

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**KINETIC INVESTMENT GROUP, LLC and
MICHAEL SCOTT WILLIAMS, CASE NO.: 8:20-cv-394-MSS-SPF**

Defendants, and

**KINETIC FUNDS I, LLC,
KCL SERVICES, LLC d/b/a LENDACY,
SCPIO, LLC, LF 42, LLC, EL MORRO
FINANCIAL GROUP, LLC, and KIH, INC.,
f/k/a KINETIC INTERNATIONAL, LLC,
Relief Defendants.**

_____/

**RECEIVER'S UNOPPOSED MOTION TO (i) APPROVE DETERMINATION
AND PRIORITY OF CLAIMS (ii) POOL RECEIVERSHIP ASSETS AND
LIABILITIES; (iii) ESTABLISH OBJECTION PROCEDURE;
AND (iv) APPROVE PLAN OF DISTRIBUTION**

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Mark A. Kornfeld, Esq., solely in his capacity as the court-appointed Receiver (the “Receiver”), respectfully requests that the Court enter an Order: (1) approving his determination and priority of claims as set forth in this Motion and the attached **Exhibits A-D**; (2) pooling all assets and liabilities of the Receivership Entities into one consolidated Receivership estate; (3) establishing a procedure for objections to the Receiver’s determination of claims and claim priority and plan of distribution; and (4) approving a Plan of Distribution.

This Unopposed Motion represents the Receiver’s ongoing efforts to return substantial recovered receivership assets to those claimants with allowed claims. Prior to filing this Motion, the Receiver (through counsel) worked closely with certain claimants to try and address discrepancies or answer questions regarding submitted claims. This process successfully resolved a number of certain claimant’s issues.

This Motion seeks approval of the Receiver’s proposed “objection procedure” which for any remaining or outstanding issues, seeks to (i) avoid inefficient, piecemeal adjudication of objections, and (ii) conserve the time and resources of the Court and the Receivership. Thus, any claimant’s objection to the Receiver’s claim determinations, claim priority, or Plan of Distribution directly filed with the Court in response to this Motion should be denied (without prejudice). As discussed in more detail in Section VI, *infra*, the Receiver will attempt to resolve any objection to the claims determination directly with the claimant(s) pursuant to the proposed “objection procedure.” If such efforts prove unsuccessful, only then will any dispute be submitted to the Court for its consideration.

This Motion also seeks approval to pool (i.e., combine) all assets and liabilities for the Receivership Entities to be used for future distributions. Finally, given the Receiver's successful efforts in marshaling and liquidating receivership assets, the Motion outlines the Receiver's intended Plan of Distribution – including a near term, interim distribution – the particulars of which shall be submitted for the Court's approval at a later date if and when this Motion is granted.

I. BACKGROUND

On February 20, 2020, Plaintiff Securities and Exchange Commission (the “Commission”) initiated this action alleging violations of federal securities laws against Defendants Kinetic Investment Group, LLC (“Kinetic Group”) and Michael S. Williams (“Williams”) and Relief Defendants Kinetic Funds I, LLC (“Kinetic Funds”), KCL Services, LLC d/b/a Lendacy (“Lendacy”), Scipio, LLC (“Scipio”), LF 42, LLC, El Morro Financial Group, LLC, and KIH Inc., f/k/a Kinetic International, LLC (collectively, the “Receivership Entities”). At a hearing on March 6, 2020, the Court entered the Order Appointing Receiver which, in relevant part, directed the Receiver to “[t]o take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants” and to “develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered and recoverable Receivership Property. Doc. 34 ¶¶ 7.B, 46.

At all relevant times, Williams owned, controlled, and exercised ultimate authority over each of the Receivership Entities. *See* Doc. 200 ¶¶ 1-8, fn. 10. Through Kinetic Funds, Defendants purported to engage in the sale of securities in the form of

hedge fund interests that promised consistent returns to investors primarily located in Arizona, Florida, and Puerto Rico. In reality, the purported returns were misstated or false, and investor funds were used for a number of unauthorized purposes including (1) the transfer of more than **\$6 million** to make payments or distributions to existing investors; (2) the transfer of roughly **\$12 million** to fund Lendacy's business of making unsecured loans to investors, non-investors, and insiders; (3) the use of over **\$4.2 million** to purchase real estate in Puerto Rico, including Defendant Williams' principal residence in a luxury penthouse located in Old San Juan; (4) the use of at least **\$2 million** to fund the operations of several other unrelated businesses and endeavors controlled by Defendant Williams; and (5) the transfer of nearly **\$4 million** to Defendant Kinetic Investment Group.¹

There is no evidence that these expenditures were done to benefit investors; instead, the Receiver believes that, at the time of his appointment, there was a shortfall of at least \$20 million between the amount investors believed were on hand and the actual amount of assets held by Kinetic Funds.

II. THE COURT-APPROVED CLAIMS PROCESS

On August 20, 2020, the Receiver filed his Motion to Establish and Approve (i) Procedure to Administer and Determine Claims; (ii) Proof of Claim For; and (iii)

¹ An unknown amount of investor funds were also apparently lost when Kinetic Funds' previous broker-dealer, VTrader, collapsed. As Williams' counsel disclosed at the March 6, 2020 hearing, "Your Honor, I'm informed before Interactive Brokers, they traded through an outfit called VTrader. And VTrader went under, and monies were lost in connection with that. That's where investor assets were held before Interactive Brokers, and monies were apparently lost in that transaction when VTrader went under."

Claims Bar Date and Notice Procedures (the “Claims Motion”). On November 5, 2020, the Court entered an Order granting the Claims Motion which established, in relevant part, the draft proof of claim form, the method to determine investor claims, timing and deadlines for submission of claims, and mechanisms to provide notice of the claims process (Doc. 155). That Order also established a Claim Bar Date of 90 days following the mailing of Proof of Claim Forms to all potential claimants or investors. Pursuant to the Court’s Order, any person or entity who failed to submit a completed proof of claim to the Receiver so that it is actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim against the Receivership or Receivership Entity.

The Court’s Order further provided that sufficient and reasonable notice would be given by the Receiver if made (1) by mail to the last known addresses of all known potential claimants, (2) by publication in *The New York Times*, *The Sarasota Herald Tribune*, and the *El Nuevo Dia* newspapers, and (3) by publication on the Receiver’s website (www.kineticreceivership.com). In compliance with the Court’s Order, on November 17, 2020, the Receiver mailed 117 packages to the last known addresses of known investors and their attorneys, if any, as well as any other known potential creditors of the Receivership estate, thereby establishing **February 15, 2021**, as the Claim Bar Date. Each package included a cover letter, the Notice of Deadline Requiring Filing of Proofs of Claim (the “Notice”), and a Proof of Claim Form (collectively, the “Claims Package”). The Receiver published the Notice in (i) *The New York Times* on December 16, 2020; (ii) *El Nuevo Dia* on December 10, 11, 14, 15, 16,

17, and 18; and (iii) *The Sarasota Herald Tribune* on December 8, 9, 10, 11, 12, 15, and 16.² The Receiver also posted the Notice and a Proof of Claim Form on his website. On December 28, 2020, the Receiver filed his Notice of (i) February 15, 2021 Claim Bar Date and (ii) Publication of Claim Bar Date Notice (Doc. 165).

The Receiver received 33 claims on or before the Claim Bar Date (the “**Claims**”). Of the 33 claims, 28 claims were submitted by investors in Kinetic Funds (the “**Investor Claimants**” or “**Investor Claims**”). The remaining five claims were submitted by other non-investor creditors (the “**Non-Investor Claimants**” or “**Non-Investor Claims**”), including one claim from a former employee, three claims from individuals or entities that provided professional services to or on behalf of one or more Receivership Entities, and one claim from the owner of an apartment that had previously been leased to one of the Receivership Entities. The Receiver subsequently received four additional investor claims after the Claim Bar Date, resulting in 37 total claims of which 32 were Investor Claims.³

² A copy of the Claim Bar Date Notice is also available on the Receiver’s website at <https://www.kineticreceivership.com/wp-content/uploads/2020/12/Claim-Bar-Date-Notice.pdf>.

³ Claim Nos. 24-27 were each submitted within several weeks of the Claim Bar Date. A majority of those claimants indicated that they had not received the Proof of Claim and subsequently submitted their completed Proof of Claim Forms. The fourth untimely Proof of Claim, submitted by a Puerto Rico pension fund on or around March 15, 2021, did not indicate any reason for the failure to submit the Proof of Claim Form by the required date. The Receiver has determined to treat those submissions as timely given that the duration of the claim submission process took place during extraordinary macroeconomic circumstances including the COVID-19 pandemic, and that the submissions came within several weeks after the Claim Bar Date. Additionally, to state the obvious, the decision to deny these claims would result in an extreme penalty to otherwise-innocent investors by completely denying

In an effort to assist potential claimants in navigating the claims process, the Court approved the Receiver's proposal to include in Proof of Claim Forms distributed to investors his preliminary calculation for the applicable investor's "Net Investment Amount" where sufficient information existed to make an initial calculation. The Net Investment Amount for an account was calculated by first determining an investor's net investment activity with Kinetic Funds, which included identifying all amounts contributed or invested by the pertinent investor(s) and subtracting any and all distributions made on account of that investment regardless of whether such distributions were characterized as profits, dividends, returns/redemptions of principal, or any other form of distribution. For those investors that also obtained a Lendacy loan by, among other things, completing a loan agreement in which they contractually agreed to repay the loan at a specified interest rate, the Receiver determined that principles of fairness and equity required those investors' net Lendacy activity to be offset from their net investment activity to calculate their Net Investment Amount. In making this calculation, the Receiver calculated each investor's outstanding Lendacy balance (including accrued interest) as of February 29, 2020 – just days before the Receiver's appointment – and offset that amount against the investor's net investment activity.

The Receiver and his Retained Professionals began reviewing submitted claim forms and supporting documentation in or around November 2020 as claims were

their participation in any recovery of investor assets.

received. This was a laborious and time-consuming process that involved, among other things, the Receiver and his forensic accountants analyzing documents submitted with the proof of claim forms to the financial reconstruction of the Receivership Entities' bank and financial accounts and other records under his control. Where necessary, the Receiver routinely engaged in substantive discussions with various Investor Claimants to address questions about the Receiver's calculations.⁴ During this process, upon further review and analysis, the Receiver also adjusted the calculated Net Investment Amount for a number of Investor Claimants in order to correctly account for accrued interest obligations on outstanding Lendacy loan amounts owing to the Receivership estate. The overwhelming majority of those claimants have all agreed with the Receiver's Net Investment Amount.

If the Investor Claimant agreed with the numbers provided by the Receiver, it did not have to provide any documentation supporting its claim. The Investor Claimant, however, was required to sign under penalty of perjury and return the completed Proof of Claim Form by the Claim Bar Date.⁵ Where the Investor Claimant disagreed or when there were discrepancies between the Investor Claimant's calculation and the Receiver's determination, the Receiver was able to reach an

⁴ For example, the largest claimant (a Puerto Rico government agency) submitted a Proof of Claim that did not account for an additional \$3 million investment that had been identified by the Receiver's Retained Professionals. The Receiver shared this discovery with said claimant and as a result received an Amended Proof of Claim accounting for this large additional investment.

⁵ For the Court's ease of reference, a copy of a blank Proof of Claim Form is attached as **Exhibit G**.

agreement with some of those Investor Claimants. Of the 32 Investor Claims submitted, 27 Claimants fully agreed with the Receiver's calculations; one Claimant disagreed, two claims did not have a net loss, and the remaining two claims were not provided calculations by the Receiver for various reasons. Following these efforts, the 30 submitted Investor Claims (with an alleged loss) collectively totaled \$34,646,577.97, while the five submitted Non-Investor Claims totaled \$1,241,541.00, resulting in total submitted claims of \$35,888,118.97.

After the filing of this Motion, the Receiver will mail a letter giving notice of this Motion to all Investor Claimants and Non-Investor Claimants to the mailing address (and, where applicable, email address) provided on each of their respective submitted Proof of Claim Forms (and to their attorneys, if any were identified). The letter will inform the Claimants that this Motion is available on the Receiver's website or, upon request, from the Receiver's office. The letter will also advise each Claimant of his, her, or its respective claim number.⁶

⁶ To minimize public disclosure of any Claimant's financial affairs, the Receiver has assigned each claim a number. To the extent the Court desires, the Receiver stands ready to file with the Court a list disclosing the identity of each Claimant associated with each claim identified by number in **Exhibits A-D**. In certain instances, however, where the Claimant's identity is important to the Receiver's determination of a claim, this Motion discloses that information.

III. THE RECEIVER'S CLAIM DETERMINATIONS AND FURTHER PLANS FOR ADMINISTERING THE CLAIMS PROCESS

A. The Receiver's Proposed Priority And Determination Of Timely Claims

As set forth in the Receiver's Claims Motion, any properly completed and submitted proof of claim should be allowed if it is established that: (1) the claim arises from or in connection with the alleged investment scheme set forth in the complaint filed by the Commission in this action; (2) losses recognized by law resulted from such activities; (3) any alleged claim and losses are supported by appropriate documentation and are consistent with the books and records available to the Receiver; and (4) no legal or equitable ground(s) exists for denying the claim.

The Receiver has carefully and thoroughly reviewed and considered all 37 submitted claims. The Receiver has determined that each claim falls within one of four categories with a corresponding priority:

- (1) Investor Claims which should be allowed in full and should receive the highest priority among claims;
- (2) Investor Claims which should be allowed in part and also should receive the highest priority among claims;
- (3) Unsecured Non-Investor Claims (the "**Non-Investor Unsecured Claims**") which should be allowed (in whole or in part), but should be paid only after allowed claims for the preceding two claim categories (Investor Claims) have been paid in full; and
- (4) Investor Claims submitted by Insiders or Sales Agents which should be Denied, or in the alternative be equitably subordinated to a priority which should be paid only after allowed claims for the preceding three claim categories have been paid in full.

This Section outlines the Receiver's determinations and priorities of the four categories of claims.. As more fully set forth in Section IV, the Receiver respectfully submits that affording defrauded investors the highest priority is both inherently equitable and consistent with prior precedent and well-established caselaw.

i. Allowed Claims Will Be Entitled To *Pro Rata* Distribution(s) of Receivership Assets

As set forth at **Exhibits A-D**, the Receiver calculated and proposed an Allowed Amount for each claim which is the amount of a claim to which the Receiver has determined the Claimant is entitled. The Allowed Amount will serve as the basis for calculating a Claimant's ultimate distribution of Receivership assets. The Receiver's determination of a Claimant's Allowed Amount is **not indicative** of the amount the Claimant will receive through any initial or future distribution(s) of Receivership assets. Rather, each Claimant holding an allowed claim with a positive Allowed Amount will be eligible for a distribution on a *pro rata* basis depending on the amount of the distribution and the priority of the claim (unless otherwise discussed in this Motion), and ultimately will likely only receive a percentage of its Allowed Amount.⁷

As of June 18, 2021, the Receiver's fiduciary bank accounts held for the Receivership Estate had a balance of approximately \$20 million. The Receiver believes that he has collected and secured sufficient funds to warrant the expense inherent in

⁷ For example, claims submitted by Non-Investor Unsecured Claimants, such as unsecured trade creditors, may receive no distributions despite having a positive Allowed Amount because, as discussed below in Section IV.B, the Receiver has proposed that those claims should be afforded a lower priority than defrauded investors' claims.

proceeding with distributing receivership assets to Claimants with approved claims, and Section VII details the Receiver's intended Plan of Distribution.

ii. Recommended Claim Determinations And Bar Of Future Claims

The Receiver considered each submitted claim to determine its claim category, with the goal that distribution of the Receivership's assets be equitable and fair among all Claimants. Various types of Claimants submitted claims, including individual investors, insiders and employees, and service providers. It is through the Receiver's review and assessment of information each Claimant provided, the books and records of the Receivership Entities, and information obtained from non-parties that the Receiver established the categories of Claimants discussed in this Motion to assure fair and equitable treatment.

The Receiver respectfully asks the Court to approve his recommended claim determinations as set forth in **Exhibits A-D** and as discussed in further detail below. Further, as the Claim Bar Date has long passed, and all Claimants and other potential creditors have had ample notice of the claims process and a full and fair opportunity to file claims and/or seek enforcement of any asserted rights or interests in the Receivership estate, the Receiver asks the Court to issue an order (1) confirming that no further claims will be considered and (2) barring any future claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver, and any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or

the Receivership Estate. *See Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked “standing to object to the adjudication of a pending claim in the Claims Disposition Order”); *SEC v. Lauer*, 2011 U.S. Dist. LEXIS 160383, *10 (S.D. Fla. 2011) (District Court denied filing of proof of claim when claimant failed to file before claims bar deadline and first interim distribution of assets of Receivership had already been effectuated.); *SEC v. Princeton Econ. Int’l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) (“All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined.”); *CFTC v. Wall St. Underground, Inc.*, 2007 WL 1531856, *4 (D. Kan. 2007) (same). Such an order is important to bring finality and to allow distributions to proceed, and is warranted in light of the ample time that has been available to address such matters.

B. Allowed Investor Claims Which Should Receive Highest Priority

Highest priority should be given to claims submitted by non-insider Investor Claimants who made an investment in the alleged scheme, suffered a net loss, and who did not promote or were not otherwise separately compensated or enriched for soliciting others to invest in Kinetic Funds. Specifically, these Investor Claimants suffered a net loss as a result of their investment activity with Kinetic Funds and, where applicable, any Lendacy loan they received. These Claimants have all also agreed with the resulting Net Investment Amount calculated (or amended) by the Receiver. The Receiver has determined that 27 Investor Claims should be allowed in the amount

of the Net Investment Amount calculated by the Receiver and agreed to by the respective Claimant. These claims are identified in **Exhibit A** and are consistent with the Receivership Entities' books and records and other documents recovered by the Receiver (collectively, the "**Receivership Records**"). Accordingly, the Court should allow each of these claims in the Allowed Amounts as set forth in **Exhibit A**.

C. Allowed In Part Investor Claims, Which Also Should Receive Highest Priority

The Receiver's Claims Motion requested that the Court approve the Net Investment Method as the mechanism for determining Allowed Amounts for Investor Claims. After no objections were filed, the Court entered an Order on November 5, 2020 granting the Claims Motion and thus approving the use of the Net Investment Method to determine Allowed Amounts for Investor Claims (Doc. 155).

As further described in the Claims Motion, the Net Investment Method calculates an Investor Claimant's net investment activity (using a money in, money out approach). If that claimant also had an outstanding Lendacy loan, the Net Investment Amount calculation would offset that amount by the claimant's net Lendacy activity which the Receiver determined by calculating the investor's outstanding Lendacy balance as of February 29, 2020. The Net Investment Amount does **not** factor in any purported appreciation or reinvestment of purported gains generated by an Investor Claimant's Kinetic Funds investment given the inconsistencies and questions surrounding KFYield's actual performance as well as the widening shortfall between Kinetic Funds' actual and represented assets.

Accordingly, the Receiver did not use the stated account balances represented in statements distributed to investors, which the Receiver maintains are not a fair representation of the true value of the underlying assets of the Receivership Funds. The Court approved the Receiver's proposal to include his determination of an investor's Net Investment Amount (and, where applicable, an investor's amended Net Investment Amount) on the Proof of Claim Forms sent to investors where sufficient information was available.

i. Claim No. 28 Should Be Allowed Only For The Net Investment Amount

Claim No. 28 was submitted by an Investor Claimant in the amount of \$261,267.76 – the amount of the investor's most recent ending statement balance – rather than the Net Investment Amount of \$250,000 calculated by the Receiver using the Net Investment Amount. The claim is set forth in **Exhibit B**. The Receiver's calculation of the Net Investment Amount for Claim No. 28 (and all other Investor Claims) does not include any purported appreciation in the underlying investment as set forth in statements distributed to that investor. The Receiver has re-reviewed Claim No. 28 and Receivership Records, and those records support the Recommended Amount of the Allowed Claim for Claim No. 28 as set forth in **Exhibit B** for that claim. Further, allowing Claim No. 28 in an amount including purported appreciation would provide that Investor Claimant an unfair and inequitable advantage over other otherwise-similarly situated Investor Claimants whose claim amount was calculated

based on their Net Investment Amount (and did not include any purported appreciation).

Accordingly, the Receiver submits that the Court should allow Claim No. 28 in the Net Investment Amount of \$250,000 calculated by the Receiver as specified in **Exhibit B**.

D. Allowed And Allowed In Part Non-Investor Unsecured Claims, Which Should Receive A Lower Priority Than Investor Claims

The Receiver received five claims from non-investor “trade creditor” or former employee claimants in connection with their provision of goods or services to Receivership Entities (“**Non-Investor Unsecured Claimants**”):

- Claim No. 29 submitted by a former employee for amounts owing under an employment agreement;
- Claim No. 30 submitted by the owner of an apartment in Sarasota, Florida resulting from the termination of an apartment lease entered into by Kinetic Group;
- Claim No. 31 submitted by Kinetic Funds’ prior legal counsel for pre-receivership legal fees; and
- Claim Nos. 32-33 submitted by a service provider that apparently provided back-end office functions for Receivership Entities Lendacy and Kinetic International

The total amount of those five claims is \$1,241,541.00, and they are itemized in **Exhibit C**.

Claim Nos. 29-31 should be allowed for the full amount claimed for services provided prior to the Receiver’s appointment. The remaining two claims, Claim Nos. 32-33, should be allowed only in the Allowed Amounts set forth in **Exhibit C**. As discussed below in Section IV, these claims (the Allowed and Allowed In Part Non-

Investor Unsecured Claims) should be second in priority to Allowed and Allowed In Part Investor Claimant claims, such that those claims are paid only after the Allowed Amounts of all Investor Claims have been paid in full.

Claim Nos. 32-33 were submitted by a software company that provided website and back-end services to Lendacy and Kinetic International. Claim No. 32 submitted a claim for \$255,000 which consisted of various invoices (including quarterly \$15,000 invoices) for services provided to Lendacy beginning in October 2019 and which continued through December 31, 2023. Similarly, Claim No. 33 submitted a claim for \$905,000 which consisted of various invoices (including an initial invoice in November 2018 for \$250,000 and subsequent quarterly invoices ranging from \$30,000 to \$75,000) for services provided to “Kinetic Bank” beginning in November 2018 and which continued through December 31, 2022. Each of these claims sought not only amounts due for services provided prior to the Receiver’s appointment, but also amounts due for services to be contractually provided in the future.

The Receiver recommends that Claim Nos. 32-33 be allowed in part up to the amount of the invoices submitted and not paid through and including the date of the Receiver’s appointment, March 6, 2020. As set forth in support documents provided for Claim No. 32, a total of \$40,000 was owing on invoices generated prior to the Receiver’s appointment on March 6, 2020. Similarly, support documents provided for Claim No. 33 indicate that a total of \$105,000 was owing on invoices generated prior to the Receiver’s appointment on March 6, 2020. The Receiver submits that it is equitable to allow Claim Nos. 32 and 33 for \$40,000 and \$105,000, respectively, which

represent the amounts owing on invoices generated prior to the Receiver's appointment. Any claims for services or fees billed in advance following the Receiver's appointment should be denied because those services were no longer necessary or provided nor did the Receiver request, approve, or use those services (and thus the services did not provide any benefit to the Receivership Estate).

Accordingly, the Court should allow the foregoing claims submitted by the Non-Investor Unsecured Claimants for the Allowed Amounts as set forth in **Exhibit C** and with the second-highest priority after all Allowed and Allowed in Part Investor Claims are paid in full.

E. Claims That Should Be Denied Or, In The Alternative, Equitably Subordinated.

Courts sit as courts of equity over securities fraud receiverships. *See, e.g., Elliott*, 953 F.2d at 1566. As such, the Court has “broad powers and wide discretion” to fashion appropriate relief, including to devise a plan for distributing receivership assets. *See, e.g., id.* In resolving claims submitted in a claims process, courts consider a wide variety of factors, with the ultimate goal of fashioning an equitable system that treats similarly situated claimants equally. *See, e.g., SEC v. Homeland Commc'ns Corp.*, 2010 WL 2035326, at *2 (S.D. Fla. May 24, 2010) (“[I]n deciding what claims should be recognized and in what amounts, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike....”) (quotation omitted); *Cunningham*, 265

U.S. at 13 (as among “equally innocent victims, equality is equity”); *Elliott*, 953 F.2d at 1570 (same).

Two of the Investor Claims were submitted by Defendant Michael Williams, the principal of Kinetic Funds, and Mr. John Symmes (“Symmes”), an investor and sales agent who facilitated or originated at least eight different investments in Kinetic Funds. The Receiver submits that those claims should be denied or, in the alternative, equitably subordinated until all other Investor Claims and Non-Investor Unsecured Claims have been paid in full. *See SEC v. Basic Energy and Affiliated Resources, Inc.*, 273 F.3d 657, 670-71 (6th Cir. 2001) (“the district court did not abuse its wide discretion when it categorically precluded the Pension Fund’s former Regional directors and sales agents from recovering from the receivership estate”); *Byers*, 637 F. Supp. 2d at 184 (“Receiver’s proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw.”). Two other Investor Claims should be denied because those Claimants did not have any net losses. These claims are identified in **Exhibit D** and briefly summarized below.

a. Investor and Principal Michael Williams’ Claim Should Be Denied, And At A Minimum, Equitably Subordinated To Other Claims

Claim No. 34 was submitted on behalf of Defendant Michael Williams and Relief Defendant LF42 (the “Williams Claim”), and apparently consists of (i) a claim of \$822,694 from Williams’ status as an investor in Kinetic Funds, and (ii) a claim of \$597,193 representing purported expenses owed to Williams and LF42. In the

Receiver's view, valid grounds exist to distinguish between innocent Investor Claimants and Williams who bears responsibility for the significant losses of investor funds. The Receiver submits that the Williams Claim should be denied because (among other things) (i) Williams cannot satisfy his good faith obligations, and (ii) Williams did not suffer any loss given the over-\$6 million that he diverted for his own benefit. Even if Williams' claim is to be granted in whole or in part, his role in the alleged scheme and responsibility for the investor losses require that his claim should be equitably subordinated to all other claims so that he is not eligible to participate in any Receivership distributions until all Investor Claims and Non-Investor Unsecured Claims have been paid in full.

i. Williams cannot satisfy his good faith obligations

First, the Court should exercise its inherent discretion and equitable powers by denying the Williams Claim because Williams did not act in good faith. *See CFTC v. PrivateFX Global One*, 778 F. Supp. 2d 786, 786-87 (S.D. Tex. 2011) at *10. ("Sitting in equity, the district court is a court of conscience."); *SEC v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, *9 (D. Or. 2009) ("In approving a plan of distribution in an SEC receivership case, the court must determine the most equitable distribution result for all claimants, including investors."); *Megafund Corp.*, 2007 WL 1099640 at *2 (overruling objection to magistrate's recommendation that claim be denied due to claimant's lack of good faith).

Here, by virtue of Williams' direct control and ownership over Kinetic Funds and Lendacy and responsibility and control over Kinetic Funds' investment decisions

and financial accounts, he (among other things) (1) made numerous misrepresentations and omissions to investors and potential investors; (2) was responsible for the investment and safekeeping of investor funds; (3) had actual knowledge about the depletion of investor assets and increasing shortfall, (4) knew or should have known that the fund performance advertised in Bloomberg was materially misleading at best in relation to the Funds' actual trading performance; and (5) directed and benefitted from the unauthorized diversion and misappropriation of at least \$6 million of investor assets that were used to, among other things, purchase a luxury penthouse and historic commercial property in Puerto Rico titled under his control, and to bankroll various speculative investments and businesses that were not disclosed to investors (nor part of the investment strategy). It would be contrary to principles of equity, fairness and good conscience to permit Williams to share in any distribution of Receivership assets given that his conduct necessitated the Receiver's appointment in the first place. *See Basic Energy*, 273 F.3d at 670-71.

ii. Williams did not suffer any loss

This claim should also be independently denied because Williams did not suffer any loss from his involvement with Kinetic Funds. First, Williams' submitted Proof of Claim Form is erroneous. At best, it contains inaccuracies and at worst deliberately omits important information. For example, Question 9 of the Proof of Claim Form requires the submitting claimant to detail – **under penalty of perjury** - the amount(s) they invested with Kinetic Funds. In addition to listing two transfers in the amount of \$65,000 and \$1.5 million, Williams also indicates that he transferred \$2,914,964 to

Kinetic Group on March 5, 2020 (the “March 5th Deposit”) — the day before the hearing on the Commission’s asset freeze and receiver motions.

The March 5th Deposit was not an investment in Kinetic Funds; rather, it appears to be a belated and last-ditch attempt to repay a portion of the misappropriated funds he took for himself and which lie squarely at the heart of the Commission’s allegations. Although the Proof of Claim Form represents that the entire amount of the March 5th Deposit remained with the Receivership Entities, that too is not true; instead, as Williams knows, nearly \$400,000 traceable to the March 5th Transfer was subsequently wired out to third-parties that same day at Williams’ direction. *See* Doc. 54 □ 21. Approximately \$2.5 million remained with the Receivership Entities when the Court entered the asset freeze and receivership orders on March 6, 2020. In other words, Williams overstated the amount of his purported “investment” with Kinetic Funds by nearly \$400,000.

Next, Williams’ Proof of Claim also fails to completely disclose all funds received from a Receivership Entity. Although admitting that he received three transfers of \$40,000, \$1.5 million, and \$2.1 million from the Receivership Entities, Williams omits any mention of the approximately \$2.775 million diverted from investor funds in May 2018 at his direction in order to purchase the Banco Espanol building in Puerto Rico. *See* Doc. 60 pp. 45-46. This transfer provided no benefit to Kinetic Funds investors as it was titled in the name of Williams’ related entity, Scipio

(and not Kinetic Funds), and served only to substantially deplete investor funds.⁸ When adjusting the amount of funds contributed by Williams and factoring in the diversion of assets to purchase the Banco Espanol building, it follows that he received (at least) roughly \$2 million more than he “invested” in Kinetic Funds.

iii. It would be inequitable for Williams to have the same distribution priority as innocent investors

“Equitable subordination does not deal with the existence or non-existence of the debt, but rather involves the question of order of payment.” *In re Lockwood*, 14 B.R. 374, 380–81 (Bankr. E.D.N.Y. 1981); *In re Powe*, 75 B.R. 387, 389 (Bankr. M.D. Fla. 1987) (“subordination is within the court’s powers where “it is necessary to prevent the consummation of conduct which is inequitable . . .”)“The fundamental aim of equitable subordination is ‘to undo or offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors. . . .’” *Id.* (quoting *In re Westgate Cal. Corp.*, 642 F.2d 1174, 1177 (9th Cir. 1981)). “Subordination is an equitable power and is therefore governed by equitable principles.” *Westgate Cal. Corp.*, 642 F.2d at 1177. “Courts equitably subordinate claims when the claimant has engaged in some type of inequitable conduct and the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the

⁸ The Receiver took possession of and later sold the Banco Espanol building for \$4.15 million (Doc. 236). Notably, the sale closed on May 11, 2021 – more than three months after Williams’ submission of his Proof of Claim. The fact that an increase in real estate values served to generate additional assets for the Receivership Estate does not excuse Williams’ failure to completely answer Question 10.

claimant.” *Picard v. Katz*, 2011 WL 4448638, *6 (S.D.N.Y. 2011). “Inequitable conduct encompasses conduct that may be lawful but is nevertheless contrary to equity and good conscience.” *Id.* (internal quotation omitted).

If Williams’ claim is not denied (and he somehow was determined to have suffered a loss as a result of his relationship with Kinetic Funds), the Court should still exercise its inherent discretion and equitable powers in equitably subordinating any approved claim amount to a priority lower than the allowed and allowed in part claims of all other Claimants. Allowing Williams to participate on equal footing with other innocent investors would be patently unfair given his distinctly different standing and the allegations and substantial documentary evidence of wrongdoing. Given that insufficient funds exist to satisfy all claims in full, the failure to subordinate Williams’ claim would only further victimize innocent investors – again – by significantly decreasing the amount that those innocent investors will ultimately receive from the Receivership Estate.

There is little question that Williams’ alleged conduct, much of which has been confirmed through the Receiver’s investigation, was – at minimum - contrary to equity and good conscience. This conduct took place while Williams was acting in a fiduciary capacity over the investor funds entrusted to Kinetic Funds. For example, an unspecified amount of investor funds (believed to be at least \$1 million) were lost following the collapse of a broker-dealer Kinetic Funds apparently privately invested in using investor funds. Over \$10 million of investor deposits were used to fund unsecured loans through Lendacy – of which at least \$4 million was taken by Williams

or for his benefit to allow him to speculate in Puerto Rico real estate, including a penthouse for his personal largesse. These were wrongful takings of investor funds – not arms’ length transfers. This misappropriation served only to enrich Williams, and certainly was not consistent with what investors were told. Another \$2 million was wrongfully diverted and used to fund speculative investments and startup businesses in Puerto Rico. These transfers also substantially depleted available funds and were of no cognizable benefit to investors.⁹

Even Williams himself has acknowledged that he should have a lower priority than investors when it comes to redemptions. In May 2019, when asked by an advisor to several Kinetic Funds investors how redemptions and other transactional activity within the Fund would be handled in the event of large withdrawal demand, Williams stated that “Management investments are redeemed last”:

In the event of a large demand for withdrawals from the fund, describe how redemptions and other transactional activity within the fund would be handled:

- Members who are not using the associated Lendacy collateralization and/or have other restrictions are redeemed first based on the redemption policy (annual / quarterly with notice)
- Members who are utilizing the associate Lendacy collateralization and/or have other restrictions are given secondary considerations (annual / quarterly with notice)
- Management investments are redeemed last.
- Any redemption regardless of size always considers market impact to all investor members, to avoid impacting those in the investment fund.

In short, it is and would be inequitable¹⁰ for Williams to participate on a *pari passu*

⁹ Nor did Williams disclose any of these activities (many of which were glaring red flags or conflicts of interest) to investors.

¹⁰ See *In re First Foliage, L.C.*, No. 10-BKC-27532, 2014 Bankr. LEXIS 2605, 2014 WL 2616618, at *11 (Bankr. S.D. Fla. June 11, 2014) (“Unclean hand is an equitable defense based on the notion that ‘he who comes into equity must come with clean hands’ and that

basis as those very investors he is accused of defrauding - especially where it appears that there are insufficient assets to satisfy investor redemptions.

b. Investor and Sales Agent John Symmes' Claim Should Be Denied, Or At A Minimum Equitably Subordinated, Given His Receipt Of Commissions For His Role As A Sales Agent In Excess Of His Net Investment Amount

Claim No. 35 was submitted on behalf of investor John Symmes who also served as a sales agent for Kinetic Funds. As a sales agent, Mr. Symmes was responsible for soliciting at least eight investors who collectively invested millions of dollars with Kinetic Funds, and his Proof of Claim Form omits the fact that he personally received over \$250,000 in commissions paid directly to him (in addition to payments towards his Lendacy loan) from investor funds for these (likely unlawful) efforts. As detailed below, Mr. Symmes' claim should be denied because (i) the amount of commissions he received exceeds any claimed loss; (ii) it would be inequitable to allow him to receive Receivership distributions in light of his role as a sales agent; and (iii) he cannot satisfy his good faith obligations. In the alternative, Mr. Symmes' claim should be equitably subordinated to a priority lower than the allowed and allowed in part claims of all other Claimants.

unclean hands 'closes the doors of a court of equity to one tainted with inequity or bad faith related to the matter in which he seeks relief, however improper may have been the behavior of the defendant.')

Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co., 324 U.S. 806, 815 (1945) (The doctrine of Unclean hands "necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant.";[the] "doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.")

According to records reviewed by the Receiver, Mr. Symmes made two investments totaling \$255,000 from his custodial account held at a retirement custodian in 2012 and 2013. At or around that time, Mr. Symmes withdrew \$190,000 as a Lendacy loan. As of February 29, 2020, Mr. Symmes' Lendacy balance was \$166,175.03, and thus his Net Investment Amount would be \$88,824.97. In Mr. Symmes' original Proof of Claim, he sought a higher Net Investment Amount of \$174,667 based on his use of the current market value of his Kinetic Funds investment (which included appreciation).

At some point, Mr. Symmes entered into an agreement with Kinetic Funds through which he would be compensated for referring new investors to Kinetic Funds and Lendacy. Upon information and belief, Mr. Symmes conducted no due diligence on the Kinetic Funds investments or otherwise undertook any independent investigation; rather, he simply relied on self-serving representations and purported documentation from Mr. Williams. Notwithstanding a short period during 2014, Mr. Symmes was not registered with a licensed broker-dealer during the time period from his date of investment to the Receiver's appointment. Yet the Receiver's records show that Mr. Symmes ultimately received over \$250,000 in transaction-based compensation consisting of "commissions" or "referral fees" for his efforts with regards to at least eight investors who entrusted millions of dollars to Kinetic Funds during that period (of which some also received a Lendacy loan). Many of those investors were not as fortunate as Mr. Symmes to have recouped their entire investment through these significant "commissions" or "referral fees."

Here, it would be simply inequitable to distribute any Receivership assets to Mr. Symmes given his role as a sales agent in soliciting other investors as well as the fact that he has already received well in excess of his original investment. *See Basic Energy*, 273 F.3d at 670 (affirming decision to precluded entity's former directors and sales agents from recovering from receivership estate). The Receiver submits that Mr. Symmes' role as a sales agent is significantly dissimilar from other less-fortunate investors, and his recoupment of his entire investment means that he did not suffer a loss and thus his claim should be denied. Even if the Court determines that Mr. Symmes should somehow be entitled to participate in the claims process, the Receiver submits that his Net Investment Amount should be calculated as \$88,824.97 and that his claim should be equitably subordinated to the lowest priority after all Investor Claims and Unsecured Claims have been paid in full.

c. Two Investor Claimant Claims Should Be Denied Because The Claims Did Not Suffer Any Loss

Claim Nos. 36-37 should be denied because the two accounts did not experience any losses and in fact recovered more than their principal investment. These claims should be denied as set forth in **Exhibit D**.

IV. THE RECEIVER'S DETERMINATION OF CLAIMS AND PRIORITIES IS FAIR AND EQUITABLE

Section I provided an overview of the Receiver's determination of claims and claim priority. This Section provides additional information, including additional support for the basis of how the Receiver determined priority of claims and other

matters affecting claims consistent with the goal of making distributions of Receivership Entities' assets fair and equitable.

A. Priority Of Claims

As discussed above, the Receiver has established the following categories of claims:

- Investor Claims which should be allowed in full;
- Investor Claims which should be allowed in part;
- Non-Investor Unsecured Claims which should be allowed (in whole or in part) but subordinated until full payment of all allowed Investor Claims; and
- Claims which should be denied (or, in the alternative, equitably subordinated until full payment of all allowed Investor Claims and Non-Investor Unsecured Claims).

From these categories, the Receiver has determined the fair and equitable priority for each of these claims' participation in future Court-approved distributions. The highest priority should be afforded to all investor claims which are allowed (**Exhibit A**) and allowed in part (**Exhibit B**). Each Claimant holding an allowed or allowed in part Investor Claim set forth in **Exhibits A-B** will receive a *pro rata* share of its respective claim's Allowed Amount from the total aggregate distribution as discussed in more detail below in Section VII. The next highest priority should be afforded to Non-Investor Unsecured Claims (**Exhibit C**), which will only participate in a distribution of Receivership assets if and after all Investor Claims are paid in full.

Lowest to no priority should be afforded to the denied claims (**Exhibit D**), including Claim Nos. 34-35 which if in the alternative are not denied should be

equitably subordinated. Such claimants, at a minimum, should only participate in future Court-approved distributions only after all allowed and allowed in part Investor Claims and Non-Investor Unsecured Claims have been paid in full. Alternatively, at a maximum, these claims should be fully denied.

B. Receivership Case Law Supports Affording The Highest Priority To Defrauded Investors

The Receiver's proposed priority for claim categories is fair and equitable. The Court's broad power to approve the Receiver's claim determinations and priority of claims is settled. *See Elliott*, 953 F. 2d at 1566 (court has "broad powers and wide discretion" to assure equitable distributions); *Homeland Commc'ns Corp.*, 2010 WL 2035326 at *2 ("[i]n equity receiverships resulting from SEC enforcement actions, district courts have very broad powers and wide discretion to fashion remedies and determine to whom and how the assets of the Receivership Estate will be distributed."). Further, no specific method of distribution is required; the method of distribution should simply be "fair and equitable." *SEC v. P.B. Ventures*, 1991 WL 269982, *2 (E.D. Pa. 1991). In the end, "[a]n equitable plan is not necessarily a plan that everyone will like." *Credit Bancorp*, 2000 WL 1752979 at *29. Indeed, "when funds are limited, hard choices must be made." *Byers*, 637 F. Supp. 2d at 176 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 84 (2d Cir. 2006)).

Courts routinely hold that treating similarly-situated parties alike in claims processes is fair and equitable. *Elliott*, 953 F.2d at 1570; *U.S. v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011). There does not require that every single claimant be

treated in the same manner; rather, fairness only requires treating similarly-situated claimants alike. *See, e.g., Byers*, 637 F. Supp. 2d at 184 (“Receiver’s proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw.”); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002) (affirming district court’s equitable authority to treat all fraud victims alike and order *pro rata* distribution of assets).

Principles of fairness and equity warrant that payment to claimants whose property was unlawfully taken from them, such as innocent investors unaware of the scheme, is given a higher priority than payment to general creditors. *SEC v. HKW Trading LLC*, 2009 WL 2499146, *3 (M.D. Fla. 2009); *SEC v. Nadel, Co.* 8:09-cv-00087 (M.D. Fla. 2009 Doc. 776 at *2) (approving receiver’s proposal to treat investors with highest priority); *Quilling v. Trade Partners, Inc.*, 2006 WL 3694629 at *1 (“As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud.”); *see* III Clark on Receivers § 667 at 1154 (Anderson 3d ed. 1959). This is the appropriate priority because “[t]he equitable doctrine of constructive trusts gives ‘the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.’” *Id.*; *see also SEC v. Megafund Corporation et al.*, Case No. 05-cv-01328 (N.D. Tex. 2007 Doc. 286 at *4) (general creditors “will not be paid until all defrauded investors are fully compensated”); *PrivateFX Global One*, 778 F. Supp. 2d at 786-87 (overruling objection of bank that extended line of credit and

adopting receiver's argument that "courts regularly grant defrauded investors a higher priority than defrauded creditors").

In *SEC v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Motion For Final Determination Of Allowed Claims at 3 (S.D. Fla. Oct. 23, 2008), attached as **Exhibit E**, the court identified additional factors that weighed in favor of giving priority to investor claims:

(1) this is an SEC enforcement action designed to protect the *investors*, not the creditors, (2) [the receivership entity's] fraudulent conduct was directed toward its *investors*, not its creditors (which were paid substantial amounts already), [and] (3) the investors as a whole are less able to bear the financial costs of [the receivership entity's] conduct than are the creditors. . . .

See also Trade Partners, Inc., 2006 WL 3694629 at *1 (noting "there is no evidence that there was an attempt to defraud [the objecting general creditor]").

Each of those factors applies equally here. Williams focused his allegedly fraudulent securities offering on the individuals and entities that invested in Kinetic Funds, and indeed depended on those infusions to fund the self-serving and bogus loans he made himself to purchase real estate for his own benefit and to fund other unrelated businesses which had no tangible or intangible benefit to investors. These activities also contributed mightily to the widening and significant shortfall between the amount of represented and actual assets. In addition, the funds available for distribution by the Receiver consist of proceeds of the scheme: they were primarily generated from the liquidation of securities and sale of assets purchased with investor

funds. As such, as a matter of equity, defrauded investors should be compensated before general creditors.

V. ALL ASSETS AND LIABILITIES OF THE RECEIVERSHIP ENTITIES SHOULD BE POOLED TO FORM A SINGLE RECEIVERSHIP ESTATE

A. Factual And Legal Basis For Pooling Assets And Liabilities

The Receiver also seeks authority to pool the Receivership Entities' assets and corresponding liabilities, as well as any future recovered assets, into one estate which will make any distributions ordered by this Court to claimants with approved claims. Specifically, the Receiver seeks authority to treat all of the Receivership Entities, including the Kinetic Funds sub-funds offered to investors, as a single entity (and to accordingly consolidate the amounts owed to those investors from the various sub-funds) from which investors' claims will be determined and paid based on the Net Investment Method. Although the vast majority of investments were made into the KFYield Fund, several investors also either invested in other sub-funds offered by Kinetic Funds and/or directed that their funds be used to purchase gold bullion.

A Court sitting over a receivership may exercise its inherent equitable powers to authorize a receiver, upon good cause shown, to treat various receivership entities as one substantively pooled estate for the purpose of distribution to allowed claimants. *See, e.g., HKW Trading*, 2009 WL 2499146 at *6 ("The Court directs that all assets and liabilities of the Receivership Entities be consolidated for all purposes."); *Nadel*, 8:09-cv-00087 (M.D. Fla. 2009 Doc. 776 at *3 (same); *SEC v. One Equity Corp.*, 2011 WL 1002702, *1 (S.D. Ohio March 16, 2011) (permitting pooling of multiple receivership

entities upon good cause shown for purposes of distributing assets to approved claimants). Courts routinely permit equity receivers to pool assets. *Basic Energy*, 273 F.3d at 663 (adopting receiver's plan to create single pool of assets for all investors); *Elliott*, 953 F.2d at 1584 (approving district court's decision to reject tracing and treat three companies as single entity);

Courts examine a number of different factors in determining whether to pool receivership assets for distribution purposes, including whether: (1) a unified scheme to defraud existed among the receivership entities; (2) the investors across the various receivership entities are similarly situated; and (3) funds were commingled among the receivership entities. *See SEC v. Founding Partners Capital Mgmt.*, 2014 WL 2993780, at *6 (M.D. Fla. July 3, 2014). *SEC v. Amerifirst Funding, Inc.*, 2008 WL 919546, *4 (N.D. Tex. Mar. 13, 2008) (pooling receivership entities because they were all involved in a unified scheme to defraud investors, even where there was no commingling of funds); *Elliot*, 953 F. 2d at 1565, n.1 (treating various receivership entities as a single entity in light of commingling of funds among them and defendant's failure to maintain strict separation); *see also U.S. v. Real Property Located at 13328 & 13324 State Hwy.*, 89 F.3d 551, 553 (9th Cir. 1996) (approving district court's finding that "[i]nstead of engaging in a tracing fiction, the equities demand that all [defrauded] customers share equally in the fund of pooled assets in accordance with the SEC plan").

Regardless of the ultimate use of the investor funds, the Receiver's Retained Professionals have confirmed that all investor deposits during the Relevant Period

were made (and thus commingled¹¹) into a single bank account owned by Kinetic Funds at BMO Harris Bank. Thus, regardless of what sub-fund(s) an investor ultimately determined to invest in, all investor funds were commingled in Kinetic Funds' bank account. Because only approximately \$11 million was transferred to Kinetic Funds' brokerage accounts during the Relevant Period, it also follows that the majority of deposited investor funds were used not only to fund distributions or redemptions to redeeming investors and for the myriad unauthorized purposes alleged by the Commission including funding Receivership Entity Lendacy, purchasing Puerto Rico real estate, and funding speculative investments and start-up businesses.

Based on the above-enumerated factors, the Court should authorize the Receiver to pool the Receivership Entities' assets. The Receiver's investigation shows that Williams and others at his direction made misrepresentations and omissions that induced investors to invest in one or more Kinetic Funds sub-funds or investment offerings. These sub-funds and/or offerings were all part of the same fraudulent scheme, i.e., there was a unified scheme to defraud investors. Investors were also "similarly situated with respect to their relationship to the defrauders." *SEC v. Loewenson*, 290 F.3d 80, 888-89 (2d Cir. 2002). When defrauded investors are similarly

¹¹ Courts have held that "*any* comingling is enough to warrant treating all the funds as tainted." *Byers*, 637 F. Supp. 2d at 177. Because "money is fungible" it is "impossible to differentiate between 'tainted' and 'untainted' dollars...." *Lauer*, 2009 WL 812719 at *4-5. "Once proceeds become tainted, they cannot become untainted." *Ward*, 197 F.3d at 1083. In addition, "when tainted funds are used to pay costs associated with maintaining ownership of [a] property, the property itself and its proceeds are tainted by the fraud." *Lauer*, 2009 WL 812719 at *3 (citing *United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla.*, 933 F.2d 976, 982 (11th Cir. 1991)).

situated, “it would not be equitable to give some of them preferential treatment in equity.” *Elliott*, 953 F.2d at 1569-70. To establish that investors are “similarly situated” or “occupy the same legal position,” courts look to the specific facts. *See Byers*, 637 F. Supp. 2d at 180 (finding real estate investors were “similarly situated” given defendants’ common role to all investments, the similarity of offering materials given to investors, the commingling of money between operations, and fact that defendants’ capital back the security offerings). Each of those factors is present here.

Consolidation and pooling of all assets held in the various sub-funds is not only warranted by the facts but is also consistent with the Net Investment Method approved by the Court whereby a claimant’s net investment activity is measured by the amount of deposits and withdrawals from the Kinetic Funds bank account – not their relative activity within any sub-funds. Further, given that the vast majority of investor deposits were invested in the KFYield Fund, the time and expense necessary to separate out any activity with respect to other sub-funds or investments would be unnecessary and unwarranted.

Accordingly, the Receiver requests that the Court authorize him to pool and consolidate all assets and liabilities of the Receivership Entities (and thus any sub-funds and investment offerings administered by Receivership Defendant Kinetic Funds) into one consolidated estate as a vehicle to administer necessary distributions of Receivership assets. To handle the estate in any other manner would be very expensive and unworkable. *See SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (“the interests of the [r]eceiver are very broad and include not only

protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy”).

VI. THE PROPOSED OBJECTION PROCEDURE

To facilitate and streamline the claims process, the Receiver requests that the Court establish a formal procedure to address instances where a Claimant does not agree with the Receiver’s recommended determination of the Claimant’s claim or objects to claim priority or the plan of distribution as approved by the Court. The procedure recommended below allows the Receiver to (1) address any disputed matters in a fair and efficient manner and (2) present any unresolved objections to the Court in an organized and, if appropriate, consolidated manner which will be efficient and, to the extent possible, avoid the Court’s receipt of objections on a piecemeal basis. The procedure also provides each Claimant with notice and an opportunity to be heard in accordance with applicable due process obligations.

The Receiver respectfully requests the Court adopt the following objection procedure (the “**Proposed Objection Procedure**”):

- a) A copy of this Motion shall be posted promptly after it is filed on the Receivership website, www.kineticreceivership.com.
- b) Within three (3) business days after the date of the Order on this Motion, the Receiver will post the Order on his website.
- c) Within ten (10) days after the date of an Order granting this Motion, the Receiver will mail each Claimant by U.S. First Class Mail at the address provided on the Proof of Claim Form a letter setting forth the procedure for objecting to the Receiver’s determination of a claim (the “**Receiver’s Claim Determination**”), claim priority, or plan of distribution as approved by the Court. If a Claimant also provided an email address and authorized the receipt of electronic communications in their Proof of Claim Form, the Receiver will

also send that letter to the provided email address. The letter will provide notice that the Court's Order on this Motion is available on the Receiver's website. The letter will further provide that a Claimant may contact the Receiver's office for a copy of the Motion and/or Order if a Claimant does not have access to the internet or cannot otherwise access the Motion and/or Order.

- d) Any Claimant that is dissatisfied with the Receiver's Claim Determination, claim priority, or plan of distribution must serve the Receiver (c/o Jordan D. Maglich, Esq., Buchanan Ingersoll & Rooney PC, 401 E. Jackson St., Suite 2400, Tampa, FL 33602) in accordance with the service requirements of Rule 5 of the Federal Rules of Civil Procedure with a written response within thirty (30) calendar days from the date of the notice letter of the Order. During this 30-day period, each claimant shall have the opportunity to cure the claim deficiency and/or to respond and contest in writing the Receiver's Determination. Any written submission from the claimant shall clearly state the nature and basis of the objection, and provide all supporting statements and documentation the Claimant wishes the Receiver and the Court to consider.
- e) Failure to properly and timely serve an objection to the Receiver's Claim Determination, claim priority, or plan of distribution shall permanently waive the Claimant's right to object to or contest the Receiver's Claim Determination, claim priority, and plan of distribution and the final claim amount shall be set as the Allowed Amount determined by the Receiver as set forth in the Exhibits attached to this Motion as approved by the Court.
- f) Although each objecting Claimant previously submitted to this Court's jurisdiction by filing a claim with the Receiver, by serving an objection the objecting Claimant shall be deemed to have confirmed submission to the exclusive jurisdiction of this Court. A person serving an objection to the Receiver's Claim Determination, claim priority, or plan of distribution, shall be entitled to notice, but only as it relates to adjudication of the particular objection and the claim to which the objection is directed.
- g) The Receiver may attempt to settle and compromise any claim or objection subject to the Court's final approval.
- h) At such times as the Receiver deems appropriate, he shall file with the Court: (1) the Receiver's further determination of a claim with any supporting documents or statements he considers are appropriate, if any; (2) any unresolved objections, with supporting statements and documentation, as served on the Receiver by the Claimant; and (3) any settlements or compromises that the Receiver wishes the Court to rule upon.

- i) The Court may make a final determination based on the submissions identified in the previous paragraph or may set the matter for hearing and, following the hearing, make a final determination. The Claimant shall have the burden of proof. The Receiver will provide notice of such hearing as provided in paragraph (d) above.

Courts in this District frequently approve the use of such objection procedures in similar circumstances. *See, e.g., Nadel, Co.* 8:09-cv-00087 (M.D. Fla. 2009 Doc. 776 at ☐ 7) (proposed objection procedure was logical, fair and reasonable). As stated above, the Receiver has reviewed the submitted proof of claim forms and has been able to arrive at an agreed claim amount with the vast majority of submitting claimants. One claimant simply has a claim amount that is inconsistent with the Receiver's records (or improperly seeks principal appreciation) that may be easily cured by the claimant by simply accepting the Receiver's Recommended Amount of Allowed Claim. The Receiver is hopeful that the proposed 30-day cure period will result in less litigation with claimants.

The Proposed Objection Procedure promotes judicial efficiency; reduces litigation costs for the Receivership; is logical, fair, and reasonable; and is in the Receivership Estate's best interests. The proposed process also satisfies due process, which essentially requires that the proceeding be fair and that affected parties be given notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Nicholson v. Gant*, 816 F.2d 591, 598 (11th Cir. 1987) ("The fundamental requisite of due process of law is the opportunity to be heard."); *Elliott*, 953 F.2d at 1566. The use of summary proceedings to implement claims procedures is customary in receiverships and satisfies due process requirements when

claimants receive an opportunity to be heard, to object to their claim determination, and to have their claims considered by a court. *See id*; *Basic Energy*, 273 F.3d at 668-671. The Proposed Objection Procedure achieves each of these requirements.

F.D.I.C. v. Bernstein explains:

One common thread keeps emerging out of the cases involving equity receiverships – that is, a district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration. In keeping with this broad discretion, “the use of summary proceedings in equity receiverships as opposed to plenary proceedings under the Federal Rules of [Civil Procedure] is within the jurisdictional authority of a district court.” Such procedures “avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership,” thereby preserving receivership assets for the benefit of creditors.

786 F. Supp. 170, 177-78 (E.D.N.Y. 1992) (citations omitted). This Court should approve the Proposed Objection Procedure because it satisfies due process and is logical, fair, and reasonable. *See Elliott*, 953 F.2d at 1567 (summary proceedings are appropriate where party has full and fair opportunity to present claims and defenses). Specifically, the Proposed Objection Procedure provides for (1) notice to Claimants of the Receiver’s determination of their claims, claim priority, and plan of distribution; (2) the opportunity for Claimants to object to these matters; and (3) the review of unresolved objections by the Court.

Importantly, the Proposed Objection Procedure eliminates the need for any objections to be filed with the Court in direct response to this Motion. In turn, that will preclude inefficient piecemeal presentation and adjudication of objections by the Court. Such a piecemeal process would result in an inefficient claims process for both

the Court and the Receivership. As such, the Proposed Objection Procedure promotes judicial efficiency and reduces litigation costs.

VII. THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION, INCLUDING AN INITIAL INTERIM DISTRIBUTION

A. The Receiver's Plan of Distribution

As of June 18, 2021, the total balance in all Receivership accounts (excluding an account held separately and consisting of trust account funds from Williams' previous counsel) is nearly \$20 million. The Receiver seeks leave to make distributions on a *pro rata* basis, and he expects to seek Court approval to make a first interim distribution constituting a significant proportion of available funds to holders of Allowed Claims in the near future. If approved by the Court, all distributions will be made in accordance with applicable parameters set forth in this Motion, including those relating to priorities.

The Receiver's proposed objection procedure allows Claimants to object to the claims determinations made by the Court based on this Motion. In relevant part, each Claimant will have 30 days from the date the Receiver mails notice to each Claimant of the Court's order on this Motion to serve the Receiver with an objection to his, her, or its claim determination. After this thirty-day objection period expires and the Receiver completes an initial review of any objections, the Receiver intends to file a motion for approval of a first interim distribution less any reserves necessitated by any timely served objections. The Receiver will make these reserves where necessary so that objections do not delay a first interim distribution. In other words, the anticipated

eight-figure distribution will be reduced by the amount reserved, if any. Any reserves will be in the amount of the *pro rata* share of the interim distribution allocated to the objected claim based on the full claim amount. The reserves will be held until the claim objection is resolved. If the objection is resolved for less than the full claim amount, the unpaid reserves will be distributed on a *pro rata* basis in a subsequent distribution.

The Receiver believes that the amount of Receivership assets on hand justifies making an interim distribution, less any possible reserves for objected claims, which will provide a sufficient amount of money to Claimants to warrant the expense of the distribution. In determining the amount of the proposed interim distribution amount, the Receiver will ensure sufficient funds remain in the Receivership to cover the expenses of (1) addressing any claims disputes, (2) administering the Receivership, and (3) paying the Receiver's professionals for services already and yet to be provided. To the extent possible and feasible, the Receiver will make additional interim distributions before making a final distribution at the close of the Receivership. Before making any distribution, the Receiver will seek leave from the Court, and at that time will provide further specifics about the distribution.

In this Motion, the Receiver seeks approval of a distribution plan which provides that, subject to applicable exceptions, priorities, and other parameters discussed in this Motion, Claimants receive a fixed percentage of their Allowed Amount from the aggregate amount distributed to Claimants in any particular distribution based upon the following formula: each claim's Allowed Amount divided

by the total Allowed Amount of all Allowed Claims multiplied by the aggregate distribution amount.

B. The Receiver's Plan Is Consistent With Applicable Legal And Equitable Principles

The Court has wide latitude in exercising inherent equitable power in approving a plan of distribution of receivership funds. *SEC v. Forex Asset Mgmt.*, 242 F.3d 325, 331 (5th Cir. 2001) (affirming district court's approval of plan of distribution because court used its discretion in "a logical way to divide the money"); *CFTC v. Levy*, 541 F.3d 1102, 1110 (11th Cir. 2008) ("Appellate Courts will 'not disturb the district court's choice of an equitable remedy except for abuse of discretion.'"); *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007) ("In ruling on a plan of distribution, the standard is simply that the district court must use its discretion in a logical way to divide the money" (internal quotations omitted)). In approving a plan of distribution in a receivership, "the district court, acting as a court of equity, is afforded the discretion to determine the most equitable remedy." *Forex*, 242 F.3d at 332. The Court may adopt any plan of distribution that is logical, fair, and reasonable. *Wang*, 944 F.2d at 83-84; *Basic Energy*, 273 F.3d at 671; *Trade Partners*, 2007 WL 107669 at *1. "Therefore, '[a]ny action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse.'" *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir. 1982) (quoting *SEC v. Ark. Loan & Thrift Corp.*, 427 F.2d 1171, 1172 (8th Cir. 1970)).

Consistent with the features of the scheme, “courts have favored pro rata distribution of assets where, as here, the funds of defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.” *Credit Bancorp*, 290 F.3d at 88. A logical, fair, and reasonable distribution plan may provide for reimbursement to certain claimants while excluding others. *See Wang*, 944 F.2d at 84; *Basic Energy*, 273 F.3d at 660-61.

The Receiver’s Proposed Plan of Distribution is (i) in the best interest of the Receivership and the Claimants as a whole; (ii) is fair, reasonable, and equitable; and (iii) satisfies due process. As previously noted, the evidence in the Receiver’s possession demonstrates that all investor funds were commingled and transferred among various accounts for the Receivership Entities; the Receivership Entities did not maintain separate investor accounts; and investors were defrauded in the same manner. Accordingly, all Investor Claimants with allowed claims should share equally (on a *pro rata* basis) in the pooled assets recovered by the Receiver, subject to the claim priorities and other applicable limitations discussed in this Motion and ultimately established by the Court. The Receiver recommends the Court approve the distribution of funds on a *pro rata* basis according to the formula set forth in the previous Section.

VIII. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court enter the proposed Order attached as **Exhibit F**:

1. Approving the Receiver’s determination of claims and claim priority as set forth above and in the attached **Exhibits A-D**;

2. Authorizing the Receiver to consolidate all Receivership Entities' assets and liabilities for all purposes, including for payment of administrative costs, for receipt of third-party recoveries, and for making distributions to holders of allowed claims;

3. Approving the plan of distribution as set forth in Section VII;

4. Approving the Proposed Objection Procedure as set forth above in Section VI for objections to the plan of distribution and the Receiver's claim determinations and claim priorities as set forth in this Motion and attached **Exhibits A-D**; and

5. Precluding further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant, taxing authority, or any other public or private person or entity and precluding any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for the Receiver conferred with counsel for the Commission and Defendant Williams prior to filing this Motion. Counsel for both Williams and the Commission have indicated they do not oppose the requested relief.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

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Attorneys for Receiver Mark A. Kornfeld

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to the following counsel of record:

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/s/ Jordan D. Maglich
Jordan D. Maglich

EXHIBIT “A”

EXHIBIT A
Investor Claims - Allowed In Full

<u>Claim Number</u>	<u>Claim Amount</u>	<u>Recommended Claim Determination</u>	<u>Allowed Amount</u>
1	\$4,000,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$4,000,000.00
2	\$500,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$500,000.00
3	\$250,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$250,000.00
4	\$26,138.59	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$26,138.59
5	\$225,084.51	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$225,084.51
6	\$249,261.19	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$249,261.19
7	\$332,582.13	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$332,582.13
8	\$898,691.09	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$898,691.09
9	\$1,818,739.42	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$1,818,739.42
10	\$18,981.58	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$18,981.58
11	\$42,565.66	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$42,565.66
12	\$49,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$49,000.00
13	\$16,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$16,000.00
14	\$1,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$1,000.00

15	\$251,778.55	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$251,778.55
16	\$842,886.56	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$842,886.56
17	\$611,804.55	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$611,804.55
18	\$1,151,949.48	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$1,151,949.48
19	\$30,613.05	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$30,613.05
20	\$1,665,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$1,665,000.00
21	\$243,599.79	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$243,599.79
22	\$23,977.29	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$23,977.29
23	\$18,000,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$18,000,000.00
24	\$665,780.31	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$665,780.31
25	\$353,883.44	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$353,883.44
26	\$120,810.06	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$120,810.06
27	\$400,000.00	The Receiver recommends that this claim be allowed for the Net Investment Amount which matches the claim amount submitted by or agreed to by the claimant.	\$400,000.00

EXHIBIT “B”

EXHIBIT B
Investor Claims - Allowed In Part

<u>Claim</u> <u>Number</u>	<u>Claim Amount</u>	<u>Recommended Claim Determination</u>	<u>Allowed</u> <u>Amount</u>
28	\$261,626.72	<p>The Claimant claims \$11,626.72 more than the Receivership Records reflect, and it appears that Claimant is seeking the most recent balance reflected on their investor statement rather than the amount calculated with the Net Investment Method. Accordingly, this claim should be allowed for the Net Investment Amount of \$250,000.00 as calculated by the Receiver.</p>	\$250,000.00

EXHIBIT “C”

EXHIBIT C**Non-Investor Unsecured Claims - Allowed and Allowed In Part**

<u>Claim Number</u>	<u>Claim Amount</u>	<u>Recommended Claim Determination</u>	<u>Allowed Amount</u>
29	\$75,000.00	This claim is submitted by a general unsecured creditor who seeks the remaining amount owing under an employment contract with Kinetic International. The Receiver recommends that this claim be allowed in the amount of \$75,000.	\$75,000.00
30	\$4,291.00	This claim is submitted by a general unsecured creditor for outstanding charges resulting from the termination of an apartment lease previously entered into by Kinetic Funds. The Receiver recommends that this claim be allowed in the amount of \$4,291.00.	\$4,291.00
21	\$2,250.00	This claim is submitted by a general unsecured creditor for outstanding fees charged for legal services provided to the Receivership Entities before the Receiver was appointed. The Receiver recommends that this claim be allowed in the amount of \$2,250.00	\$2,250.00
32	\$255,000.00	This claim is submitted by a general unsecured creditor for software services provided to Receivership Entity Lendacy and includes invoices for services provided to Lendacy both before and after the Receiver was appointed. Of this amount, \$40,000 represented invoices generated and owing prior to the Receiver's appointment on March 6, 2020. The Receiver does not believe it would be equitable to recognize any portion of the claim constituting invoices for services to be performed after the Receiver's appointment. The Receiver recommends that this claim be allowed in the amount of \$40,000.	\$40,000.00
33	\$905,000.00	This claim is submitted by a general unsecured creditor for software services provided to Receivership Entity Kinetic International and includes invoices for services provided to Kinetic International both before and after the Receiver was appointed. Of this amount, \$105,000 represented invoices generated and owing prior to the Receiver's appointment on March 6, 2020. The Receiver does not believe it would be equitable to recognize any portion of the claim constituting invoices for services to be performed after the Receiver's appointment. The Receiver recommends that this claim be allowed in the amount of \$105,000.	\$105,000.00

EXHIBIT “D”

EXHIBIT D
Investor Claims - Denied

<u>Claim Number</u>	<u>Claim Amount</u>	<u>Recommended Claim Determination</u>	<u>Allowed Amount</u>
34	\$1,420,157.00	<p>This claim was submitted by a principal of the Receivership Entities and consisted of a claim for \$822,694 from that individual's status as an investor in Kinetic Funds and a claim for \$597,193 representing purported expenses owed to the individual and his related entity. The Receiver recommends that this claim be denied because (1) the claimant cannot satisfy their good faith obligations and at a minimum was on inquiry notice of numerous problems with Kinetic Funds; (2) the proof of claim form is incomplete and it appears that the claimant did not suffer any loss given their unauthorized use of, and benefit from, millions of dollars in investor funds. The Receiver recommends that this claim be denied.</p>	None
35	\$174,667.00	<p>This claim is submitted by an investor who also acted as a sales agent and ultimately received over \$250,000 in commissions or referral fees for his efforts in soliciting at least eight investors to invest with Kinetic Funds. It would be inequitable for the claimant to be treated on the same level as other innocent investors that did not receive remuneration or compensation for attracting new investors. Additionally, the claimant cannot satisfy their good faith obligations given the failure to conduct any due diligence other than relying on representations and documentation from Defendant Williams. The Receiver recommends that this claim be denied.</p>	None
36	(\$3,684.00)	<p>This claim is submitted by an investor whose total distributions exceeded their total investment; in other words, the investor did not suffer any loss. The Receiver recommends that this claim be denied because there were no losses.</p>	None
37	(\$102,443.02)	<p>This claim is submitted by an investor whose total distributions exceeded their total investment; in other words, the investor did not suffer any loss. The Receiver recommends that this claim be denied because there were no losses.</p>	None

EXHIBIT “E”

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

MUTUAL BENEFITS CORP., *et al.*,

Defendants,

VIATICAL BENEFACTORS, LLC, *et al.*,

Relief Defendants,

_____ /

**ORDER GRANTING RECEIVER'S MOTION FOR
FINAL DETERMINATION OF ALLOWED CLAIMS**

THIS CAUSE came before the Court upon Receiver's Final Omnibus Report on Claims and Motion for Final Determination of Allowed Claims (D.E. No. 2172), filed on **October 14, 2008**.

THE COURT has considered the motion, the oral argument of the parties, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is **GRANTED** as follows.

I. Applicable Basis for Investors' Claims

The Court adopts the Receiver's position regarding the applicable basis for the investors' claims. The Receiver shall use the initial dollar amount invested with MBC as the basis for the allowed amount of each investor's claim (the "dollars invested" approach) as it is the most equitable and practical basis for determining investors' claims in this Receivership. It is also the most common and most generally recognized approach to treatment of investor claims in an equitable receivership or bankruptcy proceeding involving a fraudulent investment scheme.

II. Disputed Claims and Miscellaneous Issues

The Court adopts the Receiver's position regarding the disputed claims and miscellaneous issues as the Receiver's recommendations are in the best interest of the investors and will result in the equitable distribution of the receivership estate. Specifically, the Court finds as follows.

(1) Claims for Investment Return

These are claims where the investors have sought the amount they expected to earn on their investment with MBC (in addition to the amount invested). These claims are disallowed as the promised returns were the product of fraud and claims for "profits" in Ponzi-scheme receiverships are generally rejected by the courts.

(2) Claims for Delay/Interest/Lost Time Value of Money

These are claims where the investors have sought damages for the delay in their policies maturing "on time" in the form of interest or some other form of opportunity cost. These claims are disallowed as it would be inequitable and contrary to the case law to recognize claims based upon the fraudulent representations made in a Ponzi-scheme. Moreover, even if the business of MBC had been conducted lawfully, the investors had no guarantee that an investment in a policy would mature at the time projected in the life expectancy estimate.

(3) Claims for Premiums Paid and/or Administrative Fees Paid

These are claims where the "Keeping Investors" have sought to recover the administrative fees and/or premiums paid to keep their policies in force since the disposition process for all of the policies was concluded. These claims are disallowed as the "Keeping Investors" specifically agreed to take on the administrative expense and shared premium burden for their policies when they opted to attempt to mitigate their losses by voting to keep their policies.

(4) Claims are Unstated or Unexplained or Non-Responsive

These are claims where the investors indicated that they did not agree with the recommended claim amount, but did not explain why or indicate the additional amount sought. These claims are disallowed as there is no practical way to give these investors an additional amount without a description of what additional amount is claimed.

(5) Claims for Consequential Damages

These are claims where the investors have sought some form of consequential damages as a result of their investment with MBC (e.g. payments to an attorney or other professional, pain and suffering). These claims are disallowed as recognizing them would be impractical (as the existence and amount of the claims are difficult to verify) and inequitable (as investors made different personal choices).

(6) Claims from Trade Creditors

Six of the trade creditors responded to the Receiver's notice by indicating that they wished to preserve their claims despite the Receiver's objections. The creditors' claims shall be subordinated to the individual investors' claims because, among other things, (1) this is an SEC enforcement action designed to protect the *investors*, not the creditors, (2) MBC's fraudulent conduct was directed towards its *investors*, not its creditors (which were paid substantial amounts already), (3) the investors as a whole are less able to bear the financial costs of MBC's conduct than are the creditors, and (4) four of these creditors provided lobbying or legal services to MBC, helping to keep it in business, thereby prolonging the fraud. The Court also disallows (1) Holland & Knight's Claim No. 3049061 to the extent it relates to work that was performed post-Receivership, (2) Aaron Reed & Associates, LLC's Claim No. 3048058 to the extent it includes a retainer fee for the month of April 2004, and (3) Franklin Trade Graphics's Claim No. 3048110 to the extent it includes post-Receivership finance charges.

(7) On-Going Maturities

Additional policies will inevitably mature between this ruling and actual receivership estate distribution. In order to prevent an investor from receiving the death benefits on their investment *and* their *pro rata* share of the receivership estate distribution, any claims on policies that mature before the distribution date shall be disallowed (as the investor will already receive the death benefits on the policy).

(8) Estate of Sally G. Richardson

This investor signed an irrevocable offer to sell her policy interest to another investor on her policy. By error, the death benefit proceeds were sent to Mrs. Richardson, instead of to the investor who bought her interest in the policy. The Receiver notified Mrs. Richardson of the error, but she has not responded. Instead, she has submitted claims on five other policies through the Claims Process. These claims are denied and any amount she would have received shall be transferred to the investor who should have received the death benefit proceeds on the sold policy. (Any amount that may be transferred to the investor shall not exceed the amount that the investor should have received from the sold policy.)

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of October, 2008.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:
Counsel of Record

EXHIBIT “F”

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**KINETIC INVESTMENT GROUP, LLC
and MICHAEL SCOTT WILLIAMS,**

CASE NO.: 8:20-cv-394-MSS-SPF

Defendants, and

**KINETIC FUNDS I, LLC, KCL SERVICES,
LLC d/b/a LENDACY, SCIPIO, LLC,
LF 42, LLC, EL MORRO FINANCIAL
GROUP, LLC, and KIH, INC., f/k/a
KINETIC INTERNATIONAL, LLC,**

Relief Defendants.

_____ /

ORDER

This cause comes before the Court for consideration of the Receiver's Unopposed Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Establish Objection Procedure, and (4) Approve Plan of Distribution (the "Motion") (Doc. ____). Neither Defendant Williams nor the Securities and Exchange Commission opposes the granting of the relief sought.

Having considered the Motion, and being otherwise fully advised, it is **ORDERED AND ADJUDGED** that the Receiver's Motion is **GRANTED**.
Accordingly,

1. The Receiver's determination of claims and claim priorities as set forth in the Motion and in Exhibits A through D attached to the Motion is fair and equitable and is approved;

2. For the reasons discussed in the Motion, the Receiver is authorized to consolidate all Receivership Entities' (as the term is defined in the Motion) assets and liabilities for all purposes, including for payment of administrative costs, for receipt of third-party recoveries, and for making distributions to holders of allowed claims;

3. For the reasons discussed in the Motion and under the circumstances of this Receivership, the Net Investment Method as set forth in the Motion and its Exhibits is the appropriate method for calculating allowed amounts for investors' claims;

4. The Proposed Objection Procedure as set forth in Section VI of the Motion for objections to the plan of distribution and the Receiver's claim determinations and claim priorities is logical, fair, and reasonable and is approved, and any and all objections to claim determinations, claim priorities, or the plan of distribution shall be presented to the Receiver in accordance with the Proposed Objection Procedure as set forth in Section VI of the Motion. After any unresolved objections are filed with the Court by the Receiver, the Court shall determine whether a hearing is necessary and set the date and time of any such hearing;

5. The plan of distribution as set forth in Section VII of the Motion is logical, fair, and reasonable and is approved; and

6. To bring finality to these matters and to allow the Receiver to proceed with distributions of Receivership assets, any and all further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant, taxing authority, or any other public or private person or entity and any and all proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate are hereby barred and enjoined absent further order from this Court.

DONE AND ORDERED at Tampa, Florida, on June __, 2021.

**UNITED STATES DISTRICT
COURT JUDGE**

COPIES FURNISHED TO:
Counsel of Record

EXHIBIT “G”

PROOF OF CLAIM FORM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC and MICHAEL
SCOTT WILLIAMS,

Defendants;

and

KINETIC FUNDS I, LLC, KCL SERVICES, LLC d/b/a
LENDACY, SCPIO, LLC, LF42, LLC, EL MORRO
FINANCIAL GROUP, LLC, and KIH, INC., f/k/a KINETIC
INTERNATIONAL, LLC,

Relief Defendants.

Case Number: 8:20-cv-394

U.S. District Court Middle District of Florida (Tampa Division)

Name and address of Claimant
(Please print or type):

ATTENTION: The Honorable Mary S. Scriven of the United States District Court, Middle District of Florida, entered an order appointing Mark A. Kornfeld as Receiver over the assets of the above-captioned Defendant Kinetic Investment Group, LLC and relief defendants (individually, a “**Receivership Entity**,” and collectively, “**Receivership Entities**”). On _____, the Court issued an order establishing a Claim Bar Date for all claims and approving this Proof of Claim Form and the basic procedures to administer any claims. To be eligible to receive a distribution from the Receivership Entities’ assets, you must complete and return this Proof of Claim Form and, if applicable, provide the requested documentation, so that it is received on or before __, to **Mark A. Kornfeld, as Receiver, c/o Jordan D. Maglich, Esquire, Quarles & Brady LLP, 101 East Kennedy Blvd., Suite 3400, Tampa, Florida 33602.** *The proper filing of this completed claim form may entitle you to receive a distribution from the Receivership. Altered forms will not be accepted.*

The information provided in this Proof of Claim Form will be used to determine your distribution, if any, from the Receivership. The Receiver has the right to dispute and/or verify any information you have provided to determine the proper distribution amount, if any, to which you may be entitled. The Receiver further has the right to amend any information he may have provided as to your Net Investment Amount. **By identifying and providing a Net Investment Amount for an investor the Receiver does not waive any right to (1) deny, contest the validity of, or otherwise object to a claim or (2) if warranted, amend the provided Net Investment Amount.**

IMPORTANT INFORMATION TO READ PRIOR TO SUBMITTING THIS FORM

ANY PERSON OR ENTITY SUBMITTING THIS PROOF OF CLAIM FORM SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE ABOVE-CAPTIONED COURT FOR ALL PURPOSES, INCLUDING, WITHOUT LIMITATION, AS TO ANY CLAIMS, OBJECTIONS, DEFENSES, OR COUNTERCLAIMS THAT COULD BE OR HAVE BEEN ASSERTED BY THE RECEIVER AGAINST SUCH CLAIMANT OR THE HOLDER OF SUCH CLAIM IN CONNECTION WITH THIS RECEIVERSHIP, INCLUDING, THOSE ARISING OUT OF (1) ANY DEALING OR BUSINESS TRANSACTED BY OR WITH ANY RECEIVERSHIP ENTITY AND/OR (2) ANY DEALING OR BUSINESS TRANSACTED THAT RELATES IN ANY WAY TO ANY RECEIVERSHIP PROPERTY. CLAIMANT FURTHER AGREES BY MAKING THIS SUBMISSION TO WAIVE ANY RIGHT TO A JURY TRIAL WITH RESPECT TO SUCH CLAIMS, OBJECTIONS, DEFENSES, AND COUNTERCLAIMS.

IF THIS COMPLETED FORM, SIGNED UNDER PENALTY OF PERJURY, IS NOT RECEIVED BY THE RECEIVER AT THE ABOVE-REFERENCED ADDRESS BY _____, YOU WILL BE FOREVER BARRED FROM ASSERTING ANY CLAIM AGAINST THE RECEIVERSHIP ENTITIES' ASSETS AND YOU WILL NOT BE ELIGIBLE TO RECEIVE ANY DISTRIBUTIONS FROM THE RECEIVER.

General Instructions:

You **must** answer each and every question on the following pages. If you are an investor, however, you do not need to answer questions 17-19, which are specific to Non-Investor Claimants. Similarly, Non-Investor Claimants do not need to answer questions 8-16, which are specific to Investor Claimants. Please answer each question applicable to you as fully as possible. If you need additional space to complete an answer, please attach a separate sheet of paper and indicate the number of the question for which you are providing the additional information. If the question does not apply to you, please write "not applicable." If the answer to the question is "no" or "none," please answer as such.

1. Full name of the Claimant (the person or entity making this claim to Receivership assets). _____

2. If this form is being completed by a person other than the Claimant or on behalf of an entity, please provide the full name, address, telephone number, and email address of the person completing this form and the basis for that person's authority to act on the Claimant's behalf. **If you are a power of attorney, trustee, or other fiduciary completing this form on behalf of the Claimant in question 1, you must provide documentation with this Proof of Claim Form reflecting your legal authority to do so.**

3. If this form is being completed on behalf of an entity, please provide the full names of the entity's officers, directors, trustees, managing agents, shareholders, partners, beneficiaries, and any other party with an interest in the entity. _____

4. Provide **one** mailing address where the Claimant authorizes the receipt of all future communications relating to this claim, including any possible distribution payment the Claimant may receive. It is the Claimant's sole responsibility to advise the Receiver of any change to this address after the submission of this form.

5. Provide **one** email address for the Claimant where the Claimant authorizes the receipt of all future electronic communications relating to this claim. It is the Claimant's sole responsibility to advise the Receiver of any change to this email address after the submission of this form.

Do you consent to the receipt of electronic communications from the Receiver in lieu of mailed communications where feasible and in the Receiver's discretion? Yes _____ No _____

6. Provide **one** telephone number for the Claimant. It is the Claimant's sole responsibility to advise the Receiver of any change to this telephone number after the submission of this form. _____
7. Provide the basis for your claim (please check applicable boxes):

☐ Investor
☐ Provided Goods or Services to a Receivership Entity
☐ Other (specify basis) _____

If you are not an investor, write "Not Applicable" to questions 8 through 16. If you are an investor, write "Not Applicable" to questions 17 through 19. All Claimants must answer questions 1-7 and question 20.

Questions Specific to Investors

8. Please refer to Exhibit A attached to this document. If sufficient information is available, this Exhibit provides the following information: (1) the total amount invested; (2) the total payments, loans, and/or distributions received; and (3) the Net Investment Amount. Do the amounts listed in the Exhibit accurately represent the total amount of your investment and all funds you received related to this investment? Failure to respond to this question will mean that you agree with the amounts listed in the Exhibit.

_____ Yes, I agree with the amounts listed. _____ No, I do not agree with the amounts listed.

If you answered yes, you do not have to respond to questions 9, 10, and 11. If you answered no, you must answer questions 9, 10, and 11 and provide copies of the documents requested.

9. Please provide the following information regarding your investment in or with, or interest in, any Receivership Entity, and attach copies of all checks, bank or other financial account statements, invoices, wire transfer confirmations, and other documents relating to your answer.

1st investment in or with the Receivership Entities:

totaled \$ _____ and was made on _____ (date); through a check (or wire transfer) made payable to _____ and drawn on account number _____ with _____ (identify financial institution).

If applicable, 2nd investment in or with the Receivership Entities:

totaled \$ _____ and was made on _____ (date); through a check (or wire transfer) made payable to _____ and drawn on account number _____ with _____ (identify financial institution).

If additional investments were made, please attach a separate sheet identifying (1) those amounts, (2) the dates on which they were made, (3) the payee of the check (or recipient of the wire transfer), and (4) the account number and financial institution on which the check was drawn or the wire transfer initiated.

Total amount you are claiming you invested with the Receivership Entities: \$_____

10. Have you ever received any money from a Receivership Entity, including as a "loan" or "credit facility" from Receivership Entity KCL Services, LLC d/b/a Lendacy, an "interest" payment, "return of principal," or "referral fee" relating to your investment or for any other reason? ____ Yes_____ No. If yes, please provide the following information for each amount received, and attach copies of all checks, bank or other financial account statements, wire transfer confirmations, and other documents relating to your answers.

	<u>Date</u>	<u>Amount</u>	<u>Payor/Payee of check/wire</u>
A.	_____	_____	_____
B.	_____	_____	_____
C.	_____	_____	_____

If any additional amounts were received from any Receivership Entity, please attach a separate sheet identifying those amounts, the dates on which they were received, and the payor and payee of the check(s) or wire transfers.

Total amount you are claiming you received from the Receivership Entities: \$_____

11. **State the total amount of your claim (this is the amount that you are claiming you are owed from the Receivership): \$**_____

12. Did you receive any other funds or anything of value other than money (for example, a car or shares of stock) from any Receivership Entity or anyone acting on their behalf? Yes___ No___ . If yes, please identify how much or what you received, from whom, and the date it was received. _____

13. Provide the name of the person or persons who solicited your investment in or with the Receivership Entities.

14. Please explain the way in which you came to learn about Kinetic Funds I, LLC and/or Kinetic Investment , Group, LLC and thereafter invest in or with them, including the person who introduced you to these entities, the statements made by that person, any documents provided by that person, meetings you had with the representative(s) of those entities, information that you relied on, and any other information.

15. Are you related by blood or marriage to any of the individual defendants or relief defendants? ____ Yes___ No. If yes, to whom are you related and what is the relationship. _____

16. Did you receive any commissions, referral fees, compensation for the referral of clients, or any other

compensation of any nature from any Receivership Entity? ____ Yes ____ No. If yes, please identify how much or what you received, from whom, and the date it was received. _____

Questions Specific To Non-Investor Claimants

17. If you were not an investor, state with specificity how you claim an interest in any distribution by the Receivership Entities (for example, you provided goods or services to a Receivership Entity for which you have not been paid). _____

18. State the amount you claim you are owed by any Receivership Entity. \$ _____
 Attach copies of all documents relating to your claim (for example, copies of all invoices submitted to a Receivership Entity and copies of records of all payments received from same). If you delivered goods to a Receivership Entity, include a copy of the document confirming receipt by a representative of the Receivership Entity.

19. Identify your contact person or persons at the Receivership Entities. _____

Question for all Claimants:

20. Have you sued, threatened suit, or otherwise commenced any lawsuits, arbitrations, actions, or other proceedings, or made any demands against any person or entity relating in any way to your claim and/or any Receivership entity? ____ Yes ____ No. If yes, identify the nature and status of any such action, the date the action was initiated, the name of the attorney who commenced the action, and the amount of any money you received in connection with any such action. _____

Send this completed and signed, under penalty of perjury, Proof of Claim Form and legible copies of any documentation requested in this form to **Mark A. Kornfeld, as Receiver, c/o Jordan D. Maglich, Esquire, Quarles & Brady LLP, 101 East Kennedy Blvd., Suite 3400, Tampa, Florida 33602, SO THAT IT IS RECEIVED NO LATER THAN** _____.

IF YOU DO NOT AGREE WITH ANY AMOUNTS PROVIDED ON EXHIBIT A OR NO AMOUNTS WERE PROVIDED ON EXHIBIT A, YOU MUST PROVIDE COPIES OF ALL DOCUMENTS OR OTHER MATERIALS THAT ARE RELATED IN ANY WAY TO YOUR INVESTMENT IN THE RECEIVERSHIP ENTITIES, OR, IF YOU ARE NOT AN INVESTOR, TO YOUR CLAIM AGAINST A RECEIVERSHIP ENTITY, INCLUDING COPIES OF YOUR CANCELLED CHECKS, BANK OR OTHER FINANCIAL ACCOUNT STATEMENTS SHOWING ALL TRANSFERS OF FUNDS BETWEEN (OR FOR THE BENEFIT OF) YOU AND THE RECEIVERSHIP ENTITIES, STATEMENTS FROM THE RECEIVERSHIP ENTITIES, WIRE TRANSFER CONFIRMATIONS, AND ANY OTHER DOCUMENTS REGARDING YOUR CLAIM.

By signing below, I certify under penalty of perjury pursuant to Florida law that the information provided in this form is true and correct. If this claim is being submitted by more than one person, all persons submitting the claim must sign below certifying under penalty of perjury that the information provide is true and correct.

Signature of Claimant:_____

Print Name:_____

Date:_____

Title (if any):_____

EXHIBIT A

Investor Name: _____

Amount Invested: \$ _____

Total Payments/Loans/Distributions: \$ _____

Net Investment Amount: \$ _____

THE RECEIVER HAS PROVIDED THE ABOVE INFORMATION BASED UPON DOCUMENTS AVAILABLE TO HIM. THESE FIGURES ARE BELIEVED TO BE ACCURATE AND REASONABLE CONCLUSIONS. PLEASE CAREFULLY REVIEW THE ABOVE AMOUNTS. IF THE NUMBERS PROVIDED ARE NOT CONSISTENT WITH YOUR RECORDS, IT IS YOUR OBLIGATION TO PROVIDE TRUE AND CORRECT INFORMATION TO THE RECEIVER. IF YOU CONFIRM THAT THE ABOVE AMOUNTS ACCURATELY REPRESENT THE AMOUNT YOU INVESTED, ALL AMOUNTS YOU RECEIVED RELATING TO THIS INVESTMENT, AND ANY OTHER FUNDS YOU RECEIVED FROM THE RECEIVERSHIP ENTITIES, YOU ARE DOING SO UNDER PENALTY OF PERJURY.

BY IDENTIFYING AND PROVIDING THE ABOVE FIGURES, THE RECEIVER DOES NOT WAIVE ANY RIGHT TO (1) DENY, CONTEST THE VALIDITY OF, OR OTHERWISE OBJECT TO A CLAIM OR, (2) IF WARRANTED, AMEND ANY OF THE PROVIDED FIGURES.