guidance about the administration of a receivership. *See, e.g., Sec. & Exch. Comm'n v. Cap. Consultants, LLC*, 397 F.3d 733, 745 (9th Cir. 2005) (bankruptcy law "analogous" and therefore persuasive in administration of receivership estates). This is largely because "the purpose of bankruptcy receiverships and equity receiverships is 'essentially the same—to marshal assets, preserve value, equally distribute to creditors, and, either reorganize, if possible, or orderly liquidate.'" *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841 (5th Cir. 2019) (quoting *Janvey v. Alquire*, No. 3:09-cv-0724, 2014 WL 12654910, at *17 (N.D. Tex. July 30, 2014)); *accord Sec. & Exch. Comm'n v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) ("[t]he goal in both securities-fraud receiverships and liquidation bankruptcy is identical—the fair distribution of the liquidated assets").

Courts in this circuit typically apply bankruptcy principles to evaluate approval of settlements in receivership cases. *Sec. & Exch. Comm'n v. Champion-*

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

Cain, 2022 WL 126114, at *1 (S.D. Cal. Jan. 13, 2022) (applying bankruptcy principles regarding approval of settlements in receivership case); *Sec. & Exch. Comm'n v. Total Wealth Mgmt., Inc.*, 2019 WL 13179068, at *2 (S.D. Cal. Sept. 18, 2019) (same). Bankruptcy courts evaluate whether a compromise is "fair and equitable," taking into consideration "[a] the probability of success in litigation, [b] any difficulties that may be encountered in collection, [c] the complexity of the litigation, the expense, inconvenience, and delay necessarily attending, and [d] the interest of the receivership entities' creditors and their reasonable views." *Champion-Cain*, 2022 WL 126114, at *1 (citing *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988)); *see also Martin v. Kane (In re A & C Props.)*, 784 F.2d 1377, 1381 (9th Cir. 1986)).

"The analysis under these factors is holistic; the Court must canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness…[I]t is not necessary to satisfy each of these factors provided that the factors as a whole favor approving the settlement." *Total Wealth Mgmt., Inc.*, 2019 WL 13179068, at *3 (internal citations and quotations omitted); *accord In re Open Med. Inst., Inc.*, 639 B.R. 169, 185 (B.A.P. 9th Cir. 2022) ("a settlement can satisfy the *A & C Properties* test even if the evidence supporting one or more of the four factors is relatively weak"). The Court should consider these factors "as a whole, and not individually in a vacuum, to ascertain whether the settlement is a good deal compared to litigation." *Open Med. Inst.*, 639 B.R. at 185. Further, when assessing a settlement, the Court need not decide issues of disputed fact or questions of law raised in the controversies sought to be settled. *Burton v. Ulrich (In re Schmitt)*, 215 B.R. 417, 423 (9th Cir. BAP 1997).

Courts generally should "give deference to a [receiver's] business judgment in deciding whether to settle a matter for the benefit of the estate." *In re Douglas J. Roger, M.D., Inc., APC*, 393 F. Supp. 3d 940, 961 (C.D. Cal. 2019) (cleaned up); *see also In re Lahijani*, 325 B.R. 282, 289 (B.A.P. 9th Cir. 2005). "Approving a

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

proposed compromise is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interests of the estate nor fair and equitable for the creditors." *In re MGS Mktg.*, 111 B.R. 264, 266-67 (B.A.P. 9th Cir. 1990).

Argument

The Motion should be granted because the settlement is fair, equitable and far preferable to protracted litigation with the Dainard Entities.

First, the Receiver's probability of success litigating the Claims is mixed. *See, e.g., Total Wealth Mgmt.*, 2019 WL 13179068, at *3 ("When determining the probability of success in litigation, a court must canvass the Receiver's litigation risk and determine whether the settlement amount is commensurate to that risk.") (citation and internal quotation omitted). Assessing risk here is largely a function of how controlling law interpreting UVTA limits a receiver's ability to claw back money from investors in a Ponzi scheme.

The Receiver's potential claims against the Dainard Entities arise under UVTA, the purpose of which is "to prevent debtors from placing, beyond the reach of creditors, property that should be made available to satisfy a debt by transferring that property to others." *RPB SA v. Hyla, Inc.*, No. CV-20-04105-JAK, 2021 WL 4980092, at *4 (C.D. Cal. June 24, 2021) (quoting *Chen v. Berenjian*, 33 Cal. App. 5th 811, 817 (2019)) (cleaned up). UVTA enables a creditor to bring an action to avoid a fraudulent transfer of an asset to the extent necessary to satisfy its claim. Cal. Civ. Code § 3439.07(a)(1). A transfer is fraudulent—and thus avoidable—if the debtor transferred the asset either (1) with actual intent to hinder, delay, or defraud any of its creditors, or (2) without receiving reasonably equivalent value in exchange therefor when it had unreasonably small capital or was insolvent (often called "constructive fraud"). *Id.* §§ 3439.04(a)(1)-(2). A creditor may bring an action under

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

UVTA against the first transferee of the asset, the person for whose benefit the transfer was made or any subsequent transferees. *Id.* §§ 3439.08(b)(1)(A)-(B).

Fraudulent transfer claims—colloquially called "clawback" actions—are among a receiver's most important tools to recover monies lost by Ponzi-scheme investors. *See, e.g., Donell*, 533 F.3d at 767 (courts "have routinely applied" UVTA for this purpose). The Ponzi scheme operator is the "debtor" and each investor is a "creditor," although the investors who profited from the scheme on a net basis—sometimes called "net winners"—are the recipients of the Ponzi scheme operator's fraudulent transfers, and are thus liable under UVTA. *Id.* at 767, 771. An equity receiver has standing to pursue fraudulent transfer claims "to redress injuries that [the receivership entity] suffered when its managers caused [it] to commit waste and fraud." *Id.* at 777; *see also McNamara v. Hallinan*, No. 2:17-CV-02967-GMN, 2019 WL 4752265, at *5 (D. Nev. Sept. 30, 2019).

Like any UVTA claimant, a receiver may assert that a transfer was actually or constructively fraudulent. *Donell*, 533 F.3d at 770. But the debtor's admission that it operated a Ponzi scheme *conclusively* establishes the debtor's fraudulent intent for a UVTA claim premised on actual fraud (*In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008)),[2] as well as the debtor's financial distress for a UVTA claim premised on constructive fraud (*Donell*, 533 F.3d at 770-71).[3] To determine whether a Ponzi scheme investor is liable to the estate for receiving fraudulent transfers, courts apply

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[2] "We now hold that a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." *Slatkin*, 525 F.3d at 814.

[3] "Proof that transfers were made pursuant to a Ponzi scheme generally establishes that the scheme operator '[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction,' § 3439.04(a)(2)(A), or '[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due,' § 3439.04(a)(2)(B)." *Donell*, 533 F.3d at 770-71.

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

the "netting rule." *Id.* at 771. Under that rule, "the amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. If the net is positive, the receiver has established liability[.]" *Id.* Generally, "innocent" investors may retain the payments they received up to the amount invested, but they must disgorge the "profits" paid to them by the Ponzi scheme as they "do not represent a return on legitimate investment activity." *Id.* (quoting *In re Lake States Commodities, Inc.*, 253 B.R. 866, 872 (Bankr. N.D. Ill. 2000)).

Investors may retain payments returning the amounts invested only if they can prove that they received those transfers in good faith and for reasonably equivalent value. Cal. Civ. Code § 3439.08(a); *see also Donell*, 533 F.3d at 771. But a receiver may, under an actual fraud theory, challenge a winning investor's good faith by seeking to avoid and recover *the entire amount* paid to the investor, including amounts which could be considered "return of principal." *Donell*, 533 F.3d at 771. The investor has the burden of proving the defense that it received transfers returning its principal investment in good faith and for value. Cal. Civ. Code § 3439.08(f)(1). Whether the good-faith defense applies is a question of fact. *See, e.g., Neilson v. E & F Fin. Servs., Inc. (In re Cedar Funding, Inc.)*, No. 08-52709-MM, 2011 WL 5855441, at *5 (Bankr. N.D. Cal. Nov. 22, 2011).

Here, as discussed above, the Receiver believes that the Transfers constitute the Dainard Entities profits from investing in the 1inMM Ponzi scheme, and thus they are "net winners" and liable under UVTA. (Vives Decl. ¶¶ 10, 13-15.) Had the Receiver commenced litigation against the Dainard Entities, the Receiver would have had a high probability of success at avoiding and recovering the transfers of fictitious profits they received as a result of their investments in 1inMM, as they likely would have no defense to that claim. *Cf. In re Walldesign, Inc.*, 872 F.3d 954,

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

965 (9th Cir. 2017) (first transferees are strictly liable); *see also Donell*, 533 F.3d at 772 (UVTA "requires disgorgement" of Ponzi scheme "profits").

It is, however, not a foregone conclusion that litigation would have resulted in the Receiver avoiding and recovering *all* of the Transfers. *Cf. In re ISE Corp.*, No. BR 10-14198 MM 11, 2012 WL 1377085, at *8 (Bankr. S.D. Cal. Apr. 13, 2012) ("the success of litigation also entails consideration of the risk of uncertainty and the desire for expediency"). For one thing, the Dainard Entities contend that *none* of the Transfers is avoidable because the UVTA limitations period has expired. Moreover, even if the Court were to conclude that the Claims were not barred by the statute of limitations, the Dainard Entities also assert that some of the Transfers constitute return-of-principal, not profits, which implicates UVTA's good-faith defense. After closely reviewing the materials produced and the legal arguments presented by Mr. Andersson, the Receiver ultimately concluded that the probability of defeating the Dainard Entities' good-faith defense at trial was uncertain—in part due to the unavailability of older banking and financial records necessary to evaluate that defense—and the cost of litigating that issue through appeal would likely be prohibitive in any event. (Vives Decl. ¶ 27.) That is particularly because a defendant's good faith is a factual question, which would likely have required a trial to resolve. (*Id.*)

It is, therefore, possible that the Court would have sustained some or all of the Dainard Entities' statute-of-limitations defense, and a trial could have resulted in the Dainard Entities prevailing on their good-faith defense. Both outcomes would likely be considerably worse than the parties' settlement. Rather than take those risks, the Receiver agreed to compromise and accept 69.9 percent of the total Transfers. (Vives Decl. ¶ 28.) *See, e.g., Sec. & Exch. Comm'n v. Cap. Cove Bancorp LLC*, No. 8:15-CV-00980-JLS, 2016 WL 11752897, at *2 (C.D. Cal. Dec. 15, 2016) (granting receiver's motion to approve settlement where it "provided a recovery that is proportionate to the successful prosecution of this action when discounts are

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525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

factored in for the risk, time, and expense of fully litigating the case, and maximizes the funds available for distribution to creditors") (cleaned up); *Open Med. Inst.*, 639 B.R. at 183-84 (affirming order approving settlement where trustee stated in declaration that he had evaluated claims and was uncertain of his success on the merits if he were to pursue them—characterizing the odds of success as a "coin flip"—and "thought it was safer to settle" instead of litigate); *In re MatlinPatterson Glob. Opportunities Partners II L.P.*, 644 B.R. 418, 431 (Bankr. S.D.N.Y. 2022) (approving settlement where court was "satisfied that the negotiated dollar amount falls within the required range of reasonableness when viewed as a matter of litigation-risk-based valuation").

For these reasons, the Receiver respectfully suggests that the settlement appropriately takes into account the mixed probability of success on the merits of her UVTA claims against the Dainard Entities. (Vives Decl. ¶ 29.)

Second, the Receiver is informed and believes that there would be no difficulty in collecting the entire amount of the Transfers from the Dainard Entities. (Vives Decl. ¶ 30.) "Assessing the difficulties in collection is largely a bird-in-the-hand consideration that weighs the certainty of settlement against the potential uncertainty of collection even where a receiver secures a favorable judgment." *Total Wealth Mgmt.*, 2019 WL 13179068, at *3 (S.D. Cal. Sept. 18, 2019) (internal citation omitted). But when collectability is not an issue to either party, this factor is neutral. *See, e.g., In re TBH19, LLC*, No. 2:19-BK-23823-VZ, 2022 WL 16782946, at *7 (B.A.P. 9th Cir. Nov. 8, 2022) (difficulty-in-collection factor "neutral" where it "was not of particular concern to either side"); *see also In re Isom*, No. 4:15-BK-40763, 2020 WL 1950905, at *7 (B.A.P. 9th Cir. Apr. 22, 2020) (affirming order approving compromise even though difficulty-in-collection factor weighed against settlement), *aff'd*, 836 F. App'x 562 (9th Cir. 2020).

Third, it would be complex, expensive and time-consuming for the parties to litigate the issue of Mr. Dainard's good faith. (Vives Decl. ¶ 31.) This factor is

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525 W. MONROE ST.
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(312) 902-5200

particularly important in liquidations like this one where the goal is "obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation." *In re Law*, 308 F. App'x 152, 153 (9th Cir. 2009) (quoting *In re Blair*, 538 F.2d 849, 852 (9th Cir. 1976)). A defendant's good faith under UVTA is a question of fact, which necessarily entails discovery and trial to resolve, along with all of the time and expense associated with it. *See, e.g., Ryan Racing, LLC v. Gentilozzi*, No. 1:12-CV-488, 2015 WL 728468, at *14 (W.D. Mich. Feb. 19, 2015) (denying summary judgment on UFTA good-faith defense because it presented a question of fact for trial).

Given her review of the available evidence, the Receiver believes that such litigation against the Dainard Entities would be expensive and time-consuming, as it would likely require extensive discovery, retention of experts and numerous witnesses. (Vives Decl. ¶ 31.) A trial and appeal would likely take at least two years to complete and cost the estate several hundred thousand dollars in fees and expenses. (*Id.*) This factor, therefore, weighs heavily in favor of approving the settlement. *See, e.g., TBH19*, 2022 WL 16782946, at *3 (complexity element weighed in favor of settlement where dispute would require extensive discovery, cost the estate hundreds of thousands of dollars and take years to complete).

Fourth, the Receiver believes that the Estate's creditors are likely to support the settlement. (Vives Decl. ¶ 32.) "The opposition of the creditors of the estate to approval of a compromise may be considered by the court, but is not controlling and will not prevent approval of the compromise where it is evident that the litigation would be unsuccessful and costly…In short, creditors have a voice but not a veto." *In re Bondanelli*, No. 2:14-BK-27656-WB, 2020 WL 1304140, at *4 (B.A.P. 9th Cir. Mar. 18, 2020) (quoting *Official Unsecured Creditors' Comm. v. Beverly*

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Almont Co. (In re The Gen. Store of Beverly Hills), 11 B.R. 539, 541 (9th Cir. BAP 1981) (cleaned up)).

Here, the creditors' views of the settlement are presently unknown. As discussed below, the Receiver is giving notice of this Motion to all known creditors of the Estate by posting it on the receivership website (the "Website"), as the Court has previously authorized,[4] along with instructions how to advise the Receiver if any creditor wishes to object to the settlement. (Vives Decl. ¶ 34.) The Receiver will file a status report before the hearing as to whether any creditors objected. (*Id.* ¶ 35.)

* * *

In sum, the Receiver believes that the settlement with the Dainard Entities is fair, equitable and adequate under the circumstances to realize the value of the Estate's interest in the Transfers. Litigation is, of course, an alternative course, but "[w]hile the [Receiver] *might* do better in [] litigation, she is not likely to do so[.]" *In re Tidwell*, No. 2:17-BK-20802 RK, 2018 WL 1162511, at *3 (Bankr. C.D. Cal. Mar. 1, 2018) (emphasis added). That is the main reason why approving the settlement is appropriate. Moreover, as discussed above, the settlement avoids litigation of intensely factual and complex issues of good faith and value, which would necessarily result in more expense, inconvenience and delay for the Estate in realizing the value of the Transfers. The Motion should, therefore, be granted.

Notice to Creditors

"Creditors are entitled to 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Perez v. Safety-Kleen Sys., Inc.*,

[4] ECF #126 ¶ 5.

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253 F.R.D. 508, 518 (N.D. Cal. 2008) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)).

The Court has authorized the Receiver to provide creditors of the Estate with notice of filings in this case by posting documents on the Website. [ECF #126 ¶ 5] As the Receiver previously reported, she is still ascertaining the identities and contact information for the investors in 1inMM. While the Receiver has some investors' contact information, the Receiver is presently unsure if she has contact information for all such investors. (Vives Decl. ¶ 33.) In addition to giving notice to the parties and other interested parties by causing the Motion to be electronically filed via the Court's CM/ECF system, the Receiver will email all known creditors of the Estate (or, if represented, their counsel) with a link to this Motion and supporting exhibits. (*Id.* ¶ 34.) The Receiver's email and Website post will include instructions how to advise her of any objections to the Motion by no later than seven days before the hearing. (*Id.*) The Receiver will thereafter file a status report informing the Court if any creditor asserted a timely objection to the Motion. (*Id.* ¶ 35.)

The Court should deem this notice sufficient under the circumstances. *See, e.g., Fed. Trade Comm'n v. Cardiff*, No. CV5:18-2104-SJO, 2020 WL 9938072, at *4 (C.D. Cal. Mar. 10, 2020) (finding receiver's notice of motion to approve settlement was sufficient where receiver posted motion to its website publicly, served on all parties and served on all known creditors and interested parties); *U.S. Commodity Futures Trading Comm'n v. Forex Liquidity LLC*, No. CV-07-01437-CJC, 2008 WL 11334950, at *8 (C.D. Cal. July 14, 2008) (approving receiver's request to limit notice and deviate from Local Rule 66-7 to reduce administrative costs), *aff'd*, 384 F. App'x 645 (9th Cir. 2010).

WHEREFORE, the Receiver respectfully requests that the Court enter an order: (a) granting the Motion; (b) finding that notice of the Motion is sufficient under the circumstances and waiving any further notice otherwise required by Local

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Rule 66-7; (c) approving the terms of the settlement and compromise memorialized in the Settlement Agreement as fair and equitable; (d) authorizing the Receiver to take such further actions as may be necessary to consummate the transactions in the Settlement Agreement; and (e) granting such further relief as the Court deems necessary and appropriate.

Dated: February 13, 2023

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

By: /s/*Terence G. Banich*
Terence G. Banich

Attorneys for the Receiver
Michele Vives

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

PROOF OF SERVICE

STATE OF ILLINOIS, COUNTY OF COOK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Cook, State of Illinois. My business address is 525 W. Monroe St., Chicago, Illinois 60661. On February 13, 2023, I served the following document(s) described as:

MOTION OF RECEIVER MICHELE VIVES FOR ORDER APPROVING SETTLEMENT WITH JAMES DAINARD AND RELATED ENTITIES

as follows:

[ ] BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Katten Muchin Rosenman LLP practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[X] BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the document(s) to be sent from e-mail address terence.banich@katten.com to the persons at the e-mail address(es) listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Magnus R. Andersson (mandersson@hansonbaker.com) (Dainard counsel)

[ ] BY OVERNIGHT MAIL (FedEx): I enclosed said document(s) in an envelope or package provided by FEDEX and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FEDEX or delivered such document(s) to a courier or driver authorized by FEDEX to receive documents.

[ ] BY PERSONAL SERVICE: I caused said document to be personally delivered the document(s) to the person at the addresses listed above by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

[X] E-FILING: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

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

Executed on February 13, 2023, at Winnetka, Illinois.

/s/Terence G. Banich
Terence G. Banich

Terence G. Banich (SBN 212173)
terence.banich@katten.com
Allison E. Yager (*pro hac vice)*
allison.yager@katten.com
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe St.
Chicago, IL 60661
Telephone: (312) 902-5665
Facsimile: (312) 902-1061

Attorneys for the Receiver
Michele Vives

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ZACHARY J. HORWITZ; and 1inMM CAPITAL, LLC,

Defendants.

Case No. 2:21-cv-02927-CAS(GJSx)

DECLARATION OF MICHELE VIVES

Judge: Hon. Christina A. Snyder
Courtroom: 8D

I, Michele Vives, declare as follows:

1. I am over the age of eighteen years, am under no disability and am competent to testify to the matters set forth herein. Except as otherwise stated, all facts set forth in this declaration are based upon my personal knowledge and/or my review of documents. If called as a witness in this case, I could and would testify competently to the facts set forth in this declaration.

2. I submit this declaration in support of the *Motion of Receiver Michele Vives for Order Approving Settlement with James Dainard and Related Entities*, dated February 13, 2023 (the "Motion"). Any capitalized terms not defined herein have the meanings ascribed to them in the Motion.

3. I am the President of the Douglas Wilson Companies ("DWC"), an advisory firm that assists companies and entities of all kinds, from financial institutions to operating companies, law firms, state and federal courts, corporations, partnerships, pension funds, REITs and more. DWC has been appointed as receiver or otherwise involved in hundreds of receiver cases over the last 30 years, and has served in other fiduciary roles, such as chapter 11 trustee, chapter 11 examiner, special master, liquidating trustee, assignee for the benefit of creditors and chief restructuring officer.

A. The Receiver Order

4. On January 14, 2022, this Court entered the *Order on Appointment of a Permanent Receiver* [ECF #70] (the "Receiver Order"), which appointed me to be the federal equity receiver of defendant 1inMM Capital, LLC as well as assets that are attributable to investor or client funds or that were fraudulently transferred by Defendants (collectively, the "Estate").

5. The Receiver Order confers on me "full powers of an equity receiver," and specifically authorizes and directs me to, among other things: take custody and control over all assets of 1inMM and its subsidiaries and affiliates; conduct an investigation and discovery as may be necessary to locate and account for the

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525 W. MONROE ST.
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(312) 902-5200

assets of or managed by 1inMM and its subsidiaries and affiliates; and investigate and, where appropriate, prosecute claims and causes of action that the Receiver may possess.

B. The Receiver's investigation of transfers

6. Pursuant to the authority conferred on me by the Receiver Order, and as I have discussed in my previous quarterly reports, my staff and I have devoted a great deal of time and effort to conducting a forensic accounting analysis of the financial transactions involving 1inMM, Horwitz and their respective insiders and affiliates. This project is critical to determine who may be liable to the Estate for receiving fraudulent transfers, to identify previously unknown assets and to obtain information about 1inMM's investors.

7. I have determined that 1inMM did not just transfer funds to investors and their feeder funds; 1inMM also transferred very large sums to various persons and entities who do not appear to have been investors in the 1inMM Ponzi scheme. I am investigating both types of transfers. In doing so, I will be able to identify potential fraudulent transfers to both investors and non-investors alike, thereby increasing the pool of potential recovery to the Estate. Settlements that I reach with such transferees are likely to be very significant Estate assets.

8. My professional staff and I have, therefore, devoted considerable time and attention to reviewing and analyzing tens of thousands of banking transactions and associated records associated with 1inMM and Horwitz to identify those persons and entities who may have received transfers that are subject to avoidance and recovery.

C. Transfers to the Dainard Entities and subsequent investigation

9. During my forensic accounting investigation, I discovered that 1inMM and Horwitz had made a significant amount of transfers to James M. Dainard ("Mr. Dainard"), both directly as well as to an entity that Mr. Dainard owns and controls, JMD Investments WA, LLC ("JMD Investments"), and to a

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525 W. MONROE ST.
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large financial institution as custodian of Mr. Dainard's individual retirement account (the "Dainard IRA," and collectively with Mr. Dainard and JMD Investments, the "Dainard Entities").

10. Specifically, I determined that, between December 2015 and June 2018, 1inMM Defendants made multiple transfers in the total aggregate amount of $353,034.17 (the "Transfers") to the Dainard Entities. My forensic accounting analysis of the Transfers indicated that they constituted Mr. Dainard's profits from investing in the 1inMM Ponzi scheme.

11. Beginning on or about July 8, 2022, my counsel informally requested that Mr. Dainard produce documents pertaining to the Transfers. Discussions with Mr. Dainard continued periodically over the next several months, and eventually he retained Magnus R. Andersson of Hanson Baker Ludlow Drumheller P.S. in Bellevue, Washington, as his counsel.

12. Mr. Dainard produced documents to me in response to my informal request.

13. Through discussions with Messrs. Dainard and Andersson and review of documents Mr. Dainard produced, I determined that Mr. Dainard was an investor in 1inMM, and that in connection therewith he made several investments in 1inMM beginning in October 2013 and continuing to June 2018.

14. On various dates between approximately December 21, 2015 and June 12, 2018, 1inMM made 14 transfers to the Dainard Entities in differing amounts for a grand total of $353,034.17.

15. The 14 transfers that 1inMM made to the Dainard Entities between December 21, 2015 and June 12, 2018 constitute the Transfers, a detailed list of which is annexed hereto as **Exhibit 1-1**.

D. The parties' claims and defenses to the Transfers

16. I asserted that I may avoid and recover all of the Transfers as actual fraudulent transfers pursuant to section 3439.04(a)(1) of the California Uniform

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Voidable Transactions Act, Cal. Civ. Code § 3439 *et seq.* ("UVTA") (the "Claims"). This was because, I contended, 1inMM and Horwitz made the Transfers with the actual intent to hinder, delay, or defraud their creditors, as Horwitz pled guilty and admitted that he used 1inMM to operate a Ponzi scheme, which conclusively establishes the intent element for purposes of an actual fraudulent transfer claim under Cal. Civ. Code § 3439.04(a)(1).

17. Finally, as there was no serious question that the Dainard Entities were either the first transferee of the Transfers or the person for whose benefit those transfers were made, I argued that I could recover all of the Transfers from them under Cal. Civ. Code § 3439.08(b)(1)(A).

18. The parties then engaged in good-faith, arms-length settlement negotiations.

19. The Dainard Entities asserted various defenses to the Claims. Their principal defenses were that I could not avoid or recover the Transfers because the statute of limitations under UVTA had expired, and that some of the Transfers constituted a return of principal, as opposed to profits, and were therefore not avoidable under UVTA.

20. I reviewed the financial records and other documents that the Dainard Entities produced in response to her informal requests to assess whether the Transfers at issue were return of principal or profits. This process turned out to be somewhat inconclusive for both sides because, despite diligent efforts, some of the banking and financial records pertinent to the older transfers were no longer available. My counsel also sent Mr. Andersson a detailed analysis of why the Claims are not barred by the statute of limitations. This point remained contested during the parties' negotiations.

E. The proposed settlement

21. On February 1, 2023, the parties entered into that certain *Settlement Agreement and Mutual Release* (the "Settlement Agreement"), a true and correct

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copy of which is attached to the Motion as **Exhibit 2**.

22. As reflected in the Settlement Agreement, the Dainard Entities agreed to pay $247,000 to the Estate in full settlement of the Claims (the "Settlement Payment").

23. The Settlement Payment is 69.9 percent of the amount in controversy of $353,034.17, and reflects my assessment of the relative strength of my Claims weighed against the risk and cost associated with litigating those claims, particularly as to the Dainard Entities' asserted defenses.

24. Mr. Dainard, JMD Investments and I will exchange mutual general releases of any claims arising out of or relating to the Dainard Entities' transactions and dealings with 1inMM and Horwitz, the Transfers and the Claims.

25. Mr. Dainard and JMD Investments will also waive any right to file, and covenant not to file, a claim against the Estate.

26. The validity of the Settlement Agreement, and the parties' obligations thereunder, are subject to the condition precedent that the Court enters an order approving its material terms.

F. The settlement should be approved

27. After closely reviewing the materials produced and the legal arguments presented by Mr. Andersson, I ultimately concluded that the probability of defeating the Dainard Entities' good-faith defense at trial was uncertain—in part due to the unavailability of older banking and financial records necessary to evaluate that defense—and the cost of litigating that issue through appeal would likely be prohibitive in any event. That is particularly because a defendant's good faith is a factual question, which would likely have required a trial to resolve.

28. It is, therefore, possible that the Court would have sustained some or all of the Dainard Entities' statute-of-limitations defense, and a trial could have resulted in the Dainard Entities prevailing on their good-faith defense. Both outcomes would likely be considerably worse than the parties' settlement. Rather

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than take those risks, I agreed to compromise and accept 69.9 percent of the total Transfers.

29. For these reasons, I respectfully suggest that the settlement appropriately takes into account the mixed probability of success on the merits of my UVTA claims against the Dainard Entities.

30. I am informed and believes that there would be no difficulty in collecting the entire amount of the Transfers from the Dainard Entities.

31. Given my review of the available evidence, I believe that litigation against Mr. Dainard on the issue of his good faith would be expensive and time-consuming, as it would likely require extensive discovery, retention of experts and numerous witnesses. A trial and appeal would likely take at least two years to complete and cost the estate several hundred thousand dollars in fees and expenses.

32. I believe that the Estate's creditors are likely to support the settlement I have reached with Mr. Dainard.

G. Notice to creditors

33. As I previously reported, I am still ascertaining the identities and contact information for the investors in 1inMM. While I have some investors' contact information, I am presently unsure if I have contact information for all such investors.

34. In addition to giving notice to the parties and other interested parties by causing the Motion to be electronically filed via the Court's CM/ECF system, I will email all known creditors of the Estate (or, if represented, their counsel) with a link to this Motion and supporting exhibits. My email and Website post will include instructions how to advise me of any objections to the Motion by no later than seven days before the hearing.

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35. I will thereafter file a status report informing the Court if any creditor asserted a timely objection to the Motion.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2023 in San Diego, California

/s/*Michele Vives*
Michele Vives

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525 W. MONROE ST.
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Exhibit 1-1

Schedule A

Date	Amt. Invested	Amt. Repaid	Total Gain/ (Loss)	Transaction	Check #	Description	Name	Check Memo
12/21/15	-	2,970.00	2,970.00	Check	1064	1064 * 000010490221000	JAMES DAINARD	Dec+January Interest
12/23/15	-	1,033.09	4,003.09	Check	1070	1070 * 000010440179700	PROVIDENT TRUST GROUP, LLC FBO "JAMES DAINARD"	131000249
04/01/16	-	6,666.64	10,669.73	Wire		DOMESTIC WIRE 160401000010621	JAMES DAINARD	
05/02/16	-	1,485.00	12,154.73	Wire		DOMESTIC WIRE 160502000003337	JAMES DAINARD	
05/06/16	-	4,132.36	16,287.09	Check	1063	1063 000010400173600	PROVIDENT TRUST GROUP, LLC FBO "JAMES DAINARD"	Monthly Interest + Jan - May 2018
07/07/16	-	2,970.00	19,257.09	Wire		DOMESTIC WIRE 160707000006154	JAMES DAINARD	
08/01/16	-	2,970.00	22,227.09	Wire		DOMESTIC WIRE 160801000009084	JAMES DAINARD	
09/13/16	-	2,970.00	25,197.09	Wire		DOMESTIC WIRE 160913000008833	JAMES DAINARD	
11/08/16	-	5,940.00	31,137.09	Wire		DOMESTIC WIRE 161108000003652	JAMES DAINARD	
01/13/17	-	4,455.00	35,592.09	Wire		DOMESTIC WIRE 170113000007864	JAMES DAINARD	
02/14/17	-	4,455.00	40,047.09	Wire		DOMESTIC WIRE	JAMES DAINARD	
08/24/17	-	12,397.08	52,444.17	Check	1090	1090 000010330216800	PROVIDENT TRUST GROUP, LLC FBO "JAMES DAINARD"	2017 Interest
03/01/18	-	243,090.00	295,534.17	Wire		DOMESTIC WIRE 180301000003869	JMD INVESTMENTS LLC	
06/12/18	-	57,500.00	353,034.17	Wire		DOMESTIC WIRE 180612000007061	PROVIDENT TRUST GROUP	
TOTAL	$ -	$ 353,034.17	$ 353,034.17					

EXECUTION COPY

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (this "Agreement") is made and entered into as of this 1st day of February, 2023 (the "Effective Date"), by and between (a) Michele Vives, not individually, but solely as the receiver (the "Receiver") as more particularly described in the second recital of this Agreement, on the one hand, and (b) James M. Dainard, individually ("Dainard"); and (c) JMD Investments WA, LLC (together, the "Dainard Parties"), on the other hand (and collectively with the Receiver, the "Parties").

Recitals

WHEREAS, on April 6, 2021, the Securities and Exchange Commission commenced the civil action styled *Securities & Exchange Commission v. Horwitz*, No. 2:21-cv-02927-CAS-GJS (the "Action"), in the United States District Court for the Central District of California (the "Court") against Zachary J. Horwitz and 1inMM Capital, LLC (together, the "1inMM Defendants"), alleging that they conducted an offering fraud and Ponzi scheme in violation of federal securities laws;

WHEREAS, on January 14, 2022, the Court entered that certain *Order on Appointment of Permanent Receiver* (the "Appointment Order") in the Action that, among other things, appointed the Receiver to be the federal equity receiver of 1inMM Capital, LLC and its subsidiaries and affiliates, as well as over the assets that are attributable to funds derived from investors or clients of the 1inMM Defendants or were fraudulently transferred by the 1inMM Defendants (the "Receivership Estate");

WHEREAS, the Appointment Order authorizes the Receiver to, among other things, investigate and prosecute claims and causes of action;

WHEREAS, following a diligent investigation, including the review and analysis of the books and records of the 1inMM Defendants as well as documents and information provided by the Dainard Parties, the Receiver has identified transfers between December 2015 and June 2018 from the 1inMM Defendants directly to or for the benefit of the Dainard Parties totaling $353,034.17 (the "Transfers");

WHEREAS, the Receiver contends that the Transfers are subject to avoidance and recovery under the Uniform Voidable Transactions Act as enacted in California (California Civil Code §§ 3439-3439.14) ("UVTA"), and that consequently, the Receiver has, on behalf of the Receivership Estate, causes of action against some or all of the Dainard Parties under the UVTA to avoid and recover the Transfers or their value (the "Claims");

WHEREAS, the Dainard Parties contend that the Transfers consist, in part, of the return of Dainard's principal investment in 1inMM Capital, LLC, and thus are not avoidable under the UVTA; and

WHEREAS, the Parties, wishing to avoid the expense, delay, and uncertainty of litigation, have agreed to settle and resolve all claims and disputes between them arising out of or relating to the Transfers and the Claims (collectively, the "Disputes") on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which the Parties acknowledge, the Parties agree as follows:

EXECUTION COPY

Agreement

1. **Recitals Incorporated.** All of the foregoing recitals are true and correct and are incorporated herein as part of the Agreement for all purposes.

2. **Settlement Payment.** In consideration for the releases exchanged in paragraphs 3 and 4 of this Agreement, the Dainard Parties agree to pay the Receiver, and the Receiver agrees to accept from the Dainard Parties, the sum of $247,000.00 (two hundred forty-seven thousand dollars and zero cents) (the "Settlement Payment"). No later than ten calendar days after entry of the Approval Order (as defined below) in the civil docket of the Action, the Dainard Parties will remit the Settlement Payment to the Receiver by wire transfer per the instructions that the Receiver will provide.

3. **Release of the Dainard Parties; Covenant Not to Sue.** The Receiver, on behalf of herself, the Receivership Estate and their respective agents, employees, officers, partners, managers, parents, subsidiaries, affiliates, insurers and attorneys (collectively, the "Receiver Releasing Parties"), hereby forever releases, remises and discharges the Dainard Parties as well as their agents, employees, officers, shareholders, managers, parents, subsidiaries, affiliates, insurers and attorneys (collectively, the "Dainard Released Parties"), from any and all claims, counterclaims, actions, causes of action, lawsuits, proceedings, adjustments, offsets, contracts, obligations, liabilities, controversies, costs, expenses, attorney's fees and losses whatsoever, whether known or unknown, disclosed or concealed, asserted or unasserted, liquidated or unliquidated, contingent or absolute, accrued or unaccrued, matured or unmatured, insured or uninsured, joint or several, determined or undetermined, determinable or otherwise, whether in law, in admiralty, in bankruptcy, or in equity, and whether based on any federal law, state law, common law right of action or otherwise, from the beginning of time to the Effective Date of this Agreement arising out of or relating to the Disputes (collectively, the "Receiver Released Claims"), but specifically excluding any claims arising out of or related to this Agreement. The Receiver Releasing Parties hereby covenant not to sue any of the Dainard Released Parties on account of any Receiver Released Claim.

4. **Release of the Receiver and the Receivership Estate; Covenant Not to Sue.** The Dainard Parties, on behalf of themselves and their respective agents, employees, officers, partners, managers, parents, subsidiaries, affiliates, insurers and attorneys (collectively, the "Dainard Releasing Parties"), hereby forever release, remise and discharge the Receiver, the Receivership Estate as well as their agents, employees, officers, shareholders, managers, parents, subsidiaries, affiliates, insurers and attorneys (collectively, the "Receiver Released Parties"), from any and all claims, counterclaims, actions, causes of action, lawsuits, proceedings, adjustments, offsets, contracts, obligations, liabilities, controversies, costs, expenses, attorney's fees and losses whatsoever, whether known or unknown, disclosed or concealed, asserted or unasserted, liquidated or unliquidated, contingent or absolute, accrued or unaccrued, matured or unmatured, insured or uninsured, joint or several, determined or undetermined, determinable or otherwise, whether in law, in admiralty, in bankruptcy, or in equity, and whether based on any federal law, state law, common law right of action or otherwise, from the beginning of time to the Effective Date of this Agreement arising out of or relating to the Disputes (collectively, the "Dainard Released Claims"), but specifically excluding any claims arising out of or related to this Agreement. The Dainard Releasing Parties hereby covenant not to sue any of the Receiver Released Parties on account of any Dainard Released Claim.

5. **Section 1542 Waiver.** The Parties acknowledge that they have read and understand section 1542 of the California Civil Code (Cal. Civ. Code § 1542), which reads as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Parties hereby expressly waive and relinquish all rights and benefits under California Civil Code section 1542 with respect to the Dainard Released Claims and the Receiver Released Claims.

6. **Effectiveness of Releases.** The releases exchanged in paragraphs 3 and 4 of this Agreement shall become effective only upon the Receiver's receipt of the full amount of the Settlement Payment from the Dainard Parties as required by paragraph 2 of this Agreement.

7. **Waiver of Claim and Distribution.** The Dainard Parties hereby waive any right to file, and covenant not to file, a claim against the Receivership Estate in the Action (a "Proof of Claim"). If, notwithstanding the immediately previous sentence, any of the Dainard Parties files a Proof of Claim in the Action, then the Receiver may apply to or move the Court to enter an order disallowing that Proof of Claim, and the Dainard Parties hereby waive any notice or opportunity to be heard on any such application or motion. The Dainard Parties acknowledge and agree that they are not entitled to any distributions whatsoever from the Receivership Estate.

8. **Approval Order.** The validity of this Agreement, and the Parties' obligations hereunder, are subject to the condition precedent that the Court enters an order approving the material terms of the settlement documented in this Agreement ("Approval Order"). The Dainard Parties will support the entry of an Approval Order. If, however, the Court declines to approve the settlement documented by this Agreement, then this Agreement (including the releases contained in sections 3 and 4 hereof) will be void, and the Parties will retain all of their respective rights, claims and defenses as if this Agreement never existed.

9. **Representations and Warranties.** The Parties warrant and represent to each other that: (a) each Party shall act in good faith seeking to accomplish the purpose of this Agreement; (b) each Party has not transferred, conveyed, released, pledged, assigned or made any other disposition of the claimed rights, interests, demands, actions or causes of action, obligations, or any other matter covered by this Agreement; (c) each Party has not relied upon any promises, agreements, representations, statements or warranties in entering into this Agreement, except those that are expressly set forth herein; (d) each signatory to this Agreement warrants that he, she or it has the authority to execute this Agreement and to bind the persons or entities on behalf of which he, she or it signs, including, without limitation, each of the Dainard Releasing Parties and the Receiver Releasing Parties specified in paragraphs 3 and 4; and (e) EACH PARTY ACKNOWLEDGES THAT HE, SHE OR IT HAS READ THIS AGREEMENT IN ITS ENTIRETY AND THAT HE, SHE OR IT UNDERSTANDS AND APPRECIATES ITS CONTENTS AND SIGNIFICANCE AND HEREBY EXECUTES THE SAME AND MAKES THE RELEASE PROVIDED FOR IN THIS AGREEMENT VOLUNTARILY AND OF HIS, HER OR ITS OWN FREE WILL, HAVING FIRST HAD THE OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL.

10. **Enforcement of this Agreement.** If either Party files a motion against the other Party to enforce the terms of this Agreement, in addition to any other relief to which the successful or prevailing party or parties (the "Prevailing Party") is entitled, the Prevailing Party is entitled to recover, and the non-Prevailing Party shall pay, all reasonable attorney's fees of the Prevailing Party, court costs, and expenses (even if not recoverable by law as court costs) incurred in that action, and all appellate proceedings related thereto. The Parties also agree that any dispute arising out of or related to this Agreement shall be decided only by the Court by application or motion filed in the Action. In connection with any action or proceeding to enforce, interpret or construe any provision of this Agreement, the Dainard Parties hereby irrevocably and unconditionally (a) consent to the exercise of personal jurisdiction over them by the Court, and (b) waive any defense of improper venue or forum non conveniens. Furthermore, the Parties agree that the Court shall retain exclusive jurisdiction over all matters relating to this Agreement.

11. **Binding on Successors and Assigns.** This Agreement is and shall be binding upon: (a) the officers, directors, successors, heirs and assigns of each Party; (b) each past, present, direct or indirect parent, subsidiary, division or affiliated entity of each Party; and (c) each past or present agent, representative or shareholder of each Party.

12. **Fair Construction.** The Parties acknowledge that this Agreement is the manifestation of direct negotiation and represents the mutual and voluntary consent and understanding of each Party. As such, this Agreement shall be deemed to be the joint work product of the Parties without regard to the identity of the draftsperson, and any rule of construction that a document shall be interpreted or construed against the drafting Party shall not be applicable.

13. **No Third-Party Beneficiaries.** Nothing in this Agreement benefits, or is intended to benefit, any third party or to confer on any third party the power to enforce, or claim direct benefits under, this Agreement.

14. **Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, such invalidity or unenforceability shall not affect the remaining provisions of this Agreement.

15. **Fees and Costs.** Each of the Parties will bear her, his or its own costs and attorney's fees incurred in connection with the negotiation and delivery of this Agreement.

16. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between the Parties with regard to all matters addressed herein. This Agreement supersedes and replaces all prior commitments, negotiations, and all agreements proposed or otherwise, if any, whether written or oral, concerning the subject matters contained in this Agreement. The Parties expressly acknowledge that they have not relied on any prior or contemporaneous oral or written representations or statements by another Party in connection with the subject matter of this Agreement, except as expressly set forth herein.

17. **No Collateral Representations.** The consideration provided herein consists of the entire consideration to which the Parties will be entitled. The Parties acknowledge that none of the Parties, their agents, attorneys, insurers, representatives, successors, assigns, heirs, beneficiaries, executors, administrators, parents, subsidiaries, affiliates, current and former directors, officers, employees and representatives (as appropriate for each Party) has made any promise, representation or warranty, expressed or implied, not expressly set forth in this Agreement, which has induced any Party to execute this Agreement.

18. **Exculpation.** The Receiver is executing this Agreement solely in her representative capacity as the Receiver appointed by the Court, and the Receiver's liability hereunder shall be limited to the assets of the Receivership Estate. The Dainard Parties shall not have or assert any claims against the Receiver personally.

19. **Further Assurances.** The Parties will cooperate fully and execute all supplementary documents and take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

20. **Modification.** This Agreement may only be modified by a writing signed by all Parties.

21. **Governing Law.** This Agreement and the transactions contemplated herein shall be governed by and construed in accordance with the laws of the State of California, without reference to the conflict-of-laws rules thereof.

22. **Time.** Time is of the essence as to all dates and time periods specified in this Agreement. All time periods in this Agreement shall be computed pursuant to Federal Rule of Civil Procedure 6(a).

23. **Tax Implications.** Each Party shall be responsible for seeking their own individual tax advice and shall bear whatever tax liability she, he or it incurs in connection with the transactions contemplated by this Agreement. The Parties make no representations to each other about what tax consequences, if any, result from the transactions contemplated by this Agreement.

24. **Waiver.** No waiver of any right, obligation, or duty imposed by or under this Agreement shall be effective unless such waiver is reflected in a writing duly executed by all parties hereto. No waiver shall be effective based on conduct or oral statements. Waiver by any Party of any breach of this Agreement shall not be a waiver by such Party of any other breach of this Agreement.

25. **Counterparts.** This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original but all of which together shall constitute one in the same instrument. Facsimile or PDF signatures shall be deemed to have the same effect as original signatures.

26. **Compromise.** The Parties agree and acknowledge that this Agreement is the result of a compromise and a decision to settle all disputes between them relating to the Disputes. The Parties expressly agree that this Agreement is a compromise of disputed claims for the purposes of avoiding the expense, delay, uncertainty and burden of litigation. This Agreement is inadmissible in any proceeding for any purpose other than to enforce its terms. The Parties further agree that executing this Agreement and making the Settlement Payment is not, and shall never be construed as, an admission by any of the Dainard Parties of any fact, liability, wrongdoing or violation of any statute.

27. **Notices.** Any and all notices under this Agreement shall be in writing, and shall be transmitted to the Parties by electronic mail or express overnight delivery service as follows:

If to the Receiver:

KATTEN MUCHIN ROSENMAN LLP
Terence G. Banich
525 W. Monroe St.
Chicago, IL 60661
terence.banich@katten.com

with a copy to:

Michele Vives, Receiver
1620 Fifth Ave., Ste. 400
San Diego, CA 92101
mvives@douglaswilson.com

If to the Dainard Parties:

HANSON BAKER LUDLOW DRUMHELLER P.S.
Magnus R. Andersson
2229 112th Ave., Ste. 200
Bellevue, WA 98004-2936
mandersson@hansonbaker.com

IN WITNESS WHEREOF, the Parties hereby execute this Agreement as of the Effective Date.

MICHELE VIVES, Receiver	**JAMES M. DAINARD, individually**
	JMD INVESTMENTS WA, LLC By: James M. Dainard Its:

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ZACHARY J. HORWITZ; and 1inMM CAPITAL, LLC,

Defendants.

Case No. 2:21-cv-02927-CAS(GJSx)

[PROPOSED] ORDER APPROVING SETTLEMENT WITH JAMES DAINARD AND RELATED ENTITIES

KATTEN MUCHIN ROSENMAN LLP
525 W. MONROE ST.
CHICAGO, IL 60661
(312) 902-5200

Upon consideration of the *Motion of Receiver Michele Vives for Order Approving Settlement with James Dainard and Related Entities*, dated February 13, 2023 (the "Motion"), the Court, having jurisdiction to hear and determine the Motion, has reviewed the Motion and accompanying memorandum of points and authorities in support thereof, considered the exhibits to the Motion, namely, the *Declaration of Michele Vives*, dated February 13, 2023, and the *Settlement Agreement and Mutual Release*, dated February 1, 2023, and concluded that all parties in interest have due and sufficient notice of the Motion; after due deliberation and consideration of the Motion, and there being good cause to grant the relief provided herein; it is, pursuant to the Court's power to supervise equity receiverships and all other powers in that behalf so enabling, hereby ORDERED:

1. The Motion is GRANTED. Capitalized terms not defined herein have the meanings ascribed to them in the Motion.

2. Notice of the Motion is sufficient under the circumstances and any further notice otherwise required by Local Rule 66-7 is waived.

3. The terms of the settlement and compromise with the James Dainard and JMD Investments WA, LLC memorialized in the Settlement Agreement are fair and equitable, and are therefore APPROVED.

4. The Receiver is AUTHORIZED to take such further actions as may be necessary to consummate the transactions in the Settlement Agreement.

5. The Court retains exclusive jurisdiction to hear and determine any disputes arising out of or relating to the settlement approved by this order.

Dated:

_____
United States District Judge