

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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SECURITIES AND EXCHANGE COMMISSION, :
 :
 Plaintiff, :
 :
 -v- :
 :
 LEGEND VENTURE PARTNERS LLC, :
 :
 Defendant. :
-----X

No. 1:23-cv-05326-LAK

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR APPROVAL OF RECEIVER'S
PROPOSED PLAN OF DISTRIBUTION**

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Melanie L. Cyganowski, the Court-appointed receiver (the “**Receiver**”) of Legend Venture Partners LLC (“**LVP**”), Legend Ventures Fund 1 LLC, Legend Ventures Fund 2 LLC, Legend Ventures Fund 3 LLC, Legend Ventures Fund 4 LLC, Legend Ventures Fund 5 LLC (collectively, the “**Legend Funds**”, and together with LVP, the “**Receivership Entities**” or “**Legend**”), through her counsel, Otterbourg P.C., respectfully submits this memorandum of law and the contemporaneously filed Declaration of Melanie L. Cyganowski with exhibits (the “**Cyganowski Dec.**”) in support of her motion (the “**Motion**”) to approve her proposed plan of distribution (the “**Proposed Plan**”) attached to the Cyganowski Declaration as Exhibit A, and respectfully states as follows:

I. PRELIMINARY STATEMENT

The Receiver’s duties set forth in the Court order appointing her (the “**Receivership Order**”) include, as appropriate, proposing a plan of distribution of Receivership Property (as defined in the Receivership Order) after consultation with the staff of the Securities and Exchange Commission (the “**SEC**”) and upon motion to the Court. In conformity with the Receivership Order, the Proposed Plan was prepared by the Receiver after consultation with the SEC staff, and by this Motion, the Receiver seeks authority to implement the Proposed Plan according to its terms.

The Proposed Plan is fair and equitable. Legend allegedly “acquired” equity (indirectly through other companies or persons) in seven (7) Pre-IPO Companies.¹ The Proposed Plan is based on cash distributions from the sale of stock of any such Pre-IPO Company that “goes public” (or has another “Liquidity Event” such as a share buyout). When that occurs, the Receiver will distribute cash proceeds of sales of that Pre-IPO Company’s now public shares to the “**Silo Investors**” – that is, to those Legend investors that had earmarked their Legend investments for

¹ Pre-IPO Companies were privately held companies that allegedly had the potential of trading publicly (“go public”).

shares (“**Pre-IPO Shares**”) in the Pre-IPO Company that now has gone public.² However, before making distributions to the Silo Investors, the Proposed Plan requires that the Receiver make certain deductions for payment of necessary costs, first for reserves to pay the taxes due on account of the distribution process, and for payment of administrative claims and other administration costs of the Receivership Estate, and second, to the so-called “**Claimant Pool Component**”, through which pre-Receivership creditors (“**Claimants**”) of the Receivership Entities will receive their distributions. The balance of cash remaining will then be distributed to the Silo Investors.

In short, the Proposed Plan provides for distributions to the Silo Investors³ while at the same time making certain that tax liabilities are paid and claims are properly treated. For these reasons, and those more fully set forth below, the Receiver respectfully requests that the Court grant this Motion and authorize the Receiver to implement the Proposed Plan according to its terms.

II. SUMMARY OF PROCEDURAL BACKGROUND

A. The SEC Complaint and Appointment of the Receiver

On June 22, 2023, the SEC commenced this action (the “**Action**”) by filing its complaint (the “**Complaint**” or “**Compl.**”) against LVP, alleging, among other things, violations of various sections of the Securities Act, the Exchange Act, and the Advisers Act, and seeking, among other relief, temporary and permanent injunctive relief, disgorgement of alleged ill-gotten gains, imposition of civil penalties, and appointment of a receiver [Dkt. 1].⁴

² Legend did not actually acquire equity interests in Pre-IPO Companies. Instead, Legend largely acted as a feeder fund for other investment companies. Of the Investor funds that Legend actually invested, over 97% was used by Legend to acquire interests in other investment companies that allegedly held Pre-IPO Shares in Pre-IPO Companies. The term “Pre-IPO Shares” is used solely for convenience and does not mean to indicate that Legend owns actual shares or other equity in Pre-IPO Companies.

³ Under Legend’s Operating Agreements, distributions could be in cash or stock. *See* Cyganowski Dec. at Ex. D.

⁴ In June 2024, the SEC also filed a civil action against Legend’s principals, Mario Gogliormella, Steven Lacaj and Karim Ibrahim, alleging civil violations of the securities law related to their conduct at Legend. *See Securities and Exchange Commission v. Gogliormella, et al.*, 24-cv-04348-LAK (S.D.N.Y.) (“**Individual Civil Action**”).

According to the Complaint, from February through October 2022, Legend raised more than \$35 million from more than 300 investors located across the country and, along with a network of unregistered sales agents, engaged in illegal, unregistered offerings of securities in investment vehicles that purportedly provided access to shares of private companies that Legend told investors were likely to undertake a public offering in the near future.

The SEC further alleged that although Legend told its investors (the “**Investors**”) it would only receive compensation after the Pre-IPO Companies went public, and that it was not charging upfront fees or commissions, Legend charged Investors upfront markups on all investments, averaging between 46% and 105% above the prices Legend paid for the shares of the Pre-IPO Companies, and that Legend’s principals paid themselves more than \$9 million and their sales agents more than \$3.25 million from the markups. (Compl. ¶4).

B. Under the Receivership Order, the Receiver Has the Power to Propose a Plan

Simultaneous with the filing of the Complaint, the SEC sought and obtained emergency relief, including a temporary restraining order and an order freezing the assets of the Receivership Entities [Dkt. 6]. On July 7, 2023, over Legend’s objection, the Court entered the Receivership Order [Dkt. 33] appointing the Receiver for the estate of the Receivership Entities (the “**Receivership Estate**”).

Pursuant to the Receivership Order, the Receiver has “all powers, authorities, rights and privileges ... possessed by officers, directors, managers and general and limited partners of the Receivership Entities”, all of whom were deemed dismissed and suspended and without any

Additionally, in June 2024, the United States Attorney for the Southern District of New York charged Messrs. Gogliormella, Lacaj and Ibrahim with criminal violations of law based in part on similar allegations. *See United States v. Gogliormella et al.*, 24-cr-00362-VSB (S.D.N.Y.) (the “**Criminal Action**”). Trial in the Criminal Action is scheduled to commence on March 9, 2026. The Individual Civil Action is stayed in its entirety until the conclusion of the Criminal Action.

“authority with respect to the Receivership Entities’ operations or assets, except to the extent as may hereafter be expressly granted by the Receiver or the Court.” *See* Receivership Order, § III.

The duties of the Receiver under the Receivership Order expressly include proposing a “distribution plan” of the “**Receivership Property**” (as defined in the Receivership Order) subject to Court approval. *See* Receivership Order, § III (The Receiver has the general power and duty to “[i]f necessary, to propose a distribution plan for the Receivership Property to investors after consultation with the SEC staff and upon motion to the Court”), § X (“If appropriate, the Receiver may formulate and propose, after consultation with the Commission staff, to the Court, on motion, plans for the distribution to investors of any of the Receivership Estate, and/or Receivership Property”) and § XIV (“If appropriate, the Receiver is also authorized and empowered to develop a plan for the fair, reasonable, and efficient distribution of the Receivership Property to investors in any of the Legend Funds”).⁵

In accordance with the Receivership Order, the Receiver determined that it is appropriate to formulate and propose the plan of distribution that is the subject of this Motion.

III. SUMMARY OF PROPOSED PLAN⁶

A. The Proposed Plan Provides Cash Distributions to Silo Investors Upon a Liquidity Event

The Proposed Plan is based primarily on distributions to Silo Investors after a Pre-IPO Company has “gone public” or has had another type of Liquidity Event. Upon receiving the now-public shares of a Pre-IPO Company that goes public, the Receiver will sell the shares received in accordance with the procedures set forth in the Proposed Plan. The amount recovered from the

⁵ To assist her with her duties, the Receiver retained, with the approval of the Court, Otterbourg P.C. as her legal counsel [Dkt. 44], Stout Risius Ross, LLC as her financial advisor [Dkt. 45], Berkeley Research Group, LLC as her tax advisor [Dkt. 51] and Stretto, Inc. as her claims and noticing agent [Dkt. 160] (collectively, the “**Retained Professionals**”).

⁶ To explain to the Court and parties-in-interest how the Proposed Plan would be implemented, attached as Exhibit B to the Cyganowski Declaration is a summary of the Proposed Plan.

sale (less brokerage fees and other costs) is called “**Realized Cash**”, and it will be the primary source of the distributions. However, before distributing any amounts to Silo Investors, the Receiver will first deduct certain reserves (for the payment of potential taxes and other costs) and an amount for distributions to Legend’s Claimants.

1. Determining Silo Investors

To invest in a Legend Fund, each Investor was required to sign an agreement (a “**Subscription Agreement**”) that set forth, among other things, the Pre-IPO Company, and the number of Pre-IPO Shares in that Pre-IPO Company, to which the Investor’s investment allegedly would be “applied.” Thereafter, Legend sent each Investor a “**Welcome Letter**,” purporting to confirm the Investor’s investment in the Legend Fund, and the Pre-IPO Company and number and price of the Pre-IPO Shares to which the Investor’s capital had been “applied”. *See* Cyganowski Decl. at Ex. D.

Under the Proposed Plan, all Investors that were advised in their Subscription Agreements and their Welcome Letters (collectively, the “**Confirmation Documents**”) that their investments had been “applied” to a particular Pre-IPO Company are “**Silo Investors**” of that particular Pre-IPO Company, and the number of Pre-IPO Shares of the Pre-IPO Company to which they were advised their investments had been “applied” will be used to determine their *pro rata* share of any distributions to Silo Investors.

For example, in the Action [Dkt. 15-19 and Cyganowski Decl. at Ex. E] the SEC filed a typical Welcome Letter sent by Legend that advised the Investor that:

Your total capital contribution of \$75,200.00 received on 3/8/2022 constitutes a 11.84% membership interest in Series PL-9140(LVFI) of the Company. Series PL-9140(LVFI) currently holds a beneficial interest in 397 shares of common stock of Plaid through an affiliate of the Company. After deduction of fees from your capital contribution, \$75,200.00 has been applied to an investment in approximately 47 underlying shares of common stock of *Plaid* at a purchase price equivalent to 1600 per share [sic].

Under the Proposed Plan, the Investor to whom this Welcome Letter was sent⁷, and who signed a corresponding Subscription Agreement, is a Plaid Silo Investor. All other Investors whose Confirmation Documents stated that their Legend investments had been applied to Plaid Pre-IPO Shares are also Plaid Silo Investors.

Silo Investors are the *only Investors* that will receive any distribution on account of a Pre-IPO Company's Liquidity Event. However, before distributions are made to Silo Investors, the Proposed Plan requires the Receiver to deduct funds for Reserves and to distribute to Claimants.

B. The Plan Creates Reserves for Payment to Tax Authorities and for Administrative Claims to Permit Proper Functioning of the Receivership

Recoveries by the Receivership Estate may be subject to potential tax liability that under law (and the Proposed Plan) must be paid on an actual or estimated basis, and funds must be reserved for those liabilities.⁸ Additionally, amounts must be reserved for disputes between the Receiver and Investors and Claimants regarding disallowed Interests and Claims until such time as the disputes are resolved. Similarly, administrative claims and costs must be paid, including as may be permitted by Court order.⁹

In order for the Receivership Estate to have sufficient funds available to pay these necessary costs, the Receiver's Plan deducts the funds for these purposes from the proceeds of each Liquidity Event. These funds constitute the **Reserve Amount**. Specifically, the Reserve Amount is comprised of the following two (2) components – the "Tax Reserve Amount" and the "Non-Tax Reserve Amount":

⁷ All Personally Identifiable Information has been removed.

⁸ *See also* Receivership Order, § XV ("Further, prior Court approval is not required for payments of applicable federal, state, or local taxes.").

⁹ *See* Receivership Order, § XV ("The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estates as described in the Billing Instructions agreed to by the Receiver. Such compensation shall require the prior approval of the Court.").

(a) “Tax Reserve Amount”

The **Tax Reserve Amount** is the amount from any Realized Cash that will be set aside, in the Receiver’s discretion, up to the maximum potential tax liability arising from the Receivership’s recovery from a Liquidity Event.

Under law and the Receivership Order, the Receivership Estate is treated for federal tax purposes as a “Qualified Settlement Fund” (a “**QSF**”). The Receivership Order (at § X) states:

To the extent appropriate, the Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable “Settlement Fund,” within the meaning of Section 468B of the Internal Revenue Code and of the regulations, when applicable whether proposed, temporary or final, or pronouncements thereunder, including the filing of the elections and statements contemplated by those provisions. The Receiver shall be designated the administrator of the Settlement Fund, pursuant to Treas. Reg. § 1.468B-2(k)(3)(i), and shall satisfy the administrative requirements imposed by Treas. Reg. § 1.468B-2, including but not limited to (a) obtaining a taxpayer identification number, (b) timely filing applicable federal, state, and local tax returns and paying taxes reported thereon, and (c) satisfying any information, reporting or withholding requirements imposed on distributions from the Settlement Fund. The Receiver shall cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a “Qualified Settlement Fund.” The Receivership Entities shall cooperate with the Receiver in fulfilling the Settlement Funds’ obligations under Treas. Reg. § 1.468B-2. (Emphasis added)

Accordingly, the Receiver filed a QSF tax return for tax year 2023. The Receivership Estate is required by applicable tax regulations to continue to file QSF tax returns for each tax year until the Legend Receivership is concluded. *See* Declaration of Vernon L. Calder (“**Calder Decl.**”) attached to the Cyganowski Decl. as Exhibit C, at ¶ 4.¹⁰ The failure to file QSF tax returns for the Legend Receivership could result in substantial prejudice, potentially exposing the Receivership Estate to interest and penalties, and the Receiver herself to personal liability. *Id.*

As a QSF, the Receivership Estate pays tax on its modified gross income at the maximum trust rate, which for federal tax is currently 37%. Capital gains treatment does not apply to QSFs,

¹⁰ As set forth in the Calder Decl. at ¶ 3, Mr. Calder is a Managing Director at BRG, the Receiver’s tax accountants, where he and his colleagues regularly provide tax accounting services to receiverships.

and the lower capital gains rate is inapplicable. Calder Decl. at ¶ 9. The Receivership Estate is also subject to New York State tax of approximately 8%. *Id.* As such, the maximum tax rate applicable to any gain recognized by the Legend Receivership is approximately 45%. *Id.*

Accordingly, under the Proposed Plan, before distributions to Silo Investors are made, the Receiver will deduct from the Realized Cash an amount *up to* 45% of any gain realized on the sale of shares of the Pre-IPO Company that “went public”.¹¹ Of course, the Legend Receivership is entitled to take deductions to mitigate tax liability. The deductions available to the Receivership Estate include accrued administrative expenses of the Legend Receivership and tax losses resulting from the sale, exchange, or worthlessness of property held by the Legend Receivership. *See* Calder Decl. at ¶ 10.

(b) “Non-Tax Reserve Amount.”

Under the Proposed Plan, after deducting the Tax Reserve Amount, the Receiver will then deduct *up to* 25% of Realized Cash from a Liquidity Event for a “**Non-Tax Reserve**”. The Non-Tax Reserve funds distributions to Disputed Interests and Disputed Claims if ultimately allowed and for administrative claims, including the fees and expenses of the Receiver and her Retained Professionals as may be approved by the Court in accordance with the Receivership Order. Unless these amounts are reserved for this purpose, the Receivership Estate might not have sufficient funds to make these payments.

Both the Tax Reserve Amount and the Non-Tax Reserve Amount are “*up to*” maximum percentages so that the Receiver has discretion to deduct *less than* the maximum amounts of the Tax Reserve Amount (up to 45% of any gain) and the Non-Tax Reserve Amount (up to 25% of the balance of Realized Cash then remaining). Moreover, to the extent these amounts are not

¹¹ A gain for QSF purposes can be realized on the sale of Receivership Property **or** its distribution in-kind. Calder Decl. at ¶ 8.

required for the purposes of the Reserve, they will be distributed to the applicable Silo Investors.

C. The Plan Creates a Pre-Receivership Claimant Pool Amount Component That Will Be Utilized to Pay Claimants

Under the Proposed Plan, after deducting the Reserve Amount, the Receiver will deduct *up to* 10% of the net balance of Realized Cash for the “Claimant Pool Component.” This is a fund for distribution to holders of Allowed Claims and will be paid on a *pro rata* basis to Claimants holding Allowed Claims. Here too, the Receiver has discretion to deduct *less than* the maximum amount if the full amount is not required, and to the extent there are excess funds in the Claimant Pool Amount, they will be distributed to the applicable Silo Investors.

D. “Other Recoveries” Will Be Shared by Investors and Claimants Pro Rata

The Receivership Order directs the Receiver to investigate the Receivership Entities’ pre-Receivership business affairs and commence legal proceedings for the benefit of the Receivership Estate. Receivership Order, § XI. Under the Proposed Plan, if the Receiver makes a recovery from litigation she has commenced on behalf of the Receivership or otherwise on account of the Receivership’s claims, the amount recovered (each denominated as an “**Other Recovery**” under the Proposed Plan) will be distributed to all Investors and Claimants on a *pro rata* basis through the “**Pot Component**”. Distributions under the Pot Component are not tied to any particular investment made by any Investor and so it is appropriate that any recoveries be shared by all Investor and Claimants on a *pro rata* basis.

IV. ARGUMENT

A. Approval of the Proposed Plan is Within the Court’s Discretion

Courts have wide discretion in supervising equity receiverships and have the inherent power to fashion appropriate relief in connection therewith. *See S.E.C. v. Credit Bancorp, Ltd.*, No. 99-CIV-11395-RSW, 2000 WL 1752979, at *27 (S.D.N.Y. Nov. 29, 2000) (“*Credit Bancorp*

I”), *aff’d*, 290 F.3d 80, 91 (2d Cir. 2002) (“*Credit Bancorp II*”). This applies equally to the Court’s approval of a plan of distribution plan of receivership property. “The Court has the authority to approve any plan provided it is ‘fair and reasonable.’” *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 174 (S.D.N.Y. 2009) (citing *S.E.C. v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)), *aff’d sub nom. S.E.C. v. Malek*, 397 F. App’x 711 (2d Cir. 2010), and *aff’d sub nom. S.E.C. v. Orgel*, 407 F. App’x 504 (2d Cir. 2010). No specific distribution plan is required; rather, the plan and distributions thereunder are only required to be fair and reasonable under the facts and circumstances. *See S.E.C. v. Credit Bancorp. Ltd.*, 99-cv-11395-RSW 2000 WL 1752979 at *28-29 (equitable and fair depends on the circumstances). Plans may not necessarily be liked by all parties but the “fundamental principle governing adoption of a distribution plan is that it should be equitable and fair, with similarly-situated investors treated alike”. *Id.*

While “the ultimate decision of how much to distribute and to whom is the Court’s alone,” receivers have broad authority to shape plans for the liquidation and distribution of assets. *S.E.C. v. Amerindo Inv. Advisors, Inc.*, 2014 WL 2112032, at *16 (S.D.N.Y. May 6, 2014), *aff’d sub nom. S.E.C. v. Amerindo Inv. Advisors*, 639 F. App’x 752 (2d Cir. 2016) *cert. den’d* 578 U.S. 1024 (2016). In exercising its discretion, the court “may defer to the receiver’s choices for the plan’s details and should give substantial weight to the SEC’s views regarding a plan’s merits.” *S.E.C. v. McGinn, Smith & Co.*, No. 11-CV-457-GLS, 2016 WL 6459795, at *2 (N.D.N.Y. Oct. 31, 2016) (citations omitted).

The Proposed Plan strikes a fair and reasonable approach to assure that all constituencies benefit from the Receivership.

1. The Distribution Scheme Under the Proposed Plan is Fair to Investors and Claimants

The distribution scheme in the Proposed Plan is fair and reasonable under the

circumstances. It provides for recovery to all constituents: Investors, Claimants with pre- Receivership claims and Claimants with administrative claims, including provision for tax payments as required. Among other things:

(a) Under the Proposed Plan the distributions to Investors are based on *their* investment choices and the success of those choices. Only Silo Investors, whose investments were earmarked for an investment in the Pre-IPO Company that had the Liquidity Event will share in a distribution related to that Pre-IPO Company.¹² Other Investors whose invested funds were “applied” to other Pre-IPO Companies *will not* share in such recovery. Investors will obtain a recovery tied to their intended investment.¹³

(b) The Proposed Plan addresses distributions on account of allowed administrative claims through the Non-Tax Reserve and allowed pre-Receivership claims through the Claimant Pool Component. In order to determine the nature, extent and amount of all such claims, simultaneously with this Motion, the Receiver is filing her “Motion to Establish Procedures for Resolution of Interests and Claims and Setting Bar Dates for Claims” (the “**Procedures Motion**”) to identify and verify claims and interests. *See* Receivership Order at § XV.H (requiring the Receiver to report on “[t]he status of any creditor claims process or proceeding, after such process or proceeding have been commenced.”).

¹² Recoveries are generally based on Liquidity Events and, as such, recovery is not guaranteed.

¹³ The Court also appointed Ms. Cyganowski as receiver of StraightPath Venture Partners LLC and its related affiliates (the “**StraightPath Entities**”), which are companies that also were engaged in the acquisition of so-called “shares” in Pre-IPO Companies. *See SEC v. StraightPath Venture Partners, LLC, et al.*, Case No. 22-cv-03897-LAK (“**StraightPath**”). On November 26, 2024, this Court approved the Proposed Plan of Distribution in *StraightPath* (the “**StraightPath Plan**”). [Dkt. No. 408]. The Proposed Plan here differs from the StraightPath Plan for several reasons, most particularly due to the StraightPath Entities’ pervasive commingling of Investor capital. By contrast, the Receiver and her Retained Professionals did not identify similar conduct by Legend. In the StraightPath Plan, under certain circumstances the Receiver distributes a portion of the Realized Cash through the “Silo Component” to the Silo Investors and under certain circumstances, a portion of the Realized Cash is also distributed through the “Pot Component” to all StraightPath Investors and Claimants (subject to the terms and conditions of the StraightPath Plan). However, given the differences between StraightPath and Legend, distributions to Silo Investors under the Proposed Plan are based solely on Silo Investors’ investment decisions and are not shared with other Investors or Claimants. *See* Cyganowski Decl. at ¶¶ 25-27.

(c) The Proposed Plan further provides for distributions to both Investors and Claimants from any potential litigation recoveries through the Pot Amount. Litigation recoveries are not tied to any Investors' investment decisions and all Investors and Claimants will share in this recovery.¹⁴

2. The Reserve Amount is Proper and Necessary

Through the Reserve Amount, the Proposed Plan includes provision for payment of *inter alia*, tax liabilities, administrative claims and Disputed Interests and Disputed Claims that became allowed after negotiation with the Receiver or through proceedings before the Court. Reserves are usual in these circumstances. *See S.E.C. v. Credit Bancorp., Ltd.*, 297 F.3d 127, 140 (2d Cir. 2002) (tax reserves “are hardly novel.”). *See also* Calder Decl. at ¶ 11 (“All receiverships with which I have been involved have maintained appropriate reserves for the payment of taxes that potentially could be due.”).¹⁵

Without reserves, the Receivership Estate could have insufficient cash to pay taxes and make distributions on account of administrative claims, and Interests or Claims that are in dispute. Further, without reserves, the Receiver could be in the untenable position of not making *any* distributions until all disputes are resolved and administrative costs are paid or else seek disgorgement from Investors and Claimants of previously distributed amounts.

Similarly, because of the possibility the IRS might contend that federal income taxes allegedly due have priority, without the Reserve Amount the Receiver could not make distributions to Investors and Claimants until all taxes were paid, a timeframe that could last for years. By

¹⁴ Only Investors with Allowed Interests and Claimants with Allowed Claims are entitled to any recovery under the Proposed Plan.

¹⁵ As noted, the Reserve Amount is “up to” the maximum amount necessary to cover the associated costs, but potentially lower if in the Receiver’s discretion the full amount is not required to be deducted. Any excess funds in the Reserve will be distributed to the applicable Silo Investors.

contrast, the Tax Reserve allows the Receiver to maintain any alleged priority of the potential tax claims by holding appropriate amounts in reserve so that distributions can proceed. *See* 31 U.S.C. § 3713 (“A claim of the United States Government shall be paid first when . . . a person indebted to the Government is insolvent and . . . the debtor without enough property to pay all debts makes a voluntary assignment of property . . .”).

B. The Proposed Plan Properly Treats the Receivership as a QSF

The creation and treatment of a QSF is governed by 26 CFR § 1.468B-1 *et seq.* (“**Section 1.468B-1**”), the regulations promulgated by the Treasury Department following the enactment of Internal Revenue Code § 468B (26 U.S.C § 468B). The Receivership satisfies the elements set forth in Section 1.468B-1 and as such, a QSF arose on July 7, 2023, the date the Court entered the Receivership Order. *See e.g., United States v. Brown*, 348 F.3d 1200 (10th Cir. 2003). *See also, Field Serv. Advisory, IRS FSA 200113025*, 2001 WL 307744 (Mar. 30, 2001). *Cf., S.E.C. v. Ahmed*, No. 3:15-CV-675-JBA, 2022 WL 17404253, at *8 (D. Conn. Dec. 2, 2022).

This conclusion is supported by the language of the Receivership Order.¹⁶ As this Court found in *StraightPath, supra*, concerning an order with language identical to that found in the Receivership Order, “the ... Order contains clear non-discretionary language directing the receiver to establish and treat the receivership as a QSF.” *See StraightPath, supra*, Dkt. No. 408 at 9 (requiring the Receiver take all steps to the extent appropriate for the Receivership to obtain the

¹⁶ It is common for court orders appointing a receiver to require the establishment of a QSF. In addition to *StraightPath, supra*, see *S.E.C. v. 4D circle LLC et al.*, 4:17-cv-00321-Y (N.D. Tex. Apr. 13, 2017), Dkt. 9, ¶ 40 (“The Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable ‘Settlement Fund’ within the meaning of Section 468B of the Internal Revenue Code...”); *S.E.C. v. Abdallah et al.*, 1:14-cv-01155-SO (N.D. Ohio Dec. 3, 2014), Dkt. 119, ¶ 41 (same); *S.E.C. v. AriseBank et al.*, 3:18-cv-00186-M (N.D. Tex. Jan 25, 2018), Dkt. 12, ¶ 40 (same); *S.E.C. v. Smith et al.*, 2:19-cv-17213-MCA-SDA (D.N.J. June 29, 2020), Dkt. 22, ¶ 49 (same); *S.E.C. v. Cambridge Capital Group Advisors, LLC et al.*, 4:19-cv-00420-RH-MJF (N.D. Fla. July 30, 2021), Dkt. 140, ¶ 41 (same); *S.E.C. v. MJ Capital Funding, LLC et al.*, 0:21-cv-61644-AHS (S.D. Fla. Aug. 12, 2021), Dkt. 17, ¶ 35 (same); *S.E.C. v. Northridge Holdings, Ltd.*, 1:19-cv-05957 (N.D. Ill. Sept. 12, 2019), Dkt. 22, ¶ 42 (same).

status of a QSF under Section 468B of the Internal Revenue Code and directs, among other things, the Receiver “... cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a ‘Qualified Settlement Fund.’”).¹⁷

That the Receivership is a QSF is also supported by applicable law. A QSF is formed under law once the three-prong test of Section 1.468B-1 is met. Here, just like in *StraightPath*, *supra*, this Receivership Order contains language meeting all three prongs of the QSF test. *See* § 1.468B-1(c), a fund, account or trust is a QSF when:

- (1) It is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;
- (2) It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability— ... [a]rising out of a tort, breach of contract, or violation of law...; and
- (3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons).

26 C.F.R. § 1.468B-1(c), (c)(1)-(3).

First, the entry of the Receivership Order is treated under law as creating a trust, fund, or account that is subject to the “continuing jurisdiction” of the Court, satisfying the first prong of the QSF Test. *S.E.C. v. Ahmed*, No. 3:15-CV-675 (JBA), 2022 WL 17404253, at *7 (D. Conn. Dec. 2, 2022); *United States v. Brown*, 348 F.3d 1200, 1208 (10th Cir. 2003). *See* Receivership Order, § I (“This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of the Receivership Entities.”) *See* 26 C.F.R. § 1.468B-1(e)(1).

¹⁷ Over the last 10 years, Mr. Calder and his colleagues have been tax accountants to approximately 33 receiverships and all have been treated as QSFs with one exception. (The sole exception was an unusual matter involving a decedent’s estate.) Calder Decl. at ¶ 3.

Second, the Receivership unquestionably was formed to resolve or satisfy one or more contested or uncontested claims, satisfying the second prong of the QSF test. As this Court held in *StraightPath*, *supra*, Dkt. No. 408 at 10, in analyzing the second prong of 26 CFR § 1.468B-1(c):

... the clear aim of the receivership [is] to resolve the claims of numerous parties to this litigation, including investors, claimants, and even the receivership estate itself. The receiver undoubtedly is empowered to provide a resolution for investor claims through ‘recovery,’ ‘liquidation,’ and ‘distribution of the Receivership Property to investors in any of the SP Funds,’ thereby satisfying investor demands against the defendants.

The same conclusion is equally applicable to the Legend Receivership. The language that is the subject of the Court’s *StraightPath* decision is virtually identical to the Receivership Order here. *See* Receivership Order, § XIV (“... Receiver is also authorized and empowered to develop a plan for the fair, reasonable, and efficient distribution of the Receivership Property to investors in any of the Legend Funds.”); § XV.H (requiring the Receiver to report on “[t]he status of any creditor claims process or proceeding, after such process or proceeding have been commenced”); § XI (authorizing the Receiver to “to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate”). As noted simultaneously with the filing of this Motion, the Receiver is filing her Procedures Motion for authority to implement procedures to verify and resolve Interests and Claims.

Third, the last prong of the 26 CFR § 1.468B-1(c) is satisfied -- the Receivership’s assets are “segregated from other assets of the transferor (and related persons)”. Under the Receivership Order, the Court dismissed all prior managers of the Receivership Entity and supplanted them with the Receiver and enjoined anyone other than the Receiver from directly or indirectly controlling the Receivership Assets. *See* Receivership Order, § I (“Accordingly, all persons and entities with direct or indirect control over any Receivership Assets and/or Recoverable Assets other than the

Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets.”); *S.E.C. v. Ahmed*, 2022 WL 17404253, at *7 (“the segregation requirement is met by the fact that none of the assets in the Receivership Estate are held in accounts that contain non-Estate funds, and the Liquidation order states that ‘Defendant and Relief Defendants shall have no authority with respect to the Receivership Estate’s assets.’”).

Moreover, the failure to treat the Receivership as a QSF places the Receivership Estate and the Receiver personally in jeopardy. If, contrary to the Receivership Order, the Receivership Estate fails to pay taxes when due as a QSF, the IRS can seek recovery of back taxes plus interest and penalties that can be substantial. *See* Calder Decl., at ¶ 4. Further, the Receiver can be held *personally* liable for unpaid taxes. *Id.*; *see also* 31 U.S.C. § 3713 (“A representative of ... an estate ... paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.”) *See StraightPath*, *supra*, Dkt. No. 408 at 11 (“The receiver might also face serious personal tax consequences if she sought to avoid QSF status – and given how obvious QSF treatment was under the law, she was not required to preemptively seek clarification from the IRS and incur the costs and delays associated with such action”).

C. A Cash Distribution is within the Receiver’s Authority and Simplifies a Complex Distribution Process

Under the Proposed Plan, distributions will be made in cash, not in-kind (shares). The Receiver believes that cash distributions are fair and reasonable, simplify administration of the Receivership Estate and are consistent with Legend’s underlying documentation.

1. Cash Distributions Simplify Tax Treatment

As a QSF, the Receivership Estate has potential tax liability whenever there is a sale ***or*** a

distribution in-kind transfer of Receivership Property. If shares are sold, potential tax liability occurs at the time of sale but no further potential tax liability arises at the time the cash proceeds are distributed to Investors. If instead the shares are distributed in-kind, potential tax liability occurs at the time of distribution. Calder Decl. at ¶ 8. However, while both types of distribution, cash or in-kind, can result in tax liability, determining the amount of that potential liability – and reserving for the ultimate payment to the tax authorities – is substantially more difficult for an in-kind distribution than for a distribution in cash.

The potential QSF tax liability of the Receivership Estate resulting from either a cash sale or an in-kind distribution is determined by the value of the Receivership property on two separate dates. *See* Calder Decl. at ¶¶ 6-8.

- The first date is the date the assets were deemed to have become the property of the Receivership, which in this case is July 7, 2023, the date the Court entered the Receivership Order appointing the Receiver and creating the Receivership Estate. The value ascribed to the property on that date became the Receivership’s basis in the property for tax purposes. Calder Decl. at ¶ 6.
- The second date is the date on which the Receivership property is sold or distributed in-kind. If the value of the Receivership property on the date it is sold or distributed in-kind is *greater than* the Receivership’s basis in the property, the Receivership will recognize a gain. If the value is *less than* the Receivership’s basis in the property, the Receivership will recognize a loss. *See Brown*, 348 F.3d at 1218-1219 (QSF’s “gain or loss with respect to a particular asset is the difference between the value of the asset when the [QSF] received it and the value of the asset when the [QSF] distributed or sold it.”). Calder Decl. at ¶ 7.

In a cash distribution, determining the potential tax liability is relatively simple, particularly as securities are generally sold in blocks. To determine if there is a gain (and its dollar amount), the Receiver can simply subtract the Receivership Estate's basis in the asset sold from the net cash proceeds recovered. The Receiver can then determine the maximum potential tax liability on that gain by simply multiplying the dollar amount of the gain by 45%. The resulting product can then be allocated to the Tax Reserve. *See* Calder Decl. at ¶ 13.

By contrast, for an in-kind distribution, each transfer of securities to each Silo Investor is a taxable event requiring the Receiver to calculate the potential taxes due on it. Share values could fluctuate during the time that it takes to make transfers to hundreds of Investors, requiring recalculation of potential tax liability to be reserved each time an in-kind distribution is made.

Moreover, unlike a cash distribution, an in-kind distribution obviously does not generate cash that can be used to pay taxes. Legend has no "free" cash -- any cash that Legend may recover will be allocated for a particular purpose under the Proposed Plan (e.g., distributions). *See* Cyganowski Decl. at ¶¶15-17. Without cash to pay taxes arising from an in-kind distribution, the Receiver must *sell* shares in sufficient number to pay for the tax liability due from the in-kind distribution. However, each sale of stock to pay for such tax liability is potentially *itself a taxable event*, requiring its own reserve amount. The result is a complex process that is simplified by a cash distribution. *See* Calder Decl. at ¶¶ 13-14. Moreover, the Receiver will need to sell shares, in any event, for distributions to Claimants on account of allowed claims.

2. Cash Distributions are Consistent with Legend's Documentation

Cash distributions are consistent with Investor expectations. The operating agreements for each of the Legend Funds in which all Investors invested permit both in cash and in-kind distributions, in the discretion of the Manager (ostensibly LVP):

Distributions pursuant to this Article IV may be made in cash or, in the sole

discretion of the Manager, upon not less than ten (10) days prior written notice to the Members, in Marketable Securities (as hereinafter defined) that satisfy the further requirements described below, except that no distribution of securities shall be made to any Member to the extent such Member would be prohibited by applicable law from holding such securities.

See, e.g., Cyganowski Decl., Ex. D, Limited Liability Operating Agreement of Legend Ventures Fund 1 LLC, Section 4.7.2.

CONCLUSION

The Proposed Plan is fair and reasonable. It bases distributions to Silo Investors on their investment decisions while also making satisfactory provision through the Reserve Amount and the Claimant Pool Component for distributions to all other constituents, including any tax authorities for any alleged tax liability.

The Receiver respectfully requests that the Court grant the Motion in its entirety and enter an order substantially in the form of the proposed order submitted with the Motion.

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New York, New York

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