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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
AUGUST 16, 2018 ORDER (COURT
DOCKET NO. 395)**

1 By Order dated July 17, 2018, the Court asked interested parties to address three
2 issues including the following: “Whether Progresso and Global can be permitted to ‘choose’
3 between investor or creditor status, or must be treated as creditors based on their judgments.”
4 Court Docket (“CD”), 397 (the “Question”). Interested Party Global Generation, LLC (“Global”)
5 filed a Response on July 24, 2018. CD, 382 at pp. 5-6.

6 On July 30, 2018, this Court issued an Order in which it ruled, *inter alia*, that
7 Global may not recover both as a creditor and an investor; “...however, the Court does not decide
8 how Global’s claim will be classified...[that issue] will be addressed in conjunction with the
9 distribution plan and will be informed by the supplemental briefing ordered by the Court (citation
10 omitted).” CD, 385 at p. 2.

11 Global hereby supplements its previous Response to the Question. CD, 382 at pp.
12 5-6. The answer to the Question is that Global can be permitted to choose between investor or
13 creditor status under the broad and wide discretion the Court has to determine relief in this
14 proceeding, a principle this Court recognized in its July 30, 2018 Order. CD, 385 at pp. 3-4.
15 Global submits it should be allowed to make that choice: to do otherwise would be inequitable to
16 Global and would confer an unwarranted and undeserved benefit to the SRA Investor Group
17 (“Investor Group”) allowing the Investor Group to benefit from the fraud on Global, without
18 which there would be far fewer shares of Palantir in the receivership estate.

19 It is undisputed that Global made an early and significant investment in Palantir.
20 The Securities and Exchange Commission agrees Global has a viable claim as an investor. CD,
21 197 at 4:21-6:14 and CD, 381 at 5:6-9 (“Global Generation’s evidence and arguments
22 demonstrate that it possesses an investor status because it actually purchased Palantir shares...and
23 a large number of those shares were not redeemed through a redemption payment.”).

24 Global’s claim is different from other defrauded investors in that, unlike all other
25 defrauded investors, except Progresso Ventures, LLC (“Progresso”), Global acted when it
26 recognized the inappropriateness of Defendants’ conduct. Global did not recover anything from
27 its actions but did what no other investor in this proceeding did—Global took steps to mitigate its
28 damages.

1 In *S.E.C. v. Wealth Management*, 628 F.3d 323 (7th Cir. 2010), a case cited by the
2 Court in its July 30, 2018 Order, CD, 385 at p. 4, two investors had given notice of redemption
3 and received partial redemptions of their shares approximately a year before the filing of the
4 receivership. *S.E.C. v. Wealth Management*, *supra*, 628 F.3d at 328. Nevertheless, the court-
5 approved distribution plan treated “all investors equally as equity holders, regardless of whether
6 an investor had submitted a request to redeem his or her interest.” *Id.* at 329. “[T]he distinction
7 between redeeming and non-redeeming investors was relevant to the question of offset but did not
8 affect an investor’s priority status.” *Id.* at 329-330. Distinguishing between redeeming and non-
9 redeeming investors, the court concluded, “would elevate form over substance.” *Id.* at 329.
10 *Wealth Management* thereby considered the claims of defrauded investors to have been
11 substantially the same regardless of any investor’s giving notice of, or receiving partial,
12 redemption of shares. Global submits that the substance of its claim is the same as other
13 defrauded investors and it should be given a choice whether to be classified as an investor or,
14 based on its Judgment, as a creditor.

15 It is undisputed that, at this point, the receivership lacks sufficient assets to pay
16 creditor claims. If the Court were to mandate creditor status, Global, an original defrauded
17 investor, would be at market risk on its claim without any potential for the appreciation potential
18 of an investor claimant.

19 Global submits there is a difference between this case and the others discussed in
20 the various briefs that have been filed with the Court. In those cases, claimants jockey for
21 position knowing the value of those receivership estates were less than the total amount claimed.
22 Those courts were faced with proposed distribution plans as well as classification and/or priority
23 proposals which would have allowed one fraud victim to recover his losses at the expense of
24 other victims. *See, e.g., U.S. v. Wilson*, 659 F.3d 947, 956 (9th Cir. 2011). Here, the economic
25 consequences of allowing Global the choice—whether to be an investor or a creditor—is not clear
26 and depends on the answers to a number of outstanding issues: What amount will be generated
27 by the liquidation of the Palantir position? Will that amount satisfy, be more or less than the
28 outstanding claims? What distribution plan will be confirmed? Will it give priority to creditors?

1 Any choice by Global may have positive or negative consequences to Global itself depending on
2 the answers to these questions, among others. Further, no one can say that permitting Global to
3 make a choice will deprive any other claimant from recovering its losses. Thus, the uniqueness of
4 Global's claim as a defrauded investor which tried to mitigate combined with the status of this
5 case makes giving Global the choice of being an investor or creditor an equitable and appropriate
6 remedy.

7 The Investor Group argues Global should not be "free to choose" and is
8 "confined" to creditor status "by principles of *res judicata*, claim preclusion and claim splitting."
9 CD, 383 at 5:3-9. The Court did cite to these principles in its July 30, 2018 decision that Global
10 could not be classified both as an investor and a creditor, CD, 385 at pp. 4-6, but the Investor
11 Group does not cite, nor is Global aware of, any authority barring the equitable remedy of
12 allowing Global to choose between investor and creditor status. Indeed, no one in the Investor
13 Group relied on Global's attempt to mitigate its damages. No one in the Investor Group took any
14 action or failed to act based upon Global's attempt to mitigate. Finally, if the Investor Group is
15 permitted to take any appreciation in Global's 625,666 unredeemed Palantir shares by the forced
16 classification of Global as a creditor, the Investor Group will take the benefit of the fraud
17 perpetrated against Global, absent which there would be far fewer Palantir shares. That is simply
18 not a fair or equitable result.

19 In sum, Global has viable investor and creditor claims. That puts Global in a
20 unique position among claimants, which along with the unique status of the case warrants it being
21 allowed to choose whether to be classified as an investor or a creditor.

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23 Dated: August 23, 2018

LUBIN OLSON & NIEWIADOMSKI LLP

24 By: /s/ Theodore A. Griffinger, Jr.

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26 Attorneys for Interested Parties
27 GLOBAL GENERATION GROUP, LLC
28 and BENCHMARK CAPITAL, LLC